CONFEDERATION FISCALE EUROPEENNE

Opinion Statement FC 6/2017

ON THE WORKING PAPER BY DG TAXUD ON

TOOLBOX TO ENSURE CONSISTENCY BETWEEN TAX & DEVELOPMENT POLICIES IN THE (RE) NEGOTIATION OF DOUBLE TAX TREATIES WITH DEVELOPING COUNTRIES

Prepared by the CFE Fiscal Committee

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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 30 professional organisations from 24 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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1. Introduction

This Opinion Statement is based on written comments submitted by CFE to the European Commission Platform for Tax Good Governance Meeting on 15 June 2017.

The Opinion Statement concerns the Working Paper prepared by the European Commission (DG Taxud) regarding the creation of a so-called toolbox with which Member States would reference and consult when negotiating bilateral tax treaties with developing countries so as to ensure fair treatment of developing countries and a uniform and balanced approach to negotiation with developing countries by Member States. The proposed toolbox is contained in Annex 1 to this Opinion Statement.

2. The appropriateness of the toolbox to ensure consistency between tax and development policies in the negotiation of DTAs with developing countries

From the outset, it is necessary to underline a primary concern regarding the prioritisation at EU level of consistency in Member States' policies for the negotiation of Double Taxation Agreements (DTAs) with developing countries as compared to other tax-related issues arising in the Single Market. In our opinion, at the current stage of EU integration in the area of taxation, the EU should focus its efforts and resources in fields where the lack of coordination has been proved to negatively impact the functioning of the Single Market, for example:

- Tax Uncertainty;
- Respect of Taxpayers' Rights;
- Fight Against Tax Evasion and Aggressive Tax Planning;
- Elimination of Double Taxation;
- Digitalisation;
- Tax Incentives for Innovation and Entrepreneurship.

Until the establishment of a more deeply coordinated EU tax framework, Member State could address other taxation matters at domestic level.

Furthermore, it is important to highlight that in the event that EU intervention is not fully justified, and perceived to put further pressure on Member States' sovereignty there is a risk of negative reactions when EU coordination is considered most vital.

In addition, due consideration should be given to the fact that several steps have been taken by important international organisations worldwide to enhance tax policies of developing countries (UN Model Tax Convention/Practical TP Manual for Developing Countries / Manual for Negotiation of Bilateral Tax Treaties between Developed and Developing Countries). By undertaking action in the same sector, the EU risks unnecessarily duplicating work already completed at international level at a time when the impact is yet to be properly evaluated. At this stage, it might be more prudent to urge Member States to exploit the work already completed rather than to undertake further work in the same direction.

Notwithstanding the above considerations, should the EU proceed with the efforts to coordinate Member States policies as regards DTA negotiations with developing countries, we believe that a toolbox could be useful for a number of reasons. Firstly, it would provide a common point of reference

for all Member States. Secondly; a tool box would avoid encroaching on the sensitive issue of Member States sovereignty, as it would not have binding effect. However, at this point it must be also noted that lack of binding legal effect might undermine the effectiveness of the instrument. Thirdly, toolboxes are in principle flexible instruments, the content and scope of which may be shaped in line with the purposes pursued. Hence, its impact may vary considerably depending on its scope and content. Consequently, we consider that a toolbox may be an appropriate instrument. This however shall depend on its specific content as well as the procedures put in place to monitor its effect and to update it.

3. Scope & Content of the Toolbox

The draft toolbox addresses important issues that arise upon negotiation of DTAs that may require particular attention when it comes to developing countries. Nevertheless, the questions suggested could be characterised as generic and narrow. We consider the questions generic on the basis that they raise major issues, which are particularly difficult to answer, without providing practical tools to assist Member States in addressing them. In addition, we consider such questions to be narrow in scope because of their focus on specific articles of common DTAs, thus entailing a serious risk of neglecting a number of other issues, for example, there is no reference to arbitration and exchange of information.

