UNIVERSITAS INDONESIA

PERJANJIAN PENGHINDARAN PAJAK BERGANDA: STUDI KASUS PERSETUJUAN PENGHINDARAN PAJAK BERGANDA INDONESIA BELANDA

SKRIPSI

RATYAN NOER HARTIKO
0706278600

FAKULTAS HUKUM
PROGRAM STUDI ILMU HUKUM
KEKHUSUSAN HUKUM TENTANG HUBUNGAN TRANSNASIONAL
DEPOK
JANUARI 2012

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Skripsi ini adalah hasil karya saya sendiri, dan semua

sumber baik yang dikutip maupun dirujuk

telah saya nyatakan dengan benar.

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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian persyaratan yang diperlukan untuk meperoleh gelar Sarjana Hukum pada Program Studi Ilmu Hukum, Fakultas Hukum Universitas Indonesia.

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Jakarta, Januari 2012

Ratyan Noer Hartiko

HALAMAN PERNYATAAN PERSETUJUAN PUBLIKASI KARYA ILMIAH UNTUK KEPENTINGAN AKADEMIS

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Pada tanggal : 19 Januari 2012

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(Ratyan Noer Hartiko)

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Perekonomian global dan arus investasi lintas batas negara semakin berkembang dengan sangat pesat. Pesatnya arus investasi lintas batas negara membawa keuntungan sekaligus ancaman. Dalam hal perpajakan, investasi lintas batas negara bisa menyebabkan pemungutan pajak berganda oleh dua negara terhadap objek pajak yang sama. Hal ini dikarenakan yuridiksi negara dalam memungut pajak atas warga negara yang berada di negara asing untuk berinvestasi dan warga negara asing yang berinvestasi di negara tersebut. Keadaan ini menyebabkan satu objek pajak dikenakan pajak yang sama oleh kedua negara. sehingga pelaku bisnis mencoba untuk melakukan penghindaran pajak berganda. Hal ini menyebabkan hilangnya potensi penerimaan pajak sebuah negara. Salah satu solusi menghadapi permasalahan ini adalah dengan membuat perjanjian penghindaran pajak berganda antar dua negara. Dalam perjanjian penghindaran pajak berganda biasanya mengikuti model yang telah ada dan dipakai luas di dunia seperti OECD model (model yang dikembangkan *Organization for Economic Cooperation and Development*) dan UN model (model yang dikembangkan *United Nations*). Masing-masing model memiliki perbedaan terutama dalam hak menarik pajak oleh negara. Namun semua kembali kepada negosiasi antara kedua negara dalam menentukan isi pasal dalam perjanjian penghindaran pajak berganda mereka. Indonesia sendiri telah melakukan negosiasi pertama mengenai perjanjian penghindaran pajak berganda dengan Belanda dimulai tahun 1970-an dan dalam perjanjian penghindaran pajak berganda ini selain sebagai perjanjian untuk menghindarkan pajak berganda, juga sebagai upaya Indonesia untuk mendapatkan pengakuan dari negara lain. Semakin berkembangnya perekenomian global, perjanjian penghindaran pajak berganda ini diamandemen beberapa kali hingga tahun 2002. Namun renegosiasi ini belum selesai dan akan terus terjadi, selama perekonomian global terus berkembang dan undang-undang pajak penghasilan terus berubah menyesuaikan kondisi masing-masing negara.

Kata kunci:
Perjanjian penghindaran pajak berganda, pajak berganda, metode penghindaran pajak berganda, undang-undang pajak penghasilan

ABSTRACT

Name : Ratyan Noer Hartiko
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Title : Tax Treaty : Agreement of Double Taxation Avoidance between Indonesia and Netherlands

Global economic and transnational of investment flows growing very fast. The rapid grow of transnational of investment flows bring both benefits and. In term of taxation, transnational investment could lead to double tax collection by both of the countries to same tax object. This is due to jurisdiction of the country in collecting taxes on citizens residing in foreign countries to invest and foreign citizens who invest in the country. This situation led to an same tax object of is taxed by both countries. So business people trying to do the avoidance of double taxation. This can lead to loss of potential tax revenues of a country. One of the solutions to this problem is to make a tax treaty between two countries. In the tax treaties typically follow a model that already exist and are used widely known in the world such as the OECD model (model developed by the Organization for Economic Cooperation and Development) and UN model (model developed by the United Nations). Each of model has its differences, especially in the right to tax by the country. But all returned to the negotiation between the two countries in determining the content of articles in their tax treaty. Indonesia itself has been negotiated the first tax treaty with the Netherlands began in the 1970s and within tax treaty is in addition to a treaty to avoid double taxation, as well as Indonesia's efforts to gain recognition from other countries. The continued development of global economies, this double taxation avoidance agreement was amended several times until 2002. However, renegotiation is not completed and will continue to occur, as long as the global economic continues to grow and the income tax law continue to change adjusting the conditions of each countries.

Keywords:
Tax Treaty, double taxation, double taxation avoidance method, income tax law

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Lampiran 2 UN Model 2000

Lampiran 3 OECD Model 2010

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BAB I
PENDAHULUAN

1.1 Latar Belakang

Sebagai kewajiban kenegaraan, pajak adalah merupakan hal yang sering dibicarakan dalam kehidupan sehari-hari. Bagi masyarakat, pajak dianggap sebagai beban mengingat setiap anggota masyarakat yang memenuhi ketentuan perpajakan sebagai wajib pajak harus membayar pajak yang dikenakan kepadanya. Pajak dianggap sebagai beban mengingat adanya keharusan membayar pajak yang pada akhirnya mengurangi daya beli orang tersebut, terutama jika dibandingkan dengan ia tidak memiliki kewajiban untuk membayar pajak. Di sisi lain bagi pemerintah dan fiskus (ahli pajak), pajak harus dipungut karena terbukti pajak memberikan kontribusi yang cukup besar terhadap penerimaan negara. [1] Sedangkan di Indonesia, pajak merupakan sumber utama dalam Anggaran Penerimaan dan Belanja Negara (APBN) Indonesia yang dapat digunakan untuk meningkatkan kesejahteraan rakyat.

Pajak memiliki peranan penting dalam tatanan kenegaraan dan pembangunan. Hal ini tidak jauh dari fungsi pajak yang strategis dan memiliki peranan dalam sumber keuangan masing-masing negara. Dalam literatur pajak sering disebutkan pajak memiliki dua fungsi, yaitu fungsi *budgeter* dan fungsi *regulerend.*[2]

Fungsi *budgeter* adalah fungsi yang terletak di sektor publik, yaitu fungsi untuk mengumpulkan uang pajak sebanyak-banyaknya sesuai dengan undang-undang berlaku yang pada waktunya akan digunakan untuk membiayai pengeluaran-pengeluaran negara, yaitu pengeluaran rutin dan pengeluaran pembangunan dan bila ada sisa (surplus) akan digunakan sebagai tabungan

[1] Marihot Pahala Siahaan, *Hukum Pajak Elementer Konsep Dasar Perpajakan Indonesia*, (Yogyakarta : Graha Ilmu, 2010), hal 1.

[2] Wiryawan B. Ilyas dan Richard Burton, *Hukum Pajak*, edisi 5, (Jakarta : Penerbit Salemba Empat, 2010), hal 12. Dalam perkembangannya, fungsi pajak dapat dikembangkan dan ditambah dua fungsi lagi, yaitu fungsi demokrasi dan fungsi reditribusi.

pemerintah untuk investasi pemerintah.[3] Fungsi *Regulerend* adalah suatu fungsi bahwa pajak tersebut akan digunakan sebagai suatu alat untuk mencapai tujuan-tujuan tertentu yang letaknya di luar bidang keuangan.[4] Fungsi ini umumnya dapat dilihat pada sektor swasta.

Berkaitan dengan fungsi pajak tersebut, khususnya fungsi *budgeter*, peran pajak yang sangat strategis dalam kurun waktu 10 tahun terakhir tampak didominasi oleh penerimaan pajak. Bahkan dalam kurun waktu enam tahun terakhir secara berturut-turut sejak tahun 1992/1993 sampai dengan tahun 1997/1998 persentase peran pajak telah mencapai lebih dari 50% dari volume penerimaan APBN. Sementara itu, peran migas hanya mencapai kurang dari 30% dari volume APBN.[5]

Hal ini akan memacu, tidak hanya Indonesia, tapi negara-negara di dunia untuk menaikkan peran pajak dan penerimaan dari pajak. Melalui peraturan perundang-undangan, penerapan penarikan pajak diberlakukan di wilayah negara masing-masing bagi para wajib pajak. Masing-masing negara mulai membuat peraturan perundang-undangan mengenai pajak pada setiap sektor objek pajak.

Negara mempunyai sifat-sifat khusus yang merupakan manisfestasi dari kedaulatan yang dimilikinya dan yang hanya terdapat pada negara saja dan tidak terdapat pada asosiasi atau organisasi lainnya. Umumnya dianggap bahwa setiap negara mempunyai sifat memaksa, sifat monopoli, dan sifat mencakup semua.[6] Dalam hal peraturan perundang-undangan pajak, negara lewat tangan pemerintah, dapat melakukan penarikan pajak yang sektor dan besarnya telah diatur dalam peraturan perundang-undangan yang berlaku. Sehingga pajak merupakan manifestasi dari kedaulatan negara terhadap suatu sektor dalam wilayah negara.

Era globalisasi menimbulkan peningkatan dan keterbukaan dalam hubungan antara satu negara dengan negara lainnya. Ditambah lagi peran tekhnologi yang memudahkan manusia dalam beraktivitas. Demikian pula dengan

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[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid*, hal 13.

[6] Marihot Pahala Siahaan, *Hukum Pajak Elementer Konsep Dasar Perpajakan Indonesia,* hal 3.

pergerakan barang dan jasa, modal serta sumber daya manusia. Iklim investasi makin berkembang di seluruh dunia. Banyak negara-negara maju yang menanamkan modalnya di negara berkembang. Dalam konteks perpajakan, transaksi lintas batas negara tersebut menimbulkan permasalahan yaitu bentrokan yurudiksi peraturan perpajakan antara negara. Hal ini termasuk dalam lingkup hukum perpajakan internasional.

Rochmat Soemitro, dalam bukunya "Hukum Pajak Internasional" (1977), memberikan pengertian hukum pajak internasional itu dengan mengatakan :

> "Hukum pajak internasional adalah hukum pajak nasional yang terdiri dari kaidah, baik berupa kaidah-kaidah nasional maupun kaidah yang berasal dari traktat antarnegara dan dari prinsip/kebiasaan yang telah diterima baik oleh negara-negara di dunia untuk mengatur soal-soal perpajakan dan dalam mana dapat ditunjukkan adanya unsur-unsur asing, baik mengenai subjek pajak maupun objek pajak."[7]

Hukum pajak internasional itu didalamnya juga adalah hukum pajak nasional dan norma hukum internasional yang mengatur masalah perpajakan. Jadi tidak hanya terbatas pada traktat, konvensi dan kebiasaan internasional, tetapi juga meliputi hukum pajak nasional yang bersinggungan dengan masalah asing (luar negeri).[8]

Membicarakan mengenai hukum perpajakan internasional maka tidak luput dari permasalahan bentrokan yurudiksi peraturan perpajakan. Dalam hukum internasional, praktek pelaksanaan yuridiksi oleh negara terhadap orang, harta benda maupun tindakan dan peristiwa berbeda–beda di setiap negara dan perbedaan-perbedaan ini disebabkan faktor historis dan geografis. Secara historis, negara-negara menaati prinsip yurisdiksi teritorial, yang setiap negara dapat melaksanakan yurisdiksi terhadap harta dan benda serta tindakan yang terjadi di dalam wilayahnya.[9] Berbeda dengan prinsip yuridiksi teritorial, yurisdiksi nasionalitas melihat kepada kualitas orang dalam peristiwa hukum, hal ini

[7] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, (Yogyakarta : Andi, 2009), hal 204.

[8] *Ibid*, hal 205.

[9] J.G. Starke, *Pengantar Hukum Internasional [An Introduction of International Law] 1*, edisi ke sepuluh, diterjemahkan oleh Bambang Iriana Djajaatmadja (Jakarta: Sinar Grafika, 2010), hal 269.

umumnya terjadi apabila individu memasuki wilayah negara tersebut, baik secara sukarela maupun ekstradisi.[10]

Negara dalam melakukan pemungutan pajak terikat pada yurisdiksi dari negara yang bersangkutan. Yurisdiksi adalah ruang lingkup penggunaan wewenang untuk memungut pajak pada warganya maupun warga negara asing yang bertempat tinggal atau berkedudukan di negara tersebut sehingga tidak menimbulkan pembebanan berat bagi wajib pajak. Secara tegas maupun tersirat dalam hukum pajak diatur mengenai pengelompokkan yurisdiksi pemungutan pajak.[11] Yurisdiksi tersebut antara lain: (1) berdasarkan asas sumber, (2) berdasarkan asas kewarganegaraan, dan (3) berdasarkan asas tempat tinggal. Hal ini diterapkan dalam bersinggungan dengan hukum perpajakan internasional, didalamnya terdapat pajak yang ditarik misalnya dalam hal bagi warga negara yang berada di negara asing untuk berinvestasi dan warga negara asing yang berinvestasi di negara tersebut.

Masing-masing negara dapat saja mengenakan pajak atas penghasilan yang berasal dari transaksi lintas batas negara tersebut. Negara di tempat sumber penghasilan itu berasal, disebut sebagai negara sumber (*source state)*, tentu saja dapat mengenakan pajak atas penghasilan tersebut dengan alasan penghasilan bersumber dari negaranya. Dengan kata lain, negara sumber, dapat mengenakan pajak karena terdapat hubungan yang erat antara negara dan aktivitas yang memberikan penghasilan. Hubungan tersebut dinamakan sebagai *economic attachment*. Hal ini dikaitkan dengan logika berpikir bahwa negara tempat penghasilan tersebut bersumber telah memberikan atau menyediakan tempat, barang, dan pelayanan publik, sehingga subjek pajak dapat memperoleh penghasilan. Jadi, alasan yang mendasari negara sumber dapat mengenakan pajak adalah manfaat yang telah diberikan oleh negara sumber (*benefit theory of taxation).*[12]

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[10] *Ibid*, hal 302.

[11] Muhammad Djafar Saidi, *Pembaruan Hukum Pajak*, (Jakarta : PT RajaGrafindo Persada, 2007), hal 140.

[12] Darussalam, John Hutagaol, dan Danny Septriadi, *Konsep dan Aplikasi Perpajakan Internasional*, (Jakarta : DANNY DARUSSALAM Tax Center, 2010), hal 1.

Di lain pihak, negara subjek pajak didirikan atau bertempat kedudukan (untuk subjek pajak badan), berdomisili atau bertempat tinggal (untuk subjek pajak orang pribadi),[13] dapat juga mengenakan pajak atas penghasilan yang bersumber di luar negaranya yang diperoleh oleh subjek pajak dalam negeri-nya. Negara tempat subjek pajak didirikan atau bertempat kedudukan (untuk subjek badan), berdomisili atau bertempat tinggal (untuk subjek pajak orang pribadi) disebut sebagai negara domisili (*residence state).* Alasan negara domisili mengenakan pajak kepada subjek pajak dalam negeri-nya karena alasan yang sama dengan alasan yang diberikan negara sumber di atas. Dengan demikian, wajar ketika negara mengenakan pajak kepada subjek pajak dalam negerinya atas penghasilan yang diperoleh di luar negeri. Hubungan hak pemajakan antara suatu negara karena keterkaitan dengan subjek pajak-nya seperti yang dijelaskan di atas dinamakan sebagai *personal attachment.*[14]

Pengenaan pajak dari negara yang berbeda ini atas subjek pajak, tentunya memberatkan subjek pajak itu sendiri. Namun, tiap negara mempunyai hak pemajakan (*right to tax)* sesuai dengan peraturan perundang-undangan pajak nasional.[15] Kondisi dimana ada dua negara atau lebih yang perundang-undangan perpajakannya membebankan pajak pada subjek pajak yang sama terhadap objek pajak yang sama disebut Pajak Berganda Internasional (*International Double Taxation).* Misalnya, cabang perusahaan Amerika Serikat di Indonesia akan dikenakan PPh (Pajak Penghasilan) di Indonesia berdasarkan azas sumber. Atas penghasilan inipun pihak otoritas (pihak yang berwenang menarik pajak) akan mengenakan pajak berdasarkan azas kewarganegaraan atau azas domisili. Kejadian ini menimbulkan dua kali pengenaan pajak atas objek dan subjek yang

[13] Subjek pajak yang didirikan, bertempat kedudukan,atau bertempat tinggal di suatu negara tertentu disebut dengan subjek pajak dalam negeri (*resident*) atau dalam konteks Indonesia sering disingkat menjadi SPDN. Subjek pajak dalam negeri dikenakan pajak atas dasar *world wide income*, yaitu dikenakan pajak atas penghasilan yang bersumber di luar negeri. Sedangkan subjek pajak luar negeri dikenakan pajak atas dasar *source income*, yaitu dikenakan pajak atas penghasilan yang bersumber di negara sumber saja.

[14] Darussalam, John Hutagaol, dan Danny Septriadi, *Konsep dan Aplikasi Perpajakan Internasional*, hal 2.

[15] J.M. Aritonang dan Tony Marsyahrul, *Perpajakan Internasional sebagai Materi Studi di Perguruan Tinggi*, (Jakarta : PT Grasindo, 2008), hal 56.

sama. Jika di Indonesia kena tarif 30% dan di Amerika Serikat kena tarif 40%, maka total atas penghasilan yang sama dikenakan tarif 70%.

Tanpa adanya upaya antara negara tersebut dalam memecahkan permasalahan pajak berganda internasional ini, maka subjek pajak akan terkena pajak ganda dan wajib membayar di kedua negara. Hal ini tentunya merugikan subjek pajak. Akibat lain yang mungkin terjadi adalah semakin gencarnya usaha penyelundupan pajak (*tax evasion*).[16] Karena itu, upaya untuk meniadakan pengenaan pajak berganda internasional ini dan mencegah penyelundupan pajak sebagai akibat adanya benturan peraturan perundang-undangan perpajakan antara negara tersebut perlu dilakukan.

Penghindaran pajak berganda bergantung dari negara yang mempunyai kedaulatan dalam peraturan perundang-undangan perpajakannya. Dalam hubungan dengan internasional, penghindaran dapat dilakukan baik secara unilateral, yaitu dengan mengutamakan kepentingan wajib pajak di negaranya, maupun bilateral, dengan cara perjanjian internasional antara dua negara mengenai masalah perpajakan. Penghindaran pajak berganda internasional dengan cara unilateral dilakukan dengan memasukkan ketentuan-ketentuan untuk menghindarkan pajak berganda dalam undang-undang suatu negara dengan suatu prosedur yang jelas.[17] Sementara itu, penghindaran pajak berganda internasional dengan cara bilateral dilakukan dengan cara bilateral dilakukan melalui suatu perundingan dua negara yang berkepentingan untuk menghindari terjadinya pajak berganda. Pada prinsipnya, penghindaran pajak berganda dengan cara bilateral dimaksudkan untuk memberikan kejelasan dalam membagi hak pengenaan pajak (pemajakkan) suatu negara dengan negara lain terhadap suatu objek pajak sehingga wajib pajak tidak terbebani dengan membayar pajak dua kali. Cara yang lazim dilakukan adalah dengan melakukan perjanjian penghindaran pajak berganda (*tax treaty).*[18]

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[16] R. Santoso Brotodiharjo, *Pengantar Hukum Pajak*, (Bandung: PT Refika Aditama, 2003), hal 20.

[17] Wiryawan B. Ilyas dan Richard Burton, "*Hukum Pajak*", edisi 5, hal 193.

[18] *Ibid.*

Setiap negara tentunya mempunyai kepentingan berbeda dalam hal perpajakan tersebut. Proses negosiasi dalam pembentukan perjanjian penghindaran pajak berganda tersebut akan memakan waktu tergantung seberapa jauh perbedaan prinsip pemajakan yang ada antara kedua negara yang terlibat. Disamping itu, hal ini juga bergantung pada faktor seberapa jauh suatu negara bersedia mengorbankan hak pemajakannya dan memberikan kepada negara lainnya dalam perjanjian penghindaran pajak berganda.

Perjanjian penghindaran pajak berganda merupakan perjanjian internasional yang ketentuan hukumnya tunduk pada hukum yang diatur dalam *Vienna Convention on the Law of Treaties* (VCLT) atau disebut sebagai konvensi Wina (*Vienna Convention*).[19] Apalagi sebagian besar pasal dalam VCLT bersumber dari hukum kebiasaan internasional, sehingga dalam pembentukan, pemberlakuan sampai pembatalan *tax treaty*, yang termasuk dalam perjanjian internasional, harus mengikuti interpretasi dari prinsip tersebut. Bahkan untuk negara bukan peserta seperti Indonesia, karena prinsip VCLT sebagian besar merupakan prinsip hukum kebiasaan internasional yang mengikat oleh setiap negara. kecuali melakukan *persistence objector*.[20]

Dalam dunia perpajakan internasional terdapat dua model *tax treaty*, yaitu OECD model (*Organization for Economic Cooperation and Development*) dan UN model (*United Nations*), yang merupakan acuan bagi dua negara yang merundingkan suatu Persetujuan Penghindaran Pajak Berganda,[21] disamping itu dikenal pula US Model (*United States*) yang baru berkembang tahun 2001. Masing-masing negara mempunyai preferensi terhadap model yang sesuai dengan

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[19] Darussalam, John Hutagaol, dan Danny Septriadi, *Konsep dan Aplikasi Perpajakan Internasiona*", hal 70.

[20] Sebagaimana dinyatakan di atas, hukum kebiasaan internasional mengikat negara-negara. Sebuah negara bisa, menghindari dari terikat oleh aturan hukum kebiasaan internasional jika telah menjadi "*persistent objector*" pada norma atau aturan. Keberatan terhadap norma harus "konsisten" dan terlepas dari ketidaksepakatan. Lihat di dalam situs <http://www.internationaljusticeproject.org/int_hr_inst.cfm#persist_obj> diunduh pada tanggal 24 November 2011.

[21] R. Mansury, *Beberapa Konsep Penting Sehubungan Dengan Tax Treaties Dan Persandingan Model OECD Dengan Model PBB*, (Jakarta: Yayasan pengembangan dan Penyebaran Pengetahuan Perpajakan, 2004), hal 70.

kepentingan dari negara tersebut. Sehingga bisa terlihat perbedaan negara maju dan negara berkembang dalam pilihan *model law* ini. Apalagi menyangkut investor dan tempat domisili investasi yang akan menentukan kemana subjek pajak membayarkan pajaknya.

Permasalahan bukan hanya timbul dalam hal pajak berganda internasional yang timbul oleh perbedaan yuridiksi antara negara-negara. Namun bagi negara-negara yang ingin menyelesaikannya terutama dengan perjanjian penghindaran pajak berganda, proses pembuatan perjanjian penghindaran pajak berganda juga merupakan masalah apabila *model law* dan kepentingan saling berbentrokan.

Sehubungan dengan permasalahan di atas, diperlukan akan analisa tentang penyebab pajak berganda internasional, diikuti dengan proses penyelesaian yang bisa dilakukan oleh negara, yang akan difokuskan kepada perjanjian penghindaran pajak berganda, serta perbandingan antara *model law* yang ada untuk perjanjian penghindaran pajak berganda. Kemudian penulis akan menganalisa bagaimana perjanjian penghindaran pajak berganda Indonesia Belanda yang telah berjalan lama, yang terakhir diperbaharui tahun 2002.

1.2 Pokok Permasalahan

Berdasarkan latar belakang yang telah diuraikan tersebut di atas, maka penulis akan menganalisis tiga permasalahan yang akan dibahas dalam penelitian ini, yaitu:

1. Apa yang Menimbulkan Permasalahan Pajak Berganda dan Bagaimana Penyelesainnya ?
2. Bagaimanakah Penanganan Pajak Berganda Dalam Hukum Internasional ?
3. Bagaimanakah Pengaturan Masalah Pajak Berganda dalam Persetujuan Penghindaran Pajak Berganda Indonesia-Belanda ?

1.3 Tujuan Penelitian

Suatu tujuan dijabarkan supaya penelitian ini lebih terarah dan dapat mengenai sasaran yang ingin dicapai. Tujuan penelitian ini akan dibagi dalam dua bagian, terdiri dari tujuan penelitian secara umum dan khusus.

1.3.1 Tujuan Umum

Tujuan umum dari penelitian ini adalah menambah wawasan dan pengetahuan baik kepada peneliti dan juga pembaca mengenai *Tax Treaty* secara bilateral antara dua negara sebagai salah satu cara untuk menghindari pengenaan pajak berganda internasional.

1.3.2 Tujuan Khusus

Tujuan khusus dari penelitian ini adalah sebagai berikut:

1. Meneliti dan mempelajari perkembangan pajak berganda dan pengaturan antar negara mengenai masalah ini.
2. Meneliti dan mempelajari penyebab dan penyelesaian masalah pajak berganda dalam hukum internasional.
3. Meneliti dan mempelajari bagaimana kebijakan dalam *Tax Treaty* Indonesia Belanda tahun 2004 serta perbandingan dengan *Tax Treaty* Indonesia Belanda sebelumnya.

1.4 Kerangka Konsep

Penulisan dalam penelitian ini menggunakan beberapa istilah yang merupakan kata-kata kunci yang perlu dijabarkan secara khusus, dengan memberikan batasan mengenai pengertian atas beberapa masalah umum yang terkait dengan permasalahan di atas. Pembatasan ini diharapkan dapat menjawab permasalahan yang terkait dengan penelitian ini dan supaya terjadi persamaan persepsi dalam memahami permasalahan yang ada.

1. Pajak, adalah Iuran Kepada Negara(yang dapat dipaksakan) yang terutang oleh yang wajib membayarnya menurut peraturan-peraturan, dengan tidak mendapat prestasi kembali, yang langsung dapat ditunjuk, dan yang gunanya adalah untuk membiayai pengeluaran-pengeluaran umum berhubung dengan tugas negara untuk menyelenggarakan pemerintahan.[22]
2. Hukum Pajak adalah seperangkat kaidah hukum tertulis yang mengatur hubungan hubungan antara pejabat pajak dengan wajib pajak yang memuat sanksi hukum.[23]
3. Hukum pajak internasional adalah hukum pajak nasional yang terdiri dari kaidah, baik berupa kaidah-kaidah nasional maupun kaidah yang berasal dari traktat antarnegara dan dari prinsip/kebiasaan yang telah diterima baik oleh negara-negara di dunia untuk mengatur soal-soal perpajakan dan dalam mana dapat ditunjukkan adanya unsur-unsur asing, baik mengenai subjeknya maupun objeknya.[24]
4. Perjanjian Internasional adalah perjanjian yang diadakan antara anggota masyarakat bangsa-bangsa dan bertujuan untuk mengakibatkan akibat hukum tertentu.[25]
5. Pajak Berganda Internasional adalah apabila pajak-pajak dari dua negara atau lebih saling menindih sedemikian rupa sehingga orang-orang yang dikenakan pajak di negara-negara yang lebih dari satu, memikul beban pajak yang lebih besar daripada jika dikenakan pajak di satu negara saja.[26]

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[22] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 3. Dikutip dari pendapat Prof. PJA. Adriani. Ia pernah menjabat sebagai Guru Besar Hukum Pajak pada Universitas Amsterdam (Belanda), Pimpinan *Internasional Bureau of Fiscal Documentstion* di Amsterdam.

[23] Muhammad Djafar Saidi, *Pembaruan Hukum Pajak*, hal 1. Pengertian diambil adalah dalam arti sempit, sedangkan dalam arti luas berarti hukum yang berkaitan dengan pajak.

[24] *Ibid.*, hal 204. Dikutip dari pendapat Rochmat Soemitro.

[25] Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional*, edisi ke 2, (Bandung : PT Alumni, 2003), hal 117.

[26] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 206. Dikutip dari pengertian dari *Volkendbond (league of Nation).*

1.5 Metode Penelitian

1.5.1. Bentuk Penelitian

Bentuk penelitian dalam penelitian ini adalah penelitian yuridis normatif. Penelitian yuridis normatif adalah penelitian yang hanya dilakukan dengan cara meneliti terhadap asas-asas baik yang tertulis maupun yang tidak tertulis.[27] Penelitian ini melihat pada masalah pajak berganda internasional melihat pada penyelesaiannya yang dilakukan oleh negar-negara sebagai masyarakat internasional, serta *model law* yang berlaku ketika melakukan perjanjian penghindaran pajak berganda antara dua negara.

1.5.2. Tipologi Penelitian

Penelitian ini merupakan penelitian bersifat deskriptif, yaitu memberikan gambaran secara umum yang dapat ditangkap oleh panca indera atau menggambarkan secara tepat sifat suatu individu, keadaan, gejala atau kelompok tertentu, atau untuk menentukan frekuensi suatu gejala.[28] Kaitannya dengan penelitian ini adalah mengenal bagaimana negara-negara sebagai masyarakat internasional menyelesaikan masalah pajak berganda dalam hukum perpajakan internasional. Dari sudut bentuknya, merupakan penelitian evaluative yang memberikan penilaian atas program atau kegiatan yang telah dilaksanakan,[29] terutama masalah *tax treaty* Indonesia-Belanda. Dilihat dari sudut tujuannya penelitian ini bersifat *problem* finding yaitu menemukan permasalahn sebagai suatu akibat dari suatu kegiatan atau program yang dilaksanakan,[30] dalam hal ini adalah masalah pajak berganda internasional, yang kemudian akan dilanjutkan kepada *problem solving* yaitu bertujuan memberikan jalan keluar atau saran pemecahan permasalahan,[31] dalam hal ini melihat *tax* treaty sebagai salah satu solusi masalah pajak berganda. Selain itu, dilihat dari sudut penerapannya, penelitian ini juga termasuk penelitian murni yaitu penelitian yang bertujuan

[27] Sri Mamudji, *et.al., Metode Penelitian dan Penulisan Hukum*, (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hal10.

[28] *Ibid.*, hal 4.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*, hal 5.

untuk mengembangkan pengetahuan [32] khususnya pemahaman mengenai pemecahan masalah pajak berganda terutama menggunakan *tax treaty*. Kemudian dari sudut pandang ilmi yang dipergunakan merupakan penelitian mono disipliner yaitu pemilihan metode penelitian didasarkan pada satu disiplin ilmu,[33] yaitu ilmu hukum.

1.5.3. Jenis Data

Jenis data yang digunakan dalam penelitian ini adalah data sekunder yang terdiri dari bahan hukum primer, sekunder, tersier sebagai berikut[34]:

1. Bahan hukum primer, yaitu bahan hukum yang mempunyai kekuatan mengikat berupa peraturan perundang-undangan Indonesia, dalam hal ini adalah *Tax treaty* Indonesia Belanda yang merupakan perjanjian internasional, yang dikompilasikan dengn beberapa *model law* dan hukum kebiasaan Internasional
2. Bahan hukum sekunder, yaitu bahan hukum yang erat kaitannya dengan bahan hukum primer dan dapat membantu menganalisa, memahami, dan menjelaskan bahan hukum primer, yang antara lain adalah teori para sarjana, buku, penelusuran internet, artikel ilmiah, jurnal, tesis, surat kabar, dan majalah.
3. Bahan hukum tersier, yaitu bahan hukum yang memberikan petunjuk maupun penjelasan atas bahan hukum primer dan sekunder, misalnya ensiklopedia, atau kamus.

1.5.4. Alat Pengumpul Data

Mengenai alat pengumpul data, peneliti memakai studi dokumen. Penelitian akan menggunakan studi dokumen sebagai alat pengumpulan data, dimana "studi dokumen dipergunakan untuk mencari data sekunder"[35]. Studi dokumen dilakukan dengan meneliti setiap dokumen yang terkait seperti peraturan perundang-undangan dan literatur buku yang terkait dengan setiap pokok

[32] *Ibid.*

[33] *Ibid.*

[34] Soerjono Soekanto, *Pengantar Penelitian Hukum*, cet. III, (Jakarta: UI-Press, 1986), hal32.

[35] Sri Mamudji, *et.al.*, *Metode Penelitian dan Penulisan Hukum*, hal 6.

permasalahan yang ada sehingga dapat dibuktikan dari hasil penelitian studi dokumen tersebut bahwa masalah tersebut layak untuk diteliti. Alat pengumpul data dalam penelitian ini adalah studi dokumen yaitu suatu alat pengumpulan data yang dilakukan melalui data tertulis dengan mempergunakan *content analysis*[36] yang dalam penelitian ini adalah buku-buku yang berkaitan dengan hukum perpajakan internasional, khususnya masalah pajak berganda dan penghindarannya yang legal secara hukum.

1.5.5. Metode Analisis Data

Metode analisis data yang digunakan adalah kualitatif yaitu pada dasarnya, analisis data yang bersifat kualitatif menghasilkan laporan penelitian yang bersikap deskriptif-analitis, yaitu penguraian secara jelas studi kasus yang akan diteliti dan dipelajari adalah objek penelitian yang utuh.[37] Dalam penelitian ini apa yang telah ditentukan dalam perjanjian internasional, d dalam hal ini adalah *Tax treaty* Indonesia Belanda yang merupakan perjanjian internasional, dipelajari secara lebih mendalam khususnya mengenai permasalah yang menyebabkan perjanjian ini.

1.6. Sistematika Penulisan

Untuk mempermudah pembahasan materi pada penulisan ini, maka penulis membagi pembahasan menjadi 5 bab dan bab-bab tersebut terdiri dari sub-sub bab, maka penulis akan menjabarkan secara ringkas mengenai sistematika penulisan dalama penelitian ini sebagai berikut:

Bab 1 adalah bab mengenai Pendahuluan, yang terdiri dari latar belakang masalah, pokok permasalahan, tujuan penulisan, definisi operasional, metode penelitian, dan sistematika penulisan.

Bab 2 adalah mengenai Penyebab Timbulnya Pajak Berganda dan Penyelesaiannya. Pada sub bab pertama hingga sub bab ke tujuh berturut-turut akan dijelaskan mengenai Pengertian, penyebab terjadinya, unsur-unsur, tipe-tipe,

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[36] *Ibid.*, hal 21.

[37] *Ibid*., hal 67.

metode pneyelesaian dan penyelesaian mengenai maslah pajak berganda. Sub bab ketujuh menjelaskan mengenai dampak negatif pajak berganda bagi penanan modal.

Bab 3 adalah mengenai perjanjian penghindaran pajak berganda. Pada sub bab pertama akan menjelaskan mengenai pengertian dan sejarah perkembangan perjanjian penghindaran pajak berganda, dimulai dari pengertian, sejarah, tujuan, kedudukan terhadap undang-undang domestik dan uraian singkat pasal-pasal perjanjian penghindaran pajak berganda. Pada sub bab kedua akan menjelaskan model-model perjanjian penghindaran pajak berganda yang ada, OECD Model dan UN Model yang sering dipakai oleh negara-negara, serta model lainnya yang dikembangkan oleh negara seperti model Smerika dan model Indonesia. kemudian sub bab ketiga akan menjelaskan mengenai bentuk-bentuk perjanjian penghindaran pajak berganda. Sub bab keempat akan menjelaskan mengenai perjanjian penghindaran pajak berganda di Indonesia, termasuk didalamnya sejarah, dasar hukum keberlakuan perjanjian penghindaran pajak berganda, serta kedudukan perjanjian penghindaran pajak berganda terhadap undang-undang domestik Indonesia.

Pada Bab 4 akan dibahas mengenai analisis Persetujuan Penghindaran Pajak Berganda Indonesia Belanda. Sub bab pertama akan menjelaskan mengenai perjanjian penghindaran pajak berganda yang telah dilakukan Indonesia dengan negara-negara di dunia. Kemudian pada sub bab kedua akan menjelaskan analisa isi dari latar belakang, *person covered*, *taxes covered* dan *territory or states covered* dari perjanjian penghindaran pajak berganda Indonesia dengan Belanda yang terbaru yaitu tahun 2002. Pada sub bab ketiga akan menjelaskan mengenai implementasi dan permasalahan yang timbul dari perjanjian penghindaran pajak berganda Indonesia dengan Belanda yang ada.

Bab 5 merupakan penutup yang dalam hal ini ingin dicoba disimpulkan secara ringkas dan padat yang merupakan analisis dan pemaparan dari penulisan ini yang kemudian akan dirangkum dengan memberikan saran yang kiranya dapat memberikan arti yang baik dan berguna bagi penulis khususnya dan pembaca pada umumnya dalam menambah pengetahuan dan pemahaman mengenai

masalah pajak berganda dan Persetujuan Penghindaran Pajak Berganda terutama dalam hukum perpajakan internasional.

BAB II

PENYEBAB TIMBULNYA PAJAK BERGANDA DAN PENYELESAIANNYA

2.1 Pengertian Pajak Berganda

Dalam berbagai literatur ditemukan pengertian-pengertian pajak berganda oleh para ahli dengan penafsiran mereka masing-masing. Berikut ini adalah beberapa pengertian pajak berganda yang dikemukakan oleh para ahli :

1. Spitaler

   Spitaler menafsirkan pajak berganda sebagai berikut :

   "Double taxation is a conflict of rules which exist when different taxing authorities of various sovereign fiscal territories impose upon the same taxable subject in the hands of same legal or economic taxable subject or in the hands of both, a legal and economic taxable subject, on the same grounds, the same or similar taxes." [38]

   Sehingga dapat dilihat bahwa unsur-unsur yang terdapat dalam definisi tersebut adalah :[39]

   1) Ada beberapa negara pemungut pajak;
   2) Ada norma-norma yang bertentangan;
   3) Ada objek yang sama;
   4) Atas dasar yang sama;
   5) Dikenakan pajak yang sama atau sejenis.

[38] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, (Bandung: Eresco, 1977), hal 66. teks asli dari pengertian pajak berganda dari Spitaler adalah " *Die Doppelbesteuerung ist eine Normenkonkurenz, die dann vorliegt, wenn Abgabengewalten der Bereiche verschiedener ursprüngliche Abgaben hoheiten dasselbe Abgabenobjekt bei demselben privatrechtlichen oder wirtschaftlichen Abgabensubjekt oder beim privatlichen un beim wirtschaftlichen Abgabensubjekt, aus demselben Anlasz zu gleichen oder Abgabensubjekt, aus demselben Anlasz zu gleichen oder gleichartigen Abgaben heranziehen."*

[39] *Ibid,* hal 67.

2. Herbert Doen

Seorang sarjana Jerman ternama dalam *Deutschen Juristentag* ke-33 di Heidelberg pada tahun 1924 memberikan definisi sebagai berikut:[40]

"Double taxation exist when several independent fiscal powers (in particular several independent states) concurrently impose a similar tax on the same taxpayer on account of the same subject."

Menurut Dorn, yang dikenakan pajak adalah subjek yang sama, dan ditambah lagi dengan "*gleichzeitig"* atau "*concurrently"* yang berarti pada saat yang sama. Pengertian dari terjemahan "*on account of the same subject*" artinya mengenai hal yang sama, objeknya, yang aslinya berbunyi "*wegen desselben Gegenstandes".*

3. Ottmar Bühler

Beliau memberikan definisi tentang pajak berganda dengan membedakannya antara pajak berganda dalam arti luas dan sempit. Pajak berganda dalam arti luas adalah apabila suatu *taatbestand*[41] yang sama, pada saat yang sama pula, oleh beberapa negara dikenakan pajak yang sama atau sama sifatnya, sedangkan pajak berganda dalam arti sempit itu adalah pajak yang bersangkutan dikenakan pada subjek yang sama.[42]

Jadi perbedaan antara pajak berganda dalam arti luas dan dalam arti sempit adalah dalam arti luas tidak dipersoalkan subjeknya. Dengan adanya objek yang sama, yang oleh beberapa negara dikenakan pajak dua

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[40] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya,* hal 67. Definisi pajak berganda menurut Hebert Dorn dalam teks asli adalah "*Internationale Doppelbesteuerung (Mehrfachbelastung) liegt vor wenn mehrere selbständige Steuerhoheitstrager (insbesondere mehrere selbstandige Staaten) denselben Steuerpflichtingen wegen desselben Gegenstandes gleichzeitig zu einer gleichartigen Steuer heranziehen".*

[41] Pengertian literal dari *taatbestand* adalah fakta. Prof Soemitro dalam bukunya "Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya" (1977), hal 86 menjelaskan bahwa *taatbestand* adalah keadaan lahiriah yang menjadi dasar pengenaan pajak terhadap mana peraturan pajak sesuatu negara dapat diterapkan (*subsumption)* biasanya disebut objek pajak (*Steuerobjek*).

