

**2009 IFA TRAVELLING LECTURESHIP ON ROYALTIES BY NATHAN BOIDMAN
APPENDICES TO LECTURE OUTLINE**

APPENDIX 35 (UN MODEL TREATY)

Material:

Article 12 - Articles of the United Nations Model Double Taxation Convention Between Developed and Developing Countries, p. 21-23

Article 12 – Commentary, Articles of the United Nations Model Double Taxation Convention Between Developed and Developing Countries, p. 183-198

Part One

**ARTICLES OF THE UNITED NATIONS MODEL
DOUBLE TAXATION CONVENTION BETWEEN
DEVELOPED AND DEVELOPING COUNTRIES**

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-

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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

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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

A. GENERAL CONSIDERATIONS

1. Article 12 of the United Nations Model Convention reproduces Article 12 of the OECD Model Convention, with the following exceptions: first, substantive differences appear in paragraphs 1 and 3; second, paragraphs 2 and 5 do not appear in the OECD Model Convention with the result that the paragraph numbers in the United Nations Model Convention differ from those in the OECD Model Convention; and third, a drafting adjustment is made in paragraph 4.

2. When the user of a patent or similar property is resident in one country and pays royalties to the owner thereof who is resident in another country, the amount paid by the user is generally subject to withholding tax in his country, the source country. The source country tax is on the gross payments, with no allowance for any related expenses incurred by the owner. Without recognition of expenses, the owner's after-tax profit may in some cases be only a small percentage of gross royalties. Consequently, the owner may take the withholding tax in the source country into account in fixing the amount of the royalty, so that the user and the source country will pay more for the use of the patent or similar property than they would if the withholding tax levied by the source country were lower and took into account the expenses incurred by the owner. A manufacturing enterprise or an inventor may have spent substantial sums on the development of the property generating the royalties, because the work of research and testing involves considerable capital outlays and does not always yield successful results. The problem of determining the appropriate tax rate to be applied by the source country to gross royalty payments is therefore complex, especially since the user may

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make a lump sum payment for the use of the patent or similar property, in addition to regular royalty payments.

3. The Commentary on Article 12 of the OECD Model Convention includes the following preliminary remarks:

“In principle, royalties in respect of licences to use patents and similar property and similar payments are income to the recipient from a letting. The letting may be granted in connection with an industrial or commercial enterprise (e.g., the use of literary copyright granted by a publisher) or an independent profession (e.g., use of a patent granted by the inventor) or quite independently of any activity of the grantor (e.g., use of a patent granted by the inventor’s heirs).” [para. 1]

“Certain countries do not allow royalties paid to be deducted for the purposes of the payer’s tax unless the recipient also resides in the same State or is taxable in that State. Otherwise they forbid the deduction. The question whether the deduction should also be allowed in cases where the royalties are paid by a resident of a Contracting State to a resident of the other State is dealt with in paragraph 4 of Article 24.” [para. 2]

B. COMMENTARY ON THE PARAGRAPHS OF ARTICLE 12

Paragraphs 1 and 2

4. Paragraph 1 drops the word “only” from the corresponding provision of the OECD Model Convention, which provides that “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”. Paragraph 2 is an addition flowing logically from the premise underlying paragraph 1, which is that royalties should be taxable in the source country as well as the residence country. A member from a developed country has observed that by providing for taxing rights in respect of royalties to be shared between the State of residence and the State of source, the United Nations Model Convention departs from the principle of exclusive residence State’s right to tax provided in the OECD Model Convention. In this context, it

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should be noted that several member States of OECD have recorded reservations about the approval of exclusive residence State taxation.

5. The Group of Experts has amended the provisions of paragraph 2 of article 12 in 1999 to bring it in line with the provisions of paragraph 2 of articles 10 and 11. Prior to the amendment, it was provided that 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 recipient is the beneficial owner of the royalties, the tax will be charged in the specified manner. The purpose of this amendment is to allow the benefit of this article to the beneficial owner residing in the treaty country regardless of the residence of any agent or other intermediary collecting the income on behalf of the beneficial owner, while continuing to deny this benefit when the beneficial owner was not a resident of the treaty country, even if the intermediary collecting the income was a resident. In this connection, a reference is made to paragraph 5 of the Commentary on article 10.

6. During discussion by the Group of Experts, members from developing countries argued that, in order to facilitate the conclusion of tax treaties between those countries and developed countries, the primary right to tax royalties should be given to the country where the income arose, that is, the source country. Patents and processes might be licensed to developing countries after they had been fully exploited elsewhere and, according to these members, after the expenses incurred in connection with their development had already been largely recouped.

7. Members from developed countries responded that it would be unrealistic to assume that enterprises selected the oldest patents for licensing to developing countries. Normally, an enterprise would license its patents to foreign subsidiaries and therefore select the most up-to-date inventions, in the hope of expanding existing markets or opening up new ones. Patents are not merchandise but instruments for promoting industrial production. Several members from developed countries held as a matter of principle that the country of resi-

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dence of the owner of a patent or similar property should have the exclusive or primary right to tax royalties paid thereon.