In our view, a toolbox should not be exhausted in an outline of the questions Member States should ask before getting to the negotiation table but suggest solutions and give specific guidance on the proper ways to respond to such questions. By way of example, we would suggest that the toolbox would refer to:

- Definition of "developing countries";
- Classification of developing countries in specific categories that merit diverse approaches: (i) tax havens or not; (ii) reasons for lack in transparency requirements (lack of resources or other); (iii) size and policies towards EU etc.
- Exchange of information and experience among Member States as regards negotiation of DTAs with specific developing countries;
- Launch of regular EU reports on the status and evolution of developing countries;
- Establishment of procedural standards to be followed by Member States for the negotiation of DTAs with developing countries. For example, it could be required that to this end Member States (i) conduct preliminary reports and/or (ii) request reports and data by negotiating counterparty and/or (iii) identify *a priori* potential problems that may arise from the adoption of adjusted policies supposed to balance taxing power of developing counterparties (such as investment disincentives and/or double taxation).

4. Are the 6 Questions posed in the Toolbox the most relevant questions

The set of questions suggested in the annexed toolbox deals with some of the most significant issues arising in the context of DTA negotiations. Nevertheless, and notwithstanding the aforementioned general concerns, we believe that there is room to improve and expand the set of questions proposed. The following are some suggestions in this regard.

- An important question for MS to ask when considering DTA negotiations

with a so-called developing country relates to the type of such developing country. As mentioned before, the term "developing countries" comprises a huge number of countries, very different in capacity, type of economy, general policies. The specific characteristics of each developing country – potential DTA counterparty should constitute primary consideration for MS.

- The adequacy of the safeguards for information exchange with the developing country should be a priority for MS, taking into account the high level of protection guaranteed to EU taxpayers' right to privacy and confidentiality.

- Due account should be taken of the fact that main purpose of the action under consideration is to enhance economic development and to promote placement on equal footing of developing countries. To this end, Member States considering DTAs with developing countries could consider the simultaneous signature of International Investment Agreements.

- Questions 2 & 3 of the Toolbox entail the risk that MS produce different PE definitions and/or different provisions on technical services. Such risk undermines the function of the Single Market as well as certainty in EU taxation.

5. Suggested Follow-Up

In light of our reservations as regards prioritisation of the toolbox discussed, we would primarily consider follow-up in one of the following forms:

I. A pan-European study as regards (i) the status and general features of existing DTAs between MS and developing countries and (ii) the up-to-date impact of existing DTAs on the economy of developing countries;

II. A study to identify common features of developing countries and specify appropriate categorization. Such categorization could serve as useful tool for the determination of the approach to be taken in the negotiations' table.

III. The establishment of procedural rather than substantial standards with respect to negotiations between MS and developing countries.

IV. The establishment of specific forum for dialogue and information exchange on the matter among MS on a regular basis.

ANNEX

TOOLBOX TO ENSURE CONSISTENCY BETWEEN TAX AND DEVELOPING POLICIES IN THE (RE-)NEGOTIATION OF DOUBLE TAX TREATIS WITH DEVELOPING COUNTRIES

In the External Strategy, the Commission recalled the new EU approach for supporting domestic public finance in developing countries. The "Collect More-Spent Better" strategy[1] outlines how the EU intends to assist developing countries over the coming years in building fair and efficient tax systems, including by tackling corporate tax avoidance.

The External Strategy also suggested that Member States should apply a balanced approach to negotiating bilateral tax treaties with low-income countries, taking into account their particular situation. Tax treaties are usually aimed at preventing double taxation, allocating taxing rights and promoting foreign direct investment (FDI), with the purpose of fostering economic and political links between countries. Recently, tax treaties have also started to play an increasingly important role in addressing tax evasion, promoting transparency and allowing exchange of information in tax matters. These functions can be imbalanced if the parties involved present different economic features, i.e. unequal level of economic development.

Developed countries may sometimes not be conscious of the impact that DTAs have on developing countries, or of the most appropriate measures to support their domestic public finance. Granting taxing rights to developing countries could allow them to better cover their public financing needs.