[42] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya,* hal 69.

kali atau lebih atau sifatnya sama sudah dikatakan pajak berganda. Pada pajak berganda dalam arti sempit subjek ikut menjadi faktor penentu. Apabila pajak tersebut dikenakan pada subjek yang sama maka terjadilah pajak berganda dalam arti sempit.[43]

4. Knechtle

Dalam bukunya yang berjudul "*Basic Problem in International Fiscal Law"* (1979), membedakan pajak berganda secara luas (*wider sense)* dengan secara sempit *(narrower sense).* Dalam pengertian yang luas, pajak berganda meliputi setiap bentuk pembebanan pajak dan pungutan lainnya yang lebih dari satu kali, baik berganda *(double taxation)* atau lebih *(multiple taxation)* terhadap suatu fakta fiskal (subjek dan/ atau obyek pajak). Dalam pengertian itu tidak dipertimbangkan penyebab dari pembebanan ganda tersebut, apakah berasal dari kombinasi antara pajak dengan pungutan lainnya (bea cukai, retribusi, dan lain sebagainya), kombinasi dari berbagai jenis pajak atau disebabkan oleh pembebanan pajak secara bersamaan baik oleh penguasa pajak yang sama ataupun penguasa pajak yang berbeda.[44]

Dalam pengertian sempit, pajak berganda dianggap terjadi pada semua kasus pemajakan yang dikenakan beberapa kali terhadap suatu obyek pajak dalam satu bagian administrasi pajak yang sama. Pengertian tersebut mengesampingkan pembebanan pajak yang dilakukan oleh pemerintah daerah dan bagian administratifnya yang diperoleh berdasarkan pelimpahan wewenang dari pemerintah pusat. Dengan demikian, pajak berganda tersebut dapat disebabkan oleh pemajakan oleh penguasa tunggal (*singular power)* atau oleh berbagai lapisan administrasi (*plural power*).[45]

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[43] *Ibid,* hal 90.

[44] Gunadi, *Pajak Intemasional,* edisi revisi (Jakarta: Lembaga Penerbit Fakultas Ekonomi Universitas Indonesia, 1997), hal 96.

[45] *Ibid,* 97.

2.2 Penyebab Timbulnya Pajak Berganda

Bentrokan antara kewenangan menarik pajak negara dengan negara lain terhadap objek pajak yang sama bisa menyebabkan terjadinya pajak berganda. Hal ini karena yurisdiksi dari negara baik mengenai individu yang berada dan melakukan kegiatan di wilayahnya serta warga negara yang melakukan kegiatan di negara lain.

2.2.1 Konsepsi Yurisdiksi Hukum Internasional

Dalam konteks hukum internasional konsep yurisdiksi dibagi menjadi :

1. Prinsip teritorial

   Pelaksanaan yurisdiksi oleh suatu negara terhadap harta benda, orang, tindakan atau peristiwa yang terjadi di dalam wilayahnya jelas diakui oleh hukum internasional untuk semua negara anggota masyarakat internasional. [46] Menurut Lord Macmillan :[47]

   > "adalah suatu ciri pokok dari kedulatan dalam batas-batas ini, seperti semua negara merdeka yang berdaulat, bahwa negara harus memiliki yurisdiksi terhadap semua orang dan benda di dalam batas-batas teritorialnya dan dalm semua perkara perdata dan pidana yang timbul di dalam batas-batas teritorial ini".

2. Prinsip nasionalitas aktif

   Menurut prinsip ini negara dapat melaksanakan yuridiksi terhadap warganegaranya. prinsip ini pada umumnya diberikan oleh hukum internasional kepada semua negara yang hendak meberlakukannya.[48]

3. Prinsip nasionalitas pasif

   Prinsip ini membenarkan negara untuk menjalankan yurisdiksi apabila seorang warga negaranya menderita kerugian. Hukum internasional mengakui prinsip ini dengan beberapa pembatasan.[49]

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[46] J.G. Starke, *Pengantar Hukum Internasional [An Introduction of International Law] 1,* edisi ke sepuluh, diterjemahkan oleh Bambang Iriana Djajaatmadja, hal 270.

[47] *Ibid.* Lihat juga *Compania Naviera Vascondango v Christina SS* (1983) AC 485, hal 496-497.

[48] *Ibid,* hal 303.

4. Prinsip perlindungan

Hukum internasional mengakui bahwa setiap negara mempunyai kewenangan melaksanakan yurisdiksi terhadap kejahatan yang menyangkut keamanan dan integritas atau kepentingan ekonomi yang vital. Wewenang ini didasarkan atas prinsip perlindungan (*protective principle*). [50]

5. Prinsip universal

Suatu tindak pidana yang tunduk pada yurisdiksi universal adalah tindak pidana yang berada di bawah yurisdiksi semua negara di mana pun tindakan itu dilakukan. Karena umumnya diterima, tindakan yang bertentangan dengan kepentingan masyarakat internasional, maka tindakan itu dipandang sebagai delik *jure gentium* dan semua negara berhak untuk menangkap dan menghukum pelakunya. [51]

2.2.2 Konsepsi Yurisdiksi Hukum Pajak

Dalam hukum pajak konsep yurisdiksi dibagi menjadi :

1. Berdasarkan asas sumber

Menurut yurisdiksi pemungutan pajak berdasarkan asas sumber bahwa pemungutan pajak tidak dapat dilepaskan dengan sumber atau tempat objek pajak itu berada. Sebagai contoh, apabila terdapat objek pajak di wilayah Indonesia maka Indonesia berhak menarik pajak kepada orang atau badan yang memilki objek pajak tersebut.[52]

2. Berdasarkan asas kewarganegaraan

Yurisdiksi ini bisa disebut juga sebagai sas kebangsaan. Yurisdiksi pemungutan pajak dikenakan bukan terhadap objek pajak, melainkan dari status atau kedudukan warga negara dari setiap orang pribadi yang berasal dari

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[49] *Ibid.*

[50] *Ibid,* hal 304.

[51] *Ibid,* hal 305.

[52] Muhammad Djafar Saidi, *Pembaruan Hukum Pajak*, hal 140.

negara yang mengenakan pajak. Walaupun orang pribado yang bersangkutan tidak bertempat tinggal atau berkedudukan pada negara yang hendak melakukan pemungutan pajak, terhadap orang pribadi itu yang merupakan warga negaranya, dilakukan pemungutan pajak terhadap yang bersangkutan. Asas kewarganegaraan ini diterapkan dalam undang-undang pajak penghasilan Indonesia, yaitu pemungutan pajak dilakukan kepada warga negara Indonesia baik yang bertempat tinggal di Indonesia maupun di luar Indonesia.[53]

3. Berdasarkan asas tempat tinggal

   Kebalikan dari yurisdiksi pemungutan pajak berdasarkan asas kewarganegaraan adalah yurisdiksi pemungutan pajak berdasarkan asas tempat tinggal.pemungutan pajak dilakukan berdasarkan tempat tinggal atau kedudukan wajib pajak. Kewenangan negara memungut pajak pada wajib pajak yang bertempat tinggal atas berkedudukan pada negara yang bersangkutan. Konsekuensinya adalah segala obbjek pajak dimiliki, dikuasai atau dimanfaatkan oleh wajib pajak yang bertempat tinggal atau berkedudukan di negara yang bersangkutan dikenakan pajak. Sebagai contoh, warga negara Malaysia yang bertempat tinggal di Indonesia memanfaatkan objek Pajak bumi dan Bangunan, dikenakan Pajak Bumi dan Bangunan.[54]

Mengenai bentrokan yurisdiksi ini, Rachmanto Surahmat dalam bukunya "*Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar"* (2001) mendefinisikan 3 jenis konflik yuridiksi, yaitu:

1. Konflik antara asas domisili dengan asas sumber[55]

   Dalam hukum pajak, penyebab pengenaan pajak berganda adalah bertemunya asas domisili dengan asas sumber. Negara domisili mengenakan pajak atas seluruh penghasilan yang diperoleh penduduknya, sedangkan negara sumber mengenakan pajak atas penghasilan yang berasal dari negara

[53] *Ibid,* hal 141.

[54] *Ibid,* hal 142.

[55]Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar*, hal 21.

tersebut. Dalam hal tersebut, terjadi konflik antara *world wide income principle* dan konsep kewenangan atas wilayah.

2. Konflik karena perbedaan definisi "penduduk"[56]

Seseorang pribadi atau badan pada saat yang bersamaan dapat dianggap sebagai penduduk dari dua negara, Hal ini dapat terjadi karena definisi "penduduk" kedua negara tersebut berbeda. Misalnya negara A menganggap bahwa seseorang yang memiliki kewarganegaraan A adalah penduduknya walaupun orang tersebut tidak tinggal di negara A. Sedangkan negara B menganut prinsip bahwa setiap orang yang telah tinggal di negaranya selama waktu tertentu diangggap sebagai penduduk negara B. Apabila X, yang memiliki kewarganegaraan A namun bekerja dan tinggal di negara B maka akan terjadi konflik karena perbedaan definisi "penduduk" antara negara A dan negara B yang berakibat X akan terkena pajak berganda oleh negara A dan B.

Konflik mengenai penduduk ganda ini (*dual residence)* biasanya terjadi atas orang pribadi. Tidak demikian dengan badan hukum. Karena biasanya pengurus suatu badan hukum berada di negara mana badan hukum tersebut didirikan.

3. Perbedaan definisi tentang "sumber penghasilan"[57]

Pajak berganda dapat terjadi apabila dua negara atau lebih memperlakukan satu jenis penghasilan sebagai penghasilan yang bersumber dari wilayahnya. Hal ini akan berakibat penghasilan yang sama dikenai pajak di dua negara. Contohnya: dalam Pasal 26 ayat (1) UU No. 36 Tahun 2008 tentang Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan disebutkan bahwa apabila wajib pajak dalam negeri membayar imbalan kepada "penduduk luar negeri" sehubungan dengan jasa yang dilakukannya, imbalan tersebut harus dipotong PPh sebesar 20%. Walaupun dilakukan di luar negeri, jasa tersebut tetap dianggap sebagai

[56]*Ibid*.

[57]*Ibid*, hal 22.

penghasilan yang sumbernya ada di Indonesia berdasarkan Undang-undang Pajak Penghasilan. Sebaliknya, menurut negara di mana "penduduk luar negeri" yang memberikan jasa tersebut berada, sumber penghasilan itu berada di negaranya. Dalam hal ini, imbalan atas jasa tersebut dikenai pajak di dua negara.

2.3 Unsur-unsur Pajak Berganda

Dalam buku "Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya" (1977), Prof Rochmat Soemitro menguraikan unsur-unsur agar dapat dikatakan sebagai pajak berganda intrnasional. Adapun yang menjadi unsur-unsur dari pajak berganda internasional adalah:

1. Penguasa yang Memungut Pajak[58]

Sesuai dengan pendapat Spitaler, pajak berganda internasional hanya dapat terjadi apabila sekurang-kurangnya terdapat dua negara pemungut pajak (*Abgabengewalt*) yang masing-masing berdiri sendiri sebagai negara yang berdaulat. Negara yang berdaulat mempunyai wewenang untuk membuat undang-undang, antara lain undang-undang pajak, sehingga negara yang berdaulat mempunyai wewenang memungut pajak dari obyek dan subyek yang ada di wilayahnya atau yang ada hubungan dengan wilayahnya tanpa dicampuri oleh negara lain manapun juga. Apabila terdapat bentrokan antara kaedah pajak suatu negara dengan kaedah pajak negara yang lain lazimnya masih digolongkan dalam pajak berganda internasional.

2. Identitas Subyek *(Kesamaan Subyek)*[59]

Salah satu syarat yang harus dipenuhi untuk pajak berganda internasional ialah kesamaan subyek (identitas subyek). Subyek pajak adalah orang atau badan yang menurut undang-undang dikenakan pajak dan bertanggung jawab untuk

[58] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, 83-84.

[59] *Ibid*, 84-85.

memenuhi segala syarat formil serta pembayaran. Subyek dapat terdiri dari orang pribadi, badan, dan kesatuan ekonomi.

3. Kesamaan Obyek *(Identitas Obyek)* [60]

Obyek pajak adalah keadaan lahiriah yang menjadi dasar pengenaan pajak terhadap peraturan perpajakan suatu negara dapat diterapkan. Yang menjadi pertimbangan dalam suatu negara terdapat kesamaan obyek adalah berdasarkan pertanyaan apakah batasan dari obyek pada dua negara tersebut ditentukan menurut cara yang sama atau tidak.

4. Kesamaan Pajak[61]

Pajak yang sama jarang sekali dijumpai sekalipun masing-masing negara menggunakan istilah yang sama (misalnya *income tax* atau *Einkommen Steuer* atau *inskomsten belasting,* yang di Indonesia disebut sebagai pajak penghasilan) karena mungkin isi materilnya tidak sama, yaitu apa obyeknya dan siapa subyeknya. Sehingga istilah yang lebih disukai adalah "pajak yang sifatnya sama". Sehingga walaupun pengertian dari nama pajak secara harfiah sama, namun sifat dari pajak itu bisa berbeda. Menurut Markull ia menyimpulkan sesuai dengan Mahkamah Agung (*Verfassungsgerichtschof)* Austria bahwa untuk menentukan kesamaan sifat pajak kita harus berpangkal pada hukum tertulis dari kedua pajak yang bersangkutan, yaitu apa yang menjadi hakekatnya, artinya apa sasaran dan apa yang merupakan dasar pengukurannya (*Bemessungsgrundlage).*[62]

[60] *Ibid*, 86-87.

[61] G. Russel dalam bukunya *"Beschouwingen over Nationaal en Internationaal Belastingrecht*" (1920), mengatakan bahwa pengadilan administrasi Austria menolak kesamaan sifat antara "*income tax* Inggris" dengan pajak pendapatan individu di Austria, karena menurut *stelsel* pajak Inggris, *income tax* berdasarkan "*schedule system"* merupakan suatu pungutan atas hasil yang sifatnya "*zakelijk"* (bisnis) bukan merupakan pungutan atas keseluruhan *income*.

[62] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 91-92.

5. Kesamaan Waktu[63]

Biasanya kesamaan waktu tidak menjadi alasan terjadinya perselisihan, walaupun kadang-kadang masih ada juga kesulitan mengenai hal ini yaitu apabila dipersoalkan apakah pajak-pajak yang dikenakan oleh beberapa negara dianggap dikenakan untuk jangka waktu yang sama. Hal ini terjadi karena ada negara-negara yang tahun pajaknya disesuaikan dengan tahun anggaran *(fiscal year)* yang tidak sama dengan tahun takwim (kalender) dan ada juga pajak-pajak yang menggunakan tahun buku yang tidak sama dengan tahun takwim sebagai dasar pengenaannya.

2.4 Tipe-tipe Pajak Berganda

Knechtle, dalam buku "*Basic Problems in International Fiscal Law"* menyebut beberapa tipe pajak berganda internasional. Tipe-tipe pajak berganda tersebut yaitu:[64]

1. Tipe Faktual dan Potensial

Pajak berganda terjadi karena benturan klaim pemajakan beberapa otoritas fiskal sesuai dengan yuridiksi mereka. Tipe faktual dari pajak berganda terjadi apabila ada klaim pemajakan yang dilakukan oleh beberapa negara sesuai dengan yurisdiksi pemajakan yang mereka miliki. Sedangkan, tipe potensial dari pajak berganda terjadi apabila dari dua negara atau lebih yang mempunyai yurisdiksi pemajakan hanya satu negara saja yang melakukan klaim pemajakan tersebut.

2. Tipe Yuridis dan Ekonomi

Pajak berganda yuridis terjadi apabila suatu penghasilan atau modal yang sama dikenakan pajak pada subyek yang sama oleh lebih dari satu negara. Pajak berganda ekonomis terjadi apabila 2 (dua) orang yang secara yuridis

[63] *Ibid*, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*. 94-95. Reuvers mengatakan bahwa pengertian pengenaan pajak untuk waktu yang sama (*gelijktijdig)* tidak boleh diartikan secara sempit. Menurut beliau pajak pendapatan yang dikenakan berdasarkan pungutan di muka (*Prae numerandoheffing)* dan yang dikenakan berdasarkan sistem pungutan di belakang dengan *stelsel rill* (*post numerando heffing*) dapat dianggap sebagai pungutan yang dikenakan untuk waktu yang sama apabila dasarnya sama.

[64] Gunadi, *Pajak Intemasional*, edisi revisi, hal 98-99.

berbeda dikenakan pajak atas penghasilan yang sama oleh lebih satu negara. Dalam pajak berganda internasional yurudis nampak bahwa pemajakan oleh lebih dari satu negara tersebut dilakukan terhadap satu subjek legal yang sama. Di pihak lain, pajak berganda internasional ekonomis meliputi pemajakan atas objek yang sama terhadap legal subjek yang berbeda, namun secara ekonomis identik atau setidaknya merupakan para wajib pajak yang terdapat hubungan.

3. Tipe Langsung dan Tidak Langsung

Dalam *Neumark Report* dibuat pembedaan anatara pajak berganda internasional langsung dan tidak langsung. Pajak berganda internasional langsung terjadi apabila ada aplikasi dari dua atau lebih ketentuan dengan struktur yang sama atau berbeda terhadap satu hak yang sama pada satu wajib pajak yang sama. Pajak berganda tidak langsung terjadi apabila ada pemajakan yang sama terhadap satu hal yang sama. Jadi setara dengan pajak berganda ekonomis, hanya saja pajak berganda tidak langsung lebih komprehensif dan luas dari pajak berganda ekonomis.

2.5 Metode Penghindaran Pajak Berganda

Memperhatikan bahwa pajak berganda itu sangat merugikan, maka dibuatlah upaya-upaya untuk menghindarkan pajak berganda. Metode-metode itu dilakukan baik secara sepihak oleh suatu negara (unilateral), melakukan perjanjian antar dua negara (bilateral) maupun secara beberapa negara (multilateral). Berikut ini metode penghindaran pajak berganda yang ada, yaitu:[65]

1. Metode kredit pajak *(Credit Method),* yaitu negara domisili memperkenankan pajak yang dibayar di negara sumber untuk dikreditkan. Ada dua jenis pengkreditan dalam metode ini, yaitu kredit pajak secara penuh *(full credit)* dan pengkreditan pajak dengan pembatasan (ordinary credit).

[65] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda*, (Jakarta: PT Gramedia Pustaka Utama, 2000), hal 23

2. Metode pembebasan *(Exemption Method),* yaitu penghasilan yang diperoleh di luar negeri (negara sumber) tidak lagi dikenai pajak di negara domisili. Ada dua jenis metode pembebasan yaitu pembebasan penuh *(full exemption)* dan pembebasan dengan progresi.

Masing-masing dari tiap metode mempunyai kelebihan sehingga dipilih oleh negara untuk menjadi metode penghindaran pajak berganda oleh negara dalam hukum domestik atau perjanjian yang mereka buat. Namun demikian metode ini memiliki kelemahan-kelemahan tersendiri. Berikut adalah kelebihan dari metode tersebut :[66]

1. Alasan yang menguatkan *exemption method* ialah bahwa metode ini sering diterapkan oleh negara kreditor, dapat dengan tegas menempatkan para investor pada tingkat yang sama seperti negara sumber, karena beban pajak hanya ditentukan oleh negara sumber saja. Karenannya perangsan pajak yang diberikan oleh negara sumber tidak dipengaruhi dan tidak dihilangkan oleh pajak dinegara tempat tinggal investor.
2. Ketentuan yang saling bertentangan dapat dihindarkan karena wajib pajak investor hanya berhubungan dengan satu macam jurisdiksi saja, yaitu negara tempat tinggal.

Sedangkan kerugian yang melekat pada *exemption method* ialah:[67]

1. Mengabaikan hasil investasi di negara asing melanggar *tax neutrality* dalam arti bahwa negara tempat tinggal, mengadakan diskriminasi antara investasi dalam negeri dan investasi luar negeri, sehingga investor yang melakukan investasi di luar negeri lebih diuntungkan daripada investor dalam negeri. Kecuali ada peraturan yang menyamakan hasil tersebut.
2. Condong menimbulkan penyelundupan pajak oleh *multinational corporations.*

[66] Rochmat Soemitro, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya,* hal 117.

[67] *Ibid,* hal 118.

3. Investor akan lebih mencari dan memilih negara-negara yang tarif pajaknya lebih rendah dari tarif pajak di negara sendiri. Hal ini akan menimbulkan persaingan.
4. Keuntungan dari metode ini dapat secara sepenuhnya dinikmati apabila negar yang sedang berkembang memberikan *tax incentive* yang sangat rendah atau membebaskan pajak. Oleh karena itu metode ini bukan yang ideal, karena negara berkembang akan berlomba menurunkan tarif pajak untuk bersaing dengan negara lain.
5. Metode ini tidak berarti negara investor tidak boleh melakukan kompensasi kerugian yang diderita dalam investasi dinegara asing. Sering kali negara maju di samping memberikan pembebasan juga memberikan kompensasi kerugian usaha di negara asing.

Kemudian kerugian pada *Credit Method* adalah :[68]

1. Kerugian besarnya ialah bahwa tarif rendah dan keringanan yang diberikan oleh *less developed countries* dihilangkan, oleh pungutan pajak di negara investor dan berpindah menjadi keuntungan negara tempat tinggal investor, walaupun hal tersebut dilunakkan dengan ketentuan bahwa hasil itu baru akan dipajaki apabila hasil itu ditransfer kembali ke negara investor dalam bentuk dividen.
2. Didasarkan pada jumlah pajak yang sebenarnya dikenakan di negara asing, sering kali jumlahnya tidak diketahui, sehingga memperlambat proses penyelesaiannya. Hal ini membuat ketergantungan pada luar negeri.
3. Apabila tarif negara sumber lebih besar daripada negara domisili investor hal ini akan menyebabkan kesukaran karena hanya sebagian saja dari pajak yang dapat diperhitungkan.
4. Bila untuk *credit method* diterapkan tarif negara tempat tinggal investor, kesulitan terletak pada menentukan jumlah keuntungan yang diperoleh atau dianggap *subsidiary*nya di negara sumber.
5. Tidak menyelesaikan masalah pajak berganda, hanya memperingan tekanan pada wajib pajak.

[68] *Ibid,* hal 119.

Metode *Credit Method* digunakan sebagai penghindaran baik secara unilateral maupun secara bilateral dan multilateral (perjanjian dan traktat). *Exemption method* banyak digunakan di negara eropa continental. Sedangkan *Credit Method* banyak digunakan dalam perjanjian penghindaran pajak berganda antara lain antara Denmark dalam perjanjian dengan Israel (1966) dan Filipina (1966), Perancis dengan Spanyol (1963), Jepang dengan Brazil (1967) dan Indian (1960).[69]

2.6 Penyelesaian Masalah Pajak Berganda

Banyak metode yang bisa dilakukan tiap-tiap negara untuk mengurangi atau mengeliminasi masalah pajak berganda. Baik yang dilakukan melalui peraturan perundang-undangan perpajakan mereka secara unilateral, melakukan negosiasi secara bilateral antar negara dengan bentukperjanjian penghindaran pajak berganda. Bisa juga menggunakan traktat yang ditandatangani oleh lebih dari 2 negara maupun yang dibuat dalam cakupan regional negara (multilateral). Ada juga penyelesaian menggunakan kebiasaan internasional apabila perjanjian antar negara maupun undang-undang domestik tidak melingkupi masalah pajak berganda. Penghindaran pajak dapat dilakukan dengan cara berikut ini :

1. Secara Unilateral

Metode penghindaran pajak berganda secara unilateral adalah metode yang dilakukan oleh suatu negara melalui undang-undang perpajakan dalam negeri sendiri atau *national tax law* atau *domestik tax law*.[70] Berikut ini metode penghindaran pajak berganda yang ada, yaitu:

1. *Exemption Method*, yang terdiri dari : [71]

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[69] *Ibid.*

[70] Safri Nurmantu dan Azhari A. Samudra, *Dasar-Dasar Perpajakan*, edisi ke dua, (Jakarta: Pusat penerbitan Universitas Terbuka, 2003), hal 9.5. dalam hal yang sama, Y. Sri Pudyatmoko dalam buku "*pengantar hukum pajak*" (2009) membagi *exemption method* menjadi *pure territorial principle* dan *restricted territorial principle*, yang keduanya mempunyai pengertian yang sama dengan *Exemption without progression* dan *Exemption with progression*.

[71] *Ibid*, hal 9.5.

a. *Exemption without progression* atau *full exemption*

Dalam metode ini semua penghasilan luar negeri tidak ikut dihitung, dan karenannya hanya penghasilan dalam negeri saja yang dikenakan pajak. Misalnya penghasilan dalam negeri Rp 200.0000.000, penghasilan dari luar negeri Rp 100.000.000. Maka yang dikenakan pajak hanya penghasilan dalam negeri yang Rp 200.000.000 saja.

b. *Exemption with progression*

Dalam metode ini penghasilan luar negeri tidak dikenakan pajak, akan tetapi penghasilan luar negeri tersebut dijumlah terlebih dahulu dengan penghasilan dalam negeri untuk mendapatkan tarif progresif. Misal seperti contoh butir a, tariff pajak untuk Rp 100.000.000 adalah 15%, untuk Rp. 200.000.000 sebesar 25% dan untuk Rp 300.000.000 keatas adalah sebesar 35%. Berdasarkan tariff progresif, pajak dikenakan terhadap penghasilan Rp 200.000.000 (penghasilan dalam negeri) namun dengan tarif 35% (karena total penghasilan adalah Rp 300.000.000), bukan 25%.

2. *Credit Method*, dengan rincian : [72]

a. *Full Credit*

Pajak yang telah dipotong di luar negeri dapat dikreditkan di dalam negeri. Misalnya penghasilan diluar negeri Rp 100.000.000 dikenakan *income tax* 35% (Rp 35.000.000). Penghasilan dalam negeri Rp 200.000.000 sehingga *world wide income* menjadi Rp 300.000.000. Jika pajak penghasilan terutang (PPh terutang) atas Rp 300.000.000 adalah sebesar Rp 71.250.000, maka pajak yang telah dipotong di luar negeri dapat dikreditkan atau di perhitungkan sehingga yang harus dibayar adalah sebagai berikut:

[72] *Ibid*. hal 9.5-9.6.

PPh terutang	Rp 71.250.000
Kredit pajak luar negeri	Rp 35.000.000
Masih harus dibayar	Rp 36.250.000

b. *Ordinary Tax Credit*

Atau disebut juga kredit pajak biasa adalah kredit pajak yang dianut oleh Indonesia berdasarkan ketentuan Pasal 24 UU PPh 2008.[73] Kredit pajak yang telah dipotong di luar negeri disebut sebagai kredit pajak faktual. Selain itu dikenal pula kredit pajak teoritis yakni kredit pajak sebagai hasil penghitungan perbandingan penghasilan luar negeri dibagi dengan *worldwide income* dikalikan dengan PPh terutang atas *worldwide income*. Masih dengan contoh yang sama, kredit pajak factual sebesar Rp. 35.000.000 sedangkan kredit pajak teoritis diperoleh dengan cara :

100/300 x Rp. 71.250.000 = Rp. 23.750.000.

Kredit pajak yang diperkenakan adalah kredit pajak yang terkecil antara kredit pajak faktual dan kredit pajak teoritis. Dalam contoh ini kredit pajak yang dikurangkan adalah sebesar Rp. 23.750.000 sehingga perhitungannya adalah sebagai berikut

PPh terutang	Rp 71.250.000
Kredit pajak, Pasal 24	Rp 23.750.000
Pajak Penghasilan yang kurang dibayar	Rp 47.500.000

Selanjutnya ketentuan Pasal 24 UU PPh mengatur, bahwa rugi yang diderita pada suatu negara tidak ikut diperhitungkan atau dikompensasikan dan bahwa perhitungan kredit di setiap luar negeri dihitung sendiri (*per country limitations*)

[73] Indonesia,*Undang-Undang Tentang Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan*, UU no. 36 tahun 2008, LN no 133 tahun 2008, TLN no. 4893, pasal 24. Ayat yang mengarahkan kredit pajak sebagai cara unilateral Indonesia menghindarkan pajak berganda adalah ayat 1 yang berbunyi "Pajak yang dibayar atau terutang di luar negeri atas penghasilan dari luar negeri yang diterima atau diperoleh Wajib Pajak dalam negeri boleh dikreditkan terhadap pajak yang terutang berdasarkan Undang-undang ini dalam tahun pajak yang sama."

c. *Direct/Indirect Tax Credit*

Direct tax credit adalah kredit pajak yang berasal dari pengenaan atas deviden. Sedangkan *indirect tax credit* atau disebut juga *underlying tax credit* adalah kredit yang terkait/berhubungan dengan deviden yang dibagikan kepada pemegang saham.

d. *Fictitious Tax Credit*

Atau disebut juga *tax sparing* adalah kredit pajak yang berasal dari *source country* yang perseroannya melakukan usaha di *source country* dibebaskan dari pengenaan pajak perseroan dan pajak deviden (*tax holiday*). Walaupun menikmati *tax holiday*, akan tetapi jumlah laba dan pajak penghasilan yang terutang tetap dihitung dalam suatu SKP[74]. Karena menikmati *tax holiday*, jumlah pajak penghasilan terutang tidak perlu dibayar, akan tetapi SKPnya dapat dibawa ke *home country* dan disana jumlah pajak penghasilan yang terutang (akan tetapi tidak dibayar karena *tax holiday*) dikreditkan terhadap pajak penghasilan atas penghasilan global.

3. *Reduce Rate*[75]

Untuk menghindari pajak berganda atau mengurangi atau meringankan beban pajak berganda, undang-undang pajak domestik mengatur penurunan tariff pajak atas beberapa penghasilan tertentu. Misalnya pajak atas deviden diturunkan dari 20% menjadi 10%.

4. *Tax Deduction*[76]

Untuk menghindarkan pajak berganda, atau mengurangi beban pajak berganda undang-undang pajak domestik memberi kesempatan

[74] SKP adalah singkatan dari Surat Ketetapan Pajak. Pengertian Surat Ketetapan Pajak. pengertian SKP menurut Pasal 1 angka 14 Undang-Undang Nomor 28 Tahun 2007 adalah Surat ketetapan yang meliputi Surat Ketetapan Pajak Kurang Bayar atau Surat Ketetapan Pajak Kurang Bayar Tambahan atau Surat Ketetapan Pajak Lebih Bayar atau Surat Ketetapan Pajak Nihil.

[75] Safri Nurmantu dan Azhari A. Samudra, *Dasar-Dasar Perpajakan*, edisi ke dua, hal 9.6.

[76] *Ibid*.

kepada wajib pajak yang menerima atau memperoleh penghasilan dari luar negeri dan disana sudah dikenakan pajak, maka besarnya pajak yang dipotong di luar negeri tersebut dikurangi dari penghasilan (*tax against income*).

2. Secara Bilateral

Cara bilateral yaitu dengan menggunakan perjanjian internasional di antara kedua negara yang terlibat., yang isinya menyepakati untuk menghindari pajak ganda internasional. Pada umumnya dalam perjanjian itu disepakati misalnya negara domisili melepaskan haknya untuk memungut pajak dan hak memungut pajak tersebut diberikan kepada negara sumber. Kesepakatan ini dapat dilakukan secara timbal balik, mengingat dalam satu negara bisa dimungkinkan diterapkan lebih dari satu asas pengenaan pajak.[77]

Dalam perjanjian penghindaran pajak berganda ada keuntungan tertentu, yaitu persoalan yang berkaitan dengan pajak berganda internasional pada umumnya dapat diselesaikan secara menyeluruh. Akan tetapi tidak berarti tidak ada kelemahan, salah satunya adalah sulitnya mencapai suatu kesepakatan antara kedua negara yang berkepentingan. Kadangkala lebih menguntungkan salah satu pihak. Hal ini disebabkan karena posisi tawar yang lebih menguntungkan dari salah satu pihak dalam hal perdagangan maupun ekonomi.[78]

Walupun demikian sebagai unsur hukum internasional, perjanjian penghindaran pajak berganda mengikat kedua negara penandatangan. Kebanyakan mode keringanan yang diberikan sama dengan ketentuan domestik. Bahkan ketentuan tersebut bisa lebih longgar daripada ketentuan domestik. Hal ini diberikan sebagai perangsang penanaman modal.[79]

Secara umum dikenal 2 model perjanjian penghindaran pajak berganda, yaitu yang disusun oleh OECD (*Organization for Economic Cooperation and Development*) yang disebut OECD Model dan yang dibuat UN (United Nations)

[77] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 217.

[78] *Ibid*, hal 218.

[79] Gunadi, *Pajak Intemasional*, edisi revisi, hal 104

yang disebut UN Model.[80] Model inilah yang digunakan sebagai dasar dalam perundingan antara negara-negara dalam membuat perjanjian penghindaran pajak berganda.

3. Secara Multilateral

Dalam cara multilateral, sejumlah negara menandatangani traktat yang isinya menyepakati untuk menghindari pajak berganda internasional yang terjadi di antara mereka terhadap objek dan subjek pajak tertentu. Dalam hal ini bisanya hak untuk mengenakan pajak diberikan kepada negara sumber, sementara negara domisili dan negara kebangsaan mengalah.[81] Perjanjian secara multilateral dalam masalah pajak berganda merupakan kesepakatan bersama, pemberian keringanan pajak berganda ini lebih bersifat harmonisasi (atau mendekati unifikasi) ketentuan perpajakan masing-masing negara terkait. Tujuan dari penghapusan pajak berganda dimaksudkan memperlancar mobilitas modal, perdagangan, barang dan jasa, kekayaan, ilmu pengetahuan dan tekhnologi internasional. Dengan demikian, pendekatan multilateral akan lancar, apabila keadaan ekonomi dan sosial (termasuk arus modal, barang dan jasa transnasional) negara-negara anggota seimbang. Karena tidak ada yang memberikan pengorbanan penerimaan pajak lebih daripada negara lainnya.[82]

Contoh perjanjian multilateral misalnya *Nordic Multilateral Income and Capital Tax Convention (Nordic Convention)* yang terdiri atas Denmark, Finlandia Eslandia, Norwegia, dan Swedia. *Nordic Convention* ditandatangani di Helsinki tanggal 23 September 19996 dan berlaku secara efektif pada tanggal 1 Januari 1998. Contoh lainnya adalah *Caricom Agreement* (1994) yang terdiri atas negara-negara berikut: Antigua dan Babuda, Belize, Dominika, Grenada, Guyana, Jamaika, Monserrat, St. Kitts dan Nevis, St. Lucia, St. Vincent dan Grenadines,

[80] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 218.

[81] *Ibid.*

[82] Gunadi, *Pajak Intemasional*, edisi revisi, hal 105.

seta Trinidad dan Tobago. Hal menarik dari *Carricom Agreement* adalah semua hak pemajakan diberikan secara ekslusif hanya kepada negara sumber.[83]

4. Secara Kebiasaan internasional

Cara penyelesaian pajak berganda dilakukan melalui kebiasaan internasional, bila cara-cara diatas tidak dapat ditempuh. Misalnya negara yang bersangkutan belum mengatur mengenai perpajakan berganda dalam undang-undang perpajakan nasionalnnya. Atau negara tersebut belum melakukan perjanjian penghindaran pajak berganda dengan negara lain sehingga menyebabkan terjadinya pajak berganda. Demikian pula belum meratifikasi traktat internasional penghindaran pajak berganda. Dalam hal ini dapat digunakan kebiasaan internasional. Pada umumnya dianut kebiasaan bahwa negara sumber diberikan hak terlebih dahulu yang diutamakan untuk memungut pajak, sementara negara domisili dan negara kebangsaan melepaskan haknya.[84]

2.7 Dampak Negatif Pajak Berganda Bagi Para Penanam Modal

Pajak berganda berganda merupakan permasalahan serius bagi para investor. Hal ini karena atas suatu objek pajak yang sama dikenakan pajak yang sama oleh dua negara. Hal ini membuat keuntungan yang didapat menurun drastis dan menurunkan minat investasi. Hal ini akan berdampak pula kepada negara tujuan investasi, yang kehilangan pendapatan dari investasi asing.

Secara ekonomis, pajak merupakan pengorbanan sumber daya yang harus ditanggung oleh para pengusaha (dan masyarakat). Pajak berganda sebagai akibat dari pemajakan oleh ketentuan pemajakan (dari dua negara) memberikan tambahan beban terhadap pengusaha. Sementara itu, perluasan usaha ke mancanegara sudah mengundang tambahan risiko dibanding dengan usaha dalam negeri. Pemajakan berganda telah memperbesar risiko tersebut. Kalau tidak ada upaya untuk mencegah atau meringankan beban pajak tersebut, pajak berganda

[83] Darussalam, John Hutagaol, dan Danny Septriadi, Konsep dan Aplikasi Perpajakan Internasional, hal 26.

[84] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 219

internasional bisa memicu ekonomi global yang lebih tinggi. Oleh karena itu, nampak sudah merupakan kebutuhan internsional antara negara-negara untuk mengupayakan agar kebijakan perpajakan bersifat netral terhadap kompetisi internasional. Netralitas tersebut dicapai dengan meringankan atau mengeliminasi pajak berganda dengan metode yang telah ada.[85]

[85] Gunadi, *Pajak Intemasional*, edisi revisi, hal 100.

BAB III

PERKEMBANGAN PERJANJIAN PENGHINDARAN PAJAK BERGANDA

3.1 Pengertian dan Sejarah Perkembangan Perjanjian Penghindaran Pajak Berganda

3.1.1 Pengertian Perjanjian Penghindaran Pajak Berganda

Banyak pengertian dari berbagai buku mengenai pengertian perjanjian peghindaran pajak berganda. Secara umum pengertian tersebut banyak persamaan dalam maknanya. Berikut ini beberapa pengertian dari perjanjian penghindaran pajak berganda dari beberapa ahli :

1. Rachmanto Surahmat

Beliau berpendapat bahwa perjanjian peghindaran pajak berganda adalah rekonsiliasi dua undang-undang pajak yang berbeda, yang membagi hak 37 pemajakan atas subjek dan objek pajak luar negeri. Rekonsiliasi ini diperlukan untuk menghindarkan pengenaan pajak berganda secara juridis. Artinya dua negara mengadakan kesepakatan tentang saling membagi hak pemajakan atas penghasilan penduduknya yang melakukan usaha di negara lain. Dengan kata lain, yang diatur dalam suatu persetujuan perpajakan adalah pemajakan yang menyangkut penduduk luar negeri (atau wajib pajak luar negeri).[86]

2. John Hutagaol

Beliau memberikan pengertian perjanjian penghindaran pajak berganda sebagai perjanjian pajak antara 2 (dua) negara yang mengatur mengenai pembagian hak pemajakan atas penghasilan yang diperoleh atau diterima oleh penduduk dari salah satu atau kedua negara pihak pada persetujuan. Pembagian hak pemajakan tersebut diatur dengan tujuan untuk mencegah seminimal mungkin

[86] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar*, (Jakarta: Gramedia Pustaka Utama, 2001), hal 32.

terjadinya pengenaan pajak berganda.[87]

3. Mohammad Zain

Beliau memberikan penjelasan, bahwa perjanjian penghindaran pajak berganda merupakan pengaturan agar pelaksanaan undang-undang domestik dari dua negara atau lebih yang melakukan pungutan atas penghasilan yang sama tidak mengakibatkan munculnya pajak berganda. Dengan kata lain, perjanjian penghindaran pajak berganda hanyalah pengaturan yang diadakan untuk mencegah timbulnya pajak berganda dengan cara membatasi hak pemajakan dari negara sumber atas penghasilan yang diperoleh di wilayah yurisdiksinya.[88]

Melihat dari pengertian yang dipaparkan di atas, persamaan yang terlihat adalah adanya 2 hukum pajak yang berbeda dari dua negara yang bertabrakan terhadap subjek pajak yang menimbulkan dikenakannya pajak berganda oleh kedua negara. Oleh karena itu dibuatlah suatu perjanjian antara kedua negara untuk mengupayakan penghindaran terjadinya pajak berganda terhadap objek pajak ini.

3.1.2 Sejarah Perjanjian Penghindaran Pajak Berganda

Sejarah perjanjian penghindaran pajak berganda sudah ada sejak bentrokan pemungutan pajak dilakukan oleh penguasa (otoritas) penarik pajak yang dikarenakan adanya pajak berganda. Sehingga diperlukan suatu perjanjian untuk mempermudah penarikan pajak untuk memperlancar arus ekonomi terutama antar negara saat itu.