8. Since the Group reached no consensus on a particular rate for the withholding tax to be charged on royalties on a gross basis, the rate should be established through bilateral negotiations. The following considerations might be taken into account in negotiations:

First, the country of source should recognize both current expenses allocable to the royalty and expenditure incurred in the development of the property whose use gave rise to the royalty. It should be considered that the costs of developing the property are also allocable to profits derived from other royalties or activities, past or future, associated with these expenditures and that expenditure not directly incurred in the development of that property might nevertheless have contributed significantly to that development;

Second, if an expense ratio is agreed upon in fixing a gross rate in the source country, the country of the recipient, if following a credit method, should also use that expense ratio in applying its credit, whenever feasible. Therefore, that matter should be considered under article 23 A or 23 B.

9. Other factors might influence the determination of the withholding tax on gross royalties, including the developing countries' need to earn revenue and conserve foreign exchange; the fact that royalty payments flow almost entirely from developing countries to developed countries; the extent of assistance that developed countries should, for a variety of reasons, extend to developing countries; and the special importance of providing such assistance in the context of royalty payments; the desirability of preventing a shift of the tax burden to the licensees in the licensing arrangement; the ability that taxation at source confers on a developing country to make selective judgements by which, through reduced taxation or exemption, it could encourage those licensing arrangements if they were considered desirable for its development; the lessening of the risks of tax evasion resulting from taxation at the source; the fact that the country of the licensor supplies the facilities and activities necessary

for the development of the patent and thus undertakes the risks associated with the patent; the desirability of obtaining and encouraging a flow of technology to developing countries; the desirability of expanding the field of activity of the licensor in the utilization of his research; the benefits that developed countries obtain from world development in general; the relative importance of revenue sacrifice; the relation of the royalty decision to other decisions in the negotiations.

10. Income from film rentals should not be treated as industrial and commercial profits but should be dealt with in the context of royalties. The tax would thus be levied on a gross basis but expenses would be taken into account in fixing the withholding rate. With regard to expenses, there are factors that could be regarded as peculiarly relevant to film rentals. As a general rule, the expenses of film producers might be much higher and the profits lower than in the case of industrial royalties. On the other hand, because a considerable part of film expenses represents high salaries paid to actors and other participants who were taxed solely by the country of residence, and not by the source country, these expenses might not justify any great reduction of the withholding tax at source. However, it could be said that the amounts involved were nevertheless real costs for the producer and should be taken into account, while at the same time all countries involved should join in efforts to make sure that such income did not escape tax. Further, while the write-off of expenses in the country of residence did not mean that the expenses should not be taken into account at source, at some point old films could present a different expense situation.

11. Some members of the Group believe that because copyright royalties represent cultural efforts, they should be exempted from taxation by the source country. Other members, however, argue that tax would be levied by the residence country, and the reduction at source would not benefit the author. Other members favour exempting copyright royalties at the source, not necessarily for cultural reasons, but because the country of residence is in a better position to evaluate the expenses and personal circumstances of the creator of

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the royalties, including the period over which the books or other copyrighted items had been created; a reduction of the source country tax could be supported in some cases by the fact that the tax was too high to be absorbed by the tax credit of the residence country. However, source countries might not be willing to accept that approach to the problem. Furthermore, if the person dealing with the source country might be the publisher and not the author, arguments supporting the exemption of the author's income because of his personal situation obviously do not apply to the publisher.

Paragraph 3

12. This paragraph reproduces Article 12, paragraph 2, of the OECD Model Convention, but does not incorporate the 1992 amendment thereto which eliminates equipment rental from this article, and paragraph 3 of article 12 includes payments for tapes and royalties which are not included in the corresponding provision of the OECD Model Convention. The following portions of the OECD Commentary are relevant (the bracketed paragraphs being portions of the Commentary on the 1977 OECD Model Convention that are omitted from or altered in the present OECD Commentary):

“Paragraph 2 contains a definition of the term ‘royalties’. These relate, in general, to rights or property constituting the different forms of literary and artistic property, the elements of intellectual property specified in the text and industrial and commercial property specified in the text and information concerning industrial, commercial or scientific experience. The definition applies to payments for the use of, or the entitlement to use, rights of the kind mentioned, whether or not they have been, or are required to be, registered in a public register. The definition covers both payments made under a licence and compensation which a person would be obliged to pay for fraudulently copying or infringing the right . . . [T]he word ‘payment’, used in the definition, has a very wide meaning since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom. As a guide, certain explana-

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tions are given below in order to define the scope of Article 12 in relation to that of other Articles of the Convention, as regards, in particular, [equipment renting and] the provision of information.” [para. 8]

“Rents in respect of cinematograph films are also treated as royalties, whether such films are exhibited in cinemas or on the television. It may, however, be agreed through bilateral negotiations that rents in respect of cinematograph films shall be treated as industrial and commercial profits and, in consequence, subjected to the provisions of Articles 7 and 9.” [para. 10]