While the negotiation of double tax treaties with developing countries is the sovereign competence of Member States, it is important to ensure consistency between tax and development policies. In this context, Member States could take steps to re-consider their tax policies with developing countries, in order to reduce spill-overs and ensure consistency with development needs. Appropriate policy in this area would support the EU's wider development goals.

It is worths mentioning that institutions such as the IMF and the United Nations, among others, are increasingly questioning whether double taxation treaties between developing and developed countries in their current form support sustainable development, given the economic asymmetry between the parties involved. Whereas tax treaties between developed and industrialized economies are broadly symmetric, with a similar amount of cross-border activity in each direction, a treaty between a developing and an industrialized economy is most likely to be asymmetric. It usually involves a larger

[1] COM (2015) – Collect More, Spend Better – Supporting developing countries to better mobilise and use domestic public finances, Discussion Paper

flow of capital towards the developing country and a larger flow of capital revenues towards the industrialized economy.

Those asymmetries may lead to significant negative spill-overs. Generally, 'spill-over' refers to the impact that one jurisdiction's tax rules or practices may have on another's. Two main types of spill-overs can be identified: 1) base spill-overs, which affect directly the tax base under which a country levies a tax and 2) tax rate spill-overs, which arise from the tax rate applied. For developing countries, spill-overs have a more pronounced impact on specific elements of their tax treaties network, such as the right to levy withholding taxes. These elements are critical for domestic revenue mobilization.

Domestic revenue mobilisation is by far the most important source of the fiscal space required to achieve sustainable development. On average, developing countries raise less than 20% of GDP in taxes, compared with 30-45% in OECD countries. Around half of all low- and lower-middle-income countries (LICs and LMICs) still have tax-to-GDP ratios below 15%. Studies comparing tax efforts (a country's actual tax-to-GDP ratio compared with a potential tax to-GDP capacity based on the country's economy) suggest there is considerable room for improvement in many developing countries.[2]

Capacity building for developing countries can help them to cope with spill-overs, but this is not enough on its own. The existence of imbalanced bilateral tax treaties, which result in lost revenue and base erosion (e.g. through treaty abuse) is particularly damaging for developing countries.

Developing countries are highly dependent on source based taxation. Therefore withholding taxes on outbound payments are an essential component of their tax income, and are generally easier to administer and collect. However, tax treaties can reduce the capacity of developing countries to levy withholding taxes.

Beyond withholding taxes, other issues of relevance for developing countries in double tax treaties include the definition of a permanent establishment, capital gains, fees for technical services, transfer pricing or the absence of anti-abuse clauses. The studies and reports outlined in Annex I may be a good source of information for Member States, when undertaking impact assessments and/or reviewing their tax policies towards developing countries.

The following section aims at identifying the relevant issues when negotiating DTAs with developing countries or when considering renegotiating them. The relevance of these issues and the solutions proposed will depend on the specific situation of the developing countries concerned. There may be a

[2] COM(2015) – Collect More, Spend Better – Achieving development in an inclusive and sustainable way, Working Stuff Paper, p. 6.

need for a more detailed assessment of the advantages and disadvantages of the possible options in order to meet development goals and ensure a balanced allocation of tax revenues.

RELEVANT QUESTIONS FOR CONSIDERATION BY MEMBER STATES

When reviewing their policy in relation to DTAs with developing countries, Member States could consider the following questions. (Each question includes references to relevant documents where more detailed information can be found):

1) *Do my DTAs with developing countries reduce their capacity to levy withholding taxes in a disproportionate way? Is the benefit of the reduced withholding tax (in terms of additional foreign investments) really sufficient to compensate for the loss of tax revenues?*