Masalah-masalah pajak ganda bilateral telah timbul sejak lama, yaitu abad ke-19. Di Eropa permasalahan serta upaya-upaya untuk menghindarkannya telah timbul sejak pertengahan abad ke-19. Seligman, dalam bukunya *Double taxation*

[87] John Hutagaol, *Pemahaman Praktis Perjanjian Penghindaran Pajak Berganda: Indonesia dengan Negara-negara di kawasan Asia Pasifik, Amerika dan Afrika,* (Jakarta: Salemba Empat, 2000), hal 5.

[88] Mohammad Zain, *Manajemen Perpajakan,* (Jakarta: Salemba, 2003), hal 341.

and International Fiscal Cooperation, New York (1928), membagi perkembangan usaha untuk menghindarkan pajak ganda dalam tiga tahapan yaitu : [89]

a. yang diadakan dalam negara-negara terpisah dalam suatu negara perserikatan, misalnya di Jerman (Undang-Undang Federal tahun 1870), Swiss (Konstitusi tahun 1874), juga di Kanada, India dan Amerika Serikat;
b. diadakan di antara anggota-anggota yang otonom dari suatu kekaisaran, misalnya kekaisaran Inggris Raya;
c. usaha-usaha yang dilakukan oleh negara yang berdaulat, misalnya yang dilakukan Belanda dengan Undang-Undang tahun 1918, yang memberikan pembebasan pajak atas kapal-kapal asing dari pembayaran pajak lisensi, asalkan secara timbal balik kapal-kapal Belanda pun dibebaskan di Negara yang bersangkutan.

Sedangkan perjanjian penghindaran pajak berganda pertama dikenal akhir abad ke-19, yaitu antara beberapa negara Jerman dan Kerajaan Austro-Hungaria. Perjanjian antara Prussia dan Austro-Hungaria merupakan perjanjian mengenai penghindaran pengenaan pajak penghasilan berganda. Perjanjian tersebut disepakati pada tanggal 22 Juni 1899.[90]

Liga Bangsa-Bangsa (*League of Nations*), untuk pertama kalinya membuat suatu model untuk acuan dalam pembahasan suatu perjanjian penghindaran pajak berganda tahun 1928. Nama dari acuan tersebut adalah Model Perjanjian Perjanjian penghindaran pajak berganda atas Penghasilan dan kekayaan (*Model Tax Convention on Income and on Capital)*. Diikuti Model Mexico Tahun 1943 dan Model London 1946. Setelah perang dunia kedua, ketergantungan akan kerjasama ekonomi antara negara-negara anggota Organisasi Kerja Sama

[89] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia,* (Jakarta: Raja Grafindo Persada, 2005), hal 15.

[90] Muhammad Ro'is, "Politik Hukum Tax Treaty Indonesia (Kajian atas Tax Treaty Indonesia-Jepang)", (Thesis Magister Hukum Universitas Indonesia, Jakarta, 2006), hal 27. Lihat juga Alex Easson, "*Do We Still Need Tax Treaties ?"*, Buletin Tax Treaty Monitor, IBFD, Desember, 2000.

Ekonomi Eropa makin meningkat, serta makin memperjelas pentingnya upaya penghindaran terjadinya pajak berganda.[91]

Tahun 1956, komite Fiskal (*Fiscal Committee)* dan *Organization for Economic Cooperation and Development (OECD)* menyusun suatu draf model perjanjian yang bisa memecahkan masalah-masalah pajak berganda anatara anggotanya, serta dapat diterima semua anggotanya. Dari tahun 1958 sampai tahun1961 Komite Fiskal *OECD* menyiapkan semacam laporan sementara (*interim report),* sebelum memberikan laporan yang final pada tahun 1963 yang berjudul "*Draft Double Taxation Convention on Income and on Capital*". Kemudian draft tersebut disahkan pada tanggal 30 Juli 1963 oleh Dewan *OECD* dan merekomendasikannya kepada seluruh pemerintahan anggota *OECD* untuk melakukan perubahan_dalam perjanjian penghindaran pajak berganda bilateral diantara mereka, perubahannya disesuaikan dengan model Konvensi di atas.[92] Dengan bertambahnya pengalaman dari perundingan maupun pelaksanaan perjanjian, perjanjian ini direvisi beberapa kali hingga yang terbaru tahun 2010.

Model OECD ini ternyata mempunyai permasalahan terutama untuk negara berkembang. Hal ini dikarenakan model OECD memberikan hak utama pemajakan kepada negara domisili. Bila dilihat dari dari kacamata negara yang memiliki keseimbangan dari segi perdagangan, arus modal, maupun arus tekhnologi (*know-how*), tidak ada pihak yang dirugikan atau diuntungkan dari sisi perpajakan. Namun untuk negara berkembang ke bawah yang mempunyai ketidak seimbangan dari segi perdagangan, arus modal, maupun arus tekhnologi (*know-how*), apabila menggunakan model ini akan merugikan mereka, sebagai negara sumber penghasil. [93]

Menyadari permasalahan di atas, tahun 1967 Perserikatan Bangsa-Bangsa (*United Nations*) mengadopsi suatu resolusi untuk membentuk suatu kelompok ahli (*group of experts*) di bidang perjanjian penghindaran pajak berganda yang mewakili negara-negara maju (*developed countries*) dan negara-negara sedang

[91] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 15.

[92] *Ibid*, hal 16.

[93] *Ibid,* hal 18.

berkembang (*developing countries*). Kelompok ini ditugasi untuk menjajagi upaya dan cara mempermudah tercapainya perjanjian penghindaran pajak berganda antara negara-negara maju dan negara-negara sedang berkembang. Pada tahun 1979, Perserikatan Bangsa-Bangsa menerbitkan suatu manual untuk para perunding perjanjian penghindaran pajak berganda yang kemudian disusul dengan diterbitkannya Model Konvesi Perserikatan Bangsa-Bangsa (*United Nations Model*) tahun 1980.[94]

3.1.3 Tujuan Perjanjian Penghindaran Pajak Berganda

Tujuan utama suatu perjanjian penghindaran pajak berganda adalah untuk meniadakan atau mengurangi pemajakan berganda (*avoid double taxation)*. Selain hal tersebut, perjanjian pajak berganda juga bertujuan untuk mencegah penghindaran pajak dan penyelundupan pajak (*avoid double non-taxation*).[95] Kedua tujuan tersebut dimaksud untuk mencapai tujuan-tujuan sebagai berikut :[96]

1. Menjaga persaingan yang adil antara subjek pajak dalam negeri dan subjek pajak luar negeri dengan cara mengenakan beban pajak yang sama terhadap penghasilan yang sama berdasarkan tingkat membayar kemampuan pajak (*ability to pay)* yang sama tanpa memperhatikan di negara mana sumber penghasilan tersebut berasal;
2. Meningkatkan daya saing dan pertumbuhan ekonomi melalui kebijakan fiskal;
3. Membagi hak pemajakan anatara negara domisili dan negara sumber secara adil atas penghasilan yang berasal dari transaksii lintas batas negara;
4. Menjamin adanya netralitas dalam perpajakan internasional, baik yang bersifat netralitas atas pemajakan atas aliran modal yang masuk ke suatu negara maupun netralitas dalam pemajakan atas aliran modal yang keluar dari suatu negara.

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[94] *Ibid*, hal 19.

[95] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 5.

[96] Roy Rohatgi, *Basic International Taxation*, (Kluwer Law International The Hague The Netherlands, 2000), hal 1.

Selain itu, tujuan perjanjian penghindaran pajak berganda yang lain adalah mencegah seminimal mungkin terjadinya pemajakan berganda. Serta pada umumnya penghindaran pajak berganda adalah untuk menyamakan tariff pajak antara dua negara yang melakukan perjanjian.[97] Disamping itu, perjanjian penghindaran pajak berganda memiliki tujuan lainnya, yaitu:[98]

1. Menghindari seminimal mungkin terjadinya pengenaan pajak berganda dengan cara membatasi hak pemajakan dari negara sumber atas penghasilan yang timbul dari wilayah yurisdiksinya;
2. Mencegah timbulnya penyelundupan pajak (tax evasion) ;
3. Memberikan kepastian hukum;
4. Untuk pertukaran informasi;
5. Non diskriminasi;
6. Bantuan dalam penagihan pajak;
7. Penghematan dalam *cash flow.*

Disamping fungsi diatas suatu perjanjian pajak mempunyai fungsi lainnya. Fungsi lain tersebut sesuai dengan kondisi serta persepsi masing-masing negara tentang diadakannya suatu perjanjian penghindaran pajak berganda.

Jepang memandang bahwa fungsi dari perjanjian penghindaran pajak berganda selain menghindarkan pajak ganda juga berfungsi untuk: (1) mempermudah dan memperlancar transaksi ekonomi, (2) mendorong kerjasama ekonomi, (3) mencapai suatu pemajakan yang pantas.[99] Filipina berpendappat bahwa tujuan utama dari perjanjian penghindaran pajak berganda adalah untuk penghindaran pajak ganda atas penghasilan yang sama, yang kemudian meliputi juga penghindaran atas penyelundupan pajak. Sementara itu, beberapa fungsi

[97] Hasil wawancara dengan Bapak Tjip Ismail bertempat di Badan Arbitrase Nasional Indonesia (BANI) pada tanggal 15 November 2011.

[98] John Hutagaol, *Pemahaman Praktis Perjanjian Penghindaran Pajak Berganda: Indonesia dengan Negara-negara di kawasan Asia Pasifik, Amerika dan Afrika*, hal 5.

[99] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 23. Lihat juga Final Report of Procedings of 2nd Meeting of the Study Group of Asian Tax Administration and Research (SGATAR), Jakarta, 1972.

lainnya adalah: (1) memecahkan masalah alokasi penghasilan dengan memberikan suatu metode pemajakan yang disederhanakan, (2) mengurrangi beban terhadap pelaksanaan undang-undang perpajakan tanpa mengurangi jumlah pajak yang dibayar, (3) meringankan beban pemungutan pajak yang jumlahnya kecil, (4) memberikan bantuan dalam pemungutan pajak, (50 memajukan perdagangan internasional, (6) menarik arus penanaman modal asing dan tekhnologi (*technical know-how*).[100]

Bagi Indonesia, tujuan utama diadakannya perjanjian penghindaran pajak berganda pada permulaannya adalah sebagai pelengkap dari kebijakan penanaman modal asing. Namun akhir-akhir ini, tujuan diadakannya perjanjian penghindaran pajak berganda lebih beragam, antara lain sebagai alat diplomasi. Hal ini dapat terlihat dengan diadakannya perjanjian-perjanjian penghindaran pajak berganda dengan negara-negara lain yang bila dilihat dari segi hubungan ekonomi, perdagangan, maupun penanaman modal kurang relevan. Misalnya, perjanjian penghindaran pajak berganda yang diadakan dengan Mongolia, dan negara-negara di Asia Tengah yang hubungan ekonomi, perdagangan, maupun investasinya dengan Indonesia sangatlah minim.[101]

3.1.4 Kedudukan Perjanjian Penghindaran Pajak Berganda Terhadap Undang-undang Domestik

Perjanjian Penghindaran pajak berganda antara dua negara pada dasarnya adalah hukum internasional dan karena itu tunduk kepada aturan mengenai konvensi internasional yang diatur dalam Konvensi Wina. Kemudian hubungan antara undang-undang nasional dengan persetujuan internasional dijelaskan berikut. Ada dua aliran berkenaan dengan hubungan antara hukum internasional dan undang-undang nasional, yaitu:[102]

1) Aliran pertama yang disebut tunggal (monist), yaitu hukum internasional dan

[100] *Ibid.*

[101] *Ibid*, hal 24.

[102] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar*, hal 29.

hukum nasional merupakan bagian dari undang-undang domestik yang meletakkan hukum internasional di atas hukum nasional.

2) Aliran kedua disebut aliran dualist, yang berpendapat bahwa terdapat dua sistem perundang-undangan, yaitu nasional dan internasional. Apabila terjadi perbedaan antara keduanya, pengadilan akan memenangkan undang-undang nasional.

Apabila terdapat benturan antara perjanjian penghindaran pajak berganda dengan undang-undang pajak domestik terhadap ketentuan yang mengatur hal-hal yang sama maka yang diberlakukan adalah ketentuan yang dalam perjanjian penghindaran pajak berganda. Alasan yang dikemukakan di sini adalah :[103]

1. Perjanjian penghindaran pajak berganda adalah perjanjian internasional yang mengikat pihak-pihak yang mengadakan perjanjian yang tunduk dengan hukum perjanjian internasional. Oleh karena itu, ketentuan-ketentuan yang disepakati bersama dalam perjanjian penghindaran pajak berganda harus dilaksanakan dengan niat baik (*good faith*);
2. Perjanjian penghindaran pajak berganda merupakan rekonsiliasi antara ketentuan perundang-undangan perpajakan masing-masing negara yang mengadakan perjanjian . selain itu tujuan dari perjanjian penghindaran pajak berganda adalah untuk membatasi ketentuan perpajakan undang-undang domestik masing-masing negara. Maka dapat diasumsikan bahwa mereka telah sepakat bahwa hak pemajakan mereka berdasarkan ketentuan perundang-undangan domestik dibatasi oleh perjanjian penghindaran pajak berganda.
3. Perjanjian penghindaran pajak berganda adalah bentuk kompromi masing-masing negara yang mengadakan perjanjian. Apabila terjadi benturan maka Perjanjian penghindaran pajak berganda lebih diutamakan.
4. Perjanjian penghindaran pajak berganda pada dasarnya merupakan ketentuan yang sifatnya *spesialis (leges specials*) terhadap ketentuan umum perpajakan dari negara yang melakukan perjanjian (*lex generalis*). Jadi menurut prinsip

[103] *Ibid*, hal 32.

"*lex specialis derogate legi generali*", kedudukan Perjanjian penghindaran pajak berganda berada diatas ketentuan perpajakan domestik.

Pada perjanjian bilateral mengenai pajak berganda bersifat mengikat antara kedua negara dan diratifikasi oleh negara. Sehingga tidak boleh ada ketentuan *addendum.*[104] Serta pengaturan mengenai pajak berganda semuanya sudah termasuk dalam perjanjian bilateral tersebut.

3.1.5 Uraian Singkat Isi Perjanjian Penghindaran Pajak Berganda

Perjanjian penghindaran pajak berganda berisi pasal-pasal yang mengatur mengenai banyak hal yang berhubungan dengan lingkup perpajakan. Agus Setiawan dalam bukunya menguraikan 27 hal yang ada dalam pasal-pasal perjanjian penghindaran pajak berganda. Berikut ini adalah uraian dari isi pasal-pasal tersebut :

1. Permufakatan kedua negara

   Perjanjian penghindaran pajak berganda akan berlaku apabila ada kesepakatan bersama, namun jika perjanjian penghindaran pajak berganda tidak diinginkan salah satu negara, maka perjanjian penghindaran pajak berganda dinyatakan tidak berlaku.[105]

2. Orang/Badan yang merupakan penduduk salah satu atau kedua negara terikat dan berlaku perjanjian penghindaran pajak berganda.

   Dengan berlakunya perjanjian penghindaran pajak berganda maka dipastikan mau tidak mau penduduk yang memperoleh penghasilan dari negara lainnya yang mengadakan perjanjian penghindaran pajak berganda harus terikat dan tunduk kepada keputusan adanya perjanjian penghindaran

[104] Hasil wawancara dengan Bapak Tjip Ismail bertempat di Badan Arbitrase Nasional Indonesia (BANI) pada tanggal 15 November 2011. *Addendum* diartikan juga oleh beliau sebagai ketentuan yang mengatur secara terpisah dari perjanjian pokok. Klausula *addendum* dalam peraturan biasanya berisi kata-kata "ketentuan lebih lanjut mengenai pasal . . . diatur lebih lanjut dengan peraturan . . .". Peraturan yang dimaksud harus lebih rendah tingkatannnya dari perjanjian pokok.

[105] Agus Setiawan, *Perpajakan Internasional di Indonesia*, (Jakarta: CV Panca Karya Utama, 2006), hal 75.

pajak berganda.[106] Menurut ketentuan perjanjian penghindaran pajak berganda, ada 3 kelompok orang atau badan yang tercakup perjanjian penghindaran pajak berganda, yaitu :[107]

a. Orang atau badan yang merupakan penduduk (*resident)* Indonesia;
b. Orang atau badan yang merupakan penduduk (*resident)* negara mitra;
c. Orang atau badan yang merupakan penduduk (*resident)* kedua negara (dianggap penduduk baik oleh Indonesia dan negara mitra)

3. Pajak-pajak apa saja yang tunduk pada perjanjian penghindaran pajak berganda, pada umumnya pajak pendapatan dan pajak perseroan.

Perjanjian penghindaran pajak berganda tidak mengatur terhadap PPN, PBB, BPHTB dan lain-lain, perjanjian penghindaran pajak berganda hanya mengatur tentang pajak badan seperti Pajak Penghasilan. Penghasilan tersebut bisa berasal dari jasa, pekerjaan, kegiatan, dan usaha.[108] Namun ada satu perjanjian penghindaran pajak berganda yang memuat ketentuan mengenai Pajak Pertambahan Nilai, yaitu perjanjian penghindaran pajak berganda dengan Korea Selatan. Pasal 8 ayat 3 perjanjian tersebut menyatakan bahwa : sehubungan dengan pengoperasian kapal-kapal dan pesawat-pesawat terbang dalam lalu lintas internasional, Korea akan memberikan pembebasan pengenaan Pajak Pertambahan Nilai (*Value Added Tax)* terhadap perusahaan Indonesia apabila Indonesia memberikan pembebasan yang serupa.[109]

Pada umumnya perjanjian penghindaran pajak berganda mencakup pajak langsung (*direct tax*) yang berupa pajak penghasilan (*income tax)* dan pajak kekayaan (*capital/property tax*). Namun di Indonesia dalam perjanjian penghindaran pajak berganda yang baru hanya mencakup pajak yang bertalian

[106] *Ibid.*

[107] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 56.

[108] Agus Setiawan, *Perpajakan Internasional di Indonesia*, hal 75.

[109] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 81.

dengan pajak penghasilan saja. Hal ini karena di Indonesia sudah tidak ada lagi pajak kekayaan.[110]

4. Istilah yang mengandung perihal hukum

Menurut Adriani, hukum nasional itu termasuk di dalam hukum internasional, hukum pajak internasional merupakan suatu pengertian yang lebih luas dari pada pengertian pajak ganda. Hukum pajak internasional merupakan suatu kesatuan hukum yang mengupas suatu persoalan yang diatur dalam undang-undang nasional mengenai:[111]

a. pemajakan terhadap orang-orang luar negeri
b. peraturan-peraturan nasional untuk menghindarkan pajak ganda
c. traktat-traktat.

5. Bentuk Usaha Tetap (BUT)

Dalam perpajakan internasional, untuk menentukan hak pemajakan suatu negara, atas sumber penghasilan dari usaha yang dijalankan wajib pajak luar negeri dapat dikenakan di negara Indonesia atau di negara domisili, untuk itu harus ditentukan apakah BUT atau tidak? Jika dianggap sebagai BUT, maka harus mengacu kepada undang-undang negara dimana BUT berkedudukan atau tergantung perjanjian penghindaran pajak berganda antar kedua negara.[112]

6. Pendirian atas harta tak gerak.

Pendekatan produksi dimanfaatkan untuk menentukan letak sumber penghasilan dari harta tak bergerak, sewa atas harta tak bergerak yang terletak di Indonesia dianggap bersumber di negara tersebut. Sebaliknya sewa atas harta tak bergerak yang terletak di luar Indonesia dapat dianggap bersumber selain di negara tersebut dan oleh karenanya berhak atas kredit pajak luar negeri.[113]

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[110] *Ibid*.

[111] Agus Setiawan, *Perpajakan Internasional di Indonesia*, hal 75.

[112] *Ibid*, hal 76.

[113] Gunadi, *Pajak Intemasional*, edisi revisi, hal 65.

7. Laba perusahaan di suatu negara.

Laba perusahaan suatu negara dikenakan pajak di negara domisili, kecuali jika negara tersebut memiliki BUT di negara lainnya.[114]

8. Hubungan istimewa.

Untuk menghindari terjadinya *transfer pricing* yang tidak sesuai dengan prinsip *arm lenght*, maka pejabat yang berwenang di negara Indonesia, dapat melakukan penghitungan kembali atas jumlah pendapatan atau biaya serta hutang atau modal yang tidak wajar.[115]

9. Keuntungan dari pengoperasian kapal laut atau pesawat udara.

Laba yang berasal dari pengoperasian pesawat udara dalam jalur lalu lintas internasional dapat dikenakan pajak di negara domisili di mana tempat pimpinan perusahaan yang sebenarnya berkedudukan, kecuali jika kegiatan tersebut sifatnya teratur, labanya dikenai pajak di negara Indonesia dalam bentuk BUT. Laba yang dapat dikenai pajak di negara Indonesia ditentukan berdasarkan alokasi laba yang pantas dari laba bersih secara keseluruhan yang diperoleh dari pengoperasian kapal tersebut.

Jika tempat pimpinan perusahaan yang sebenarnya dari perusahaan pelayaran laut atau pelayaran sungai berada di atas kapal atau perahu, maka hal itu dianggap berada di negara di mana pelabuhan pangkalan dari kapal laut atau perahu tersebut berada, atau bila tidak mempunyai pelabuhan pangkalan, ia dianggap berada di negara di mana perusahaan yang mengoperasikan kapal laut atau perahu tersebut berkedudukan.

Ketentuan-ketentuan tersebut di atas juga berlaku bagi laba yang diperoleh dari keikutsertaan suatu gabungan perusahaan, suatu usaha kerjasama atau suatu keagenan usaha internasional.

[114] Agus Setiawan, *Perpajakan Internasional di Indonesia*, hal 76.

[115] *Ibid.*

Apabila tidak ada perjanjian penghindaran pajak berganda, maka menurut Undang-Undang PPh, dikenakan PPh Pasal 15, dengan tarif efektif sebesar 2,64% x penghasilan bruto.[116]

10. Pajak atas dividen, bunga dan royalti.

Dividen, bunga dan royalti yang dibayarkan kepada subjek pajak luar negeri dapat dikenakan pajak di negara sumber penghasilan, misal dividen, bunga, dan royalti yang diperoleh di Indonesia, maka Indonesia dapat mengenakan pajak sesuai tarif *Tax Treaty* atau jika tidak ada *Tax Treaty* maka dikenakan PPh Pasal 26 dengan tarif efektif sebesar 20% x Penghasilan bruto.[117]

11. Keuntungan karena pengalihan harta tak gerak.

Keuntungan dari harta tidak bergerak dapat dikenakan pajak di negara sumber penghasilan, termasuk keuntungan atau pemindahtanganan yang diperoleh suatu bentuk usaha tetap atau suatu tempat usaha tetap. Sedangkan keuntungan dari pemindahtanganan kapal-kapal dan pesawat udara yang dioperasikan dalam jalur lalu lintas internasional atau harta bergerak yang ada hubungannya dengan pengoperasian kapal-kapal dan pesawat udara, hanya akan dikenakan pajak di negara tempat manajemen dari perusahaan yang mengoperasikannya berada.[118]

12. Pendapatan yang diterima seorang penduduk suatu negara sehubungan dengan pekerjaan bebas atau pekerjaan lain yang sifatnya sama.

Penghasilan yang diperoleh penduduk asing sehubungan dengan jasa-jasa profesional atau pekerjaan bebas lainnya hanya akan dikenakan pajak di Negara domisili kecuali dalam hal dibawah ini, dimana penghasilan itu dapat juga dikenai pajak di Negara Indonesia:[119]

a. jika ia mempunyai suatu tempat tertentu yang tersedia secara teratur dipergunakan untuk menjalankan pekerjaan di Negara Indonesia, penghasilan tersebut dapat dikenakan pajak di Negara Indonesia tetapi

[116] *Ibid*, hal 77.

[117] *Ibid.*

[118] *Ibid*

[119] *Ibid*, hal 78.

hanya bagian penghasilan yang dianggap berasal dari tempat tertentu itu; atau

b. jika ia tinggal di Negara Indonesia selama suatu masa atau masa-masa yang melebihi 183 hari dalam masa 12 bulan yang mulai atau berakhir pada satu tahun pajak.

13. Pajak atas gaji, upah dan balas jasa lainnya yang berkenaan dengan pekerjaan.

Gaji, upah, dan imbalan sejenis lainnya yang diperoleh penduduk asing karena suatu hubungan kerja hanya dikenakan pajak di negara domisilinya. Jika pekerjaan tersebut dilakukan di Negara Indonesia maka imbalan yang diterima dari pekerjaan dimaksud dapat dikenakan pajak di Negara Indonesia.

Imbalan yang diperoleh seorang penduduk asing karena pekerjaan yang dilakukan di Negara Indonesia, hanya akan dikenakan pajak di negara domisili, apabila:[120]

a. penerima imbalan berada di Negara Indonesia dalam suatu masa atau masa-masa yang jumlahnya tidak melebihi 183 hari dalam tahun takwim bersangkutan; dan

b. imbalan dibayarkan oleh, atau atas nama pemberi kerja bukan merupakan penduduk Indonesia; dan

c. imbalan tidak menjadi beban bentuk usaha tetap atau tempat tetap yang dimiliki oleh pemberi kerja di Negara Indonesia.

Imbalan diperoleh karena pekerjaan yang dilakukan di atas kapal laut atau pesawat udara yang dioperasikan dalam jalur lalu lintas internasional, atau di atas perahu dalam pengangkutan sungai, dapat dikenakan pajak di negara di mana pimpinan perusahaan berada.

14. Pendapatan para pengurus.

Gaji, upah, imbalan dan pembayaran-pembayaran serupa para direktur dan manajer yang diperoleh penduduk Asing dalam kedudukannya sebagai anggota

[120] *Ibid.*

dewan direksi suatu perseroan yang berkedudukan di Negara Indonesia dikenai pajak di Negara Indonesia.[121]

15. Pendapatan seorang seniman penghibur.

Penghasilan yang diperoleh penduduk asing sebagai artis seperti artis teater, film, radio atau televisi dan pemain musik atau sebagai olahragawan, dari kegiatan-kegiatan perseorangan mereka yang dilakukan di Negara Indonesia dapat dikenakan pajak di Negara Indonesia. Apabila penghasilan tersebut diterima bukan oleh artis atau atlet itu sendiri tetapi oleh orang atau badan lain, maka penghasilan tersebut dapat dikenakan pajak di negara dimana kegiatan-kegiatan seniman atau olahragawan itu dilakukan.[122]

16. Pendapatan atas pensiunan.

Pensiun dan imbalan sejenis lainnya yang dibayarkan kepada penduduk asing akibat suatu hubungan kerja masa lalu, hanya akan dikenakan pajak di negara domisili. Pensiun yang dibayar atau pembayaran-pembayaran lainnya dalam rangka program umum yang menjadi bagian dari tunjangan sosial dari salah satu negara atau bagian ketatanegaraannya hanya dikenai pajak di negara domisili.[123]

17. Kunjungan penduduk atau mahasiswa yang menerima bantuan negara lainnya.

Untuk peningkatan sumber daya manusia berupa pendidikan dan pelatihan kerja, maka penghasilan yang diperoleh penduduk yang belajar atau dalam pelatihan kerja yang memperoleh penghasilan berasal dari negara domisili, tidak dikenakan pajak di Indonesia sepanjang sesuai dengan ketentuan yang diatur dalam perjanjian penghindaran pajak berganda.[124]

18. Pengajar atau peneliti negara lain.

Dalam rangka mencerdaskan kehidupan bangsa dan meningkatkan hubungan kerjasama terutama di bidang pendidikan dan kebudayaan antar kedua

[121] *Ibid*, hal 79.

[122] *Ibid*.

[123] *Ibid.*

[124] *Ibid.*

negara, dimana penghasilan yang diperolehnya semata-mata dari mengajar atau penelitian berasal dari negara lain, dibebaskan pemajakannya sepanjang sesuai dengan ketentuan yang diatur dalam perjanjian penghindaran pajak berganda.[125]

19. Pendapatan lain-lain.

Jenis-jenis penghasilan lainnya dari salah satu negara, dari mana pun asalnya, dan tidak tunduk kepada pasal-pasal terdahulu dalam persetujuan ini hanya akan dikenakan pajak di negara domisili, kecuali terhadap pendapatan yang berasal dari harta tak gerak, jika penerima pendapatan itu merupakan penduduk dari negara, menjalankan perusahaan dengan suatu BUT di negara lain, atau melakukan pekerjaan bebas dengan suatu tempat tertentu di negara lain, dan hak atau kekayaan sehubungan dengan mana pendapatan itu dibayar mempunyai hubungan efektif dengan pendirian tetap atau tempat tertentu itu.[126]

Jenis-jenis penghasilan dari penduduk salah satu negara yang tidak dicakup dalam pasal-pasal terdahulu dari persetujuan ini, dan berasal dari negara lainnya dapat juga dikenai pajak di negara Indonesia, tergantung negosiasi.

20. Metode Penghindaran Pajak Berganda

Penghindaran pajak berganda metodenya berdasarkan subjek, objek penghasilan serta pajaknya, atas dasar tersebut perjanjian penghindaran pajak berganda dapat membebaskan pajak, mengkreditkan pajak, atau cara lain. Namun yang digunakan pada umumnya hanya pembebasan pajak untuk diplomat atau konsuler dan pengkreditan pajak untuk pajak yang dibayar diluar negeri.[127]

21. Non Diskriminasi

Warga negara dari suatu negara lain tidak akan dikenakan pajak atau kewajiban perpajakan di Negara Indonesia dengan perlakuan berlainan atau lebih memberatkan daripada pengenaan pajak dan kewajiban-kewajiban wajib pajak Negara Indonesia.[128]

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[125] *Ibid.*

[126] *Ibid*, hal 80.

[127] *Ibid.*

[128] *Ibid.*

22. Pertukaran bahan keterangan yang diperlukan untuk melaksanakan ketentuan-ketentuan persetujuan.

Pejabat-pejabat yang berwenang dari kedua negara pada persetujuan akan melakukan tukar-menukar informasi yang diperlukan untuk melaksanakan ketentuan-ketentuan dalam Persetujuan ini atau untuk melaksanakan undang-undang nasional masing-masing negara pada persetujuan mengenai pajak-pajak yang dicakup dalam persetujuan, sepanjang pengenaan pajak menurut undang-undang negara yang bersangkutan tidak bertentangan dengan persetujuan ini, khususnya untuk mencegah terjadinya penggelapan atau penyelundupan pajak.[129]

23. Bagian–bagian yang tidak diatur dalam pasal-pasal perjanjian penghindaran pajak berganda.

Apabila tidak diatur dalam perjanjian penghindaran pajak berganda, namun sepanjang disepakati oleh kedua negara dan disepakati dengan keputusan terpisah, tetap merupakan bagian dari perjanjian penghindaran pajak berganda dan berlaku secara keseluruhan.[130]

24. Tindakan-tindakan suatu negara yang tidak sesuai dengan ketentuan.

Apabila terdapat tindakan negara yang tidak sesuai perjanjian penghindaran pajak berganda maka dapat mengajukan keberatan kepada negara domisili untuk dibahas lebih lanjut dengan negara yang terkait.[131]

25. Pernyataan tentang hak-hak khusus anggota misi diplomatik atau pegawai konsuler berdasarkan ketentuan hukum internasional.

Berdasarkan ketentuan-ketentuan umum hukum internasional, para anggota misi diplomatik atau pegawai-pegawai konsuler memperoleh hak-hak khusus di bidang fiskal berdasarkan ketentuan-ketentuan persetujuan yang khusus.[132]

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[129] *Ibid.*

[130] *Ibid*, hal 81.

[131] *Ibid.*

[132] *Ibid.*

26. Dimulainya perjanjian penghindaran pajak berganda dan ratifikasi.

Berdasarkan Pasal 23 A Undang-undang Dasar 1945, yang menyatakan bahwa ”Segala Pajak untuk keperluan negara berdasarkan undang-undang”. Setelah diratifikasi, maka perjanjian penghindaran pajak berganda mulai di berlakukan. Dengan demikian perjanjian perjanjian penghindaran pajak berganda dapat disetarakan dengan Undang-Undang. Untuk itu diperlukan adanya pengesahan atau ratifikasi oleh Dewan Perwakilan Rakyat. Hal ini juga sesuai dengan Undang-undang Dasar 1945 Pasal 11, yang menyatakan bahwa: ”Presiden dengan persetujuan Dewan Perwakilan Rakyat menyatakan perang, membuat perdamaian, dan perjanjian dengan negara lain”. [133]

27. Berakhirnya perjanjian penghindaran pajak berganda

Persetujuan perjanjian penghindaran pajak berganda akan tetap berlaku sampai diakhiri oleh salah satu pihak pada persetujuan. Masing-masing pihak pada persetujuan dapat mengakhiri berlakunya persetujuan ini, melalui perwakilan diplomatik, dengan menyampaikan pemberitahuan tertulis tentang berakhirnya persetujuan sekurang-kurangnya 6 bulan sebelum berakhirnya tahun takwim berikutnya setelah jangka waktu sekian tahun sejak berlakunya persetujuan. [134]

3.2 Model-model Perjanjian Penghindaran Pajak Berganda

Perjanjian penghindaran pajak berganda secara bilateral yang ada saat ini didasarkan atas suatu model tertentu. Model-model ini dikembangakan oleh ahli-hali perpajakan baik dalam suatu organisasi maupun negara. Organisasi yang membuat model perjanjian penghindaran pajak berganda antara lain adalah *Organization for Economic Co-operation and Development (OECD)* yang disebut sebagai *Model Tax Convention on Income and on Capital* atau disingkat dengan OECD *Model Tax Convention.*[135] Kemudian *United Nations* (UN) juga membuat model perjanjian penghindaran pajak berganda yang kemudian dikenal sebagai

[133]*Ibid.*

[134] *Ibid*, hal 82.

[135]Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 23.

UN Model. Amerika Serikat adalah salah satu negara yang membuat model perjanjian penghindaran pajak berganda sendiri.

Masing-masing model memiliki persamaan serta perbedaan dalam pasalnya, terutama menyangkut hak pemajakan jatuh ke negara yang mana. Masing-masing model juga memberikan prioritas pemajakan berbeda baik negara domisili maupun negara sumber, tergantung model yang dipakai. Beberapa negara mengembangkan sendiri model perjanjian penghindaran pajak berganda sesuai kebutuhan negaranya masing-masing. Sehingga pada dasarnya belum ada suatu model yang pasti untuk perjanjian penghindaran pajak berganda. Namun model-model yang telah ada dibuat untuk mempermudah serta menjadi pedoman bagi negara-negara yang ada.

3.2.1 OECD Model

OECD model dimaksudkan sebagai panduan bagi suatu negara yang akan mengadakan perjanjian penghindaran pajak berganda.[136] OECD model bukanlah model yang pertama kali dibuat, Liga Bangsa-Bangsa (*League of Nations)* mengembangkan yang pertama tahun 1920-an. Bukan pula yang terpenting sekarang ini, karena UN model yang dibuat tahun 1980 masih digemari oleh beberapa negara. Tetapi OECD model telah menjadi poin penting dalam banyak negosiasi semua perjanjian penghindaran pajak berganda.[137]

Tahun 1929, Liga Bangsa-Bangsa, mendirikan komite fiskal yang dinamakan *Fiscal Committee* untuk mengembangkan model perjanjian penghindaran pajak berganda secara komprehensif. Dalam kongres tahun 1940 dan 1943 di Meksiko, *Fiscal Committee* menghasilkan draft perjanjian penghindaran pajak berganda yang dinakan *Mexico Draft.* Substansi dari draft tersebut memberikan hak pemajakan sebanyak mungkin kepada negara sumber penghasilan atas penghasilan yang diperoleh dari transaksi lintas batas negara.

[136] Kevin Holmes, *International Tax Policy and Double Tax Treatimes: An Introduction to Principle and Application,* (IBFD Publications BV The Netherlands, 2007), hal 61.

[137] Peter A. Barnes, "*A model to celebrate",* http://www.oecdobserver.org/news/fullstory.php/aid/2742/, paragraf 5, diunduh pada tanggal 22 Oktober 2011 pukul 16:04.

Tentunya *Mexico Draft* sangat menguntungkan negara-negara berkembang. Akan tetapi, pada tahun 1946, draft ini diubah menjadi yang dinamakan *London Draft*. Pada *London Draft*, hak pemajakan terhadap penghasilan dari transaksi lintas batas negara sebanyak mungkin diberikan kepada negara domisili.[138]

Dalam kurun waktu 1946-1955, prinsip-prinsip dari *Mexico Draft* dan *London Draft* dijadikan acuan oleh berbagai negara dalam melakukan perjanjian penghindaran pajak berganda. Walau sudah lebih dari 70 (tujuh puluh) perjanjian penghindaran pajak berganda yang ditandatangani berbagai negara, masih terdapat permasalahan dalam darft-draft tersebut. Untuk itu, tahun 1956, *Organization fo European Economic Cooperation* (OEEC) mendirikan komite fiskal yang bertugas untuk membuat *draft* perjanjian penghindaran pajak berganda yang dapat diterima oleh semua anggota OEEC. Selama tahun 1958 sampai tahun 1961, komite fiskal membuat laporan interim dalam menyusun model perjanjian terbaru.[139]

Tahun 1960, OEEC berubah menjadi OECD. Ditahun 1963, OECD menerbitkan model perjanjian penghindaran pajak berganda mereka (OECD model tahun 1963). Model perjanjian penghindaran pajak berganda yang diterbitkan di tahun 1963 ini sama seperti *draft London*, memberikan prioritas hak pemajakan sebanyak mungkin kepada negara domisili. Hal ini mencerminkan kepentingan anggota OECD yang merupakan negara –negara maju yang menjadi tempat domisili aliran modal. Pada tahun 1970-an ekonomi dunia mengalami pertumbuhan sehingga OECD model tahun 1963 tidak dapat mengantisipasi permasalahan pemajakan yang semakin kompleks akibat perkembangan perekonomian dunia. Oleh karena itu tahun 1977, *Committee on Fiscal Affairs* dari OECD menerbitkan revisi atas OECD model tahun 1963.[140]

Setelahnya, secara berkala OECD model selalu diperbaharui untuk menyesuaikan dengan perkembangan perekonomian yaitu di tahun 1994, 1995,

[138] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 23-24.

[139] *Ibid*, hal 24.

[140] *Ibid*.

1997, 2000, 2003, 2005, 2008,dan terakhir tahun 2010.[141] Sehingga OECD model lebih digemari dalam negosiasi perjanjian penghindaran pajak berganda karena selalu mengikuti perkembangan ekonomi dan OECD melanjutkan ke area yangbaru dalam hal perpajakan seperti *e-commerce,* kompensasi yang ditangguhkan[142], pendapatan pension pekerja lintas batas negara.[143]

Sebagai suatu model perjanjian penghindaran pajak berganda, OECD Model memiliki struktur sebagai berikut ini:[144]

1. *Introduction;*
2. Model Perjanjian terhadap pemajakn atas penghasilan dan modal (*text);*
3. *Commentaries;*
4. Posisi dari negara-negara anggota OECD ketika mempunyai:
   a. Pandangan yang berbeda terhadap pasal-pasal tertentu (reservation); dan/atau
   b. Pandangan yang berbeda terhadap *commentaries* atas pasal-pasal tertentu (*observation*)
5. Posisi dari negara-negara bukan anggota OECD

Text dari OECD Model sebagai sebuah model perjanjian penghindaran pajak berganda terdiri dari 7 Bab dan 31 pasal seperti yang terdapat dalam OECD model tahun 2010.[145]

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[141] *Ibid*, hal 25. Pada buku ini diterbitkan tahun 2010 namun penulisnya menulis tahun 2009, sehingga data terakhir revisi OECD model dalam buku ini tahun 2008. Data revisi terbaru tahun 2010 dapat dilihat dalam situs OECD *tax treaties department* <http://www.oecd.org/document/37/0,3746,en_2649_33747_1913957_1_1_1_1,00.html>

[142] Kompensasi yang ditangguhkan adalah pengaturan sebagian dari penghasilan karyawan dibayarkan pada tanggal setelah pendapatan yang sebenarnya diterima. Contoh meliputi dana pensiun, rencana masa pensiun dan opsi saham. Manfaat utamanya adalah penundaan pajak pada tanggal dimana penerimanya benar-benar menerima pendapatannya.

[143] Peter A. Barnes, "*A model to celebrate",* http://www.oecdobserver.org/news/fullstory.php/aid/2742/, paragraph 15, diunduh pada tanggal 22 Oktober 2011 pukul 15:30.

[144] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 29.

[145] *Organization for European Economic Cooperation*, *Model Tax Convention on Income and on Capital CONDENSED VERSION*, http://www.oecd.org/dataoecd/25/24/47213736.pdf,

3.2.2 UN Model

OECD model lebih memberikan prioritas hak pemajakan kepada negara-negara maju atas penghasilan yang diperoleh dari transaksi lintas batas negara yang merupakan asal modal, tekhnologi, dan sumberdaya manusia. Di lain pihak, negara berkembang, sebagai negara tempat tujuan investasi modal, tekhnologi, dan sumber daya manusia menjalankan kegiatan bisnisnya tentu sangat dirugikan kalau diberikan sebagian kecil hak pemajakan.

Keinginan untuk membuat perjanjian pajak bilateral antara negara maju dan negara berkembang akhirnya diakui *Economic and Social Council United Nations* dalam resolusi 1273 (XLIII) yang diadopsi pada tanggal 4 Agustus 1967 yang meminta *Secretary General* untuk:

> *"to set up an ad hoc working group consisting of experts and tax administrators nominated by Governments, but acting in their personal capacity, both from developed and developing countries and adequately representing different regions and tax systems, with the task of exploring, in consultation with interested international agencies, ways and means for facilitating the conclusion of tax treaties between developed and developing countries, including the formulation, as appropriate, of possible guidelines and techniques for use in such tax treaties which would be acceptable to both groups of countries and would fully safeguard their respective revenue interests*"[146]

Dalam rangka memberikan hak pemajakan yang lebih besar lagi kepada negara berkembang, tahun 1968, *United Nations* mendirikan *Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries* untuk membuat model perjanjian penghindaran pajak berganda yang lebih memihak negara-negara berkembang. Sejak tahun 1980, *Ad Hoc Group* tersebut dikenal dengan nama *Ad Hoc Group of Experts on International Cooperation in Tax Matters.*[147]

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diunduh pada tanggal 24 Oktober 2011 pukul 15:00. Lihat lampiran 1 untuk melihat bentuk dari Text OECD Model

[146] United Nations, "*United Nations Model Double Taxation Convention between Developed and Developing Countries"*, (New York: United Nations, 2001), hal viii. Diunduh dari http://unpan1.un.org/intradoc/groups/public/documents/un/unpan002084.pdf pada 26 November 2011.

[147] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 25.

Sebagai tindak lanjut dibentuknya *Ad Hoc* tersebut, pada tahun 1980 diterbitkanlah model perjanjian penghindaran pajak berganda antara negara maju dan negara berkembang untuk pertama kalinya (UN Model). UN model yang diterbitkan tahun 1980 tersebut sebagian besar mengikuti OECD Model 1977. Walupun mengikuti OECD model, tetapi pasal-pasal UN model, hak pemajakannya lebih banyak diberikan kepada negara berkembang atau negara tujuan investasi, tekhnologi dan sumberdaya manusia (negara sumber).[148]

Seperti yang telah dijelaskan sebelumnya, OECD Model secara terus menerus memperbaharui model perjanjian yang telah mereka buat, dalam rangka mengantisipasi perkembangan perekonomian dan permasalahan hukum pajak. Akan tetapi UN model hanya baru sekali melakukan penyesuaian pada tahun 2001.[149]

Text dari UN Model sebagai sebuah model perjanjian penghindaran pajak berganda terdiri dari 7 Bab dan 29 pasal seperti yang terdapat dalam UN model tahun 2001.[150]

3.2.3 Model Lainnya

Selain OECD Model dan UN model, yang telah menjadi acuan sejak lama negara berkembang dan negara maju untuk membuat perjanjian penghindaran pajak berganda, masih ada model-model lain yang dikembangkan sendiri oleh negara untuk memenuhi kebutuhan perpajakan nasional mereka.

a. Model Indonesia

Indonesia merupakan negara berkembang serta tujuan investasi bagi negara-negara lainnya. Banyak dan beragamnya sumberdaya di Indonesia tentunya menarik para investor asing untuk melakukan investasi di Indonesia. Hal ini tentu menciptakan arus transaksi lintas batas negara.

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[148] *Ibid*, hal 25-26

[149] Brian J. Arnold, "*The 2008 Update of the OECD Model: An Introduction*", Buletin for International Taxation, IBFD, (Mei-Juni 2009), hal 178.

[150] *United Nations*, *United Nations Model Double Taxation Convention between Developed and Developing Countries*, http://www.un.org/esa/ffd/documents/Double Taxation.pdf, diunduh pada tanggal 19 Oktober 2011. Lihat lampiran 2 untuk melihat Text dari UN Model.

Tentunya permasalahan hukum terutama dalam bidang pajak mencuat, khususnya terjadinya pajak berganda. Dengan awal perjanjian penghindaran pajak berganda dengan Kerajaan Belanda yang membicarakan mengenai "Perjanjian antara Republik Indonesia dan Kerajaan Belanda mengenai Penghindaran Pajak Ganda dan Penghindaran Pengelakan Pajak atas Pendapatan dan atas Kekayaan".[151] Hingga akhirnya membuat lebih dari 60 perjanjian penghindaran pajak berganda dengan negara lain sampai saat ini (2011), dengan perjanjian yang terakhir dengan Hong Kong dimana telah ditandatangani tanggal 23 Maret 2010 namun belum berlaku efektif.[152]

Karena Indonesia sebagai negara yang sedang berkembang, Indonesia menganut prinsip UN model dalam bidang perjanjian penghindaran pajak berganda. Namun tidak berarti bahwa Indonesia menggunakan ketentuan dalam UN Model tersebut. Indonesia menganut kombinasi antara UN Model dan prinsip-prinsip pokok yang terkandung dalam undang-undang perpajakan nasional. Perpaduan antara dua model itu menghasilkan suatu model yang disebut Model Indonesia yang menjadi dasar berpijak dalam perundingan perjanjian penghindaran pajak berganda.[153]

Walaupun disebutkan menggunakan model Indonesia, belum ada bentuk resmi yang dikeluarkan pemerintah untuk text model Indonesia untuk perjanjian penghindaran pajak berganda. Namun dalam bukunya, Agus Setiawan mengelompokkan Model Indonesia untuk Perjanjian Penghindaran Pajak Berganda. Ruang lingkup Perjanjian Penghindaran Pajak Berganda dengan menggunakan Model Indonesia dikelompokkan sebagai berikut: [154]

1). Subjek Pajak, Jenis Pajak, Istilah Umum, Penduduk (Pasal 1, 2, 3 dan 4 *Tax Treaty*)

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[151] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 40.

[152] Data diambil dari arsip *tax treaty* <http://ortax.org/ortax/?mod=treaty&page=doc&q=&hlm=>. Data perjanjian penghindaran pajak berganda tersebut termasuk negara yang telah berakhir perjanjiannya seperti Mauritius.

[153] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar*, hal 4.

[154] Agus Setiawan, *Perpajakan Internasional di Indonesia*, hal 71-72.

2). Jenis-jenis Penghasilan

a. Laba Bentuk Usaha Tetap (Pasal 5 *Tax Treaty*)

b. Laba Harta Tidak Bergerak (Pasal 6 *Tax Treaty)*

c. Laba Usaha (Pasal 7 *Tax Treaty)*

d. Laba Usaha Perkapalan dan Penerbangan (Pasal 8 *Tax Treaty)*

e. Dividen (Pasal 10 *Tax Treaty)*

f. Bunga (Pasal 11 *Tax Treaty)*

g. Royalti (Pasal 12 *Tax Treaty)*

h. Harta Bergerak (Pasal 13 *Tax Treaty)*

i. Pendapatan Lain-lain (Pasal 22 *Tax Treaty)*

3). Hal-hal yang terkait dengan pekerjaan

a. Pekerjaan Bebas (Pasal 14 *Tax Treaty)*

b. Pegawai Swasta (Pasal 15 *Tax Treaty)*

c. Direktur (Pasal 16 *Tax Treaty)*

d. Artis dan Atlet (Pasal 17 *Tax Treaty)*

e. Pensiun (Pasal 18 *Tax Treaty)*

f. Pegawai Negeri (Pasal 19 *Tax Treaty)*

4). Hubungan Istimewa (Pasal 9 *Tax Treaty)*

5). Metode Penghindaran Pajak

a. Penghapusan Pajak (Pasal 23 dan Pasal 27 *Tax Treaty)*

b. Pengkreditan Pajak (Pasal 23 *Tax Treaty)*

6). Pendidikan dan Pelatihan

a. Guru / Peneliti (Pasal 20 *Tax Treaty)*

b. Mahasiswa atau Pelatihan Karyawan (Pasal 21 *Tax Treaty)*

7). Ketentuan Lain-lain

a. Non Diskriminasi (Pasal 24 *Tax Treaty)*

b. Tatacara Persetujuan Bersama (Pasal 25 *Tax Treaty)*

c. Pertukaran Informasi (Pasal 26 *Tax Treaty)*

d. Berlakunya Perjanjian (Pasal 28 *Tax Treaty*

e. Berakhirnya Perjanjian (Pasal 29 *Tax Treaty)*

b. US Model

Amerika Serikat merupakan anggota OECD[155], sehingga perjanjian penghindaran pajak berganda yang mereka lakukan mengikuti OECD Model. Amerika Serikat memiliki perjanjian pajak penghasilan dengan sejumlah negara asing. Berdasarkan perjanjian ini, penduduk (tidak harus warga negara) dari negara asing dikenakan pajak pada tingkat yang rendah atau dibebaskan dari pajak pendapatan Amerika Serikat pada barang-barang tertentu dari pendapatan yang mereka terima dari sumber-sumber di Amerika Serikat. Tarif ini berkurang dan pembebasan[156] bervariasi antara negara dan item tertentu dari pendapatan.[157] Hingga awal tahun 2009, Amerika Serikat telah membuat perjanjian penghindaran pajak berganda dengan 67 negara.[158]

Dari perspektif AS titik awal untuk mempertimbangkan isu-isu kebijakan pajak penghasilan perjanjian adalah mengenai Model US untuk perjanjian pajak

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[155] Amerika Serikat meratifikasi konvensi OECD pada tanggal 12 April 1961. Data negara-negara yang telah meratifikasi konvensi OECD bisa dilihat di http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html.

[156] Pengurangan tarif dan pembebasan disini mengacu kepada metode penghindaran pajak berganda yaitu *Reduced Rates dan Exemption.*

[157] "U.S. Tax Treaties", <http://www.unclefed.com/ForTaxProfs/Treaties/index. html>, diunduh pada tanggal 5 November 2011 pukul 15.00.

[158] Ikhtisar yang dari perjanjian pajak penghasilan yang ada AS, dan negosiasi perjanjian pajak yang sedang berlangsung, secara periodik termasuk dalam Pajak Jurnal Manajemen Internasional, sebuah publikasi bulanan yang diterbitkan oleh Tax Management, Inc. Pada "*Current Status of U.S. Tax Treaties and International Tax Agreements*" yang dibuat oleh Venuti, Corwin dan Lainoff, 38 Tax Management International Journal 174 (13 Maret 2009), Amerika Serikat memiliki perjanjian pajak penghasilan yang berlaku dengan 67 negara (per 16 Februari 16 2009). Tiga perjanjian (atau protokol) diidentifikasi sebagai ditandatangani dan menunggu persetujuan Senat AS (yaitu, dengan Perancis, Malta dan Selandia Baru). Dalam laporan ini Amerika Serikat telah diidentifikasi sebagai memiliki perjanjian pajak penghasilan di bawah berbagai tahap negosiasi dengan 23 negara. AS-Uni Soviet Pajak Penghasilan Perjanjian yang sama, ditandatangani 20 Juni 1973, berlaku untuk negara-negara Armenia, Azerbaijan, Belarusia, Georgia, Kirgistan, Moldova, Tajikistan, Turkmenistan, dan Uzbekistan.

penghasilan. Kira-kira setiap sepuluh tahun Departemen Keuangan Amerika Serikat merilis model sendiri mengenai perjanjian pajak penghasilan, yang menjadi titik awal (dari perspektif Amerika Serikat) untuk menegosiasikan perjanjian pajak penghasilan. US Model yang paling terakhir dirilis pada akhir tahun 2006. Bahkan ketika tahun 2006, US Model dirilis, model tersebut tidak memenuhi semua posisi bilateral perjanjian pajak penghasilan Amerika Serikat. Untuk negara-negara mitra perjanjian, dan dalam kenyataannya, bahkan untuk pihak Amerika Serikat, OECD "*Model Income Tax Convention On Income and Capital*" telah menjadi titik awal de facto untuk negosiasi perjanjian pajak penghasilan.[159]

Text dari US Model sebagai sebuah model perjanjian penghindaran pajak berganda terdiri dari 29 Pasal seperti yang terdapat dalam *text* US model tahun 2006.[160]

3.2.4 Pembagian atas Hak Pemajakan Antara Kedua Negara Dalam Model Perjanjian Penghindaran Pajak Berganda

Metode yang dipergunakan dalam suatu perjanjian penghindaran pajak berganda untuk menghindari adanya pemajakan berganda adalah menggolongkan suatu penghasilan berdasarkan suatu penggolongan tertentu (*scheduler income*) dan menentukan hak pemajakan suatu negara atas jenis-jenis penghasilan yang dihasilkan dari penggolongan penghasilan tersebut. Dengan demikian, hak pemajakan suatu negara atas suatu jenis penghasilan dengan jenis penghasilan lainnya dapat berbeda-beda. Jadi, penentuan jenis penghasilan merupakan hal penting karena akan menentukan negara mana yang berhak untuk memajaki atas

[159] William P. Streng, "*U.S. Income Tax Treaties Trends, Issues & Policies Recent Developments - Future Prospects*" makalah disampaikan pada Houston International Tax Forum di Texas, 2 April 2009, Hal 13. Data makalah di unduh dari <http://www.law.uh.edu/faculty/wstreng/HoustonInternationalTaxForum.pdf> pada tanggal 27 Oktober 2011 pukul 14.00.

[160] United States, *United States Model Income Tax Convention 2006.* Data diunduh dari http://www.irs.gov/pub/irs-trty/model006.pdf pada tanggal 27 Oktober 2011, pukul 14.00. Lihat lampiran 3 untuk melihat Text dari US Model.

penghasilan tersebut.[161] Pasal-pasal yang mengatur tentang hak pemajakan suatu negara atas jenis-jenis penghasilan tersebut disebut sebagai "*distributive rules*" atau "*assignment rules*" atau disebut juga dengan "*allocation articles*".[162] Pada umumnya, penggolongan penghasilan dalam pasal-pasal yang disebut sebagai distributive rules tersebut adalah sebagai berikut:[163]

1. *Active income*

Active income merupakan penghasilan yang berasal dari kegiatan usaha dan pekerjaan. Jenis-jenis penghasilan dalam perjanjian penghindaran pajak berganda yang dikategorikan sebagai *active income* yaitu: penghasilan dari kegiatan bisnis (*business profit*), penghasilan dari transportasi laut, sungai, dan udara, penghasilan dari pemberian jasa profesi yang dilakukan oleh individu (*independent personal services*), gaji pegawai (*dependent personal services*), penghasilan direktur, artis dan olahragawan, gaji Pegawai Negeri Sipil, dan penghasilan yang diterima oleh pelajar.

2. *Passive income*

Passive income merupakan penghasilan yang berasal dari investasi dalam bentuk *tangible* maupun *intangible properties* (termasuk dalam bentuk *financial investment*). Jenis-jenis penghasilan dalam perjanjian penghindaran pajak berganda yang dikategorikan sebagai *passive income* adalah: penghasilan dari harta tidak bergerak, penghasilan dari dividen, bunga, royalti, *capital gain*, serta pensiun.

3. *Other income*

Pasal ini mengatur penghasilan yang tidak dapat digolongkan berdasarkan penggolongan tersebut di atas.

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[161] Darussalam dan Danny Septriadi, *Pembagian Hak Pemajakan Atas Suatu Jenis Penghasilan Berdasarkan OECD Model Perjanjian penghindaran pajak berganda*, < http://www.ortax.org/ortax /?mod=issue&page=show&id=35&q=&hlm=2>, diunduh pada tanggal 19 Oktober 2011.

[162] Istilah tersebut diambil dari Klaus Vogel, Roy Rohatgi, serta Robert Deutsch, Roisin M Arkwright, dan Daniela Chiew, yang buku-bukunya menjadi dasar penulisan artikel ini oleh Darussalam dan Danny Septriadi.

[163] Kevin Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application*, IBFD, 2007, hal 88-90.

Adapun pembagian hak pemajakan suatu negara berdasarkan distributive rules yang diatur dalam perjanjian penghindaran pajak berganda pada dasarnya adalah sebagai berikut:[164]

1. Hak pemajakan diberikan sepenuhnya kepada salah satu negara. Pada umumnya diberikan kepada negara di mana subjek pajak tersebut terdaftar sebagai subjek pajak dalam negeri (*residence state*).
2. Hak pemajakan dibagi antara negara domisili (*residence state*) dan negara sumber penghasilan (*source state*).

Dalam model perjanjian penghindaran pajak berganda yang dikembangkan oleh OECD, UN dan US serta perjanjian yang dibuat oleh Indonesia dengan negara lain dalam versi bahasa Inggris, terminologi yang dipergunakan untuk menyatakan bahwa hak pemajakan atas suatu penghasilan hanya diberikan kepada satu negara yang biasanya diberikan kepada negara di mana subjek pajak tersebut terdaftar sebagai subjek pajak dalam negeri (*residence state*) adalah "*shall be taxable only in...*". Dengan demikian, jika hak pemajakan tersebut hanya diberikan kepada suatu negara maka negara lainnya tidak boleh untuk mengenakan pajak. Sehingga, isu pemajakan berganda atas suatu penghasilan yang diatur melalui penggunaan terminologi ini seharusnya tidak akan terjadi karena hak pemajakan diberikan sepenuhnya kepada negara domisili dan negara sumber dilarang untuk mengenakan pajak.[165]

Di sisi lain, terminologi yang dipergunakan untuk menyatakan bahwa hak pemajakan atas suatu penghasilan dibagi antara negara domisili dan negara sumber adalah "*may be taxed in...*". Makna terminologi tersebut adalah negara sumber juga dapat mengenakan pajak. Sehingga, disamping negara domisili berhak untuk mengenakan pajak, negara sumber juga dapat mengenakan pajak.[166]

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[164] Darussalam dan Danny Septriadi, Pembagian Hak Pemajakan Atas Suatu Jenis Penghasilan Berdasarkan OECD Model Perjanjian penghindaran pajak berganda, < http://www.ortax.org/ortax /?mod=issue&page=show&id=35&q=&hlm=2>, diunduh pada tanggal 19 Oktober 2011.

[165] *Ibid.*

[166] Menurut Penulis artikel "Pembagian Hak Pemajakan Atas Suatu Jenis Penghasilan Berdasarkan Oecd Model Perjanjian penghindaran pajak berganda", untuk Pasal 10 (dividen) dan Pasal 11 (bunga), terminologi "may be taxed in.." juga merujuk kepada negara domisili untuk dapat mengenakan pajak (Pasal 10 ayat (1) dan Pasal 10 ayat (2) OECD Model) dan juga merujuk

Apabila masing-masing negara mengenakan pajak maka terdapat isu pemajakan berganda. Untuk menghindari adanya pemajakan berganda maka negara domisili diwajibkan untuk memberikan keringanan pajak berganda melalui mekanisme *tax credit method* atau *income exemption method* (tergantung kepada ketentuan domestik negara domisili).[167]

Berikut ini adalah tabel antara model perjanjian penghindaran pajak berganda mengenai jenis-jenis penghasilan yang hanya dikenakan pajak di negara domisili (*Shall be Taxable Only in…*) dan jenis-jenis penghasilan yang dapat dikenakan pajak di negara sumber atau di bagi antara kedua negara(*Maybe Taxed in...*) :[168]

Pasal	**Jenis Penghasilan**	**OECD Model[169]**	**UN Model[170]**	**US Model[171]**
6	Penghasilan Harta Tidak Bergerak	(b)	(b)	(b)
7	Laba Usaha	(a)[172] (b)[173]	(a) (b)	(a) (b)

kepada negara sumber untuk dapat mengenakan pajak (pasal 10 ayat (2) dan Pasal 11 ayat (2) OECD Model).

[167] Darussalam dan Danny Septriadi, Pembagian Hak Pemajakan Atas Suatu Jenis Penghasilan Berdasarkan OECD Model Perjanjian penghindaran pajak berganda, < http://www.ortax.org/ortax /?mod=issue&page=show&id=35&q=&hlm=2>, di unduh pada tanggal 19 Oktober 2011.

[168] Jenis-jenis Penghasilan yang hanya dikenakan pajak di negara domisili (*Shall be Taxable Only in…*) ditandai dengan (a) dan jenis-jenis penghasilan yang dapat dikenakan pajak di negara sumber (*Maybe Taxed in...*) akan ditandai dengan (b). serta Model yang digunakan untuk tabel perbandingan ini adalah OECD Model 2010, UN Model 2001 dan US Model 2006

[169] Penjelasan dari pasal-pasal dalam tabel OECD model mengikuti artikel yang dibuat oleh Darussalam dan Danny Septriadi yang berjudul "Pembagian Hak Pemajakan Atas Suatu Jenis Penghasilan Berdasarkan OECD Model Perjanjian penghindaran pajak berganda", yang dapat dilihat dalam < http://www.ortax.org/ortax/?mod=issue&page=show &id=35&q=&hlm=2>

[170] Pada dasarnya UN Model menyerupai OECD model dalam pasal-pasalnya. Sehingga tidak sedikit pasal dalam UN Model yang sama dengan OECD model. Oleh karena itu untuk penjelasan mengenai pasal-pasal dalam UN Model sama dengan penjelasan pasal-pasal dalam OECD model kecuali diberi *footnote* tersendiri. Perbedaan paling mendasar dari OECD dan UN model dalam hak pemajakan yang jelas terlihat adalah dalam Pasal 12 mengenai Royalti.

[171] Seperti yang telah dijelaskan dalam sub bab sebelumnya mengenai US Model, model ini juga dipengaruhi oleh OECD Model yang menjadi pegangan sebelum US Model dibuat tahun 2001. Apalagi Amerika Serikat merupakan anggota OECD. Sehingga pasal-pasal dari US Model tidak jauh berbeda dengan OECD Model sehingga pengertian pasal juga merujuk pada OECD Model, kecuali di beri *footnote* tersendiri. Sama seperti UN model, yang jelas terlihat berbeda dalam hak pemajakan dengan OECD Model adalah mengenai Royalti dalam Pasal 12.

8	Transportasi Laut, Sungai, dan Udara dalam lalu lintas internasional	(a)[174]	(a)(b)[175]	(a)
10	Dividen	(b)[176]	(b)	(b)
11	Bunga	(b)[177]	(b)	(b)
12	Royalti	(a)	(b)	(b)
13	*Capital Gain*[178]	(a)[179] (b)[180]	(a)(b)	(a)(b)
14	Penghasilan Profesi[181]	(a)[182] (b)[183]	(a)(b)	(a)(b)
15	Gaji Pegawai	(a)[184] (b)[185]	(a)(b)	

[172] Hanya dikenakan pajak di negara domisili, kecuali jika laba usaha tersebut diperoleh dari kegiatan bisnisnya di negara lain (negara sumber) melalui suatu *Permanent Establishment* (Bentuk Usaha Tetap).

[173] Dapat dikenakan pajak di negara sumber atas laba usaha yang diatribusikan kepada Bentuk Usaha Tetap yang berada di negara sumber.

[174] Hanya dikenakan pajak di negara domisili (atas dasar tempat kedudukan manajemen), kecuali laba yang berasal dari kegiatan usaha transportasi laut, sungai, dan udara yang semata-mata dilakukan hanya dari dan ke dalam suatu wilayah negara lainnya, maka laba dari transportasi laut, sungai, dan udara tersebut dapat dikenakan pajak di negara lainnya tersebut (negara sumber)(Pasal 8 ayat 3).

[175] Terdapat dalam Pasal 8 (*Alternative B*) ayat 2. Mengenai kapal laut lintas internasional yang kegiatan aktivitasnya lebih dari biasanya dari manajemen negara sumber.

[176] Dapat dikenakan pajak di negara domisili (Pasal 10 ayat (1)) dan negara sumber (Pasal 10 ayat (2))

[177] Dapat dikenakan pajak di negara domisili (Pasal 11 ayat (1)) dan negara sumber (Pasal 11 ayat (2))

[178] Pasal 13 US Model menamakan judul pasal dengan "*Gain*".

[179] Hanya dikenakan pajak di negara domisili atas capital gain yang tunduk dengan Pasal 13 ayat (5).

[180] Dapat dikenakan pajak di negara sumber, kecuali untuk capital gain yang tunduk dengan Pasal 13 ayat (5), hanya negara domisili yang dapat mengenakan pajak

[181] Pasal 14 OECD Model ini telah dihapus berdasarkan OECD Model tahun 2000 sehingga sebenarnya Pasal 14 sudah tidak ada dalam OECD Model 2010. Namun dalam model tahun 1997 Pasal 14 menyatakan bahwa penghasilan ini dikenakan pajak di negara domisili (*Shall be Taxable Only in…*). Sebagian besar perjanjian penghindaran pajak berganda masih mencantumkan pasal ini.

[182] Hanya dikenakan pajak di negara domisili, kecuali apabila individu yang menjalankan kegiatan profesi tersebut mempunyai tempat tetap (*fixed base*) di negara sumber.

[183] Dapat dikenakan pajak di negara sumber apabila individu yang menjalankan kegiatan profesi tersebut mempunyai tempat tetap (*fixed base*) di negara sumber.

[184] Hanya dikenakan pajak di negara domisili sepanjang:

1. Pegawai tersebut tidak hadir di negara lainnya (negara sumber) dalam periode yang tidak melebihi 183 hari dalam periode waktu 12 bulan yang dimulai dan berakhir di tahun fiskal yang bersangkutan, dan

16	Gaji Direktur	(b)	(b)	(b)[186]
17	Artis dan Olahragawan	(b)[187]	(b)	(b)[188]
18	Pensiun	(a)	(a)	(a)[189]
19	Gaji Pegawai Negeri Sipil	(a)	(a)	(a)
21	Penghasilan Lainnya	(a)	(a)	(a)
22	Modal	(a) [190] (b)[191]	(a)(b)	X[192]

Tabel 3.1 Perbedaan hak pemajakan dari model-model perjanjian penghindaran pajak berganda

Berbeda dengan ketiga model di atas, belum ada publikasi resmi mengenai bentuk Model Indonesia. Hal ini karena model Indonesia baru sebatas pemahaman dari berbagai perjanjian penghindaran pajak berganda Indonesia dengan negara lain oleh para ahli, terutama Rachmanto Surahmat.[193] Namun pada dasarnya

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2. Imbalan tersebut dibayar oleh pemberi kerja yang bukan subjek pajak dalam negeri dari negara sumber penghasilan, dan
3. Imbalan tersebut tidak dibiayakan di negara sumber oleh BUT dari si pemberi kerja.

[185] Dapat dikenakan pajak di negara sumber sepanjang:

1. Pegawai tersebut hadir di negara sumber dalam periode yang melebihi 183 hari dalam periode waktu 12 bulan yang dimulai dan berakhir di tahun fiskal yang bersangkutan, atau
2. Imbalan tersebut dibayar oleh pemberi kerja yang subjek pajak dalam negeri dari negara sumber penghasilan, atau
3. Imbalan tersebut dibiayakan di negara sumber oleh BUT dari si pemberi kerja.

[186] Dalam US Model gaji direktur terdapat dalam pasal 15.

[187] Dapat dikenakan pajak di negara sumber atas penghasilan yang diterima oleh artis terkait dengan penghasilan dari pertunjukannya maupun penghasilan olahragawan yang terkait dengan penghasilan dari pertandingannya.

[188] Dalam US Model gaji direktur terdapat dalam Pasal 16.

[189] Pensiun dalam US Model terdapat dalam Pasal 17 yang menggabungkan pensiun, jaminan sosial, tunjangan hari tua, alimentasi/tunjangan cerai dan hak anak. Semua hal yang diatur dalam Pasal 17 ini dikenakan pajak di negara domisili (*Shall be Taxable Only in…*).

[190] Modal yang direpresentasikan dengan Kapal laut dan Pesawat Terbang yang menjadi transportasi lintas batas negara. (Pasal 22 ayat 3).

[191] Termasuk modal dari *property* seperti yang disebutkan dalam Pasal 6 yang dimiliki oleh penduduk negara sumber. Serta modal dari harta tidak bergerak yang merupakan *Property* bisnis dari suatu Bentuk Usaha Tetap yang dimiliki perusahaan dari negara sumber.

[192] US Model tidak memiliki pengaturan mengenai Modal seperti OECD dan UN Model.

[193] Model Indonesia disebutkan beliau dalam bukunya *"Persetujuan Penghindaran Pajak Berganda Sebuah Pengantar"*(2001). Yang kemudian menjadi rujukan penulis lain dalam merujuk model Indonesia seperti Agus Setiawan "*Perpajakan Internasional di Indonesia*" (2006).

Model Indonesia merupakan model sendiri yang merupakan gabungan dari OECD Model dan UN Model yang diambil pasal-pasal sesuai dengan kepentingan perpajakan Indonesia.[194]

Melihat kondisi tersebut maka untuk melihat arah hak pemajakan dari Indonesia terhadap perjanjian penghindaran pajak berganda maka di bawah ini adalah tabel hak pemajakan perjanjian penghindaran pajak berganda antara Indonesia dengan Negara-Negara yang masih aktif perjanjian penghindaran pajak bergandanya :[195]

No.	Negara	Pelayaran	Penerbangan	Penghasilan Lainnya
1	Algeria	Negara Domisili	Negara Domisili	Negara Sumber
2	Australia	Negara Domisili	Negara Domisili	Negara Domisili
3	Austria	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili
4	Bangladesh	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili
5	Belgium	Negara Domisili	Negara Domisili	Negara Domisili
6	Brunei Darussalam	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Sumber
7	Bulgaria	Negara Domisili	Negara Domisili	Negara Domisili
8	Canada	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
9	Czech	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
10	China	Negara Domisili dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili/ Sumber
11	Denmark	Negara Domisili	Negara Domisili	Negara Domisili
12	Egypt	Negara Domisili	Negara Domisili	Negara Domisili/

[194] Hasil wawancara dengan Bapak Tjip Ismail bertempat di Badan Arbitrase Nasional Indonesia (BANI) pada tanggal 15 November 2011.

[195] Data diunduh dari < http://ortax.org/ortax/?mod=panduan&page=show&id=94&q=&hlm=> pada 5 November 2011.

				Sumber
13	Finland	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
14	France	Negara Domisili	Negara Domisili	Negara Domisili
15	Germany	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
16	Hungary	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili/ Sumber
17	India	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
18	Italy	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
19	Japan	Negara Domisili	Negara Domisili	Negara Domisili
20	Jordan	Negara Domisili	Negara Domisili	Negara Domisili
21	Korea, Republic of	Negara Domisili	Negara Domisili	Negara Domisili
22	Korea, Democratic People's Republic of	Negara Domisili	Negara Domisili	Negara Domisili/Sumber
23	Kuwait	Negara Domisili	Negara Domisili	Negara Domisili
24	Luxembourg	Negara Domisili	Negara Domisili	Negara Domisili
25	Malaysia	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili/ Sumber
26	Mexico	Negara Domisili	Negara Domisili	Negara Sumber
27	Mongolia	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
28	Netherlands	Negara Domisili	Negara Domisili	Negara Domisili
29	New Zealand	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
30	Norway	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
31	Pakistan	Negara Sumber	Negara Domisili	Negara Domisili/ Sumber
32	Philippines	Negara Sumber dengan Tarif Maksimal 1,5%	Negara Sumber dengan Tarif Maksimal 1,5%	Negara Domisili/ Sumber

		dari Bruto	dari Bruto	
33	Poland	Negara Sumber	Negara Domisili	Negara Domisili/ Sumber
34	Romania	Negara Sumber dengan Tarif Maksimal 2%	Negara Domisili	Negara Sumber
35	Portuguese	Negara Domisili	Negara Domisili	Negara Domisili
36	Qatar	Negara Domisili	Negara Domisili	Negara Domisili
37	Russia	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Sumber
38	Saudi Arabia[196]	N/A	Negara Domisili	N/A
39	Seychelles	Negara Domisili	Negara Domisili	Negara Domisili
40	Singapore	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili
41	Slovak	Negara Domisili	Negara Domisili	Negara Domisili
42	South Africa	Negara Domisili	Negara Domisili	Negara Sumber
43	Spain	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
44	SriLanka	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Domisili
45	Sudan	Negara Domisili	Negara Domisili	Negara Domisili
46	Sweden	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
47	Switzerland	Negara Domisili	Negara Domisili	N/A
48	Syria	Negara Domisili	Negara Domisili	Negara Domisili
49	Taipei /Taiwan	Negara Domisili	Negara Domisili	Negara Domisili
50	Thailand	Negara Sumber dengan 50% Potongan Pajak	Negara Domisili	Negara Sumber
51	Tunisia	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber

[196] Untuk arab Saudi hanya terdapat hak pemajakan atas penerbangan lintas internasional.

52	Turkey	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
53	UAE (United Arab Emirates)	Negara Domisili	Negara Domisili	Negara Domisili
54	Ukraine	Negara Domisili	Negara Domisili	Negara Domisili
55	United Kingdom	Negara Domisili	Negara Domisili	N/A
56	United States of America	Negara Domisili	Negara Domisili	N/A
57	Uzbekistan	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
58	Venezuela	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber
59	Vietnam	Negara Domisili	Negara Domisili	Negara Domisili/ Sumber

Tabel 3.2. Perbandingan hak pemajakan dari persetujuan penghindaran pajak berganda Indonesia dengan negara-negara peserta

Terlihat bahwa mengenai penerbangan dan pelayaran lintas internasional lebih ke arah negara domisili, walaupun ada beberapa memberikan kepada negara sumber, baik secara penuh maupun secara *tax credit* dimana dibayarkan 50% ke negara sumber. Untuk penghasilan lainnya bervariasi antara negara sumber dan negara domisili.

3.3 Bentuk-Bentuk Perjanjian Penghindaran Pajak Berganda

Melihat dari penyelesaian masalah pajak berganda, masing-masing negara mempunyai bentuk-bentuk sendiri dalam membuat perjanjian penghindaran pajak berganda. Bentuk perjanjian penghindaran pajak berganda ini ditemukan dalam penyelesaian secara bilateral dan multilateral. Dalam berhubungan dengan negara lain, masing-masing negara berdaulat untuk membuat bentuk perjanjian sesuai dengan kebutuhan dan kepentingan dari masing-masing negara. Bentuk-bentuk tersebut adalah :

1. Bilateral

Bentuk perjanjian penghindaran pajak berganda secara bilateral adalah bentuk yang paling bayak dilakukan antara 2 negara. Cara bilateral yaitu dengan

menggunakan perjanjian internasional di antara kedua negara yang terlibat., yang isinya menyepakati untuk menghindari pajak ganda internasional. Perjanjian penghindaran pajak berganda (P3B merupakan singkatan dalam bahasa Indonesia) internasional atau bisa disebut sebagai *Tax Treaty*.[197] Bentuk ini banyak diminati oleh negara-negara karena lebih mudah untuk mencari titik temu persamaan kepentingan perpajakan, serta perjanjian ini mengikat kedua negara yang meratifikasinya.

Contoh bentuk perjanjian ini ada banyak sekali, salah satunya adalah perjanjian penghindaran pajak berganda antara Indonesia dan Belanda tahun 2004 dengan judul "Persetujuan Antara Pemerintah Republik Indonesia dan Pemerintah Kerajaan Belanda untuk Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak Yang Berkenaan Dengan Pajak Atas Penghasilan".[198]

2. Multilateral/Regional

Berbeda dengan bentuk bilateral, perjanjian penghindaran pajak berganda biasanya dalam bentuk traktat atau konvensi. Dalam cara multilateral, sejumlah negara menandatangani traktat yang isinya menyepakati untuk menghindari pajak berganda internasional yang terjadi di antara mereka terhadap objek dan subjek pajak tertentu.[199] Perjanjian secara multilateral dalam masalah pajak berganda merupakan kesepakatan bersama, pemberian keringanan pajak berganda ini lebih bersifat harmonisasi (atau mendekati unifikasi) ketentuan perpajakan masing-masing negara terkait. Tujuan dari penghapusan pajak berganda dimaksudkan memperlancar mobilitas modal, perdagangan, barang dan jasa, kekayaan, ilmu pengetahuan dan tekhnologi internasional. Dengan demikian, pendekatan multilateral akan lancar, apabila keadaan ekonomi dan sosial (termasuk arus modal, barang dan jasa transnasional) negara-negara anggota seimbang.[200] Oleh karenanya perjanjian penghindaran pajak berganda yang dilakukan biasanya

[197] Y. Sri Pudyatmoko, *Pengantar Hukum Pajak*, edisi IV, hal 217.

[198] Dalam versi bahasa inggris judulnya adalah "*Agreement Between The Government Of The Republic Of Indonesia And The Government Of The Kingdom Of The Netherlands For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income*".

[199] *Ibid*, hal 218.

[200] Gunadi, *Pajak Internasional*, edisi revisi, hal 105.

bersifat regional karena negara-negara yang dirasa memiliki keadaan ekonomi dan sosial yang tidak jauh berbeda.

Contoh perjanjian multilateral misalnya *Nordic Multilateral Income and Capital Tax Convention (Nordic Convention)* yang terdiri atas Denmark, Finlandia Eslandia, Norwegia, dan Swedia. *Nordic Convention* ditandatangani di Helsinki tanggal 23 September 1996 dan berlaku secara efektif pada tanggal 1 Januari 1998. Contoh lainnya adalah *Caricom Agreement* (1994) yang terdiri atas negara-negara berikut: Antigua dan Babuda, Belize, Dominika, Grenada, Guyana, Jamaika, Monserrat, St. Kitts dan Nevis, St. Lucia, St. Vincent dan Grenadines, seta Trinidad dan Tobago. Hal menarik dari *Carricom Agreement* adalah semua hak pemajakan diberikan secara ekslusif hanya kepada negara sumber.[201]

3.4 Perjanjian Penghindaran Pajak Berganda di Indonesia

3.4.1 Sejarah Perjanjian Penghindaran Pajak Berganda di Indonesia

Untuk sejarah perjanjian penghindaran pajak berganda di Indonesia dibagi menjadi 2 tahap, yaitu tahap masa pemerintahan penjajahan Hindia Belanda dan masa setelah Indonesia merdeka.

a. Keadaan pada masa pemerintahan jajahan Hindia Belanda

Sebelum Indonesia merdeka, pemerintahannya dikendalikan oleh kebijakan Hindia Belanda. Peraturan-peraturan yang ada dibuat dan dilaksanakan dalam wilayah jajahan Hindia Belanda waktu itu. Termasuk salah satunya mengenai permasalahan pajak berganda antara pemerintahan Hindia Belanda dengan negara lainnya.

Pada masa pemerintahan Hindia Belanda sudah ada peraturan yang mengatur mengenai masalah pajak berganda. Hal ini terbukti dengan adanya *Staatsblaad* Tahun 1934 Nomor 291 yang dikeluarkan pemerintah Hindia Belanda. *Staatsblaad* ini isinya mengatur mengenai penghindaran pajak ganda atas

[201] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 26.

pendapatan yang diperoleh di luar negeri dari seseorang yang bertempat tinggal di Indonesia.[202]

Selain *Staatsblaad*, pada masa pemerintahan Hindia Belanda, pernah pula diadakan perjanjian penghindaran pajak berganda antara Kerajaan Belanda dengan Kanada mengenadi penghindaran pajak berganda atas pendapatan. Berdasarkan pertukaran nota (*exchange of notes*) yang dilakukan antara pemerintah Kerajaan Belanda dengan pemerintah Kanada pada tanggal 2 April 1938, perjanjian yang bersangkutan diberlakukan jugas di Hindia Belanda.[203]

Kondisi diatas menyebabkan Hindia Belanda juga terikat terhadap perjanjian antara Kerajaan Belanda dengan Pemerintah Kanada. Karena Hindia Belanda masih berada dalam kondisi negara jajahan Kerajaan Belanda. Sehingga perjanjian tersebut mengikat juga ke daerah jajahan Kerajaan Belanda, termasuk Hindia Belanda.

b. Keadaan pada masa setelah Indonesia Merdeka

Indonesia memproklamasikan kemerdekaannya pada tanggal 17 Agustus 1945. Seetelahnya dimulailah babak baru dalam pemerintahan Republik Indonesia dan interaksinya dengan negara-negara lain. Dimulai dari pengakuan dari negara-negara di dunia atas keberadaan Indonesia serta membuat hubungan diplomatik dengan negara lain. Hal ini karena dalam pasal 1 Konvensi Montevideo 27 Desember 1933 mengenai Hak-hak dan Kewajiban Negara menyebutkan bahwa unsur konstitutif ke-4[204] bagi pembentukan negara adalah *capacity to enter into relation with other states*, atau kapasitas untuk mengadakan hubungan dengan negara-negara lain. Namun akibat perkembangan hubungan antar negara yang sangat cepat, ketentuan Konvensi Montevideo yang berisikan unsur kapasitas tersebut sudah agak ketinggalan dan diganti dengan kedaulatan[205] sebagai unsur

[202] *Ibid*, hal 39

[203] *Ibid.*

[204] Unsur-unsur konstitutif lainnya bagi pembentukan suatu negara yang merupakan subjek penuh hukum internasional antara lain: (1) penduduk yang tetap, (2) Wilayah tertentu, (3) Pemerintah. Lihat dalam Boer Mauna, *Hukum Internasional Pengertian Peranan Dan Fungsi Dalam Era Dinamika Global*, (Bandung: Alumni, 2003), hal 17-23.