   Allocating taxing rights is one of the primary aims of DTAs. However, a balanced approach on the taxes levied by the source country should be applied, as developing countries rely mostly on that type of income. In this respect, the withholding tax rate should allow for an appropriate distribution of taxing rights between the residence and the source country.
   It should also be borne in mind that DTAs which provide for low withholding taxes do not always increase tax revenues in the developed countries (i.e. residence countries). This is particularly the case where (i) the residence country applies 'tax sparing/matching credit clauses', which allow the taxpayer to deduct a higher tax rate from the tax bill despite the reduced tax rate in DTAs or (ii) the residence country disallow the imputation of the foreign withholding tax.
   In addition, the literature[3] shows that a reduced withholding tax rate may result in a treaty override in the source country, which is a frequent source of legal uncertainty for business and investments.
   See: COM(2016)24; IMF (2014); NORAD (2009); VIDC (2014); Action Aid (2016).
2) *Should the notion of permanent establishment be adjusted to accommodate the particular needs of developing countries?*

   The following issues may justify adjusting the notion of permanent establishment (PE) in DTAs with developing countries:
   1) The period of time required to qualify business activities in a source country as PE might be excessively long (e.g. construction sites, extractive activities, etc.);
   2) The definition of the status of PE might be too narrow, with classes of activities being excluded from such definition (e.g. loans, marketing, specific agents' activities, etc.);
   3) The profits attributed to PEs might be limited, for example because of an exemption for such profits or the application of the functionally separated entity principle, which restricts the activities attributed to PEs to those strictly carried out by PEs themselves. This approach may conflict with domestic rules of many developing countries. Often, they still apply the relevant business activity principle, which takes a wider approach to defining PEs' activities, and therefore try to exercise 'force of attraction' in respect of such profits.

[3] Reference to this topic is made, among others, in IMF Policy Paper "*Spill-overs in international corporate taxation*", IBDF "*Tax Treaty Override and the Need for Coordination between Legal Systems: Safeguarding the Effectiveness of International Law*", ActionAid "*Mistreated*".

If provisions such as those described above are included in a DTA, this may prevent source countries from levying taxes on PE activities, limiting the possibility of taxing domestic activities despite a substantial economic presence in the source country.
See: IBFD (2015); UN (2015)4; Action Aid (2016).

3) *Could a new article on "Fees for Technical Services" in tax treaties ensure fairness and new tax resources for developing countries?*

Fees for technical services refer to payments for any service of a managerial, technical or consultancy nature which are not provided by an employee of resident companies of contracting states or through PEs. Provisions may be introduced for levying taxes on activities whose economic benefit is *de facto* only for the source state but that are operated in the residence country of a company or in a third country and aimed at responding to rapid changes in modern economies, particularly with respect to cross-border digital services. The introduction of such clause in DTAs could be helpful for allocating tax rights on economic activities substantially carried out in a state. It could also provide certainty for businesses, by clarifying their tax treatment for such services in advance. Such clauses have recently been discussed in the UN Committee of Experts on International Cooperation in Tax Matters and a new provision covering this matter should be included in the UN Model Convention, when it is next updated by the end of 2017.
See: UN (2016); IBFD (2015)

4) *Does the DTA's provide for a fair allocation of capital gain tax rights by source countries?*

Capital gains may be generated by different economic transactions, i.e. sales of immovable properties or assets, shares, exploitation rights, financial instruments, etc. Most DTAs with developing countries provide for source taxation for the first category of transactions only (sales of immovable properties) and link taxing rights of the source country to residence-based criteria. Business may take advantage of this, shifting their capital gains to other sources which are not covered by DTAs. It would be important to ensure that capital gain provisions include a broad scope of economic transactions.
See: UN (2015)4; Dutch Ministry of Foreign Affairs (2013); Eurodad (2013).

5) *Which measures could be introduced to simplify the administration of transfer pricing?*

The implementation of transfer pricing rules and the use of transfer pricing documentation are essential to assess the taxable basis of multinational enterprises (MNEs) and to tackle aggressive tax planning. Dealing with such documents requires investment in terms of time and resources, which are not always available to developing countries. Different approaches could be undertaken in order to facilitate transfer pricing issues for developing countries. These could include (1) developing more detailed provisions for the Arm's Length Principle in DTAs or guidance on how it should be applied in concrete situations, (2) improving public data availability for comparability studies and capacity building of tax administration and (3) introducing appropriate anti-avoidance rules,
See: IMF (2014); IMF/OECD/UN/ World Bank (2011); OECD (2014).