[205] Dalam buku yang sama, Boer Mauna menjelaskan bahwa pengertian kedaulatan ialah kekuasaan tertinggi yang dimiliki oleh suatu negara untuk secara bebas melakukan berbagai

konstitutif keempat pembentukan negara mengingat artinya yang sangat penting dan ruang lingkup yang lebih luas.[206]

Kedaulatan Indonesia tersebut dilaksanakan antara lain dengan mengadakan perjanjian-perjanjian internasional dengan negara lain, termasuk didalamnya melaksanakan perjanjian penghindaran pajak berganda. Indonesia secara resmi memasuki suatu era dalam mengadakan kontak dengan negara lain untuk mengadakan perjanjian penghindaran pajak berganda, baru pada bulan april 1970, yaitu pada saat dimulainnya perundingan pertama antara delegasi Indonesia dengan delegasi Kerajaan Belanda untuk membicarakan mengenai "Perjanjian antara Republik Indonesia dan Kerajaan Belanda mengenai Penghindaran Pajak Ganda dan Penghindaran Pengelakan Pajak atas Pendapatan dan atas Kekayaan", walaupun penjajagan kearah itu telah dilakukan beberapa tahun sebelumnya.[207]

Perundingan mengenai perjanjian penghindaran pajak berganda tersebut kemudian diikuti dengan perundingan-perundingan dengan negara-negara lainnya. Perundingan dengan Jepang pertama kali diadakan di Jakarta tanggal 1 April 1971. Kemudian dengan Kerajaan Inggris Raya dan Irlandia utara, perundingan pertamanya diadakan di London pada tanggal 31 Agustus 1971. Perundingan dengan Amerika Serikat perundingan pertamannya dilakukan di Washington DC pada tanggal 20 September 1971. Perundingan dengan Federasi Jerman, perundingan pertamanya dilakukan pada tanggal 6 Maret 1972 bertempat di Jakarta. Setelah itu pun perundingan-perundingan perjanjian penghindaran pajak berganda diadakan dengan negara-negara lain dari berbagai benua di dunia.[208]

Hingga saat ini sudah ada 63 negara menandatangani perjanjian penghindaran pajak berganda dengan Indonesia.[209] Hal ini termasuk diantaranya

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kegiatan sesuai kepentingannya asal saja kegiatan tersebut tidak berrtentangan dengan hukum internasional.

[206] Boer Mauna, *Hukum Internasional Pengertian Peranan Dan Fungsi Dalam Era Dinamika Global*, (Bandung: Alumni, 2003), hal 24

[207] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 40.

[208] *Ibid*.

[209] *Tax Treaty Arsip*, <http://www.ortax.org/ortax/?mod=treaty&page=doc&q =&hlm=>, data diunduh pada tanggal 15 Oktober 2011, pukul 14.00.

perjanjian penghindaran pajak berganda yang masih berlaku (*entry into force*) sebanyak 57 negara.[210] Beberapa negara pernah merevisi perjanjian penghindaran pajak berganda dengan Indonesia seperti Belanda, Belgia, Inggris dan Thailand. Sedangkan Negara yang telah dihentikan perjanjian penghindaran pajak berganda dengan Indonesia dan tidak diperbaharui adalah Mauritius. Hal ini karena negara tersebut termasuk negara *tax haven*, sehingga malah menjadi tempat penyelundupan dan penghindaran pajak.[211] Dan perjanjian penghindaran pajak berganda dengan Hong Kong masih menunggu ratifikasi kedua negara sebelum *entry into force (*masih dalam status *not in force).*

3.4.2 Dasar Hukum Keberlakuan Perjanjian Penghindaran Pajak Berganda di Indonesia

Dasar hukum dari pembentukan dan penerapan perjanjian penghindaran pajak berganda di Indonesia adalah:

1) Pancasila sebagai dasar negara dan falsafah hidup negara Indonesia.
2) Pasal 23A Amandemen UUD 1945, yang berbunyi "Pajak dan pungutan lain yang bersifat memaksa untuk keperluan negara diatur dengan undang-undang."
3) Undang-Undang Republik Indonesia Nomor 28 Tahun 2007 Tentang Perubahan Ketiga Atas Undang-Undang Nomor 6 Tahun 1983 Tentang Ketentuan Umum dan Tata Cara Perpajakan, khususnya Pasal 12.[212]

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[210] http://www.pajak.go.id/treaty_tkb/, diunduh pada tanggal 15 Oktober 2011 pukul 16:05. Alamat situs http://www.pajak.go.id adalah alamat situs resmi Direktorat Jendral Pajak dibawah Kementerian Keuangan Republik Indonesia.

[211] Hasil wawancara dengan Bapak Tjip Ismail bertempat di Badan Arbitrase Nasional Indonesia (BANI) pada tanggal 15 November 2011. Negara t*ax haven* memiliki maksud negara yang tarif pajaknya rendah atau bahkan tidak ada sama sekali, sehingga menjadi incaran banyak pelaku usaha untuk menghindarkan membayar pajak.

[212] Isi dari pasal tersebut ialah :

Pasal 12

(1) Setiap Wajib Pajak wajib membayar pajak yang terutang sesuai dengan ketentuan peraturan perundang-undangan perpajakan, dengan tidak menggantungkan pada adanya surat ketetapan pajak.

4) Undang-Undang Nomor 36 Tahun 2008 Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan, khususnya. Pasal 21, 24, dan 26.[213]

5) Keputusan Menteri Keuangan Republik Indonesia Nomor 164/Kmk.03/2002 Tentang Kredit Pajak Luar Negeri.

Selain peraturan diatas, Direktorat Jenderal Pajak juga mengeluarkan peraturan internal yang harus diterapkan oleh seluruh Kantor Pajak di Indonesia yaitu dengan Peraturan Dirjen Pajak Nomor Per-61/Pj./2009 Tata Cara Penerapan Persetujuan Penghindaran Pajak Berganda.

Dalam sila ke 5 Pancasila, menjelaskan "Keadilan Sosial Bagi Seluruh Rakyat Indonesia". Keadilan yang ingin dicapai pemerintah ini melalui pemungutan pajak yang nantinya akan dikembalikan kepada rakyat dalam bentuk jalannya roda pemerintahan serta pembangunan. Kemudian negara mempunyai kewenangan untuk memungut pajak yang bersifat memaksa sesuai UUD 1945 Pasal 23A. Hal ini tentunya membuat otoritas pajak di Indonesia mempunyai yurisdiksi memungut pajak atas subjek dan objek pajak yang diatur dalam undang-undang. Sehingga tentunya bisa menyebabkan bentrokan yurisdiksi yang menimbulkan pajak berganda.

Umunya Perjanjian Penghindaran Pajak Berganda berfungsi menggantikan tarif pajak pasal 26 Undang-Undang PPh. Hal ini karena didalam perjanjian

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(2) Jumlah Pajak yang terutang menurut Surat Pemberitahuan yang disampaikan oleh Wajib Pajak adalah jumlah pajak yang terutang sesuai dengan ketentuan peraturan perundang-undangan perpajakan.

(3) Apabila Direktur Jenderal Pajak mendapatkan bukti jumlah pajak yang terutang menurut Surat Pemberitahuan sebagaimana dimaksud pada ayat (2) tidak benar, Direktur Jenderal Pajak menetapkan jumlah pajak yang terutang.

Pajak terutang disini salah satunya adalah pajak dari wajib pajak dalam negeri atas hasil yang diperoleh dari pendapatan baik dalam maupun luar negeri. Pajak pada prinsipnya terutang pada saat timbulnya objek pajak yang dapat dikenai pajak, tetapi untuk kepentingan administrasi perpajakan saat terutangnya pajak tersebut adalah pada suatu saat, untuk Pajak Penghasilan yang dipotong oleh pihak ketiga. Hal ini termasuk di dalamnya pajak yang telah di potong di luar negeri dari penghasilan *world wide income.* Lihat penjelasan Pasal 12.

[213] Pasal 21 berisi mengenai jenis pekerjaan, jasa dan kegiatan yang mendapatkan pemotongan pajak. Pasal 24 berisi mengenai 24 berisi mengenai kredit pajak, salah satu metode penghindaran pajak berganda secara unilateral oleh Indonesia. Dan pasal 26 berisi mengenai pajak penghasilan sebesar 20% atas penghasilan wajib pajak luar negeri yang dikenakan pajak.

perpajakan Indonesia memberikan insentif bagi investor asing untuk menaikkan minat investasi.

3.4.3 Kedudukan Perjanjian Penghindaran Pajak Berganda terhadap Undang-Undang Domestik Indonesia

Di Indonesia, suatu persetujuan internasional, termasuk perjanjian penghindaran pajak berganda, menjadi bagian dari undang-undang nasional setelah persetujuan tersebut diratifikasi. Namun karena perjanjian penghindaran pajak berganda tersebut merupakan persetujuan di bidang ekonomi, perjanjian tersebut tidak perlu diratifikasi ke DPR, melainkan cukup dengan suatu keputusan presiden. Hal ini sesuai dengan Pasal 11 ayat (1) UU no 24 tahun 2000 tentang Perjanjian Internasional.[214]

Mengenai kedudukan antara perjanjian penghindaran pajak berganda dengan undang-undang perpajakan Indonesia kedua-duanya mempunyai bobot dan kedudukan yang setara. Dua-duanya merupakan undang-undang. Kedudukan dan bobot perjanjian penghindaran pajak berganda tidak lebih tinggi (supra nasional) dari undang-undang perpajakan.[215]

Indonesia belum mempunyai Yurispudensi yang dapat dipakai sebagai pedoman untuk memecahkan apabaila ada konflik antara perjanjian penghindaran pajak berganda dengan undang-undang perpajakan nasional. Namun, karena kedudukan perjanjian penghindaran pajak berganda setara dengan undang-undang perpajakan nasional, adagium yang berlaku umum dapat dipakai sebagai pedoman. Adagium yang menyatakan ketentuan yang bersifat khusus (*lex specialist*) mengalahkan atau mengenyampingkan ketentuan yang bersifat umum (*lex generalist*). Dalam kaitan ini maka, ketentuan-ketentuan perjanjian penghindaran pajak berganda adalah bersifat khusus dan ketentuan-ketentuan undang-undang perpajakan nasional bersifat umum. Sehingga apabila kedua peraturan ini

[214] Darussalam, John Hutagaol, dan Danny Septriadi, *Hukum Pajak Internasional Indonesia Perkembangan dan Pengaruhnya*, hal 31.

[215] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 52.

mengatur hal yang sama, maka ketentuan perjanjian penghindaran pajak berganda mngesampingkan ketentuan undang-undang perpajakan nasional.[216]

[216]*Ibid, hal 53.*

BAB IV

ANALISA PERJANJIAN PERPAJAKAN INDONESIA BELANDA

4.1 Perjanjian Penghindaran Pajak Berganda Indonesia dengan Negara-Negara di Dunia

Indonesia merupakan salah satu bagian dari masyarakat dunia. Melakukan perjanjian internasional dengan negara lain tidak hanya untuk mempererat hubungan antar negara namun juga menjaga kepastian hukum. Salah satu perjanjian internasional yang Indonesia laksanakan dalam hubungan perpajakan salah satunya adalah perjanjian penghindaran pajak berganda.

Hingga saat ini telah banyak negara-negara yang telah mengadakan perjanjian pajak dengan Indonesia. Perjanjian-perjanjian penghindaran pajak berganda Indonesia dengan negara lain yang baik yang telah berlaku efektif, diamandemen, dihentikan juga yang belum berlaku (belum ada ratifikasi) antara lain adalah perjanjian penghindaran pajak berganda dengan negara-negara berikut :[217]

No.	Negara	Judul	Penanda-tanganan	Berlaku Efektif	Status
1	Afrika Selatan (South Africa)	Agreement	15 Juli 1997	01 Januari 1999	Berlaku
2	Aljazair (Algeria)	Agreement	28 April 1995	01 Januari 2001	Berlaku
3	Amerika (United States Of America)	Convention	11 Juli 1988	01 Februari 1991	Berlaku
		Protocol	24 Juli 1996	01 Februari 1997	Berlaku
		Convention	11 Juli 1988	01 Februari 1997	Berlaku
4	Australia (Australia)	Agreement	22 April 1992	01 Juli 1993	Berlaku
5	Austria (Austria)	Agreement	24 Juli 1986	01 Januari 1989	Berlaku
6	Bangladesh	Agreement	19 Juli 2003	01 Januari 2007	Berlaku

[217] <http://ortax.org/ortax/?mod=treaty&page=doc&q=&hlm=>, diunduh pada tanggal 15 Oktober 2011 pukul 16:05.

	(Bangladesh)				
7	Belanda (Netherlands)	Agreement	05 Maret 1973	01 Januari 1971	Dihentikan
		Protocol	22 Juli 1991		Dihentikan
		Protocol	23 Agustus 1993	01 Juni 1994	Dihentikan
		Agreement	29 Januari 2002	01 Januari 2004	Berlaku
8	Belgia (Belgium)	Agreement	13 november 1973	01 Januari 1975	Dihentikan
		Agreement	16 September 1997	01 Januari 2002	Berlaku
9	Brunei Darussalam (Brunei Darussalam)	Agreement	27 Februari 2000	01 Januari 2003	Berlaku
10	Bulgaria (Bulgaria)	Agreement	11 Januari 1991	01 Januari 1993	Berlaku
11	China (China)	Agreement	07 november 2001	01 Januari 2004	Berlaku
12	Denmark (Denmark)	Convention	28 Desember 1985	01 Januari 1987	Berlaku
13	Finlandia (Finland)	Agreement	15 Oktober 1987	01 Januari 1990	Berlaku
14	Hongkong	Agreement	23 Maret 2010		Belum Berlaku
15	Hungaria (Hungary)	Agreement	19 Oktober 1989	01 Januari 1994	Berlaku
16	India (India)	Agreement	07 Agustus 1987	01 Januari 1988	Berlaku
17	Inggris (United Kingdom)	Agreement	13 Maret 1974	01 Januari 1976	Dihentikan
		Agreement	05 April 1993	01 Januari 1995	Berlaku
18	Iran	Agreement	30 April 2004	01 Januari 2011	Berlaku
19	Italia (Italy)	Agreement	18 Februari 1990	01 Januari 1996	Berlaku
20	Jepang (Japan)	Agreement	3 Maret 1982	01 Januari 1983	Berlaku
21	Jerman (Germany)	Agreement	30 Oktober 1990	01 Januari 1992	Berlaku

22	Kanada (Canada)	Convention	16 Januari 1979	01 Januari 1980	Berlaku
		Protocol	01 April 1998	01 Januari 1999	Berlaku
		Convention	01 April 1998	01 Januari 1999	Berlaku
23	Korea (Democratic People's Republic of Korea)	Agreement	11 Juli 2002	01 Januari 2005	Berlaku
24	Korea (Republic of Korea)	Agreement	10 november 1988	01 Januari 1990	Berlaku
25	Kuwait (Kuwait)	Agreement	23 April 1997	01 Januari 1999	Berlaku
26	Luxembourg (Luxembourg)	Agreement	14 Januari 1993	01 Januari 1995	Berlaku
27	Malaysia (Malaysia)	Agreement	12 September 1991	01 Januari 1987	Berlaku
28	Mauritius	Agreement	10 Desember 1996	01 Juli 1998	Dihentikan
29	Meksiko (Mexico)	Agreement	06 September 2002	01 Januari 2005	Berlaku
30	Mesir (Egypt)	Agreement	13 Mei 1998	01 Januari 2003	Berlaku
31	Mongolia (Mongolia)	Agreement	02 Juli 1996	01 Januari 2001	Berlaku
32	Norwegia (Norway)	Convention	19 Juli 1988	01 Januari 1991	Berlaku
33	Pakistan (Pakistan)	Agreement	07 Oktober 1990	01 Januari 1991	Berlaku
34	Perancis (France)	Convention	14 September 1979	01 Januari 1981	Berlaku
35	Philipina (Philippines)	Agreement	18 Juni 1981	01 Januari 1983	Berlaku
36	Polandia (Poland)	Agreement	06 Oktober 1992	01 Januari 1994	Berlaku
37	Portugal	Agreement	09 Juli 2003	01 Januari 2008	Berlaku
38	Qatar	Agreement	30 April 2006	01 Januari 2008	Berlaku
39	Republik Ceko (Czech)	Agreement	04 Oktober 1994	01 Januari 1997	Berlaku

40	Romania (Romania)	Agreement	03 Juli 1996	01 Januari 2000	Berlaku
41	Rusia (Rusia)	Agreement	12 Maret 1999	01 Januari 2003	Berlaku
42	Saudi Arabia (Saudi Arabia)[218]	Agreement	09 Maret 1991	01 Januari 1989	Berlaku
43	Selandia Baru (New Zealand)	Agreement	25 Maret 1987	01 Januari 1989	Berlaku
44	Seychelles (Seychelles)	Agreement	27 September 1999	01 Januari 2001	Berlaku
45	Singapura (Singapore)	Agreement	08 Mei 1990	01 Januari 1992	Berlaku
46	Slovakia (Slovakia)	Agreement	12 Oktober 2000	01 Januari 2002	Berlaku
47	Spanyol (Spain)	Agreement	30 Mei 1995	01 Januari 2000	Berlaku
48	Sri Lanka (Sri Lanka)	Agreement	03 Februari 1993	01 Januari 1995	Berlaku
49	Sudan (Sudan)	Agreement	10 Februari 1998	01 Januari 2001	Berlaku
50	Suriah (Syria)	Agreement	27 Juni 1997	01 Januari 1999	Berlaku
51	Suriname	Agreement	14 Oktober 2003		Belum Berlaku
52	Swedia (Sweden)	Convention	28 Februari 1989	01 Januari 1990	Berlaku
53	Swiss (Switzerland)	Agreement	29 Agustus 1988	01 Januari 1990	Berlaku
54	Taiwan (Taiwan)	Agreement	01 Maret 1995	01 Januari 1996	Berlaku
55	Thailand (Thailand)	Agreement	25 Maret 1981	01 Januari 1983	Dihentikan
		Agreement	15 Juni 2001	01 Januari 2004	Berlaku
56	Tunisia (Tunisia)	Agreement	13 Mei 1992	01 Januari 1994	Berlaku

[218] Perjanjian Penghindaran Pajak Berganda dengan Saudi Arabia bersifat parsial, hanya mengatur mengenai penghindaran pajak ganda atas penghasilan dari penerbangan dalam lalu lintas internasional.

57	Turki (Turkey)	Agreement	25 Februari 1997	01 Januari 2001	Berlaku
58	Ukraina (Ukraine)	Agreement	11 April 1996	01 Januari 1999	Berlaku
59	Uni Emirat Arab (United Arab Emirates)	Agreement	30 november 1995	01 Januari 2000	Berlaku
60	Uzbekistan (Uzbekistan)	Agreement	27 Agustus 1996	01 Januari 1999	Berlaku
61	Venezuela (Venezuela)	Agreement	27 Februari 1997	01 Januari 2001	Berlaku
62	Vietnam (Vietnam)	Agreement	22 Desember 1997	01 Januari 2000	Berlaku
63	Yordania (Jordan)	Agreement	12 november 1996	01 Januari 1999	Berlaku

Tabel 4.1 Seluruh Persetujuan Penghindaran Pajak Berganda yang dibuat oleh Indonesia

Mengenai Judul yang dipilih dalam perjanjian penghindaran pajak berganda Indonesia adalah sebagai berikut : "*Agreement Between The Government Of . . . For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes Of Income"* atau "Persetujuan Antara Pemerintah … Dan Pemerintah … Untuk Penghindaran Pajak Berganda Dan Penghindaran Pengelakan Pajak Yang Berkenaan Dengan Pajak Atas Penghasilan". Dalam judul tersebut mengandung 3 hal pokok, yaitu :[219]

1. Penggunaan istilah "*agreement*" dan bukan *"convention*" sebagaimana dipakai dalam OECD Model;
2. Pajak yang dicakup adalah pajak penghasilan dan
3. Persetujuan yang dimaksud adalah antara dua "pemerintah (*governments*)" bukan antara dua "negara (*states*)"

OECD Model, UN Model dan Model Amerika menggunakan istilah "*convention"* dan bukan "*agreement*". Namun, dari sudut pandang Indonesia istilah "agreement" lebih cocok karena istilah "*convention"* mempunyai konotasi

[219] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda (P3B) Suatu Kajian terhadap kebijakan Indonesia*, (Jakarta: Penerbit Salemba Empat, 2011), hal 13.

perjanjian multilateral. Sesuai dengan konstitusi suatu "*convention"* harus diratifikasi oleh DPR sedangkan suatu perjanjian di bidang ekonomi tidak perlu ratifikasi oleh DPR. [220] Sebagai contoh adalah "*Agreement Between The Government Of The Republic Of Indonesia And The Government Of The Republic Of Brunei Darussalam For The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Income"* yang ditandatangani 27 Februari 2000 di Bandar Seri Begawan dan diratifikasi melalui Keputusan Presiden No.57 Tahun 2000 tanggal 20 April 2000 Lembaran Negara No.52.

Sebelum berlakunya undang-undang tentang persetujuan internasional[221], setiap persetujuan yang mencakup substansi sebagaimana disebutkan sebagi berikut harus diratifkasi oleh DPR, yaitu :

1. Persetujuan di bidang politik atau yang berpengaruh terhadap persetujuan aliansi, dan persetujuan tentang batas negara;
2. Setiap persetujuan yang akan berpengaruh terhadap kebijakan politik luar negeri walaupun persetujuan dimaksud menyangkut bidang ekonomi dan kerja sama tekhnik atau pinjaman;
3. Hal-hal lain yang berdasarkan konstitusi harus berupa undang-undang.

Kemudian setelah berlakunya undang-undang tentang persetujuan internasional, pengesahan persetujuan internasional dilakukan dengan Undang-undang apabila berkenan dengan:[222]

1. Masalah politik, perdamaian, pertahanan, dan keamanan negara;

[220] *Ibid.* Hal ini diperkuat juga dari hasil wawancara dengan Bapak Haryanto dari bagian Perjanjian Internasional Regional Eropa bagian Perjanjian Perpajakan II Direktorat Jendral Pajak yang berlangsung di ruangan tamu bagian perjanjian Perpajakan II Lantai 11 Direktorat Jendral pajak pada hari kamis tanggal 8 Desember 2011. Beliau menyatakan bahwa perjanjian bilateral Indonesia terutama perjanjian penghindaran pajak berganda menggunakan kata "*agreement*".

[221] Undang-undang no. 24 tahun 2000 tentang Perjanian Internasional, sebelum berlaku undang-undang tentang perjanjian internasional, ratifikasi didasarkan atas Surat Presiden kepada DPR No 2826/HK/60 Tanggal 22 Agustus 1960.

[222] Indonesia, *Undang-Undang tentang Perjanjian Internasional,* UU no.24 tahun 2000, LN No. 185 Tahun 2000, TLN No. 4012. Pasal 10.

2. perubahan wilayah atau penetapan batas wilayah negara Republik Indonesia;
3. kedaulatan atau hak berdaulat negara;
4. hak asasi manusia dan lingkungan hidup;
5. pembentukan kaidah hukum baru;
6. pinjaman dan/atau hibah luar negeri.

Jadi setiap persetujuan internasional yang mencakup diluar hal yang disebutkan tidak perlu memperoleh ratifikasi DPR. Ratifikasi dalam kaitannya dengan pengesahan tentang berlakunya suatu persetujuan dilakukan dengan keputusan presiden, dan presiden akan memberitahukannya kepada DPR. Hal ini juga berlaku untuk undang-undang tentang persetujuan internasional.[223]

Walaupun demikian tidak semua Persetujuan Penghindaran Pajak Berganda menggunakan istilah "*agreement*", dan memakai "*convention*" sehingga dalam bahasa Indonesia menjadi "perjanjian". Negara-negara tersebut adalah Amerika Serikat, Denmark, Kanada, Prancis, Norwegia dan Swedia. Bila melihat dari negara tersebut, semuanya merupakan anggota dari OECD[224], sehingga kemungkinan negosiasi saat perundingan mengacu kepada OECD model sangat

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[223] *Ibid*, Pasal 11 ayat (1) dan (2). Dalam pasal 11 ayat (1) dijelaskan bahwa pengesahan perjanjian melalui keputusan presiden dilakukan atas perjanjian yang mensyaratkan adanya pengesahan sebelum memulai berlakunya perjanjian, tetapi memiliki materi yang bersifat prosedural dan memerlukan penerapan dalam waktu singkat tanpa mempengaruhi peraturan perundang-undangan nasional. Jenis-jenis perjanjian yang temasuk dalam kategori ini, di antaranya adalah perjanjian induk yang menyangkut kerjasama di bidang ilmu pengetahuan dan teknologi, ekonomi, teknik, perdagangan, kebudayaan, pelayaran niaga, penghindaran pajak berganda, dan kerjasama perlindungan penanaman modal, serta perjanjian-perjanjian yang bersifat teknis.

Dalam pasal 11 ayat (2) dijelaskan bahwa Dewan Perwakilan Rakyat dapat melakukan pengawasan terhadap Pemerintah, walaupun tidak diminta persetujuan sebelum pembuatan perjanjian internasional tersebut karena pada umumnya pengesahan dengan keputusan presiden hanya dilakukan bagi perjanjian internasional di bidang teknis. Di dalam melaksanakan fungsi dan wewenang Dewan Perwakilan Rakyat dapat meminta pertanggungjawaban atau keterangan Pemerintah mengenai perjanjian internasional yang telah dibuat. Apabila dipandang merugikan kepentingan nasional, perjanjian internasional tersebut dapat dibatalkan atas permintaan Dewan Perwakilan Rakyat.

[224] <http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html>, diunduh pada 20 Desember 2011. Dalam situs ini berisi negara-negara anggota OECD yang sudah meratfikasi konvensi OECD.

besar. Kemudian OECD model menggunakan istilah "*convention*" sebagai judul dari perjanjian penghindaran pajak berganda.

Kemudian dalam beberapa perjanjian penghindaran pajak berganda, terdapat protokol yang merupakan bagian yang tidak terpisahkan dengan batang tubuh dari perjanjian penghindaran pajak berganda. Protokol juga dibuat dalam hal terjadinya amandemen atas perjanjian penghindaran pajak berganda yang telah ada. Dalam hal ini membuat protokol atas perjanjian perpajakan yang telah ada akan lebih mudah daripada membuat perjanjian penghindaran pajak berganda yang baru.[225] Sehingga untuk protokol yang mengamandemen perjanjian penghindaran pajak berganda sebelumnya juga memerlukan ratifikasi. Sebagai contoh adalah "*Protocol that Amend Which Signed in Kuala Lumpur dated 22 July 1991 concerning Agreement of Double Tax Avoidance and Prevention of Income Tax and Wealth Dodger With its Protocol Dated 5 March 1973"* yang ditandatangani di Jakarta pada tanggal 23 Agustus 1993 diratifikasi Melalui Keppres No.11 Tahun 1994 Tgl 24-02-1994 LN No.5. Protokol amandemen ini baru 3 negara yang melakukan untuk Persetujuan Penghindaran Pajak Berganda dengan Indonesia, yaitu Amerika Serikat, Belanda dan Kanada.

Status suatu perjanjian penghindaran pajak berganda yang dibuat Indonesia dalam tabel diatas mengenai keberlakuan suatu perjanjian. Keberlakuan ini mengenai persetujuan yang masih berlaku, dihentikan dan belum berlaku. Sehingga pada dasarnya, keberlakuan ini melihat kepada sudah adanya ratifikasi atau belum suatu persetujuan. Proses ratifikasi dari perjanjian penghindaran pajak berganda baik sebelum maupun sesudah undang-undang tentang persetujuan internasional menggunakan keputusan presiden.[226] Sebagai contoh keberlakuan "*Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of India For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income with Protocol*" sudah berlaku dan masih berlaku hingga sekarang sejak ditandatangani di Jakarta pada tanggal 8 Juli 1987 dan diratifikasi melalui Keppres No.47 tahun 1987

[225] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 249.

[226] Lihat note menganai uu no 24 tahun 2000.

tanggal 8 Desember 1987 Lembaran Negara No.50. Namun sesuai dengan Pasal 28 huruf (a)[227] mengenai keberlakuan persetujuan di Indonesia maka persetujuan berlaku efektif pada tanggal 1 Januari 1988.

Berbeda kasusnya dengan Mauritius. Walupun Persetujuan Penghindaran Pajak Berganda dengan Mauritius dengan judul "*Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income*" sudah ditandangani di Jakarta pada tanggal 10 Desember tahun 1996 dan diratifikasi melalui Keputusan Presiden No.6 tahun 1998 tanggal 12 Januari 1998 LN No.14, namun persetujuan ini sudah dihentikan. Melalui nota diplomatik nomor: 289/EKON/14/VI/04, Indonesia memberitahukan penghentian Persetujuan Penghindaran Pajak Berganda dengan Mauritius. Hal ini tertera dalam Surat Edaran Direktur Jenderal Pajak Nomor SE - 06/PJ.3/2004 Tentang Pemberitahuan Penghentian Persetujuan Penghindaran Pajak Berganda (P3B) Antara Pemerintah Republik Indonesia Dengan Pemerintah Republik Mauritius tanggal 24 Juni 2004. Sehingga sesuai dengan dengan ketentuan Pasal 29 ayat 1 bagian (a) yang menyatakan bahwa tanggal efektif penghentian persetujuan akan berlangsung pada tanggal 1 Januari pada tahun setelah tahun penyampaian pemberitahuan penghentian. Oleh karena itu tahun setelah tahun pemberitahuan penghentian, yaitu 2004, maka keberlakuan efektif penghentian akan jatuh pada tanggal 1 Januari 2005.

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[227] Isi dari pasal 29 tersebut adalah :

Masing-masing Negara pihak pada Persetujuan akan memberitahukan kepada Negara lainnya mengenai penyelesaian tatacara yang diperlakukan berdasarkan perundang-undangannya untuk memberlakukan Persetujuan ini akan mulai berlaku pada tanggal dimana pemberitahuan yang kemudian dilakukan oleh salah satu Negara dan Persetujuan ini akan mengikat :

(a)di Indonesia, sehubungan dengan penghasilan yang diperoleh di suatu tahun mulai pada atau setelah hari pertama bulan Januari tahun takwim berikutnya dimana pemberitahuan yang kemudian dilakukan;

(b)di India, sehubungan dengan penghasilan yang diperoleh ditahun sebelumnya, mulai pada atau setelah hari pertama bulan April tahun takwim berikutnya dimana pemberitahuan yang kemudian dilakukan.

Sehingga sesuai dengan isi pasal tersebut, tanggal keberlakuan dari perjanjian penghindaran pajak berganda adalah pada tanggal 1 Januari pada tahun setelah ratifikasi di Indonesia dilakukan.

Untuk Persetujuan Penghindaran Pajak Berganda antara Indonesia dengan Suriname serta Indonesia dengan Hongkong, kedua persetujuan ini belum berlaku. Walaupun Persetujuan Penghindaran Pajak Berganda antara Indonesia dengan Suriname sudah ditandangani di Paramaribo tanggal 14 Oktober 2003 dan Persetujuan Penghindaran Pajak Berganda antara Indonesia dengan Hongkong di Jakarta pada tanggal 23 Maret 2010, namun kedua persetujuan tersebut sampai saat penulis menulis belum diratifikasi di Indonesia. Sehingga belum ada Keputusan Presiden mengenai keberlakuan kedua perjanjian ini. Oleh karena itu walaupun sudah ditandatangani, kedua persetujuan ini masih belum berlaku di Indonesia.

4.2 Persetujuan Penghindaran Pajak Berganda Indonesia dengan Belanda

4.2.1 Latar belakang perjanjian perpajakan Indonesia-Belanda

Indonesia merupakan negara yang berdaulat dengan politik luar negeri bebas aktif. Oleh karenannya Indonesia bisa membuat perjanjian internasional dengan negara lain. Kedaulatan Indonesia tersebut dilaksanakan antara lain dengan mengadakan perjanjian-perjanjian internasional dengan negara lain, termasuk didalamnya melaksanakan perjanjian penghindaran pajak berganda. Hal ini pada awal kemerdekaan merupakan salah satu cara mencari pengakuan negara-negara di dunia mengenai Indonesia. kemudian, Indonesia secara resmi memasuki suatu era dalam mengadakan kontak dengan negara lain untuk mengadakan perjanjian penghindaran pajak berganda, baru pada bulan april 1970, yaitu pada saat dimulainnya perundingan pertama antara delegasi Indonesia dengan delegasi Kerajaan Belanda untuk membicarakan mengenai "Perjanjian antara Republik Indonesia dan Kerajaan Belanda mengenai Penghindaran Pajak Ganda dan Penghindaran Pengelakan Pajak atas Pendapatan dan atas Kekayaan", walaupun penjajagan kearah itu telah dilakukan beberapa tahun sebelumnya.[228]

[228] Jaja Zakaria, *Perjanjian Penghindaran Pajak Berganda serta Penerapannya di Indonesia*, hal 40.

Kemudian pada tanggal 5 Maret 1973 di Jakarta, ditandatangani perjanjian penghindaran pajak berganda pertama Indonesia dengan Belanda dengan nama perjanjian "*Agreement between the Republic of Indonesia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital"* (Persetujuan antara Pemerintah Republik Indonesia dan Pemerintah Kerajaan Belanda mengenai Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak Atas Pendapatan dan Atas Kekayaan). Setelah penadatanganan perjanjian tersebut, pemerintah Indonesia melakukan ratifikasi dengan menerbitkan Keputusan Presiden No.1 Tanggal 14 Januari 1974 Lembaran Negara No.2. Walaupun demikian perjanjian ini berlaku pada tanggal 1 Januari 1971. Hal ini karena isi pasal dari Pasal 29 perjanjian mengenai keberlakuan perjanjian berbunyi :

> "*This Agreement shall enter into force on the date on which the Contracting Governments have notified each other in writing that the formalities constitutionally required in their respective countries have been complied with, and its provisions shall have effect for taxable years and periods beginning on or after the first day of January 1971."*[229]

Sehingga sesuai dengan Pasal 29 maka akan berlaku semua ketentuan-ketentuan yang termasuk dalam perjanjian penghindaran pajak berganda ini untuk tahun perpajakan setelah 1 Januari 1971.

Setelah perjanjian penghindaran pajak berganda yang pertama, Indonesia merasa perlu mengubah beberapa isi pasal dari perjanjian penghindaran pajak berganda 1973. Oleh karenanya dibuat "*Protocol of Amendment for Agreement of Double Tax Avoidance and Prevention of Income Tax and Wealth Dodger with its Protocol Signed in Jakarta on the date of 5 March 1973"* (Protokol Perubahan Atas Persetujuan Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak Atas Penghasilan dan Atas Kekayaan Dengan Protokolnya Yang Ditandatangani di Jakarta Pada Tanggal 5 Maret 1973) yang ditandatangani di Kuala Lumpur pada tanggal 22 Juli 1991. Namun tidak ada catatan ratifikasi dari

[229] Versi bahasa Indonesia untuk isi pasal 29 perjanjian ini adalah Persetujuan ini berlaku terhitung mulai hari tanggal dimana kedua Pemerintahan saling memberitahukan secara tertulis, bahwa di Negara masing-masing telah dipenuhi persyaratan-persyaratan yang diharuskan oleh Undang-Undang Dasar masing-masing, sedang ketentuan-ketentuan Perjanjian akan berlaku bagi tahun-tahun pajak dan masa-masa pajak yang mulai pada atau sesudah tanggal 1 Januari 1971.

data situs Kementerian Luar Negeri Republik Indonesia.[230] Kemudian tidak lama setelahnya dibuat kembali protokol baru yang mengamandemen protokol tahun 1991 yaitu "*Protocol that Amend Which Signed in Kuala Lumpur dated 22 July 1991 concerning Agreement of Double Tax Avoidance and Prevention of Income Tax and Wealth Dodger With its Protocol Dated 5 March 1973"* (Protokol Yang Merubah Protokol Yang Ditandatangani di Kuala Lumpur Tanggal 22 juli 1991 Mengenai Persetujuan Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak Atas Penghasilan dan Atas kekayan Dengan Protokol nya Tertanggal 5 Maret 1973) yang ditandatangani di Jakarta 22 Agustus 1993. Protokol ini kemudian diratifikasi melalui Keppres No.11 Tahun 1994 Tgl 24-02-1994 LN No.5. Isi dari protokol ini menyesuaikan kepada penyempurnaan peraturan perpajakan serta menghapus istilah "*tax on capital*" atau pajak kekayaan. Namun untuk mempermudah melihat perubahan-perubahan yang terjadi dalam susunan perjanjian yang telah diamandemen oleh kedua protokol ini maka Direktorat Jendral Pajak mengeluarkan "*Consolidated Transcript Of Indonesia - Netherlands Tax Treaty Agreement Between The Kingdom Of The Netherlands And The Republic Of Indonesiafor The Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect To Taxes On Incomeas Amended By Protocol 1991 And 1993 (Come Into Force As Of 2 May 1994)*" (Susunan Dalam Satu Naskah Dari Persetujuan Penghindaran Pajak Berganda (P3B) Indonesia - Belanda Sebagaimana Telah Diubah Dengan Protokol Perubahan Tahun 1991 Dan Tahun 1993 (Berlaku Mulai 2 Mei 1994)). Susunan dalam satu naskah ini dikeluarkan Direktur Jenderal Pajak dengan Surat Edaran Direktur Jenderal Pajak Nomor Se - 06/PJ.1012/1996, yang berbunyi :

> *Sehubungan telah berlakunya Protokol Perubahan atas Persetujuan Penghindaran Pajak Berganda (P3B) Indonesia - Belanda pada tanggal 2 Mei 1994, untuk memudahkan Saudara dalam menerapkan P3B tersebut bersama ini disampaikan susunan dalam satu naskah dari P3B Indonesia - Belanda sebagaimana telah diubah dengan Protokol Tahun 1991 dan 1993.*

[230] Data berasal dari situs Kementerian Luar Negeri Republik Indonesia, <http://www.kemlu.go.id/Daftar%20Perjanjian%20Internasional/belanda.htm>, yang diunduh pada tanggal 13 Desember 2011.

Susunan dalam satu naskah dari P3B Indonesia - Belanda tersebut dibuat dalam bahasa Inggris sebagaimana dalam Lampiran I dan bahasa Indonesia sebagaimana dalam Lampiran II.

Baru kemudian pada tahun 2002 dibuat kembali "*Agreement between Government of Republic of Indonesia and Government of Kingdom of Netherlands for Double Income Tax Avoidance and Prevention of Fiscal Evasion Related with Income Tax"* (Persetujuan Antara Pemerintah Republik Indonesia dan Pemerintah Kerajaan Belanda Untuk Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak yang Berkenaan dengan Pajak Atas Penghasilan) yang ditandatangani di Jakarta pada tanggal 29 Januari 2009, yang kemudian diratifikasi melalui Keputusan Presiden No.92 Tahun 2003 tanggal 14 November 2003 Lembaran Negara No.130. Perjanjian ini berlaku efektif 1 Januari 2004. Perjanjian ini yang dipakai untuk penghindaran pajak berganda antara Indonesia dengan Belanda hingga saat ini.

Namun demikian, renegosiasi mengenai isi pasal masih dijalankan oleh pemerintah Indonesia. Hingga saat ini telah dilakukan renegosiasi kembali dengan Belanda mengenai isi perjanjian penghindaran pajak yang baru yang sudah memasuki putaran ke-5 dengan putaran terakhir pada bulan September 2009. [231] Proses renegosiasi perjanjian pajak dengan Belanda sudah dimulai. Ada beberapa poin dari perjanjian penghindaran pajak berganda dengan Belanda yang sudah dibahas ulang, antara lain soal tarif pajak terhadap bunga pinjaman. Jadi jika ada utang, bunga pinjaman akan dikenakan pajak penghasilan (PPh). Pada perjanjian penghindaran pajak 2002 dengan Belanda tarifnya 0%, sekarang dinaikkan besarannya sekitar 5%. Namun dalam renegosiasi ini belum final mengenai tarifnya. Hal lain yang juga sedang diperbaiki mengenai keuntungan kepemilikan atau *beneficial ownership* dan *treaty shopping*. Dengan renegosiasi ini juga nantinya orang yang tidak tinggal di Belanda, tidak bisa memanfaatkan perjanjian penghindaran pajak berganda Indonesia dengan Belanda.[232]

[231] Hasil wawancara dengan Bapak Haryanto dari bagian Perjanjian Internasional Regional Eropa bagian Perjanjian Perpajakan II Direktorat Jendral Pajak.

[232] Renegosiasi Pajak Berganda Dimulai, <http://www.ortax.org/ortax/?mod=berita&page=show&id=11732&q=&hlm=3>, diunduh pada 20 Desember 2011.

Namun selama renegosiasi ini belum dirampungkan dan diratifikasi maka perjanjian penghindaran pajak berganda yang berlaku tetap perjanjian penghindaran pajak berganda Indonesia dengan Belanda tahun 2002.

4.2.2 *Person Covered*

Subjek pajak yang dapat menerapkan perjanjian penghindaran pajak berganda harus memenuhi persyaratan Pasal 1 yaitu :

> *"This Agreement shall apply to persons who are residents of one or both of the two States."*

Tahap ini untuk memastikan apakah subjek pajak merupakan "*person"* sesuai dengan definisi yang diatur pada Pasal 3 ayat (1) huruf (d) sebagai berikut :

> *"the term "person" comprises an individual, a company and any other body of persons;"*

Berdasarkan hal tersebut yang disebut dengan "*person"* dapat berupa :

1. Orang individu (*Individual*);
2. Badan (*Company*)[233]; dan
3. Kumpulan dan orang-orang dan/atau badan-badan (any other body of persons).

Khusus Persetujuan Penghindaran Pajak Berganda Indonesia dengan Belanda tahun 2002 mengenai "*company"*, terdapat protokol yang menjelaskan lebih lanjut ketentuan-ketentuan yang terdapat dalam Pasal 3 ayat (1) huruf (e). Protokol itu berisi :

> *"In case an entity that is treated as a body corporate for tax purposes is liable as such to tax in a State, but the income of that entity is taxed in the other State respectively as income of the participants in that entity, the competent authorities shall take such measures that on the one hand no*

[233] Pengertian *Company* djelaskan dalam pasal 3 ayat (1) huruf (e), yaitu: *"the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes".* Sehingga pengertian *company* sendiri diartikan sebagai badan hukum (*body corporate*) atau suatu entitas dalam bentuk apapun (*any entity*) yang diperlukan sebagai badan hukum untuk tujuan perpajakan. Lihat Darussalam, John Hutagaol, dan Danny Septriadi, "*Konsep dan Aplikasi Perpajakan Internasional*", hal 40.

double taxation remains, but on the other hand it is prevented that merely as a result of application of the Agreement income is (partly) not subject to tax. "[234]

Setelah diketahui subjek pajak yang dimaksud dengan "*person*", maka tahap selanjutnya adalah mempertanyakan apakah subjek pajak tersebut termasuk "*resident*" dari salah satu negara yang mengadakan perjanjian (Indonesia dan Belanda). Hal tersebut diatur dalam Pasal 4 ayat (1), yaitu :

"For the purposes of this Agreement, the term "resident of one of the two States" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature."

Definisi "*resident"* merupakan konsep yang sangat penting dalam penerapan suatu perjanjian penghindaran pajak berganda.[235] Definisi "*resident"* dapat dipersamakan dengan "subjek pajak dalam negeri". "*Resident"* yang berhak untuk mengaplikasikan suatu perjanjian penghindaran pajak berganda adalah "*resident"* yang terutang pajak (is *liable to tax*)[236] atas penghasilan yang diterima atau diperoleh dari dalam dan luar negeri (*world wide income*).[237]

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[234] Versi bahasa Indonesia dari protokol ini adalah :

"Dalam hal suatu badan yang diperlakukan sebagai badan hukum untuk kepentingan perpajakan mempunyai kewajiban perpajakan di salah satu Negara, namun penghasilan dari badan tersebut juga dikenakan pajak di Negara lainnya sebagai penghasilan dari partisipan di badan tersebut, maka pejabat yang berwenang akan menetapkan aturan sehingga pada satu pihak tidak dikenakan pajak berganda, tetapi pada pihak lain hal tersebut dicegah dengan cara, sebagai akibat dari penerapan persetujuan ini, penghasilan tadi (atau sebagiannya) tidak akan dikenakan pajak."

[235] Konsep "*resident"* merupakan konsep yang penting. Menurut OECD *Commentary*, konsep "*resident"* berguna untuk : (1) menentukan subjek pajak yang dicakup dalam perjanjian penghindaran pajak berganda, (2) untuk menghilangkan pemajakan berganda yang diakibatkan adanya subjek pajak dalam negeri rangkap (*dual resident*), dan (3) untuk menghilangkan pemaajakan berganda yang diakbatkan oleh pemajakan yang dilakukan oleh negara domisili dan negara sumber. Lihat Darussalam, John Hutagaol, dan Danny Septriadi, "*Konsep dan Aplikasi Perpajakan Internasional*", hal 42.

[236] Dalam paragraph 8 dari OECD *Commentary* tahun 2008 atas pasal 4 ayat (1) (mengenai *fiscal domicile*) menerangkan bahwa yang dimaksud *"liable to tax"* adalah subjek pajak yang mempunyai kewajiban pajak atas penghasilan yang diterima atau diperoleh dari dalam dan luar negeri (*world wide income tax liability*). Lihat Darussalam, John Hutagaol, dan Danny Septriadi, "*Konsep dan Aplikasi Perpajakan Internasional*", hal 42.

[237] Darussalam, John Hutagaol, dan Danny Septriadi, *Konsep dan Aplikasi Perpajakan Internasional*, hal 42.

Pasal 4 ayat (1) perjanjian penghindaran pajak berganda tidak memberikan definisi tentang "*resident"*. Pengaturan tentang "*resident"* diberikan kepada undang-undang domestik dari kedua negara yang mengadakan perjanjian, yaitu Indonesia dan Belanda. Jadi, yang menentukan subjek pajak merupakan "*resident"* dari negara yang mengadakan perjanjian adalah berdasarkan ketentuan domestik masing-masing negara.[238]

Untuk Indonesia sendiri mengenai wajib pajak dalam negeri diatur dalam Undang-Undang Pajak Penghasilan 2008.[239] Berdasarkan ketentuan Undang-Undang Pajak Penghasilan 2008 definisi "subjek pajak dalam negeri" adalah yang meliputi :[240]

1. orang pribadi yang bertempat tinggal di Indonesia;
2. orang pribadi yang berada di Indonesia lebih dari 183 (seratus delapan puluh tiga) hari dalam jangka waktu 12 (dua belas) bulan;
3. orang pribadi yang dalam suatu tahun pajak berada di Indonesia dan mempunyai niat untuk bertempat tinggal di Indonesia;
4. badan yang didirikan atau bertempat kedudukan di Indonesia;
5. warisan yang belum terbagi sebagai satu kesatuan menggantikan yang berhak.

Disamping itu Undang-Undang Pajak Penghasilan secara tegas membedakan perlakuan pajak terhadap wajib pajak dalam negeri dan wajib pajak luar negeri. Penghasilan yang bersumber dari Indonesia yang diterima oleh wajib pajak luar negeri dikenai pemotongan Pajak Penghasilan yang sifatnya final.[241]

Melihat dari bentuk isi Pasal 4 ayat (1) perjanjian antara Indonesia dengan Belanda tahun 2002, menggunakan bentuk UN Model sebagai dasar pembuatan pasal ini.[242]

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[238] *Ibid*, hal 43.

[239] Indonesia,Undang-Undang Tentang Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan, UU no. 36 tahun 2008, LN no 133 tahun 2008, TLN no. 4893, pasal 2 ayat (3).

[240] Rachmanto Surahmat, *Persetujuan Penghindaran Pajak Berganda (P3B) Suatu Kajian terhadap kebijakan Indonesia*, hal 15.

[241] *Ibid*, hal 42.

[242] *Ibid*, hal 44.

Secara umum, dapat disimpulkan bahwa subjek pajak yang dapat menerapkan suatu perjanjian penghindaran pajak berganda Indonesia dengan Belanda adalah subjek pajak yang tercakup dalam Pasal 1. Kemudian Pasal 1 tersebut harus secara bersamaan dipakai dengan Pasal 3 ayat (1) huruf (d) untuk "person" (dan huruf (e) mengenai "*company*") dan Pasal 4 ayat (1) yang mendefinisikan "*resident*".

4.2.3 *Tax Covered*

Pada umumnya perjanjian penghindaran pajak berganda yang dilakukan Indonesia dengan negara-negara lain sekarang ini adalah hanya kepada pajak penghasilan saja. Namun pada perjanjian-perjanjian yang awal dibuat masih mencakupkan pajak kekayaan (*income on capital*) didalamnya. Pada persetujuan Indonesia dan Belanda mengenai jenis pajak yang dicakup dalam persetujuan ada dalam Pasal 2 ayat (3). Pada persetujuan pajak Indonesia dengan Belanda tahun 1973, pajak-pajak yang tercakup untuk pajak di Indonesia adalah :

1. pajak pendapatan (*income tax*);
2. pajak perseroan (*company tax*);
3. pajak kekayaan (*capital tax*);
4. pajak atas bunga, dividen dan royalti (*tax on interest, dividend and royalty*).

Sesuai dengan judul persetujuan pajak Indonesia dengan Belanda tahun 1973 yang masih menggunakan kata "… *Taxes On Income And On Capital"* (Pajak atas Penghasilan dan Kekayaan). Sehingga pajak kekayaan masih dimasukkan dalam persetujuan pajak Indonesia dengan Belanda tahun 1973 sebagai pajak yang ditarik dari subjek pajak.

Pasal 2 ayat (3) mengenai *Tax Covered* dari perjanjian mengacu pada undang-undang domestik yaitu peraturan perundang-undangan yang mengatur tentang perpajakan. Perundang-undangan perpajakan telah mengalami reformasi yang mendasar pada tahun 1983. Perjanjian penghindaran pajak berganda yang sekarang berlaku sekarang ini telah melewati dua era undang-undang yang berbeda. Sebelum berlakunya undang-undang pajak penghasilan 1983, yang

berlaku adalah Ordonansi Pajak Perseroan 1925, Ordonansi Pajak Pendapatan 1944 dan Pajak atas Bunga, Dividend an Royalti 1970. Oleh karena itu perjanjian penghindaran pajak berganda Indonesia sebelum tahun 1983 merujuk pada undang-undang pada masa itu.[243]

Kemudian dilakukan perubahan atas persetujuan 1973 melalui protokol 1991 dan 1993 dimana perubahan dari protokol tersebut mengenai pajak yang tercakup dalam persetujuan ini untuk Indonesia menyangkut pajak penghasilan yang dikenakan berdasarkan undang-undang pajak penghasilan 1984 dan sepanjang yang diatur dalam Pasal 33 ayat (2) dan (3) undang-undang tersebut, pajak perseroan yang dikenakan berdasarkan ordonansi pajak perseroan 1925 dan pajak atas bunga, dividen dan royalti, yang dikenakan berdasarkan undang-undang pajak atas bunga, dividen dan royalti 1970 sepanjang Pasal 33, ayat (2) a dan (3) tersebut di atas, berlaku pada tanggal penetapannya. Hal mengenai pajak kekayaan (*tax on capital*) telah dihapus dalam isi pasal perjanjian.

Kemudian pada persetujuan Indonesia Belanda tahun 2002, mengenai pajak yang tercakup menyangkut pajak yang dikenakan berdasarkan undang-undang pajak penghasilan. Tentunya pajak penghasilan ini disesuaikan dengan amandemen yang terbaru.[244]

Menurut Pasal 26 Undang-Undang Pajak penghasilan 2008, ketentuan ini mengatur tentang pemotongan atas penghasilan yang bersumber di Indonesia yang diterima atau diperoleh Wajib Pajak luar negeri selain bentuk usaha tetap. Ketentuan ini mengatur tentang pemotongan pajak atas penghasilan yang diterima atau diperoleh Wajib Pajak luar negeri yang bersumber di Indonesia, selain dari penghasilan sebagaimana dimaksud pada ayat (1)[245], yaitu penghasilan dari

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[243] *Ibid*, hal 19.

[244] Perubahan Terbaru Pajak Penghasilan Adalah Undang-Undang Republik Indonesia Nomor 36 Tahun 2008 Tentang Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan, Lembaran Negara Republik Indonesia Tahun 2008 No. 133, Tambahan Lembaran Negara Republik Indonesia No. 4893.

[245] Penghasilan yang disebutkan dalam Undang-Undang Pajak Penghasilan pasal 26 ayat (1) adalah antara lain : (1) dividen, (2) bunga termasuk premium, diskonto, dan imbalan sehubungan dengan jaminan pengembalian utang, (3) royalti, sewa, dan penghasilan lain sehubungan dengan penggunaan harta, (4) imbalan sehubungan dengan jasa, pekerjaan, dan kegiatan, (5) hadiah dan penghargaan,(6) pensiun dan pembayaran berkala lainnya (7) premi swap dan transaksi lindung nilai lainnya, dan/atau (8) keuntungan karena pembebasan utang.

penjualan atau pengalihan harta, dan premi asuransi, termasuk premi reasuransi. Atas penghasilan tersebut dipotong pajak sebesar 20% (dua puluh persen) dari perkiraan penghasilan neto dan bersifat final. Menteri Keuangan diberikan wewenang untuk menetapkan besarnya perkiraan penghasilan neto dimaksud, serta hal-hal lain dalam rangka pelaksanaan pemotongan pajak tersebut.[246]

Namun dengan adanya Persetujuan Penghindaran Pajak Berganda Indonesia dengan Belanda 2002, maka tarif Pajak Penghasilan Pasal 26 akan berubah sebagai berikut :

1. Bunga (*Interest*) sebesar 10% maksimal dari jumlah bruto (Pasal 11 ayat (2));
2. Royalti sebesar 10% maksimal dari jumlah bruto (Pasal 12 ayat (2));
3. Dividen sebesar 10% maksimal dari jumlah bruto (Pasal 10 ayat (2));
4. *Branch Profit Tax* sebesar 10% maksimal dari jumlah bruto (Pasal 10 ayat (8)).

4.2.4 *Territory or States covered*

Penentuan *"territory"* atau yuridiksi pemajakan sangat penting untuk menentukan subjek pajak merupakan "*resident*" dari negara yang mengadakan perjanjian penghindaran pajak berganda tersebut. *"Territory"* dalam konteks ini tidak hanya meliputi apakah subjek pajak merupakan "*resident*" dari suatu "*state*" atau negeri seperti yang didefinisikan dalam perjanjian penghindarn pajak berganda yang bersangkutan, tetapi termasuk apakah sumber dari penghasilan tersebut berasal dari negara yang memang memenuhi kualifikasi untuk menjadi negara sumber penghasilan (*qualifying source).*[247]

[246] Indonesia, *Undang-Undang Republik Indonesia Nomor 36 Tahun 2008 Tentang Perubahan Keempat Atas Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan*, Lembaran Negara Republik Indonesia Tahun 2008 No. 133, Tambahan Lembaran Negara Republik Indonesia No. 4893, penjelasan pasal 26 ayat (2).

[247] Darussalam, John Hutagaol, dan Danny Septriadi, *Konsep dan Aplikasi Perpajakan Internasional*, hal 51.

Mengenai cakupan negara yang termasuk dalam Persetujuan Penghindaran Pajak Berganda Indonesia Belanda 2002 terlihat dalam Pasal 3 mengenai definisi umum. Pada Pasal 3 ayat (1) dijelaskan bahwa :

> *"the terms "one of the two States" and "the other State" mean Indonesia or the Netherlands, as the context requires; the term "the two States" means Indonesia and the Netherlands;"*

Hal ini untuk menegaskan bahwa penggunaan kata negara dalam persetujuan ini hanya Indonesia dan/atau Belanda saja.

Kemudian mengenai wilayah Belanda sesuai dengan Pasal 3 ayat (1) huruf (b) menyatakan :

> *"the term "the Netherlands" comprises the part of the Kingdom of the Netherlands that is situated in Europe and the part of the seabed and its sub-soil under the North Sea, over which the Kingdom of the Netherlands has sovereign rights in accordance with international law;"*

Definisi "Belanda" berarti bagian dari Kerajaan Belanda yang terletak di Eropa dan sebagian dari dasar laut serta isi bumi di bawahnya yang terletak di bawah Laut Utara, di mana Kerajaan Belanda memiliki hak kedaulatan sesuai dengan hukum internasional.

Untuk Indonesia sendiri wilayah yang dicakup berdasarkan Pasal 3 ayat (1) huruf (c) menyatakan :

> *"the term "Indonesia" comprises the territory of the Republic of Indonesia as defined in its laws, and parts of the continental shelf and adjacent seas over which the Republic of Indonesia has sovereignty, sovereign rights or jurisdiction in accordance with international law;"*

Definisi "Indonesia" berarti wilayah Republik Indonesia sebagaimana ditegaskan dalam perundang-undangannya, dan daratan dan lautan di sekitarnya di mana Republik Indonesia memiliki kedaulatan, hak-hak kedaulatan, atau yurisdiksi (kewenangan untuk mengatur) sesuai dengan ketentuan-ketentuan hukum internasional. Hal ini sedikit berbeda dengan definisi "Indonesia" pada protokol 1991 yang menyatakan :

> *"the term "Indonesia" means the land areas, the archipelagic waters and the teritorial waters of the Republic of Indonesia as defined in its laws and in accordance with international law as well as the adjacent areas to the extent that the Republic of Indonesia has sovereign rights and jurisdiction in accordance with the provisions of the United Nations Convention on the Law of the Sea, 1982;"*

Hal ini karena Indonesia meratifikasi *United Nations Convention on the Law of the Sea* (UNCLOS) dengan menandatangani tanggal 3 Februari 1986 dan diratifikasi oleh Pemerintah Indonesia dalam Undang-undang No 17 Tahun 1985 tentang Pengesahan UNCLOS 1982 lembaran negara no 76 tahun 1985. Tentunya pengesahan UNCLOS ini terjadi setelah persetujuan Indonesia Belanda 1971. Sehingga pada protokol 1991 dibuat perubahan mengenai definisi "Indonesia" yang menunjukkan kesatuan Indonesia mengenai wilayah perairan Nusantara Indonesia yang telah diakui dunia melalui UNCLOS.

4.3 Implementasi dan Permasalahan

Tujuan utama suatu perjanjian penghindaran pajak berganda adalah untuk meniadakan atau mengurangi pemajakan berganda (*avoid double taxation)*. Selain hal tersebut, perjanjian pajak berganda juga bertujuan untuk mencegah penghindaran pajak dan penyelundupan pajak (*avoid double non-taxation*).[248] Sehingga pada dasarnya hal tersebut sama dengan perjanjian penghindaran pajak berganda Indonesia dengan Belanda.

Perjanjian penghindaran pajak berganda pada generasi awal, pembuatannya merupakan salah satu cara bentuk mencari pengakuan atas kedaulatan Indonesia.[249] Hal ini termasuk perjanjian penghindaran pajak berganda Indonesia dengan Belanda tahun 1971 yang merupakan perjanjian penghindaran pajak berganda pertama yang dibuat pemerintah Indonesia. Berjalan seiring dengan waktu dan perkembangan peraturan perpajakan kedua negara, maka isi dari perjanjian itu pun mengalami perubahan. Baik saat protokol 1991 dan 1993

[248] Lihat *notes* 85.

[249] Hasil wawancara dengan Bapak Haryanto dari bagian Perjanjian Internasional Regional Eropa bagian Perjanjian Perpajakan II Direktorat Jendral Pajak.

serta perjanjian penghindaran pajak berganda Indonesia dengan Belanda 2002. Semua bertujuan untuk mencegah penghindaran pajak dan penyelundupan pajak.

Namun, implementasi dari perjanjian penghindaran pajak berganda Indonesia dengan Belanda tidak selamanya berjalan mulus tanpa masalah. Implementasi dari perjanjian penghindaran pajak berganda pada dasarnya memberikan keringanan pajak untuk penghasilan yang tertera didalamnya misalnya bunga untuk wajib pajak luar negeri atas penghasilan di Indonesia, maka dikenakan pajak hanya 10% sesuai Pasal 11 ayat (2) perjanjian penghindaran pajak berganda Indonesia dengan Belanda. Hal ini mengubah ketentuan Pasal 26 undang-undang pajak penghasilan yang memberikan pajak 10%.

Namun pada kasus "Pembatalan Perjanjian Utang PT IKKP"[250], pada tahun 1994, PT IKKP membutuhkan dana untuk ekspansi perusahaan yang akan dipenuhi dengan menerbitkan notes (bonds) di pasaran internasional. Untuk itu didirikan IKBV berkedudukan di Belanda yang menerbitkan *notes* dan hasil penjualannya dipinjamkan ke PT IKKP. Perjanjian kredit dibuat antara PT IKKP dan IKBV. Sebagai penjamin utang dan pengguna dana, secara tidak langsung PT IKKP juga akan membayar pokok pinjaman dan bunga kepada kreditor internasional (melalui IKBV). Karena berdomisili di Belanda, dalam menerima bunga dari PT IKKP, IKBV menikmati tarif pajak rendah (10%) berdasar Pasal 10 ayat (2) Persetujuan Penghindaran Pajak Berganda Indonesia-Belanda sebagaimana telah diubah dengan Protokol Perubahan 1991 dan 1993 (berlaku mulai 2 Mei 1994). Pada 2003, PT IKKP mengajukan gugatan perdata ke Pengadilan Negeri Bengkalis, yang putusannya dikuatkan oleh Pengadilan Tinggi Riau dan Mahkamah Agung yang menyatakan batal demi hukum perjanjian utang (*bonds*) dan penjaminan, sehingga PT IKKP tampaknya bebas dari kewajiban membayar pokok utang (*bonds*) dan bunga.

Untuk tujuan penerapan Undang-Undang Pajak Penghasilan dan Persetujuan Penghindaran Pajak Berganda Indonesia-Belanda PT. IKPP adalah wajib pajak dalam negeri indonesia, sedangkan IKBV adalah wajib pajak luar

[250] Gunardi, *Implikasi Pajak atas Pembatalan Perjanjian Utang PT IKKP oleh MA,* <http://www.pbtaxand.com/news/2007/04/implikasi-pajak-atas-pembatalan-perjanjian-utang-pt-ikkp-oleh-ma>. Diunduh pada 25 desember 2011.

negeri indonesia (atau wajib pajak dalam negeri Belanda). Sebagai wajib pajak dalam negeri, sesuai dengan Pasal 4 ayat (1) Undang-Undang Pajak Penghasilan, PT. IKPP berkewajiban membayar pajak atas penghasilan global. Untuk IKBV berkewajiban membayar pajak atas penghasilan yang diperoleh dari Indonesia (Pasal 2 ayat (4) Undang-Undang Pajak Penghasilan). Putusan pembatalan (demi hukum) perjanjian utang dan penjaminan menyebabkan PT IKKP tidak membayar pokok utang dan bunga. Jika utang batal tentunya tidak ada bunga. Bunga yang telah dibayar tahun-tahun lalu dapat dikarakterisasi sebagai bukan biaya untuk memperoleh penghasilan kena pajak. Dan kalau selama ini sudah dipotong 10% PPh Pasal 26, karena IKBV ternyata bukan *beneficial owner* maka PT IKKP harus memotong pajak 20 % (bukan 10 %). Karena tidak ada utang, bunga ini harus direkarakterisasi sebagai penghasilan lain-lain (other income). Namun dalam Persetujuan Penghindaran Pajak Berganda Indonesia-Belanda saat itu (protokol 1991 dan protokol 1993) tidak terdapat ketentuan penghasilan lain-lain.[251]

Apabila sudah ada mengenai ketentuan penghasilan lain-lain maka Indonesia bisa menarik pajak dan memperoleh pemasukan. Hal-hal seperti ini membutuhkan renegosiasi perjanjian penghindaran pajak berganda yang baru. Hingga sekarang pun renegosiasi den pihak Belanda tetap dilakukan untuk menyelesaikan kekurangan dalam perjanjian perpajakan. Misalnya hal-hal yang sudah dibahas ulang, antara lain soal tarif pajak terhadap bunga pinjaman. Jadi jika ada utang, bunga pinjaman akan dikenakan pajak penghasilan. Pada perjanjian penghindaran pajak 2002 dengan Belanda tarifnya 0%, sekarang dinaikkan besarannya sekitar 5%.[252]

Dari kasus diatas juga kita bisa melihat ada celah hukum bagi wajib pajak untuk menghindarkan pembayaran pajak dari protokol 1991 dan protokol 1991 yang membuat pemasukan negara dari pajak bisa tidak didapatkan. Serta permasalahan tarif pada perjanjian penghindaran pajak berganda Indonesia dengan Belanda 2002 yang bisa mengurangi pendapatan dari pajak Indonesia. oleh karenanya perjanjian penghindaran pajak berganda Indonesia dengan

[251] *Ibid.*

[252] Renegosiasi Pajak Berganda Dimulai, <http://www.ortax.org/ortax/?mod=berita&page=show&id=11732&q=&hlm=3>, diunduh pada 20 Desember 2011.

Belanda harus diamandemen sesuai dengan kebutuhan perpajakan dalam negeri. Jangan sampai merugikan negara karena hilangnya salah satu sumber pendapatan negara dari pajak.

Selain itu aparat pajak selain memperkuat lembaganya dengan *tax accountant*[253] serta tekhnologi informasi perpajakan juga harus diperkuat dengan para *tax lawyer* yang paham dengan berbagai rekayasa *tax planning*[254] dan penafsiran kontrak.[255] Sehingga bentuk-bentuk *tax planning* yang merugikan negara bisa dikurangi dan dihindarkan.

[253] Akuntan pajak. Suatu pekerjaan yang merencanakan kegiatan ekonomi dan mengatur *tax planning* suatu perusahaan atau badan hukum dengan tujuan mengoptimalkan.

[254] *Tax planning* adalah upaya Wajib Pajak untuk meminimalkan pajak yang terutang melalui skema yang memang telah jelas diatur dalam peraturan perundang-undangan perpajakan dan sifatnya tidak menimbulkan dispute antara Wajib Pajak dan otoritas pajak. Darrusalam dan Danny Septriadi, Tax Avoidance, Tax Planning, Tax Evasion, dan Anti Avoidance Rule, <http://www.ortax.org/ortax/?mod=issue&page= show&id=36&q=&hlm=2>, di unduh pada tanggal 24 Desember 2011.

[255] Gunardi, *Implikasi Pajak atas Pembatalan Perjanjian Utang PT IKKP oleh MA,* <http://www.pbtaxand.com/news/2007/04/implikasi-pajak-atas-pembatalan-perjanjian-utang-pt-ikkp-oleh-ma>. Diunduh pada 25 desember 2011.

BAB V

PENUTUP

5.1 Kesimpulan

Setelah pembahasan yang termuat dalam bab sebelumnya, maka kesimpulan dari tulisan ini adalah :

1. Permasalahan pajak berganda dalam hukum internasional merupakan permasalahan dari bentrokan yurisdiksi pemungutan pajak masing-masing negara. Setiap negara mempunyai cara tersendiri untuk menghindarkan permasalahan pajak berganda baik secara unliteral, bilateral maupun multilateral. Kedaulatan negara untuk menarik pajak atas warga negaranya di negara lain serta kegiatan warga negara asing di wilayah teritorial negara yang berhubungan dengan transaksi lintas batas negara menyebabkan terjadinya pajak berganda. Masing-masing negara dapat saja mengenakan pajak atas penghasilan yang berasal dari transaksi lintas batas negara tersebut. Sehingga tidak jarang dua negara mengenakan pajak yang sama terhadap subjek dan objek pajak yang sama. Hal ini karena negara sumber sebagai tempat sumber penghasilan itu berasal, memiliki hak menarik pajak untuk segala kegiatan yang dilakukan diwilayah teritorialnya. Kemudian negara domisili, sebagai negara tempat subjek pajak berdomisili, memiliki hak menarik pajak dikarenakan subjek pajak adalah warga negara dari negaranya. Hal inilah yang menyebabkan timbulnya pajak berganda oleh kedua negara terhadap subjek dan objek pajak yang sama. Hal ini tentu akan mengurangi minat investasi.

   Sehingga diperlukan suatu metode untuk mengurangi bahkan menghilangkan pajak berganda. Penyelesaian masalah pajak berganda dapat dilakukan sebagi berikut : (1) secara unilateral biasanya termuat didalam peraturan perpajakan domestik mereka, dalam pasalnya terdapat mengenai metode penghindaran pajak berganda, (2) kemudian melalui perjanjian penghindaran pajak berganda secara bilateral antara dua negara yang telah banyak dilakukan di dunia, (3) dalam hal beberapa kawasan

yang memiliki kesamaan sistem perpajakan dan wilayah yang berdekatan, perjanjian perpajakan dilakukan secara multilateral/regional yang dibuat dalam suatu traktat (*convention*).

2. Penanganan permasalahan pajak berganda dalam hukum internasional dilakukan melalui perjanjian antara dua negara baik secara bilateral maupun bersama-sama dengan banyak negara yang mempunyai kesamaan dalam sistem perpajakan dan ekonomi secara multilateral. Permasalahan perjanjian penghindaran pajak berganda sudah ada sejak bentrokan pemungutan pajak dilakukan oleh penguasa (otoritas) penarik pajak yang dikarenakan adanya pajak berganda. Sehingga diperlukan suatu perjanjian untuk mempermudah penarikan pajak untuk memperlancar arus ekonomi terutama antar negara saat itu. Kemudian perjanjian penghindaran pajak berganda secara bilateral pertama dikenal akhir abad ke-19, yaitu antara beberapa negara Jerman dengan Kerajaan Austro-Hungaria.

   Untuk mempermudah proses negosiasi perjanjian penghindaran pajak berganda secara bilateral dibuatlah model perjanjian penghindaran pajak berganda. Model pertama dimulai oleh Liga Bangsa-Bangsa (League of Nations) untuk mempermudah proses pembuatan perjanjian penghindaran pajak berganda. Hingga sekarang model ini berkembang hingga sekarang terdapat OECD Model dan UN Model, bahkan Amerika Serikat membuat model perjanjian penghindaran pajak berganda yang dikenal sebagai US Model.

   Selain secara bilateral, negara-negara juga membuat perjanjian penghindaran pajak berganda secara multilateral. Merupakan kesepakatan bersama, pemberian keringanan pajak berganda ini lebih bersifat harmonisasi (atau mendekati unifikasi) ketentuan perpajakan masing-masing negara terkait. Perjanjian penghindaran pajak berganda multilateral akan lancar, apabila keadaan ekonomi dan sosial (termasuk arus modal, barang dan jasa transnasional) negara-negara anggota seimbang. Oleh karenanya perjanjian penghindaran pajak berganda yang dilakukan biasanya bersifat regional karena negara-negara yang dirasa memiliki keadaan ekonomi dan sosial yang tidak jauh berbeda. Hal ini bisa

dicontohkan dalam *Nordic Multilateral Income and Capital Tax Convention (Nordic Convention)* yang terdiri atas Denmark, Finlandia Eslandia, Norwegia, dan Swedia, serta *Caricom Agreement* (1994) yang terdiri atas negara-negara berikut: Antigua dan Babuda, Belize, Dominika, Grenada, Guyana, Jamaika, Monserrat, St. Kitts dan Nevis, St. Lucia, St. Vincent dan Grenadines, seta Trinidad dan Tobago.

3. Pengaturan permasalahan pajak berganda Indonesia dengan Belanda melalui persetjuan penghindaran pajak berganda secara bilateral. Indonesia secara resmi memasuki suatu era dalam mengadakan kontak dengan negara lain untuk mengadakan perjanjian penghindaran pajak berganda, baru pada bulan april 1970, yaitu pada saat dimulainnya perundingan pertama antara delegasi Indonesia dengan delegasi Kerajaan Belanda.

   Perjanjian penghindaran pajak berganda Indonesia dengan Belanda dilakukan secara bilateral. Perjanjian pertama dibuat pada tahun 1973. Hingga saat ini perjanjian penghindaran pajak berganda Indonesia dengan Belanda sudah mengalam renegosiasi hingga yang terbaru persetujuan penghindaran pajak berganda tahun 2002. Sebelumnya sudah diamandemen dengan protokol 1991 dan 1993 yang susunan dalam satu naskah ini dikeluarkan Direktur Jenderal Pajak dengan Surat Edaran Direktur Jenderal Pajak Nomor Se - 06/PJ.1012/1996. Hingga sekarang pun tetap dilakukan proses renogosiasi dengan Belanda mengenai ketentuan dalam persetujuan penghindaran pajak berganda Indonesia dengan Belanda terutama untuk masalah tarif. Hal ini dilakukan karena persetujuan penghindaran pajak berganda Indonesia dengan Belanda 2002 pun masih jauh dari sempurna.

   Pengaturan dalam persetujuan penghindaran pajak berganda Indonesia dengan Belanda tahun 2002 untuk Indonesia hanya mengatur mengenai pajak penghasilan yang telah diamandemen sebanyak 4 kali terakhir tahun 2008. Mengenai pajak kekayaan sudah dinyatakan tidak berlaku lagi sehingga penggunaaan istilah pajak kekayaan sudah tidak diatur dalam persetujuan penghindaran pajak berganda Indonesia dengan Belanda,

bahakan semua persetujuan penghindaran pajak berganda Indonesia, walupun perjanjian penghindaran pajak berganda Indonesia dengan Prancis masih mengaturnya. Hal tersebut karena belum ada amandemen dari persetujuan tersebut.

Persetujuan penghindaran pajak berganda Indonesia dengan Belanda menggunakan metode campuran baik UN Model juga OECD Model yang keduanya diambil dan dipakai sesuai kebutuhan dan kepentingan perpajakan Indonesia. Persetujuan ini juga mengatur hak pemajakan negara terhadap penghasilan-penghasilan tertentu dan besarnya pajak yang diterima pihak asing atas kegiatannya di Indonesia yang dimuat dalam pasal 26 undang-undang pajak penghasilan. Walaupun dalam undang-undang pajak penghasilan wajib pajak luar negeri dikenai pajak sebesar 20% namun bila ada perjanjian penghindaran pajak, seperti persetujuan penghindaran pajak berganda Indonesia dengan Belanda tahun 2002 besar persentase pajak bisa dikurangi. Dalam persetujuan penghindaran pajak berganda Indonesia dengan Belanda 2002 maka tarif Pajak Penghasilan pasal 26 akan berubah sebagai berikut :

1. Bunga (*Interest*) sebesar 10% maksimal dari jumlah bruto (pasal 11 ayat (2));
2. Royalti sebesar 10% maksimal dari jumlah bruto (pasal 12 ayat (2));
3. Dividen sebesar 10% maksimal dari jumlah bruto (pasal 10 ayat (2));
4. *Branch Profit Tax* sebesar 10% maksimal dari jumlah bruto (pasal 10 ayat (8)).

Sehingga persetujuan penghindaran pajak berganda Indonesia dengan Belanda 2002 akan menguntungkan Indonesia karena selain untuk menghindarkan pajak berganda juga untuk memberikian insentif pajak untuk investor. Hal ini diberikan untuk meningkatkan penerimaan negara dari pajak serta meningkatkan investasi dalam negeri. Bagi para investor penurunan pajak yang mereka bayarkan memberikan keuntungan dan minat lebih untuk melakukan investasi. Namun tentunya masih ada beberapa kekurangan dalam persetujuan yang memerlukan renegosiasi

ulang, terutama mengenai tarif. Karena masih ada beberapa pasal yang membuat Indonesia dirugikan dalam hal penerimaan pajak.

5.2 Saran

Perjanjian penghindaran pajak berganda merupakan cara efektif untuk mengurangi dan menghilangkan pajak berganda. Namun karena perjanjian penghindaran pajak berganda merupakan proses negosiasi bilateral antar dua negara maka tidak dipungkiri bisa terjadi berbagai masalah dan kekurangan didalamnya. Sehingga bila hal itu terjadi proses renegosiasi dan perubahan isi pasal dari perjanjian diperlukan dan harus diselesaikan secepat mungkin. Penggunaan protokol untuk mengubah pasal merupakan cara tercepat daripada mengubah keseluruhan perjanjian penghindaran pajak berganda yang sudah ada. Kemudian perubahan undang-undang perpajakan harus diikuti dengan penyesuaian perjanjian penghindaran pajak berganda yang sudah ada. Bila terdapat hal yang berbeda dan menyimpang diusahakan perjanjian penghindaran pajak berganda mengikuti undang-undang perpajakan yang baru.

Kemudian karena perjanjian penghindaran pajak berganda bertujuan untuk menghindarkan terjadinya pajak negara, perjanjian ini juga merupakan salah satu pintu masuk pendapatan negara dari pajak. Sehingga bila diketahui kita memiliki perjanjian penghindaran pajak berganda dengan negara *tax haven*, maka sudah sewajibnya kita menghentikan perjanjian penghindaran pajak berganda yang ada, sebagai contoh persetujuan penghindaran pajak berganda Indonesia dengan Mauritius. Hal ini untuk melindungi hilangnya hak pemajakan karena ketentuan perpajakan di negara *tax haven* yang sangat merugikan.

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"Agreement between Government of Republic of Indonesia and Government of Kingdom of Netherlands for Double Income Tax Avoidance and Prevention of Fiscal Evasion Related with Income Tax (Persetujuan Antara Pemerintah Republik Indonesia dan Pemerintah Kerajaan Belanda Untuk Penghindaran Pajak Berganda dan Penghindaran Pengelakan Pajak yang Berkenaan dengan Pajak Atas Penghasilan)" Tahun 2002. *http://ortax.org/ortax/?mod=treaty&page=show&id=34&q=&hlm=&isi=1*. Diunduh pada 26 November 2011.

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WAWANCARA

Hasilwawancara dengan Bapak Haryanto dari bagian Perjanjian Internasional Regional Eropa bagian Perjanjian Perpajakan II Direktorat Jendral Pajak yang berlangsung di ruangan tamu bagian perjanjian Perpajakan II Lantai 11 Direktorat Jendral pajak pada hari kamis tanggal 8 Desember 2011. Jam 08.00

Hasil wawancara dengan Bapak Tjip Ismail bertempat di Badan Arbitrase Nasional Indonesia (BANI) pada tanggal 15 November 2011. Pukul 13.00.

AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
AND
THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS
FOR
THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

CHAPTER I
SCOPE OF THE AGREEMENT

Article 1
PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the two States.

Article 2
TAXES COVERED

1. This Agreement shall apply to taxes on income imposed on behalf of each of the two States or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.
2. There shall be regarded as taxes on income all taxes imposed on total income, or elements of income, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
3. The existing taxes to which the Agreement shall apply, are, in particular:

   (a) in the case of the Netherlands:

   - de inkomstenbelasting (income tax);
   - de loonbelasting (wages tax);
   - de vennootschapsbelasting (company tax) including the Government share in the net profits of the exploitation of natural resources levied pursuant to the Mining Act of 1810 (Mijnwet 1810) with respect to concessions issued from 1967, or pursuant to the Netherlands Continental Shelf Mining Act of 1965 (Mijnwet Continentaal Plat 1965);
   - de dividendbelasting (dividend tax);

   (hereinafter referred to as "Netherlands tax");

   (b) in the case of Indonesia:

   - the income tax.

   (hereinafter referred to as "Indonesian tax").

4. The Agreement shall also apply to any identical or substantially similar taxes which are subsequently imposed in addition to, or in place of, the existing taxes. The competent authorities of the two States shall notify to each other any substantial changes which have been made in their respective taxation laws.