6) *Should DTAs without a proper anti-abuse clause be re-negotiated?*

The improper use of tax treaties to exploit differences in tax legislation between two contracting states is a concern for every country. It can give rise to double non taxation and lead to a direct loss of tax revenues. Due to their weak administrative capacities, developing countries may be more vulnerable to such treaty shopping. Accordingly, the introduction of an anti-abuse clause in DTAs might be highly relevant for developing countries.

See: UNCTAD (2015); UN (2015)[4]; SOMO (2013).

APPENDIX I

1: Member States' as well as third countries' reports

1) **IBFD (2015): " Possible effects of the Irish Tax System on Developing Economies" (IR)**
http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf

A summary of the report can be found in Annex II

2) **IBFD (2013): "Onderzoek belastingverdragen met ontwikkelingslanden" (NL)**
https://www.eerstekamer.nl/overig/20130830/_onderzoek_belastingverdragen_met/document

A summary of the report can be found in Annex II

3) **Dutch Ministry of Foreign Affairs (2013): IOB Study: Evaluation issues in financing for development, analysing effects of Dutch corporate tax policy on developing countries**
https://www.government.nl/documents/reports/2013/11/14/iob-study-evaluation-issues-in-financing-for-development-analysing-effects-of-dutch-corporate-tax-policy-on-developing-countries

4) **NL (2013): Government's response to the IBFD report**
https://www.government.nl/documents/parliamentary-documents/2013/09/09/government-s-response-to-the-report-from-seo-economics-amsterdam-on-other-financial-institutions-and-the-ibfd-report-on-develop

5) **NORAD - Norwegian Government (2009) "Tax Havens and Development"**
https://www.regjeringen.no/contentassets/0a903cdd09fc423ab21f43c3504f466a/en-gb/pdfs/nou200920090019000en_pdfs.pdf

https://www.regjeringen.no/globalassets/upload/ud/vedlegg/utvikling/tax-havens-short.pdf

2: Commission/ European Parliament papers

1) **COM (2016)18 – Platform for Tax Good Governance, Follow-up of the Communication on the External Strategy: Tax Treaties between Member States and Developing Countries**

http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/platform/meeting_2016/20160614_paper_tax_treaties_developing_countries.pdf

2) **COM(2016)24 – Communication on an External Strategy for Effective Taxation**
http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-24-EN-F1-1.PDF

3) **COM (2015) – Collect More Spend Better – Achieving development in an inclusive and sustainable way**
https://ec.europa.eu/europeaid/sites/devco/files/pol-collect-more-spend-better-swd-20151015_en.pdf

4) **COM(2015) – Collect More Spend Better – Supporting developing countries to better mobilise and use domestic public finances**
https://ec.europa.eu/europeaid/sites/devco/files/com_collectmore-spendbetter_20150713_en.pdf

5) **European Parliament resolution of 8 July 2015 on tax avoidance and tax evasion as challenges for governance, social protection and development in developing countries**
http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0265&language=EN

6) **European Parliament resolution of 26 February 2014 on promoting development through responsible business practices, including the role of extractive industries in developing countries**
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0163+0+DOC+XML+V0//EN

7) **COM(2010) 163 – Communication Tax and Development, Cooperating with Developing Countries on Promoting Tax Good Governance in Tax Matters**
https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/com(2010)163_en.pdf

8) **COM (2010) – SEC(2010) 426: Staff Work Document accompanying the Communication from the Commission Tax and Development Cooperating with Developing Countries on Promoting Good Governance in Tax Matters**
https://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/sec(2010)426_en.pdf

9) **COM(2009) 201 – Communication Promoting Good Governance in Tax Matters**
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0201:FIN:EN:PDF

7) **EP - Committee on Development (2011) "Report on Tax and Development – Cooperating with Developing Countries on Promoting Good Governance in Tax Matters" (Rapp.: Hon. Eva Joly)**