CHAPTER II
DEFINITIONS
Article 3
GENERAL DEFINITIONS

1. In this Agreement, unless the context otherwise requires:

   (a) the terms "one of the two States" and "the other State" mean Indonesia or the Netherlands, as the context requires; the term "the two States" means Indonesia and the Netherlands;

   (b) the term "the Netherlands" comprises the part of the Kingdom of the Netherlands that is situated in Europe and the part of the seabed and its sub-soil under the North Sea, over which the Kingdom of the Netherlands has sovereign rights in accordance with international law;

   (c) the term "Indonesia" comprises the territory of the Republic of Indonesia as defined in its laws, and parts of the continental shelf and adjacent seas over which the Republic of Indonesia has sovereignty, sovereign rights or jurisdiction in accordance with international law;

   (d) the term "person" comprises an individual, a company and any other body of persons;

   (e) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

   (f) the terms "enterprise of one of the two States" and "enterprise of the other State" mean respectively an enterprise carried on by a resident of one of the two States and an enterprise carried on by a resident of the other State;

   (g) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of one of the two States, except when the ship or aircraft is operated solely between places in the other State;

   (h) the term "nationals" means

      (1) all individuals possessing the nationality of one of the two States;

      (2) all legal persons, partnerships and associations deriving their status as such from the laws in force in one of the two States;

   (i) the term "competent authority" means:

      (1) in the Netherlands, the Minister of Finance or his duly authorized representative;

      (2) in Indonesia, the Minister of Finance or his duly authorized representative.

2. As regards the application of the Agreement at any time by one of the two States, any term not defined therein shall, unless the context otherwise requires, have the meaning which it has at that time under the law of that State for the purpose of the taxes to which the Agreement applies, any

meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Article 4
FISCAL DOMICILE

1. For the purposes of this Agreement, the term "resident of one of the two States" means any person who, under the law of that State, is liable to taxation therein by reason of his domicile, residence, place of management or any other criterion of a similar nature.
2. For the purposes of this Agreement an individual, who is a member of a diplomatic or consular mission of one of the two States in the other State or in a third State and who is a national of the sending State, shall be deemed to be a resident of the sending State if he is submitted therein to the same obligations in respect of taxes on income as are residents of that State.
3. Where by reason of the provisions of paragraph 1 an individual is a resident of both States, then this case shall be determined in accordance with the following rules:

   (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him. If he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closest (centre of vital interests);

   (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;

   (c) if he has an habitual abode in both States or in neither of them, the competent authorities of the two States shall settle the question by mutual agreement.

4. Where by reason of the provisions of paragraph 1 a person other than an individual and other than an enterprise to which the provisions of Article 8 apply, is a resident of both States, then it shall be deemed to be a resident of the State in which its place of effective management is situated. If the competent authorities of the two States consider that a place of effective management is present in both States, they shall settle the question by mutual agreement.

Article 5
PERMANENT ESTABLISHMENT

1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business in which the business of the enterprise is wholly or partly carried on.
2. The term "permanent establishment" shall include especially:

   (a) a place of management;

   (b) a branch;

   (c) an office;

(d) a factory;

(e) a workshop;

(f) a farm of plantation;

(g) a mine, an oil-well, quarry or other place of extraction of natural resources.

3. The term "permanent establishment" likewise encompasses:

(a) a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months;

(b) the furnishing of services, including consultancy services, by an enterprise through an employee or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than three months within any 12-month period.

4. The term "permanent establishment" shall not be deemed to include:

(a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.

5. A person acting in one of the two States on behalf of an enterprise of the other State -- other than an agent of an independent status to whom paragraph 7 applies -- shall be deemed to be a permanent establishment in the first-mentioned State if:

(a) he has, and habitually exercises in the first-mentioned State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(b) he maintains in the first-mentioned State a stock of goods or merchandise belonging to the enterprise from which he regularly fills orders on behalf of the enterprise.

6. An insurance enterprise of one of the two States shall, except with regard to reinsurance, be deemed to have a permanent establishment in the other State if it collects premiums in the territory of that other State or insures risks situated therein through an employee or through a representative who is not an agent of an independent status within the meaning of paragraph 7.
7. An enterprise of one of the two States shall not be deemed to have a permanent establishment in the other State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business. However, when such a broker or agent carries on activities wholly or almost wholly for that enterprise itself or for that enterprise and other enterprises which are controlled by or have a controlling interest in it, he shall not be considered an agent of an independent status within the meaning of this paragraph.
8. The fact that a company which is a resident of one of the two States controls or is controlled by a company which is a resident of the other State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

CHAPTER III
TAXATION OF INCOME
Article 6
INCOME FROM IMMOVABLE PROPERTY

1. Income from immovable property may be taxed in the State in which such property is situated.
2. The term "immovable property" shall be defined in accordance with the law of the State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.
3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.
4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of professional services.

Article 7
BUSINESS PROFITS

1. The profits of an enterprise of one of the two States shall be taxable only in that State unless the enterprise carries on business in the other State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment or are derived within such other State from sales of goods or merchandise of the same kind as those sold, or from other business

transactions of the same kind as those effected, through the permanent establishment.

2. Where an enterprise of one of the two States carries on business in the other State through a permanent establishment situated therein, there shall in each State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.
3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.
4. Insofar as it has been customary in one of the two States to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles laid down in this Article.
5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.
6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.
7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8
SHIPPING AND AIRCRAFT

1. Profits from the operation of ships or aircraft in international traffic carried on by an enterprise of a State shall be taxable only in that State.
2. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency but only to so much of them as is attributable to the participating enterprise in proportion to its share in such joint operation.

Article 9
ASSOCIATED ENTERPRISES

1. Where:

   (a) an enterprise of one of the two States participates directly or indirectly in the management, control or capital of an enterprise of the other State, or

   (b) the same persons participate directly or indirectly in the

management, control or capital of an enterprise of one of the two States and an enterprise of the other State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where one of the two States includes in the profits of an enterprise of that State -- and taxes accordingly -- profits on which an enterprise of the other State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged in that State on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and the competent authorities of the two States shall, if necessary, consult each other.

Article 10
DIVIDENDS

1. Dividends paid by a company which is a resident of one of the two States to a resident of the other State may be taxed in that other State.
2. However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other State, the tax so charged shall not exceed 10 per cent of the gross amount of the dividends.
3. The competent authorities of the two States shall by mutual agreement settle the mode of application of paragraph 2.
4. The provisions of paragraph 2 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.
5. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, founders' shares or other rights participating in profits, as well as income from debt-claims participating in profits and income from other corporate rights assimilated to income from shares by the taxation law of the State of which the company making the distribution is a resident.
6. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the dividends, being a resident of one of the two States, has in the other State, of which the company paying the dividends is a resident, a permanent establishment with which the holding by virtue of which the dividends are paid is effectively connected. In such a case, the provisions of Article 7 shall apply.
7. Where a company which is a resident of one of the two States derives profits or income from the other State, the other State may not impose any tax on

the dividends paid by the company to persons who are not residents of that other State, nor subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

8. Notwithstanding any other provisions of this Agreement, where a company which is a resident of one of the two States has a permanent establishment in the other State, the profits of the permanent establishment may be subjected to an additional tax in that other State in accordance with its law, but the additional tax so charged shall not exceed 10 per cent of the amount of such profits after deducting therefrom income tax and other taxes on income imposed thereon in that other State.

Article 11
INTEREST

1. Interest arising in one of the two States and paid to a resident of the other State may be taxed in that other State.
2. However, such interest may also be taxed in the State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.
3. Notwithstanding the provisions of paragraph 2, interest arising in one of the two States shall be taxable only in the other State to the extent that such interest is derived by:

   (i) the Government of the other State, including political subdivisions and local authorities thereof; or

   (ii) the Central Bank of the other State; or

   (iii) a financial institution owned or controlled by the Government of the other State, including political subdivisions and local authorities thereof; or

   (iv) any resident of the other State with respect to debt-claims guaranteed or insured by the Government of the other State including political subdivisions and local authorities thereof, the Central Bank of the other State or any financial institution owned or controlled by that Government.

4. Notwithstanding the provision of paragraph 2, interest arising in one of the two States shall be taxable only in the other State if the beneficial owner of the interest is a resident of the other State and if the interest is paid on a loan made for a period of more than 2 years or is paid in connection with the sale on credit of any industrial, commercial or scientific equipment.
5. The competent authorities of the two States shall by mutual agreement settle the mode of application of paragraphs 2, 3 and 4.
6. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and, in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures.

Penalty charges for late payment shall not be regarded as interest for the purpose of this Article. However, the term "interest" does not include income dealt with in Article 10.

7. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the interest, being a resident of one of the two States, has in the other State in which the interest arises a permanent establishment with which the debt-claim from which the interest arises is effectively connected. In such a case, the provisions of Article 7 shall apply.
8. Interest shall be deemed to arise in one of the two States when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the interest, whether he is a resident of one of the two States or not, has in one of the two States a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.
9. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each State, due regard being had to the other provisions of this Agreement.

Article 12
ROYALTIES

1. Royalties arising in one of the two States and paid to a resident of the other State may be taxed in that other State.
2. However, such royalties may also be taxed in the State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.
3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work -- including cinematograph films and films or tapes used for radio or television broadcasting -- any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience. However, the term does not include payments for the furnishing of technical services.
4. The competent authorities of the two States shall by mutual agreement settle the mode of application of paragraph 2.
5. The provisions of paragraphs 1 and 2 shall not apply if the recipient of the royalties, being a resident of one of the two States, has in the other State in which the royalties arise a permanent establishment with which the right or

property giving rise to the royalties is effectively connected. In such case, the provisions of Article 7 shall apply.

6. Royalties shall be deemed to arise in one of the two States when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of one of the two States or not, has in one of the two States a permanent establishment in connection with which the contract under which the royalties are paid was concluded, and such royalties are borne by such permanent establishment, then such royalties shall be deemed to arise in the State in which the permanent establishment is situated.
7. Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the royalties paid, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the law of each State, due regard being had to the other provisions of this Agreement.

Article 13
LIMITATION OF ARTICLES 10, 11 AND 12

International organisations, organs and officials thereof and members of a diplomatic or consular mission of a third State, being present in one of the two States, shall not be entitled, in the other State, to the reductions from tax provided for in Articles 10, 11 and 12 in respect of the items of income dealt with in these Articles and arising in that other State, if such items of income are not subject to a tax on income in the first-mentioned State.

Article 14
CAPITAL GAINS

1. Gains from the alienation of immovable property, as defined in paragraph 2 of Article 6, may be taxed in the State in which such property is situated.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of one of the two States has in the other State or of movable property pertaining to a fixed base available to a resident of one of the two States in the other State for the purpose of performing professional services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in the other State.
3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships and aircraft shall be taxable only in the State of which the enterprise is a resident.
4. Gains from the alienation of any property other than those mentioned in paragraphs 1, 2 and 3, shall be taxable only in the State of which the alienator is a resident.
5. Notwithstanding the provisions of paragraph 4, one of the two States may, in accordance with its own laws, including the interpretation of the term alienation, levy tax on gains derived by an individual who is a resident of the other State from the alienation of shares in, jouissance rights or debt-

claims on, a company whose capital is divided into shares and which, under the laws of the first-mentioned State, is a resident of that State, and from the alienation of part of the rights attached to the said shares, jouissance shares or debt-claims, if that individual either alone or with his or her spouse -- or one of their relations by blood or marriage in the direct line -- directly or indirectly holds at least 5 per cent of the issued capital of a particular class of shares in that company. This provision shall apply only if the individual who derives the gains has been a resident of the first-mentioned State in the course of the last ten years preceding the year in which the gains are derived and provided that, at the time he became a resident of the other State, the above-mentioned conditions regarding share ownership in the said company were satisfied.

In cases where, under the domestic laws of the first-mentioned State, an assessment has been issued to the individual in respect of the alienation of the aforesaid shares deemed to have taken place at the time of his emigration from the first-mentioned State, the above shall apply only in so far as part of the assessment is still outstanding.

Article 15
INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of one of the two States in respect of professional services or other activities of an independent character shall be taxable only in that State unless he has a fixed base regularly available to him in the other State for the purpose of performing his activities or he is present in that other State for a period or periods exceeding in the aggregate 91 days in any 12-month period. If he has such a fixed base or remains in that other State for the aforesaid period or periods, the income may be taxed in that other State but only so much of it as is attributable to that fixed base or is derived in that other State during the aforesaid period or periods.
2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, dentists and accountants.

Article 16
DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 17, 19, 20, 21 and 22 salaries, wages and other similar remuneration derived by a resident of one of the two States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.
2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of one of the two States in respect of an employment exercised in the other State shall be taxable only in the first-mentioned State, if:

   (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned, and

   (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of one of the two States in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the State of which the enterprise is a resident.

Article 17
DIRECTORS' FEE

1. Remuneration and other payments derived by a resident of Indonesia in his capacity as a "bestuurder" or a "commissaris" of a company which is a resident of the Netherlands may be taxed in the Netherlands.
2. Remuneration and other payments derived by a resident of the Netherlands in his capacity as a "pengurus" or a "komisaris" of a company which is a resident of Indonesia may be taxed in Indonesia.

Article 18
ARTISTES AND ATHLETES

Notwithstanding the provisions of Articles 7, 15 and 16, income derived by public entertainers, such as theatre, motion picture, radio or television artists, and musicians, and by athletes, from their personal activities as such, or income derived from the furnishing by an enterprise of the services of such public entertainers or athletes, may be taxed in the State in which these activities or services are exercised.

Article 19
PENSIONS, ANNUITIES AND SOCIAL SECURITY PAYMENTS

1. Subject to the provisions of paragraph 1 of Article 20, pensions and other similar remuneration and annuities and lump-sum payments in lieu of the right to an annuity, arising in one of the two States and paid to a resident of the other State, may be taxed in the first-mentioned State.
2. Any pension and other payment paid out under the provisions of a social security system of one of the two States to a resident of the other State may be taxed in the first-mentioned State.
3. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make payments in return for adequate and full consideration in money or money's worth.
4. A pension or other similar remuneration or annuity is deemed to be derived from one of the two States if and insofar as the contributions or payments associated with the pension or similar remuneration or annuity, or the entitlements received from it qualified for tax relief in that State. The transfer of a pension from a pension fund or an insurance company in one of the two States to a pension fund or an insurance company in another State will not restrict in any way the taxing rights of the first-mentioned State under this Article.

Article 20
GOVERNMENTAL FUNCTIONS

1. Remuneration, including pensions, paid by, or out of funds created by, one of the two States or a political subdivision or a local authority thereof to any

individual in respect of services rendered to that State or subdivision or local authority thereof in the discharge of functions of a governmental nature may be taxed in that State.

2. Notwithstanding paragraph 1, the provisions of Article 16, 17 or 19 shall apply to remuneration or pensions in respect of services rendered in connection with any trade or business carried on by one of the two States or a political subdivision or a local authority thereof.

3. Paragraph 1 shall not apply in so far as services are rendered to a State in the other State by an individual who is a resident and a national of that other State.

Article 21
PROFESSORS AND TEACHERS

An individual who sojourns in one of the two States for a period not exceeding two years, for the purpose of teaching at a university, college, school or other educational institution or at a non-commercial and non-industrial research institute in that State and who immediately prior to such sojourn is a resident of the other State, shall not be taxed in the first-mentioned State in respect of any payments which he receives for such activity.

Article 22
STUDENTS

1. An individual who immediately before visiting one of the two States is a resident of the other State and is temporarily present in the first-mentioned State for the primary purpose of:

   (a) studying at a recognised university, college or school in that first-mentioned State; or

   (b) securing training as a business apprentice,

   shall be exempt from tax in the first-mentioned State in respect of:

   (i) all remittances from abroad for the purpose of his maintenance, education or training; and

   (ii) any remuneration for personal services performed in the first-mentioned State in an amount that does not exceed an amount to be determined by the competent authorities by mutual agreement, for any taxable year.

   The benefits under this paragraph shall only extend for such period of time as may be reasonable or customarily required to effectuate the purpose of the visit.

2. An individual who immediately before visiting one of the two States is a resident of the other State and is temporarily present in the first-mentioned State for a period not exceeding three years for the purpose of study, research or training solely as a recipient of a grant, allowance or award from a scientific, educational, religious or charitable organization or under a technical assistance programme entered into by one of the two States, a political subdivision or a local authority thereof shall be exempted from tax in the first-mentioned State on:

(a) the amount of such grant, allowance or award; and

(b) any remuneration for personal services performed in the first-mentioned State provided such services are in connection with his study, research or training or are incidental thereto, to an amount that does not exceed an amount to be determined by the competent authorities by mutual agreement, for any taxable year.

3. An individual who immediately before visiting one of the two States is a resident of the other State and is temporarily present in the first-mentioned State for a period not exceeding twelve months as an employee of, or under contract with the last-mentioned State, a political subdivision or a local authority thereof, or an enterprise of the last-mentioned State, for the purpose of acquiring technical, professional or business experience, shall be exempted from tax in the first-mentioned State on:

(a) all remittances from the last-mentioned State for the purpose of his maintenance, education or training; and

(b) any remuneration for personal services performed in the first-mentioned State, provided such services are in connection with his study or training or are incidental thereto, in an amount that does not exceed an amount to be determined by the competent authorities by mutual agreement.

However, the benefits under this paragraph shall not be granted if the technical, professional or business experience is acquired from a company 50 per cent or more of the voting stock of which is owned by the State, the political subdivision or the local authority thereof or the enterprise, having sent the employee or the person working under contract.

Article 23
OTHER INCOME

1. Items of income of a resident of one of the two States, wherever arising, not dealt with in the foregoing Articles of this Agreement, and other than income in the form of lotteries and prizes, shall be taxable only in that State.
2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of one of the two States, carries on business in the other State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

CHAPTER IV
Article 24
ELIMINATION OF DOUBLE TAXATION

1. Each of the two States, when imposing tax on its residents, may include in the basis upon which such taxes are imposed, the items of income, which

according to the provisions of this Agreement may be taxed in the other State.

2. Where a resident of Indonesia derives items of income which may be taxed in the Netherlands in accordance with the provisions of this Agreement and are included in the basis referred to in paragraph 1, the amount of the Netherlands tax payable in respect of the income shall be allowed as a credit against the Indonesian tax imposed on that resident. The amount of credit, however, shall not exceed that part of the Indonesian tax which is appropriate to such income.

3. Where a resident of the Netherlands derives items of income which according to Article 6, Article 7, paragraph 6 of Article 10, paragraph 7 of Article 11, paragraph 5 of Article 12, paragraphs 1 and 2 of Article 14, Article 15, paragraph 1 of Article 16, Article 19, Article 20, and paragraph 2 of Article 23, of this Agreement may be taxed in Indonesia and are included in the basis referred to in paragraph 1, the Netherlands shall exempt such items of income by allowing a reduction of its tax. This reduction shall be computed in conformity with the provisions of the Netherlands law for the avoidance of double taxation. For that purpose the said items of income shall be deemed to be included in the total amount of the items of income which are exempt from the Netherlands tax under those provisions.

4. Further, the Netherlands shall allow a deduction from the Netherlands tax so computed for the items of income which according to paragraph 2 of Article 10, paragraph 2 of Article 11, paragraph 2 of Article 12, paragraph 5 of Article 14, paragraph 1 of Article 17, and Article 18, of this Agreement may be taxed in Indonesia to the extent that these items are included in the basis referred to in paragraph 1. The amount of this deduction shall be equal to the tax paid in Indonesia on these items of income, but shall not exceed the amount of the reduction which would be allowed if the items of income so included were the sole items of income which are exempt from the Netherlands tax under the provisions of the Netherlands law for the avoidance of double taxation.

CHAPTER V
SPECIAL PROVISIONS
Article 25
OFFSHORE ACTIVITIES

1. The provisions of this Article shall apply notwithstanding any other provisions of this Agreement. However, this Article shall not apply where offshore activities of a person constitute for that person a permanent establishment under the provisions of Article 5 or a fixed base under the provisions of Article 15.

2. In this Article the term "offshore activities" means activities which are carried on offshore in connection with the exploration or exploitation of the seabed and its sub-soil and their natural resources, situated in one of the two States.

3. An enterprise of one of the two States which carries on offshore activities in the other State shall, subject to paragraph 4 of this Article, be deemed to be carrying on, in respect of those activities, business in that other State through a permanent establishment situated therein, unless the offshore

activities in question are carried on in the other State for a period or periods not exceeding in the aggregate 30 days in any period of 12 months.

For the purposes of this paragraph:

(a) where an enterprise of one of the two States carrying on offshore activities in the other State is associated with another enterprise and that other enterprise continues, as part of the same project, the same offshore activities that are or were being carried on by the first-mentioned enterprise, and the afore-mentioned activities carried on by both enterprises -- when added together -- exceed a period of 30 days, then each enterprise shall be deemed to be carrying on its activities for a period exceeding 30 days in a 12-month period;

(b) an enterprise of one of the two States shall be regarded as associated with another enterprise if one holds directly or indirectly at least one third of the capital of the other enterprise or if a person holds directly or indirectly at least one third of the capital of both enterprises.

4. However, for the purposes of paragraph 3 of this Article the term "offshore activities" shall be deemed not to include:

(a) one or any combination of the activities mentioned in paragraph 4 of Article 5;

(b) towing or anchor handling by ships primarily designed for that purpose and any other activities performed by such ships;

(c) the transport of supplies or personnel by ships or aircraft in international traffic.

5. A resident of a State who carries on offshore activities in the other State, which consist of professional services or other activities of an independent character, shall be deemed to be performing those activities from a fixed base in the other State if the offshore activities in question last for a continuous period of 30 days or more.

6. Salaries, wages and other similar remuneration derived by a resident of a State in respect of an employment connected with offshore activities carried on through a permanent establishment in the other State may, to the extent that the employment is exercised offshore in that other State, be taxed in that other State.

7. Where documentary evidence is produced that tax has been paid in one of the States on the items of income which may be taxed in that State according to Article 7 and Article 15 in connection with respectively paragraph 3 and paragraph 5 of this Article, and to paragraph 6 of this Article, the other State shall allow a reduction of its tax which shall be computed in conformity with the rules laid down in paragraph 2 of Article 24 respectively paragraph 3 of Article 24.

Article 26
NON-DISCRIMINATION

1. Nationals of one of the two States shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the two States.
2. The taxation on a permanent establishment which an enterprise of one of the two States has in the other State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging one of the two States to grant to residents of the other State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.
3. Except where the provisions of paragraph 1 of Article 9, paragraph 9 of Article 11, or paragraph 7 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of one of the two States to a resident of the other State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.
4. Enterprises of one of the two States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.
5. Contributions paid by, or on behalf of, an individual who is a resident of one of the two States to a pension plan that is recognized for tax purposes in the other State will be treated in the same way for tax purposes in the first-mentioned State as a contribution paid to a pension plan that is recognized for tax purposes in that first-mentioned State, provided that:

   (a) such individual was contributing to such pension plan before he became a resident of the first-mentioned State; and

   (b) the competent authority of the first-mentioned State agrees that the pension plan corresponds to a pension plan recognized for tax purposes by that State.

6. In this Article the term "taxation" means taxes which are the subject of this Agreement.

Article 27
MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the two States result or will result for him in taxation not in accordance with the provisions of this Agreement, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the State of which he is a resident or, if his case comes under paragraph 1 of Article 26, to that of the State of which he is a national. The case must be

presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case by mutual agreement with the competent authority of the other State, with a view to the avoidance of taxation not in accordance with this Agreement.
3. The competent authorities of the two States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the elimination of double taxation in cases not provided for in this Agreement.
4. The competent authorities of the two States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Article 28
EXCHANGE OF INFORMATION

1. The competent authorities of the two States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic laws of the two States concerning taxes covered by the Agreement in so far as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Article 1. Any information received by one of the two States shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Agreement. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
2. In no case shall the provisions of paragraph 1 be construed so as to impose on one of the two States the obligation:

   (a) to carry out administrative measures at variance with the laws or administrative practice of that or of the other State;

   (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other State;

   (c) to supply information which would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

Article 29
DIPLOMATIC AND CONSULAR OFFICIALS

Nothing in the Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special agreements.

Article 30
TERRITORIAL EXTENSION

1. This Agreement may be extended, either in its entirety or with any necessary modifications, to either or both of the countries Aruba or the Netherlands Antilles, if the country concerned imposes taxes substantially similar in character to those to which this Agreement applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed in notes to be exchanged through diplomatic channels.
2. Unless otherwise agreed the termination of the Agreement shall not also terminate the application of the Agreement to any country to which it has been extended under this Article.

CHAPTER VI
FINAL PROVISIONS
Article 31
ENTRY INTO FORCE

This Agreement shall enter into force on the latter of the dates on which the respective Governments notify each other in writing through diplomatic channels, that the formalities constitutionally required in their respective States for the entry into force of this Agreement have been complied with. This Agreement shall have effect:

(a) in respect of tax withheld at the source, to income derived on or after 1st of January in the year next following that in which the Agreement enters into force; and

(b) in respect of other taxes on income, for taxable years beginning on or after 1st of January in the year next following that in which the Agreement enters into force.

Article 32
TERMINATION

This Agreement shall remain in force until terminated by a State. Either State may terminate the Agreement, through diplomatic channels, by giving written notice of termination on or before the thirtieth of June of any calendar year following after the period of five years from the year in which the Agreement enters into force. In such case, the Agreement shall cease to have effect:

(a) in respect of tax withheld at source, to income derived on or after 1st of January in the year next following that in which the notice of termination is given; and

(b) in respect of other taxes on income, for taxable years beginning on or after 1st of January in the year next following that in which the notice of termination is given.

In witness whereof the undersigned, duly authorised thereto, have signed this Agreement.

Done at Jakarta, on 29 January 2002, in two originals, each in the Netherlands, Indonesian and English languages, the three texts being equally authentic. In case there is any divergence of interpretation between the Indonesian and Netherlands texts, the English text shall prevail.

For the Government of the Republic of Indonesia:	For the Government of the Kingdom of the Netherlands:

PROTOCOL

At the moment of signing the Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, this day concluded between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia the undersigned have agreed that the following provisions shall form an integral part of the Agreement.

I. With reference to subparagraph (e) of paragraph 1 of Article 3

In case an entity that is treated as a body corporate for tax purposes is liable as such to tax in a State, but the income of that entity is taxed in the other State respectively as income of the participants in that entity, the competent authorities shall take such measures that on the one hand no double taxation remains, but on the other hand it is prevented that merely as a result of application of the Agreement income is (partly) not subject to tax.

II. With reference to Article 4

An individual living aboard a ship without any real domicile in either of the States shall be deemed to be a resident of the State in which the ship has its home harbour.

III. With reference to paragraph 3 of Article 5

It is understood that representative offices which operate in Indonesia on a permit given by the Indonesian Ministry of Finance or the Indonesian Ministry of Trade, shall not constitute a permanent establishment, unless they carry on business activities other than activities which have a preparatory or auxiliary character.

IV. With reference to Article 7

In respect of paragraphs 1 and 2 of Article 7, where an enterprise of one of the two States sells goods or merchandise or carries on business in the other State through a permanent establishment situated therein, the profits of that permanent establishment shall not be determined on the basis of the total amount received by the enterprise, but shall be determined only on the basis of the remuneration which is attributable to the actual activity of the permanent establishment for such sales or business. Especially, in the case of contracts for the survey, supply, installation or construction of industrial, commercial or scientific equipment or premises, or of public works, when the enterprise has a permanent establishment, the profits of such permanent establishment shall not be determined on the basis of the total amount of the contract, but shall be determined only on the basis of that part of the contract which is effectively carried out by the permanent establishment in the State where the permanent establishment is situated. The profits related to that part of the contract which is carried out by the head office of the enterprise shall be taxable only in the State of which the enterprise is a resident.

V. With reference to Article 7

In the application of paragraph 3 of Article 7, no deduction shall be allowed in respect of amounts charged -- otherwise than with respect to expenses actually incurred -- by the head office of the enterprise or any of its other offices to the permanent establishment, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of

commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys made available to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of a permanent establishment, for such amounts charged -- otherwise than with respect to expenses actually incurred -- by the permanent establishment to the head office of the enterprise or any of its other offices.

VI. With reference to Article 9

It is understood, however, that the fact that associated enterprises have concluded arrangements, such as cost sharing arrangements or general services agreements, for or based on the allocation of executive, general administrative, technical and commercial expenses, research and development expenses and other similar expenses, is not in itself a condition as meant in paragraph 1 of Article 9.

VII. With reference to paragraph 3 subparagraph (iii) of Article 11

A financial institution as mentioned in paragraph 3 subparagraph (iii) of Article 11, includes especially: the Netherlands Development Finance Company (Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.), and the Netherlands Investment Bank for Developing Countries (Nederlandse Investeringsbank voor Ontwikkelingslanden N.V.).

VIII. With reference to Articles 10, 11 and 12

Where tax has been levied at source in excess of the amount of tax chargeable under the provisions of Articles 10, 11 and 12, applications for the refund of the excess amount of tax have to be lodged with the competent authority of the State having levied the tax, within a period of three years after the expiration of the calendar year in which the tax has been levied.

IX. With reference to Article 12

In respect of paragraph 3 of Article 12, the term studies or surveys of a scientific, geological or technical services includes or technical nature, engineering contracts including blue prints related thereto, and consultancy or supervisory services.

X. With reference to Article 28

It is understood that, notwithstanding the fourth sentence in paragraph 1 of Article 28, such persons or authorities may use the information received for the levying of any national taxes and in case of the Netherlands also social security.

In witness whereof the undersigned, duly authorized thereto, have signed this Protocol.

Done at Jakarta, on 29 January 2002, in two originals, each in the Netherlands, Indonesian and English languages, the three texts being equally authentic. In case there is any divergence of interpretation between the Indonesian and Netherlands texts, the English text shall prevail.

For the Government of the Republic of Indonesia:	For the Government of the Kingdom of the Netherlands:

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TITLE OF THE CONVENTION

Convention between (State A) and (State B) with respect to taxes on income and on capital[10]

PREAMBLE OF THE CONVENTION[11]

[10]States wishing to do so may follow the widespread practice of including in the title a reference to either the avoidance of double taxation or to both the avoidance of double taxation and the prevention of fiscal evasion.

[11]The Preamble of the Convention shall be drafted in accordance with the constitutional procedures of the Contracting States.

Chapter I

SCOPE OF THE CONVENTION

Article 1

PERSONS COVERED

This Convention shall apply to persons who are residents of one or both of the Contracting States.

Article 2

TAXES COVERED

1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes to which the Convention shall apply are in particular:

(*a*) (in State A): .....

(*b*) (in State B): .....

4. The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of significant changes made to their tax law.

Chapter II

DEFINITIONS

Article 3

GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:

(*a*) The term "person" includes an individual, a company and any other body of persons;

(*b*) The term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

(*c*) The terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(*d*) The term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

(*e*) The term "competent authority" means:

(i) (In State A): .....

(ii) (In State B): .....

(*f*) The term "national" means:

(i) Any individual possessing the nationality of a Contracting State

(ii) Any legal person, partnership or association deriving its status as such from the laws in force in a Contracting State.

2. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Article 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of incorporation, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

(*a*) He shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

(*b*) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

(*c*) If he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

(*d*) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

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

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(*a*) A place of management;

(*b*) A branch;

(*c*) An office;

(*d*) A factory;

(*e*) A workshop;

(*f*) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. The term "permanent establishment" also encompasses:

(*a*) A building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only if such site, project or activities last more than six months;

(*b*) The furnishing of services, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a

Contracting State for a period or periods aggregating more than six months within any twelve-month period.

4. Notwithstanding the preceding provisions of this article, the term "permanent establishment" shall be deemed not to include:

(*a*) The use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise;

(*b*) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display;

(*c*) The maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(*d*) The maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(*e*) The maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.

(*f*) The maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (*a*) to (*e*), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person—other than an agent of an independent status to whom paragraph 7 applies—is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State in respect of any activities which that person undertakes for the enterprise, if such a person:

(*a*) Has and habitually exercises in that State an authority to conclude contracts in the name of the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of busi-

ness, would not make this fixed place of business a permanent establishment under the provisions of that paragraph; or

(*b*) Has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise.

6. Notwithstanding the preceding provisions of this article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

7. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted wholly or almost wholly on behalf of that enterprise, and conditions are made or imposed between that enterprise and the agent in their commercial and financial relations which differ from those which would have been made between independent enterprises, he will not be considered an agent of an independent status within the meaning of this paragraph.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Chapter III

TAXATION OF INCOME

Article 6

INCOME FROM IMMOVABLE PROPERTY

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall also apply to income derived from the direct use, letting or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (*a*) that permanent establishment; (*b*) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (*c*) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere. However, no such deduction shall be allowed in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission, for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the permanent establishment. Likewise, no account shall be taken, in the determination of the profits of

a permanent establishment, for amounts charged (otherwise than towards reimbursement of actual expenses), by the permanent establishment to the head office of the enterprise or any of its other offices, by way of royalties, fees or other similar payments in return for the use of patents or other rights, or by way of commission for specific services performed or for management, or, except in the case of a banking enterprise, by way of interest on moneys lent to the head office of the enterprise or any of its other offices.

4. In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary; the method of apportionment adopted shall, however, be such that the result shall be in accordance with the principles contained in this article.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where profits include items of income which are dealt with separately in other articles of this Convention, then the provisions of those articles shall not be affected by the provisions of this article.

(NOTE: The question of whether profits should be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods and merchandise for the enterprise was not resolved. It should therefore be settled in bilateral negotiations.)

Article 8

SHIPPING, INLAND WATERWAYS TRANSPORT AND AIR TRANSPORT

Article 8 *(alternative A)*

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or a boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

Article 8 *(alternative B)*

1. Profits from the operation of aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of ships in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated unless the shipping activities arising from such operation in the other Contracting State are more than casual. If such activities are more than casual, such profits may be taxed in that other State. The profits to be taxed in that other State shall be determined on the basis of an appropriate allocation of

the overall net profits derived by the enterprise from its shipping operations. The tax computed in accordance with such allocation shall then be reduced by ___ per cent. (The percentage is to be established through bilateral negotiations.)

3. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

5. The provisions of paragraphs 1 and 2 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

Article 9

ASSOCIATED ENTERPRISES

1. Where:

(*a*) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(*b*) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not

so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that State—and taxes accordingly—profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of the Convention and the competent authorities of the Contracting States shall, if necessary, consult each other.

3. The provisions of paragraph 2 shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.

Article 10

DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

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

(*a*) ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends if

the beneficial owner is a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends;

(*b*) ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of article 7 or article 14, as the case may be, shall apply.

5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except in so far as such dividends are paid to a resident of that other State or in so far as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a

fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

Article 11

INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "interest" as used in this article means income from debt claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this article.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt claim in respect of which the interest is paid is effectively connected with (*a*) such permanent establishment or fixed base, or with (*b*) business activities referred to in (*c*) of

paragraph 1 of article 7. In such cases the provisions of article 7 or article 14, as the case may be, shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 12

ROYALTIES

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ___ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Con-

tracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "royalties" as used in this article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with (*a*) such permanent establishment or fixed base, or with (*b*) business activities referred to in (*c*) of paragraph 1 of article 7. In such cases the provisions of article 7 or article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the liability to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this article shall

apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

Article 13

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains from the alienation of shares of the capital stock of a company, or of an interest in a partnership, trust or estate, the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State. In particular:

(1) Nothing contained in this paragraph shall apply to a company, partnership, trust or estate, other than a company, partnership, trust or estate engaged in the business of management of im-

movable properties, the property of which consists directly or indirectly principally of immovable property used by such company, partnership, trust or estate in its business activities.

(2) For the purposes of this paragraph, "principally" in relation to ownership of immovable property means the value of such immovable property exceeding 50 per cent of the aggregate value of all assets owned by the company, partnership, trust or estate.

5. Gains from the alienation of shares other than those mentioned in paragraph 4 representing a participation of ___ per cent (the percentage is to be established through bilateral negotiations) in a company which is a resident of a Contracting State may be taxed in that State.

6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14

INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

(*a*) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or

(*b*) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is

derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15

DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

(*a*) The recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; and

(*b*) The remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

(*c*) The remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting

State in which the place of effective management of the enterprise is situated.

Article 16

DIRECTORS' FEES AND REMUNERATION OF TOP-LEVEL MANAGERIAL OFFICIALS

1. Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the Board of Directors of a company which is a resident of the other Contracting State may be taxed in that other State.

2. Salaries, wages and other similar remuneration derived by a resident of a Contracting State in his capacity as an official in a top-level managerial position of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 17

ARTISTES AND SPORTSPERSONS

1. Notwithstanding the provisions of articles 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

Article 18

PENSIONS AND SOCIAL SECURITY PAYMENTS

Article 18 *(alternative A)*

1. Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

2. Notwithstanding the provisions of paragraph 1, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.

Article 18 *(alternative B)*

1. Subject to the provisions of paragraph 2 of article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment may be taxed in that State.

2. However, such pensions and other similar remuneration may also be taxed in the other Contracting State if the payment is made by a resident of that other State or a permanent establishment situated therein.

3. Notwithstanding the provisions of paragraphs 1 and 2, pensions paid and other payments made under a public scheme which is part of the social security system of a Contracting State or a political subdivision or a local authority thereof shall be taxable only in that State.

Article 19

GOVERNMENT SERVICE

1. (*a*) Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(*b*) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the individual is a resident of that State who:

(i) Is a national of that State; or

(ii) Did not become a resident of that State solely for the purpose of rendering the services.

2. (*a*) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(*b*) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that other State.

3. The provisions of articles 15, 16, 17 and 18 shall apply to salaries, wages and other similar remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

Article 20

STUDENTS

Payments which a student or business trainee or apprentice who is or was immediately before visiting a Contracting State a resident of the

other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

Article 21

OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of article 7 or article 14, as the case may be, shall apply.

3. Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing articles of this Convention and arising in the other Contracting State may also be taxed in that other State.

Chapter IV

TAXATION OF CAPITAL

Article 22

CAPITAL

1. Capital represented by immovable property referred to in article 6, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

2. Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or by movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services may be taxed in that other State.

3. Capital represented by ships and aircraft operated in international traffic and by boats engaged in inland waterways transport, and by movable property pertaining to the operation of such ships, aircraft and boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

[4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.]

(The Group decided to leave to bilateral negotiations the question of the taxation of the capital represented by immovable property and movable property and of all other elements of capital of a resident of a Contracting State. Should the negotiating parties decide to include in the Convention an article on the taxation of capital, they will have to determine whether to use the wording of paragraph 4 as shown or wording that leaves taxation to the State in which the capital is located.)

Chapter V

METHODS FOR THE ELIMINATION OF DOUBLE TAXATION

Article 23 A

EXEMPTION METHOD

1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

2. Where a resident of a Contracting State derives items of income which, in accordance with the provisions of articles 10, 11 and 12, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State.

3. Where in accordance with any provision of this Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

Article 23 B

CREDIT METHOD

1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Con-

vention, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the income tax paid in that other State; and as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other State. Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.

2. Where, in accordance with any provision of this Convention, income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

Chapter VI

SPECIAL PROVISIONS

Article 24

NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Except where the provisions of paragraph 1 of article 9, paragraph 6 of article 11, or paragraph 6 of article 12 apply, interest, royalties and other disbursements paid by an enterprise of a Contracting

State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. The provisions of this article shall, notwithstanding the provisions of article 2, apply to taxes of every kind and description.

Article 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satis-

factory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure.

Article 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention, in so far as the taxation thereunder is not contrary to the Convention, in particular for the prevention of fraud or evasion of such taxes. The exchange of information is not restricted by article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. How-

ever, if the information is originally regarded as secret in the transmitting State it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes which are the subject of the Convention. Such persons or authorities shall use the information only for such purposes but may disclose the information in public court proceedings or in judicial decisions. The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which such exchanges of information shall be made, including, where appropriate, exchanges of information regarding tax avoidance.

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(*a*) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(*b*) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(*c*) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (*ordre public*).

Article 27

MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

Chapter VII

FINAL PROVISIONS

Article 28

ENTRY INTO FORCE

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at _____ as soon as possible.

2. The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:

(*a*) (In State A): .....

(*b*) (In State B): .....

Article 29

TERMINATION

This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year ____. In such event, the Convention shall cease to have effect:

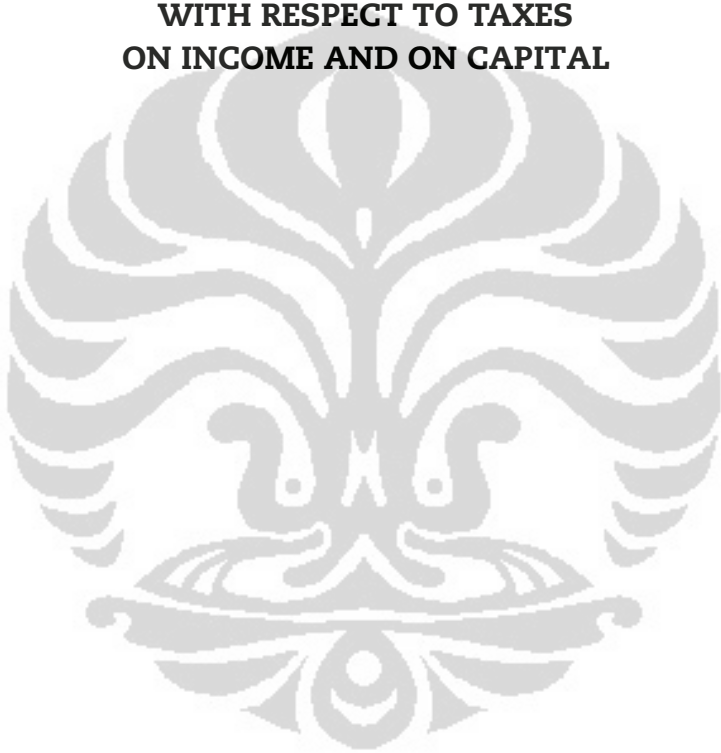
(*a*) (In State A): .....

(*b*) (In State B): .....

TERMINAL CLAUSE

NOTE: The provisions relating to the entry into force and termination and the terminal clause concerning the signing of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States.

MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL



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TITLE OF THE CONVENTION

Convention between (State A) and (State B)
with respect to taxes on income and on capital[1]

PREAMBLE TO THE CONVENTION[2]

1 States wishing to do so may follow the widespread practice of including in the title a reference to either the avoidance of double taxation or to both the avoidance of double taxation and the prevention of fiscal evasion.

2 The Preamble of the Convention shall be drafted in accordance with the constitutional procedure of both Contracting States.

Chapter I

SCOPE OF THE CONVENTION

ARTICLE 1

PERSONS COVERED

This Convention shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

TAXES COVERED

1. This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

3. The existing taxes to which the Convention shall apply are in particular:

a) (in State A): .....

b) (in State B): .....

4. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

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Chapter II

DEFINITIONS

ARTICLE 3

GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:

   a) the term "person" includes an individual, a company and any other body of persons;

   b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

   c) the term "enterprise" applies to the carrying on of any business;

   d) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

   e) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

   f) the term "competent authority" means:

      (i) (in State A): .....

      (ii) (in State B): .....

   g) the term "national", in relation to a Contracting State, means:

      (i) any individual possessing the nationality or citizenship of that Contracting State; and

      (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;

   h) the term "business" includes the performance of professional services and of other activities of an independent character.

2. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein.

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

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

ARTICLE 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop, and

f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

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3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs *a)* to *e)*, provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person — other than an agent of an independent status to whom paragraph 6 applies — is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

Chapter III

TAXATION OF INCOME

ARTICLE 6

INCOME FROM IMMOVABLE PROPERTY

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships, boats and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise.

ARTICLE 7

BUSINESS PROFITS

1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the permanent establishment in accordance with the provisions of paragraph 2 may be taxed in that other State.

2. For the purposes of this Article and Article [23 A] [23B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise.

3. Where, in accordance with paragraph 2, a Contracting State adjusts the profits that are attributable to a permanent establishment of an enterprise of one of the

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Contracting States and taxes accordingly profits of the enterprise that have been charged to tax in the other State, the other State shall, to the extent necessary to eliminate double taxation on these profits, make an appropriate adjustment to the amount of the tax charged on those profits. In determining such adjustment, the competent authorities of the Contracting States shall if necessary consult each other.

4. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

ARTICLE 8

SHIPPING, INLAND WATERWAYS TRANSPORT AND AIR TRANSPORT

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Profits from the operation of boats engaged in inland waterways transport shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

3. If the place of effective management of a shipping enterprise or of an inland waterways transport enterprise is aboard a ship or boat, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship or boat is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship or boat is a resident.

4. The provisions of paragraph 1 shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

ARTICLE 9

ASSOCIATED ENTERPRISES

1. Where

   a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

   b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions,

have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

ARTICLE 10
DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

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

a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

b) 15 per cent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

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5. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

ARTICLE 11

INTEREST

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment, then such interest shall be deemed to arise in the State in which the permanent establishment is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would

have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 12

ROYALTIES

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

ARTICLE 13

CAPITAL GAINS

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a

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permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic, boats engaged in inland waterways transport or movable property pertaining to the operation of such ships, aircraft or boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains derived by a resident of a Contracting State from the alienation of shares 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.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident.

[ARTICLE 14 - INDEPENDENT PERSONAL SERVICES]

[Deleted]

ARTICLE 15

INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 16, 18 and 19, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned, and

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State, and

c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, or aboard a boat engaged in inland waterways transport, may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

ARTICLE 16
DIRECTORS' FEES

Directors' fees and other similar payments derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

ARTICLE 17
ARTISTES AND SPORTSMEN

1. Notwithstanding the provisions of Articles 7 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised.

ARTICLE 18
PENSIONS

Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.

ARTICLE 19
GOVERNMENT SERVICE

1. *a)* Salaries, wages and other similar remuneration paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

   b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

   (i) is a national of that State; or

   (ii) did not become a resident of that State solely for the purpose of rendering the services.

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2. *a)* Notwithstanding the provisions of paragraph 1, pensions and other similar remuneration paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

b) However, such pensions and other similar remuneration shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3. The provisions of Articles 15, 16, 17, and 18 shall apply to salaries, wages, pensions, and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

ARTICLE 20
STUDENTS

Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

ARTICLE 21
OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

Chapter IV

TAXATION OF CAPITAL

ARTICLE 22

CAPITAL

1. Capital represented by immovable property referred to in Article 6, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.

2. Capital represented by movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State may be taxed in that other State.

3. Capital represented by ships and aircraft operated in international traffic and by boats engaged in inland waterways transport, and by movable property pertaining to the operation of such ships, aircraft and boats, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

Chapter V

METHODS FOR ELIMINATION OF DOUBLE TAXATION

ARTICLE 23 A

EXEMPTION METHOD

1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall, subject to the provisions of paragraphs 2 and 3, exempt such income or capital from tax.

2. Where a resident of a Contracting State derives items of income which, in accordance with the provisions of Articles 10 and 11, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the income of that resident an amount equal to the tax paid in that other State. Such deduction shall not, however, exceed that part of the tax, as computed before the deduction is given, which is attributable to such items of income derived from that other State.

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3. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

4. The provisions of paragraph 1 shall not apply to income derived or capital owned by a resident of a Contracting State where the other Contracting State applies the provisions of this Convention to exempt such income or capital from tax or applies the provisions of paragraph 2 of Article 10 or 11 to such income.

ARTICLE 23 B

CREDIT METHOD

1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow:

a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State;

b) as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other State.

Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.

2. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on the remaining income or capital of such resident, take into account the exempted income or capital.

Chapter VI
SPECIAL PROVISIONS

ARTICLE 24

NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or

may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11, or paragraph 4 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

ARTICLE 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of

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the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.[1]

1 In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 65 of the Commentary on the paragraph. As mentioned in paragraph 74 of that Commentary, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals.

ARTICLE 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

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ARTICLE 27

ASSISTANCE IN THE COLLECTION OF TAXES[1]

1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that

1 In some countries, national law, policy or administrative considerations may not allow or justify the type of assistance envisaged under this Article or may require that this type of assistance be restricted, *e.g.* to countries that have similar tax systems or tax administrations or as to the taxes covered. For that reason, the Article should only be included in the Convention where each State concludes that, based on the factors described in paragraph 1 of the Commentary on the Article, they can agree to provide assistance in the collection of taxes levied by the other State.

State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to carry out measures which would be contrary to public policy (*ordre public*);

c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;

d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

ARTICLE 28

MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

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ARTICLE 29

TERRITORIAL EXTENSION[1]

1. This Convention may be extended, either in its entirety or with any necessary modifications [to any part of the territory of (State A) or of (State B) which is specifically excluded from the application of the Convention or], to any State or territory for whose international relations (State A) or (State B) is responsible, which imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed between the Contracting States in notes to be exchanged through diplomatic channels or in any other manner in accordance with their constitutional procedures.

2. Unless otherwise agreed by both Contracting States, the termination of the Convention by one of them under Article 30 shall also terminate, in the manner provided for in that Article, the application of the Convention [to any part of the territory of (State A) or of (State B) or] to any State or territory to which it has been extended under this Article.

Chapter VII

FINAL PROVISIONS

ARTICLE 30

ENTRY INTO FORCE

1. This Convention shall be ratified and the instruments of ratification shall be exchanged at ..... as soon as possible.

2. The Convention shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:

a) (in State A): .....

b) (in State B): .....

1 The words between brackets are of relevance when, by special provision, a part of the territory of a Contracting State is excluded from the application of the Convention.

ARTICLE 31

TERMINATION

This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year after the year ..... In such event, the Convention shall cease to have effect:

a) (in State A): .....

b) (in State B): .....

TERMINAL CLAUSE[1]

1 The terminal clause concerning the signing shall be drafted in accordance with the constitutional procedure of both Contracting States.

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UNITED STATES MODEL INCOME TAX CONVENTION OF NOVEMBER 15, 2006

CONVENTION BETWEEN
THE GOVERNMENT OF THE UNITED STATES OF AMERICA
AND THE GOVERNMENT OF -------
FOR THE AVOIDANCE OF DOUBLE TAXATION
AND THE PREVENTION OF FISCAL EVASION
WITH RESPECT TO TAXES ON INCOME

The Government of the United States of America and the Government of -----, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows:

Article 1

GENERAL SCOPE

1. This Convention shall apply only to persons who are residents of one or both of the Contracting States, except as otherwise provided in the Convention.

2. This Convention shall not restrict in any manner any benefit now or hereafter accorded:

a) by the laws of either Contracting State; or

b) by any other agreement to which the Contracting States are parties.

3. a) Notwithstanding the provisions of subparagraph b) of paragraph 2 of this Article:

i) for purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that any question arising as to the interpretation or application of this Convention and, in particular, whether a taxation measure is within the scope of this Convention, shall be determined exclusively in accordance with the provisions of Article 25 (Mutual Agreement Procedure) of this Convention; and

ii) the provisions of Article XVII of the General Agreement on Trade in Services shall not apply to a taxation measure unless the competent authorities agree that the measure is not within the scope of Article 24 (Non-Discrimination) of this Convention.

b) For the purposes of this paragraph, a "measure" is a law, regulation, rule, procedure, decision, administrative action, or any similar provision or action.

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

5. The provisions of paragraph 4 shall not affect:

a) the benefits conferred by a Contracting State under paragraph 2 of Article 9 (Associated Enterprises), paragraphs 1 b), 2, and 5 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support), paragraphs 1 and 4 of Article 18 (Pension Funds), and Articles 23 (Relief From Double Taxation), 24 (Non-Discrimination), and 25 (Mutual Agreement Procedure); and

b) the benefits conferred by a Contracting State under paragraph 2 of Article 18 (Pension Funds), Articles 19 (Government Service), 20 (Students and Trainees), and 27 (Members of Diplomatic Missions and Consular Posts), upon individuals who are neither citizens of, nor have been admitted for permanent residence in, that State.

6. An item of income, profit or gain derived through an entity that is fiscally transparent under the laws of either Contracting State shall be considered to be derived by a resident of a State to the extent that the item is treated for purposes of the taxation law of such Contracting State as the income, profit or gain of a resident.

Article 2

TAXES COVERED

1. This Convention shall apply to taxes on income imposed on behalf of a Contracting State irrespective of the manner in which they are levied.

2. There shall be regarded as taxes on income all taxes imposed on total income, or on elements of income, including taxes on gains from the alienation of property.

3. The existing taxes to which this Convention shall apply are:

a) in the case of ------:

b) in the case of the United States: the Federal income taxes imposed by the Internal Revenue Code (but excluding social security and unemployment taxes), and the Federal excise taxes imposed with respect to private foundations.

4. This Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any changes that have been made in their respective taxation or other laws that significantly affect their obligations under this Convention.

Article 3

GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:

a) the term "person" includes an individual, an estate, a trust, a partnership, a company, and any other body of persons;

b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes according to the laws of the state in which it is organized;

c) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State, and an enterprise carried on by a resident of the other Contracting State; the terms also include an enterprise carried on by a resident of a Contracting State through an entity that is treated as fiscally transparent in that Contracting State;

d) the term “enterprise” applies to the carrying on of any business;

e) the term “business” includes the performance of professional services and of other activities of an independent character;

f) the term "international traffic" means any transport by a ship or aircraft, except when such transport is solely between places in a Contracting State;

g) the term "competent authority" means:

i) in -----, ----------; and

ii) in the United States: the Secretary of the Treasury or his delegate;

h) the term “--------” means ;

i) the term "United States" means the United States of America, and includes the states thereof and the District of Columbia; such term also includes the territorial sea thereof and the sea bed and subsoil of the submarine areas adjacent to that territorial sea, over which the United States exercises sovereign rights in accordance with international law; the term, however, does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory;

j) the term "national" of a Contracting State means:

i) any individual possessing the nationality or citizenship of that State; and

ii) any legal person, partnership or association deriving its status as such from the laws in force in that State;

k) the term “pension fund” means any person established in a Contracting State that is:

i) generally exempt from income taxation in that State; and

ii) operated principally either:

A) to administer or provide pension or retirement benefits; or

B) to earn income for the benefit of one or more persons described in clause A).

2. As regards the application of the Convention at any time by a Contracting State any term not defined therein shall, unless the context otherwise requires, or the competent authorities agree to a common meaning pursuant to the provisions of Article 25 (Mutual Agreement Procedure), have the meaning which it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

Article 4

RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or of profits attributable to a permanent establishment in that State.

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2. The term “resident of a Contracting State” includes:

a) a pension fund established in that State; and

b) an organization that is established and maintained in that State exclusively for religious, charitable, scientific, artistic, cultural, or educational purposes,

notwithstanding that all or part of its income or gains may be exempt from tax under the domestic law of that State.

3. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:

a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (center of vital interests);

b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavor to settle the question by mutual agreement.

4. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then if it is created or organized under the laws of one of the Contracting States or a political subdivision thereof, but not under the laws of the other Contracting State or a political subdivision thereof, such company shall be deemed to be a resident of the first-mentioned Contracting State. In all other cases involving dual resident companies, the competent authorities of the Contracting States shall endeavor to determine the mode of application of the Convention to such company. If the competent authorities do not reach such an agreement, that company will not be treated as a resident of either Contracting State for purposes of its claiming any benefits provided by the Convention.

5. Where by reason of the provisions of paragraphs 1 and 2 of this Article a person other than an individual or a company is a resident of both Contracting States, the competent authorities of the Contracting States shall by mutual agreement endeavor to determine the mode of application of this Convention to that person.

Article 5

PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

a) a place of management;

b) a branch;

c) an office;

d) a factory;

e) a workshop; and

f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources.

3. A building site or construction or installation project, or an installation or drilling rig or ship used for the exploration of natural resources, constitutes a permanent establishment only if it lasts, or the exploration activity continues for more than twelve months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or of collecting information, for the enterprise;

e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs a) through e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person -- other than an agent of an independent status to whom paragraph 6 applies -- is acting on behalf of an enterprise and has and habitually exercises in a Contracting State an authority to conclude contracts that are binding on the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities that the person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 that, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business as independent agents.

7. The fact that a company that is a resident of a Contracting State controls or is controlled by a company that is a resident of the other Contracting State, or that carries on business in that other State (whether through a permanent establishment or otherwise), shall not be taken into account in determining whether either company has a permanent establishment in that other State.

Article 6

INCOME FROM REAL PROPERTY

1. Income derived by a resident of a Contracting State from real property, including income from agriculture or forestry, situated in the other Contracting State may be taxed in that other State.

2. The term "real property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to real property (including livestock and equipment used in agriculture and forestry), rights to which the provisions of general law respecting landed property apply, usufruct of real property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships and aircraft shall not be regarded as real property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of real property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from real property of an enterprise.

5. A resident of a Contracting State who is liable to tax in the other Contracting State on income from real property situated in the other Contracting State may elect for any taxable year to compute the tax on such income on a net basis as if such income were business profits attributable to a permanent establishment in such other State. Any such election shall be binding for the taxable year of the election and all subsequent taxable years unless the competent authority of the Contracting State in which the property is situated agrees to terminate the election.

Article 7

BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as are attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits that it might be expected to make if it were a distinct and independent enterprise engaged in the same or similar activities under the same or similar conditions. For this purpose, the profits to be attributed to the permanent establishment shall include only the profits derived from the assets used, risks assumed and activities performed by the permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses that are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.*

4. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

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* Protocol or Notes should include the following language:

It is understood that the business profits to be attributed to a permanent establishment shall include only the profits derived from the assets used, risks assumed and activities performed by the permanent establishment. The principles of the OECD Transfer Pricing Guidelines will apply for purposes of determining the profits attributable to a permanent establishment, taking into account the different economic and legal circumstances of a single entity. Accordingly, any of the methods described therein as acceptable methods for determining an arm's length result may be used to determine the income of a permanent establishment so long as those methods are applied in accordance with the Guidelines. In particular, in determining the amount of attributable profits, the permanent establishment shall be treated as having the same amount of capital that it would need to support its activities if it were a distinct and separate enterprise engaged in the same or similar activities. With respect to financial institutions other than insurance companies, a Contracting State may determine the amount of capital to be attributed to a permanent establishment by allocating the institution's total equity between its various offices on the basis of the proportion of the financial institution's risk-weighted assets attributable to each of them. In the case of an insurance company, there shall be attributed to a permanent establishment not only premiums earned through the permanent establishment, but that portion of the insurance company's overall investment income from reserves and surplus that supports the risks assumed by the permanent establishment.

5. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where profits include items of income that are dealt with separately in other Articles of the Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

7. In applying this Article, paragraph 6 of Article 10 (Dividends), paragraph 4 of Article 11 (Interest), paragraph 3 of Article 12 (Royalties), paragraph 3 of Article 13 (Gains) and paragraph 2 of Article 21 (Other Income), any income or gain attributable to a permanent establishment during its existence is taxable in the Contracting State where such permanent establishment is situated even if the payments are deferred until such permanent establishment has ceased to exist.

Article 8

SHIPPING AND AIR TRANSPORT

1. Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.

2. For purposes of this Article, profits from the operation of ships or aircraft include, but are not limited to:

a) profits from the rental of ships or aircraft on a full (time or voyage) basis;

b) profits from the rental on a bareboat basis of ships or aircraft if the rental income is incidental to profits from the operation of ships or aircraft in international traffic; and

c) profits from the rental on a bareboat basis of ships or aircraft if such ships or aircraft are operated in international traffic by the lessee.

Profits derived by an enterprise from the inland transport of property or passengers within either Contracting State shall be treated as profits from the operation of ships or aircraft in international traffic if such transport is undertaken as part of international traffic.

3. Profits of an enterprise of a Contracting State from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) shall be taxable only in that Contracting State, except to the extent that those containers are used for transport solely between places within the other Contracting State.

4. The provisions of paragraphs 1 and 3 shall also apply to profits from participation in a pool, a joint business, or an international operating agency.

Article 9

ASSOCIATED ENTERPRISES

1. Where:

a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

b) the same persons participate directly or indirectly in the management, control, or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations that differ from those that would be made between independent enterprises, then any profits that, but for those conditions, would have accrued to one of the enterprises, but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2. Where a Contracting State includes in the profits of an enterprise of that State, and taxes accordingly, profits on which an enterprise of the other Contracting State has been charged to tax in that other State, and the other Contracting State agrees that the profits so included are profits that would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those that would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other.

Article 10

DIVIDENDS

1. Dividends paid by a company that is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the dividends are beneficially owned by a resident of the other Contracting State, except as otherwise provided, the tax so charged shall not exceed:

a) 5 percent of the gross amount of the dividends if the beneficial owner is a company that owns directly at least 10 percent of the voting stock of the company paying the dividends;

b) 15 percent of the gross amount of the dividends in all other cases.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. Notwithstanding paragraph 2, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if:

a) the beneficial owner of the dividends is a pension fund that is a resident of the other Contracting State; and

b) such dividends are not derived from the carrying on of a trade or business by the pension fund or through an associated enterprise.

4. a) Subparagraph a) of paragraph 2 shall not apply in the case of dividends paid by a U.S. Regulated Investment Company (RIC) or a U.S. Real Estate Investment Trust (REIT). In the case of dividends paid by a RIC, subparagraph b) of paragraph 2 and paragraph 3 shall apply. In the case of dividends paid by a REIT, subparagraph b) of paragraph 2 and paragraph 3 shall apply only if:

i) the beneficial owner of the dividends is an individual or pension fund, in either case holding an interest of not more than 10 percent in the REIT;

ii) the dividends are paid with respect to a class of stock that is publicly traded and the beneficial owner of the dividends is a person holding an interest of not more than 5 percent of any class of the REIT's stock; or

iii) the beneficial owner of the dividends is a person holding an interest of not more than 10 percent in the REIT and the REIT is diversified.

b) For purposes of this paragraph, a REIT shall be "diversified" if the value of no single interest in real property exceeds 10 percent of its total interests in real property. For the purposes of this rule, foreclosure property shall not be considered an interest in real property. Where a REIT holds an interest in a partnership, it shall be treated as owning directly a proportion of the partnership's interests in real property corresponding to its interest in the partnership.

5. For purposes of this Article, the term "dividends" means income from shares or other rights, not being debt-claims, participating in profits, as well as income that is subjected to the same taxation treatment as income from shares under the laws of the State of which the payer is a resident.

6. The provisions of paragraphs 2 through 4 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the payer is a resident, through a permanent establishment situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

7. A Contracting State may not impose any tax on dividends paid by a resident of the other State, except insofar as the dividends are paid to a resident of the first-mentioned State or the dividends are attributable to a permanent establishment, nor may it impose tax on a corporation's undistributed profits, except as provided in paragraph 8, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in that State.

8. a) A company that is a resident of one of the States and that has a permanent establishment in the other State or that is subject to tax in the other State on a net basis on its income that may be taxed in the other State under Article 6 (Income from Real Property) or under paragraph 1 of Article 13 (Gains) may be subject in that other State to a tax in addition to the tax allowable under the other provisions of this Convention.

b) Such tax, however, may be imposed:

i) on only the portion of the business profits of the company attributable to the permanent establishment and the portion of the income referred to in subparagraph a) that is subject to tax under Article 6 or under paragraph 1 of Article 13 that, in the case of the United States, represents the dividend equivalent amount of such profits or income and, in the case of -------, is an amount that is analogous to the dividend equivalent amount; and

ii) at a rate not in excess of the rate specified in paragraph 2 a).

Article 11

INTEREST

1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed only in that other State.

2. Notwithstanding the provisions of paragraph 1:

a) interest arising in ---------- that is determined with reference to receipts, sales, income, profits or other cash flow of the debtor or a related person, to any change in the value of any property of the debtor or a related person or to any dividend, partnership distribution or similar payment made by the debtor or a related person may be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner is a resident of the other Contracting State, the interest may be taxed at a rate not exceeding 15 percent of the gross amount of the interest;

b) interest arising in the United States that is contingent interest of a type that does not qualify as portfolio interest under United States law may be taxed by the United States but, if the beneficial owner of the interest is a resident of ----------, the interest may be taxed at a rate not exceeding 15 percent of the gross amount of the interest; and

c) interest that is an excess inclusion with respect to a residual interest in a real estate mortgage investment conduit may be taxed by each State in accordance with its domestic law.

3. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums or prizes attaching to such securities, bonds or debentures, and all other income that is subjected to the same taxation treatment as income from money lent by the taxation law of the Contracting State in which the income arises. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purposes of this Convention.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

5. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case the excess part of the payments shall remain taxable according to the laws of each State, due regard being had to the other provisions of this Convention.

Article 12

ROYALTIES

1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed only in that other State.

2. The term "royalties" as used in this Article means:

a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic, scientific or other work (including cinematographic films), any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and

b) gain derived from the alienation of any property described in subparagraph a), to the extent that such gain is contingent on the productivity, use, or disposition of the property.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right, or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.

Article 13

GAINS

1. Gains derived by a resident of a Contracting State that are attributable to the alienation of real property situated in the other Contracting State may be taxed in that other State.

2. For the purposes of this Article the term "real property situated in the other Contracting State" shall include:

a) real property referred to in Article 6 (Income from Real Property);

b) where that other State is the United States, a United States real property interest; and

c) where that other State is ------,

i) shares, including rights to acquire shares, other than shares in which there is regular trading on a stock exchange, deriving their value or the greater part of their value directly or indirectly from real property referred to in subparagraph a) of this paragraph situated in --------; and

ii) an interest in a partnership or trust to the extent that the assets of the partnership or trust consist of real property situated in --------, or of shares referred to in clause i) of this sub-paragraph.

3. Gains from the alienation of movable property forming part of the business property of a permanent establishment that an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

4. Gains derived by an enterprise of a Contracting State from the alienation of ships or aircraft operated or used in international traffic or personal property pertaining to the operation or use of such ships or aircraft shall be taxable only in that State.

5. Gains derived by an enterprise of a Contracting State from the alienation of containers (including trailers, barges and related equipment for the transport of containers) used for the transport of goods or merchandise shall be taxable only in that State, unless those containers are used for transport solely between places within the other Contracting State.

6. Gains from the alienation of any property other than property referred to in paragraphs 1 through 5 shall be taxable only in the Contracting State of which the alienator is a resident.

Article 14

INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 15 (Directors' Fees), 17 (Pensions, Social Security, Annuities, Alimony, and Child Support) and 19 (Government Service), salaries, wages, and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the taxable year concerned;

b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and

c) the remuneration is not borne by a permanent establishment which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration described in paragraph 1 that is derived by a resident of a Contracting State in respect of an employment as a member of the regular complement of a ship or aircraft operated in international traffic shall be taxable only in that State.

Article 15

DIRECTORS' FEES

Directors' fees and other compensation derived by a resident of a Contracting State for services rendered in the other Contracting State in his capacity as a member of the board of directors of a company that is a resident of the other Contracting State may be taxed in that other Contracting State.

Article 16

ENTERTAINERS AND SPORTSMEN

1. Income derived by a resident of a Contracting State as an entertainer, such as a theater, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would be exempt from tax in that other Contracting State under the provisions of Articles 7 (Business Profits) and 14 (Income from Employment) may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or sportsman, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed twenty thousand United States dollars ($20,000) or its equivalent in ---------- for the taxable year of the payment.

2. Where income in respect of activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income, notwithstanding the provisions of Article 7 (Business Profits) or 14 (Income from Employment), may be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised unless the contract pursuant to which the personal activities are performed allows that other person to designate the individual who is to perform the personal activities.

Article 17

PENSIONS, SOCIAL SECURITY, ANNUITIES, ALIMONY, AND CHILD SUPPORT

1. a) Pensions and other similar remuneration beneficially owned by a resident of a Contracting State shall be taxable only in that State.

b) Notwithstanding subparagraph a), the amount of any such pension or remuneration arising in a Contracting State that, when received, would be exempt from taxation in that State if the beneficial owner were a resident thereof shall be exempt from taxation in the Contracting State of which the beneficial owner is a resident.

2. Notwithstanding the provisions of paragraph 1, payments made by a Contracting State under provisions of the social security or similar legislation of that State to a resident of the other Contracting State or to a citizen of the United States shall be taxable only in the first-mentioned State.

3. Annuities derived and beneficially owned by an individual resident of a Contracting State shall be taxable only in that State. The term "annuities" as used in this paragraph means a stated sum paid periodically at stated times during a specified number of years, or for life, under an obligation to make the payments in return for adequate and full consideration (other than services rendered).

4. Alimony paid by a resident of a Contracting State to a resident of the other Contracting State shall be taxable only in that other State. The term "alimony" as used in this paragraph means periodic payments made pursuant to a written separation agreement or a decree of divorce, separate maintenance, or compulsory support, which payments are taxable to the recipient under the laws of the State of which he is a resident.

5. Periodic payments, not dealt with in paragraph 4, for the support of a child made pursuant to a written separation agreement or a decree of divorce, separate maintenance, or compulsory support, paid by a resident of a Contracting State to a resident of the other Contracting State, shall be exempt from tax in both Contracting States.

Article 18

PENSION FUNDS

1. Where an individual who is a resident of one of the States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of paragraph 1 of Article 17 (Pensions, Social Security, Annuities, Alimony and Child Support), to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that other State).

2. Where an individual who is a member or beneficiary of, or participant in, a pension fund that is a resident of one of the States exercises an employment or self-employment in the other State:

a) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises an employment or self-employment in the other State shall be deductible (or excludible) in computing his taxable income in that other State; and

b) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period shall not be treated as part of the employee's taxable income and any such contributions shall be allowed as a deduction in computing the taxable income of his employer in that other State.

The relief available under this paragraph shall not exceed the relief that would be allowed by the other State to residents of that State for contributions to, or benefits accrued under, a pension plan established in that State.

3. The provisions of paragraph 2 of this Article shall not apply unless:

a) contributions by or on behalf of the individual, or by or on behalf of the individual's employer, to the pension fund (or to another similar pension fund for which the first-mentioned pension fund was substituted) were made before the individual began to exercise an employment or self-employment in the other State; and

b) the competent authority of the other State has agreed that the pension fund generally corresponds to a pension fund established in that other State.

4. a) Where a citizen of the United States who is a resident of ------ exercises an employment in ------- the income from which is taxable in -------, the contribution is borne by an employer who is a resident of ------- or by a permanent establishment situated in -----, and the individual is a member or beneficiary of, or participant in, a pension plan established in ------,

i) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises the employment in --------, and that are attributable to the employment, shall be deductible (or excludible) in computing his taxable income in the United States; and

ii) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period, and that are attributable to the employment, shall not be treated as part of the employee's taxable income in computing his taxable income in the United States.

b) The relief available under this paragraph shall not exceed the lesser of:

i) the relief that would be allowed by the United States to its residents for contributions to, or benefits accrued under, a generally corresponding pension plan established in the United States; and

ii) the amount of contributions or benefits that qualify for tax relief in --------.

c) For purposes of determining an individual's eligibility to participate in and receive tax benefits with respect to a pension plan established in the United States, contributions made to, or benefits accrued under, a pension plan established in ------ shall be treated as contributions or benefits under a generally corresponding pension plan established in the United States to the extent relief is available to the individual under this paragraph.

d) This paragraph shall not apply unless the competent authority of the United States has agreed that the pension plan generally corresponds to a pension plan established in the United States.

Article 19

GOVERNMENT SERVICE

1. Notwithstanding the provisions of Articles 14 (Income from Employment), 15 (Directors' Fees), 16 (Entertainers and Sportsmen) and 20 (Students and Trainees):

a) Salaries, wages and other remuneration, other than a pension, paid to an individual in respect of services rendered to a Contracting State or a political subdivision or local authority thereof shall, subject to the provisions of subparagraph b), be taxable only in that State;

b) such remuneration, however, shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

i) is a national of that State; or

ii) did not become a resident of that State solely for the purpose of rendering the services.

2. Notwithstanding the provisions of paragraph 1 of Article 17 (Pensions, Social Security, Annuities, Alimony, and Child Support):

a) any pension and other similar remuneration paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority (other than a payment to which paragraph 2 of Article 17 applies) shall, subject to the provisions of subparagraph b), be taxable only in that State;

b) such pension, however, shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3. The provisions of Articles 14 (Income from Employment), 15 (Directors' Fees), 16 (Entertainers and Sportsmen) and 17 (Pensions, Social Security, Annuities, Alimony, and Child Support) shall apply to salaries, wages and other remuneration, and to pensions, in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

Article 20

STUDENTS AND TRAINEES

1. Payments, other than compensation for personal services, received by a student or business trainee who is, or was immediately before visiting a Contracting State, a resident of the other Contracting State, and who is present in the first-mentioned State for the purpose of his full-time education or for his full-time training, shall not be taxed in that State, provided that such payments arise outside that State, and are for the purpose of his maintenance, education or training. The exemption from tax provided by this paragraph shall apply to a business trainee only for a period of time not exceeding one year from the date the business trainee first arrives in the first-mentioned Contracting State for the purpose of training.

2. A student or business trainee within the meaning of paragraph 1 shall be exempt from tax by the Contracting State in which the individual is temporarily present with respect to income from personal services in an aggregate amount equal to $9,000 or its equivalent in [ ] annually. The competent authorities shall, every five years, adjust the amount provided in this subparagraph to the extent necessary to take into account changes in the U.S. personal exemption and the standard deduction.

3. For purposes of this Article, a business trainee is an individual:

a) who is temporarily in a Contracting State for the purpose of securing training required to qualify the individual to practice a profession or professional specialty; or

b) who is temporarily in a Contracting State as an employee of, or under contract with, a resident of the other Contracting State, for the primary purpose of acquiring technical, professional, or business experience from a person other than that resident of the other Contracting State (or a person related to such resident of the other Contracting State).

Article 21

OTHER INCOME

1. Items of income beneficially owned by a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from real property as defined in paragraph 2 of Article 6 (Income from Real Property), if the beneficial owner of the income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein and the income is attributable to such permanent establishment. In such case the provisions of Article 7 (Business Profits) shall apply.

Article 22

LIMITATION ON BENEFITS

1. Except as otherwise provided in this Article, a resident of a Contracting State shall not be entitled to the benefits of this Convention otherwise accorded to residents of a Contracting State unless such resident is a "qualified person" as defined in paragraph 2.

2. A resident of a Contracting State shall be a qualified person for a taxable year if the resident is:

a) an individual;

b) a Contracting State, or a political subdivision or local authority thereof;

c) a company, if:

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

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

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

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

d) a person described in paragraph 2 of Article 4 of this Convention, provided that, in the case of a person described in subparagraph a) of that paragraph, more than 50 percent of the person's beneficiaries, members or participants are individuals resident in either Contracting State; or

e) a person other than an individual, if:

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

ii) less than 50 percent of the person's gross income for the taxable year, as determined in the person's State of residence, is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State entitled to the benefits of this Convention under subparagraph a), subparagraph b), clause i) of subparagraph c), or subparagraph d) of this paragraph in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property).

3. a) A resident of a Contracting State will be entitled to benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or registered securities dealer), and the income derived from the other Contracting State is derived in connection with, or is incidental to, that trade or business.

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

c) For purposes of applying this paragraph, activities conducted by persons connected to a person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

4. If a resident of a Contracting State is neither a qualified person pursuant to the provisions of paragraph 2 nor entitled to benefits with respect to an item of income under paragraph 3 of this Article the competent authority of the other Contracting State may, nevertheless, grant the benefits of this Convention, or benefits with respect to a specific item of income, if it determines that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under this Convention.

5. For purposes of this Article:

a) the term "recognized stock exchange" means:

i) the NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;

ii) stock exchanges of -------; and

iii) any other stock exchange agreed upon by the competent authorities;

b) the term “principal class of shares” means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. If no single class of ordinary or common shares represents the majority of the aggregate voting power and value of the company, the “principal class of shares” are those classes that in the aggregate represent a majority of the aggregate voting power and value of the company

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

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

Article 23

RELIEF FROM DOUBLE TAXATION

1. In the case of -------, double taxation will be relieved as follows:

2. In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a resident or citizen of the United States as a credit against the United States tax on income applicable to residents and citizens:

a) the income tax paid or accrued to ------ by or on behalf of such resident or citizen; and

b) in the case of a United States company owning at least 10 percent of the voting stock of a company that is a resident of -------- and from which the United States company receives dividends, the income tax paid or accrued to ------- by or on behalf of the payer with respect to the profits out of which the dividends are paid.

For the purposes of this paragraph, the taxes referred to in paragraphs 3 a) and 4 of Article 2 (Taxes Covered) shall be considered income taxes.

3. For the purposes of applying paragraph 2 of this Article, an item of gross income, as determined under the laws of the United States, derived by a resident of the United States that, under this Convention, may be taxed in ----- shall be deemed to be income from sources in -----.

4. Where a United States citizen is a resident of -------:

a) with respect to items of income that under the provisions of this Convention are exempt from United States tax or that are subject to a reduced rate of United States tax when derived by a resident of ------ who is not a United States citizen, ------- shall allow as a credit against -------- tax, only the tax paid, if any, that the United States may impose under the provisions of this Convention, other than taxes that may be imposed solely by reason of citizenship under the saving clause of paragraph 4 of Article 1 (General Scope);

b) for purposes of applying paragraph 2 to compute United States tax on those items of income referred to in subparagraph a), the United States shall allow as a credit against United States tax the income tax paid to -------- after the credit referred to in subparagraph a); the credit so allowed shall not reduce the portion of the United States tax that is creditable against the ---------- tax in accordance with subparagraph a); and

c) for the exclusive purpose of relieving double taxation in the United States under subparagraph b), items of income referred to in subparagraph a) shall be deemed to arise in ------- to the extent necessary to avoid double taxation of such income under subparagraph b).

Article 24

NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall also apply to persons who are not residents of one or both of the Contracting States. However, for the purposes of United States taxation, United States nationals who are subject to tax on a worldwide basis are not in the same circumstances as nationals of --------- who are not residents of the United States.

2. The taxation on a permanent establishment that an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities.

3. The provisions of paragraphs 1 and 2 shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs, and reductions for taxation purposes on account of civil status or family responsibilities that it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9 (Associated Enterprises), paragraph 5 of Article 11 (Interest), or paragraph 4 of Article 12 (Royalties) apply, interest, royalties, and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of a resident of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of the first-mentioned resident, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.

5. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith that is more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. Nothing in this Article shall be construed as preventing either Contracting State from imposing a tax as described in paragraph 8 of Article 10 (Dividends).

7. The provisions of this Article shall, notwithstanding the provisions of Article 2 (Taxes Covered), apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof.

Article 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for such person in taxation not in accordance with the provisions of this Convention, it may, irrespective of the remedies provided by the domestic law of those States, and the time limits prescribed in such laws for presenting claims for refund, present its case to the competent authority of either Contracting State.

2. The competent authority shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States. Assessment and collection procedures shall be suspended during the period that any mutual agreement proceeding is pending.

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They also may consult together for the elimination of double taxation in cases not provided for in the Convention. In particular the competent authorities of the Contracting States may agree:

a) to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

b) to the same allocation of income, deductions, credits, or allowances between persons;

c) to the settlement of conflicting application of the Convention, including conflicts regarding:

i) the characterization of particular items of income;

ii) the characterization of persons;

iii) the application of source rules with respect to particular items of income;

iv) the meaning of any term used in the Convention;

v) the timing of particular items of income;

d) to advance pricing arrangements; and

e) to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of the Convention.

4. The competent authorities also may agree to increases in any specific dollar amounts referred to in the Convention to reflect economic or monetary developments.

5. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Article 26

EXCHANGE OF INFORMATION AND ADMINISTRATIVE ASSISTANCE

1. The competent authorities of the Contracting States shall exchange such information as may be relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes of every kind imposed by a Contracting State to the extent that the taxation thereunder is not contrary to the Convention, including information relating to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, such taxes. The exchange of information is not restricted by paragraph 1 of Article 1 (General Scope) or Article 2 (Taxes Covered).

2. Any information received under this Article by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to above, or the oversight of such functions. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. In no case shall the provisions of the preceding paragraphs be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information that is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitation be construed to permit a Contracting State to decline to supply information because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information requested by the other Contracting State because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

6. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts, and writings).

7. Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto. This paragraph shall not impose upon either of the Contracting States the obligation to carry out administrative measures that would be contrary to its sovereignty, security, or public policy.

8. The requested State shall allow representatives of the requesting State to enter the requested State to interview individuals and examine books and records with the consent of the persons subject to examination.

8. The competent authorities of the Contracting States may develop an agreement upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States, but in no case will the lack of such agreement relieve a Contracting State of its obligations under this Article.

Article 27

MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

Article 28

ENTRY INTO FORCE

1. This Convention shall be subject to ratification in accordance with the applicable procedures of each Contracting State, and instruments of ratification will be exchanged as soon thereafter as possible.

2. This Convention shall enter into force on the date of the exchange of instruments of ratification, and its provisions shall have effect:

a) in respect of taxes withheld at source, for amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force;

b) in respect of other taxes, for taxable periods beginning on or after the first day of January next following the date on which the Convention enters into force.

3. Notwithstanding paragraph 2, the provisions of Article 26 (Exchange of Information and Administrative Assistance) shall have effect from the date of entry into force of this Convention, without regard to the taxable period to which the matter relates.

Article 29

TERMINATION

This Convention shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Convention by giving notice of termination to the other Contracting State through diplomatic channels. In such event, the Convention shall cease to have effect:

a) in respect of taxes withheld at source, for amounts paid or credited after the expiration of the 6 month period beginning on the date on which notice of termination was given; and

b) in respect of other taxes, for taxable periods beginning on or after the expiration of the 6 month period beginning on the date on which notice of termination was given.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE at _____ in duplicate, in the English and ---------- languages, both texts being equally authentic, this __ day of _____, 20_.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF