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0027+0+DOC+PDF+V0//EN

3: Papers by International Organisations

1) **IMF (2014): "IMF Policy Paper, spill-overs in international corporate taxation"**
http://www.imf.org/external/np/pp/eng/2014/050914.pdf

A summary of the report can be found in Annex II

2) **IMF/OECD/UN/ World Bank (2011): "Supporting the development of more effective tax systems"**
https://www.oecd.org/ctp/48993634.pdf

3) **OECD (2014) "Report to G20 Development Working Group on the Impact of BEPS in Low Income Countries"**
http://www.oecd.org/tax/part-1-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf

https://www.oecd.org/g20/topics/taxation/part-2-of-report-to-g20-dwg-on-the-impact-of-beps-in-low-income-countries.pdf

4) **UN (2016) "Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries"**
http://www.un.org/esa/ffd/wp-content/uploads/2016/05/manual_btt.pdf

5) **UN (2015)[1] "Addis Ababa Action Agenda of the Third International Conference on Financing for Development**"
http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf

6) **UN (2015)[2] "Resolution adopted by the General Assembly on 27 July 2015: Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)"**
http://www.undocs.org/A/RES/69/313

7) **UN (2015)[3] "Post-2015 Development Agenda entitled 'Transforming our world: the 2030 Agenda for Sustainable Development', adopted by the United Nations General Assembly in September 2015"**

http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

8) **UN (2015)[4] "Protecting the Tax Base of Developing Countries"**
http://www.un.org/esa/ffd/wp-content/uploads/2015/07/handbook-tb.pdf

A summary of the report can be found in Annex II

9) **UN (2014) "Papers on Selected Topics in Negotiation of Tax Treaties for Developing Countries"**
http://www.un.org/esa/ffd/wp-content/uploads/2014/08/Papers_TTN.pdf

10) **UN (2013) "Handbook on Administration of Double Tax Treaties for Developing Countries"**
http://www.un.org/esa/ffd/wp-content/uploads/2014/08/UN_Handbook_DTT_Admin.pdf

11) **UN (2011) "United Nations Model Double Taxation Convention: 2011 Update"**
http://www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_Update.pdf

12) **UNCTAD (2015) "International Tax and Investment Policy Coherence – Chapter V"**
http://unctad.org/en/PublicationChapters/wir2015ch5_en.pdf

4: Papers by NGO's

1) **Action Aid (2016): "Mistreated"**
http://www.actionaid.org/sites/files/actionaid/actionaid_-_mistreated_tax_treaties_report_-_feb_2016.pdf

A summary of the report can be found in Annex II

2) **Action Aid Dataset of tax treaties signed by low income countries in Asia and Sub-Saharan Africa**
http://www.actionaid.org/sites/files/actionaid/aa_treaties_dataset_feb_2016.xlsx

3) **Action Aid (2014) "Policy Brief on Double Taxation Agreements"**
http://actionaid.org/sites/files/actionaid/policy_brief_on_double_taxation_agreements.pdf

4) **Eurodad (2015): " Fifty Shades of Tax Dodging"**
http://www.eurodad.org/files/pdf/5630c89596bec.pdf

5) **Eurodad (2013): "Double Taxation Agreements in Latin America - Analysis of the Links among Taxes, Trade and Responsible Finance"**
http://www.eurodad.org/files/pdf/524d3b7c8e8ed.pdf

6) **SOMO (2013) "Should the Netherlands Sign Tax Treaties with Developing Countries?"**
http://www.hollandquaestor.nl/documents/pdf/publicaties/overige/somo-rapport-should-the-netherlands-sign-tax-treaties-with-developing-countries.pdf

7) **VIDC (2014) "A Legal and Economic Analysis of Double Taxation Treaties between Austria and Developing Countries"**
http://www.vidc.org/fileadmin/Bibliothek/DP/Neuwirth/Studie_Doppelbesteuerungsabk/BraunFuentes_AustrianDTTs_Layout_final3.pdf