“In classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 alludes to the concept of ‘know-how’. Various specialist bodies and authors have formulated definitions of know-how which do not differ intrinsically. One such definition, given by the ‘Association des Bureaux pour la Protection de la Propriété Industrielle’ (ANBPPI), states that ‘know-how is all the undivulged technical information, whether capable of being patented or not, that is necessary for the industrial reproduction of a product or process, directly and under the same conditions; inasmuch as it is derived from experience, know-how represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of technique’. In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognized that the grantor is not required to play any part himself in the application of the formulae granted to the licensee and that he does not guarantee the result thereof. This type of contract thus differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party. Thus, payments obtained as consideration for after-sales service, for services rendered by a seller to the pur-

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chaser under a guarantee, for pure technical assistance, or for an opinion given by an engineer, an advocate or an accountant, do not constitute royalties within the meaning of paragraph 2. Such payments generally fall under Article 7 or Article 14. In business practice, contracts are encountered which cover both know-how and the provision of technical assistance. One example, amongst others, of contracts of this kind is that of franchising, where the franchisor imparts his knowledge and experience to the franchisee and, in addition, provides him with varied technical assistance, which, in certain cases, is backed up with financial assistance and the supply of goods. The appropriate course to take with a mixed contract is, in principle, to break down, on the basis of the information contained in the contract or by means of a reasonable apportionment, the whole amount of the stipulated consideration according to the various parts of what is being provided under the contract, and then to apply to each part of it so determined the taxation treatment proper thereto. If, however, one part of what is being provided constitutes by far the principal purpose of the contract and the other parts stipulated therein are only of an ancillary and largely unimportant character, then it seems possible to apply to the whole amount of the consideration the treatment applicable to the principal part.” [para. 11]

“Whether payments received as consideration for computer software may be classified as royalties poses difficult problems but is a matter of considerable importance in view of the rapid development of computer technology in recent years and the extent of transfers of such technology across national borders. Software may be described as a program, or series of programs, containing instructions for a computer required either for the operational processes of the computer itself (operational software) or for the accomplishment of other tasks (application software). It can be transferred through a variety of media, for example in writing, on a magnetic tape or disk, or on a laser disk. It may be standardized with a wide range of applications or be tailor-made for single users. It can be trans-

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ferred as an integral part of computer hardware or in an independent form available for use on a variety of hardware. The rights in computer software are a form of intellectual property. Research into the practices of OECD Member countries has established that all but one protect software rights either explicitly or implicitly under copyright law. Transfers of rights occur in many different ways ranging from the alienation of the entire rights to the sale of a product which is subject to restrictions on the use to which it is put. The consideration paid can also take numerous forms. These factors may make it difficult to determine where the boundary lies between software payments that are properly to be regarded as royalties and other types of payment.” [para. 12]

“Three situations are considered. The first is of payments made where less than the full rights in software are transferred. In a partial transfer of rights the consideration is likely to represent a royalty only in very limited circumstances. One such case is where the transferor is the author of the software (or has acquired from the author his rights of distribution and reproduction) and he has placed part of his rights at the disposal of a third party to enable the latter to develop or exploit the software itself commercially, for example by development and distribution of it . . . [E]ven where a software payment is properly to be regarded as a royalty there are difficulties in applying the copyright provisions of the Article to software royalties since paragraph [3] requires that software should be classified as a literary, artistic or scientific work. None of these categories seems entirely apt but treatment as a scientific work might be the most realistic approach. Countries for which it is not possible to attach software to any of those categories might be justified in adopting in their bilateral treaties an amended version of paragraph 2 which either omits all references to the nature of copyrights or refers specifically to software.” [para. 13]

“In other cases, the acquisition of the software will generally be for the personal or business use of the purchaser. The

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payment will then fall to be dealt with as commercial income in accordance with Articles 7 or 14. It is of no relevance that the software is protected by copyright or that there may be restrictions on the use to which the purchaser can put it.” [para. 14]

“The second situation is where the payments are made as consideration for the alienation of rights attached to the software. It is clear that where consideration is paid for the transfer of the full ownership, the payment cannot represent a royalty and the provisions of the Article are not applicable. Difficulties can arise where there are extensive but partial alienation of rights involving:

- exclusive right of use during a specific period or in a limited geographical area;
- additional consideration related to usage;
- consideration in the form of a substantial lump sum payment.” [para. 15]

“Each case will depend on its particular facts but in general such payments are likely to be commercial income within Article 7 or 14 or a capital gains matter within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated in full or in part, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency.” [para. 16]

“The third situation is where software payments are made under mixed contracts. Examples of such contracts include sales of computer hardware with built-in software and concessions of the right to use software combined with the provision of services. The methods set out in paragraph 11 above for dealing with similar problems in relation to patent royalties and know-how are equally applicable to computer software.

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Where necessary the total amount of the consideration payable under a contract should be broken down on the basis of the information contained in the contract or by means of a reasonable apportionment with the appropriate tax treatment being applied to each apportioned part.” [para. 17]

“The suggestions made above regarding mixed contracts could also be applied in regard to certain performances by artists and, in particular, in regard to an orchestral concert given by a conductor or a recital given by a musician. The fee for the musical performance, together with that paid for any simultaneous radio broadcasting thereof, seems to fall to be treated under Article 17. Where, whether under the same contract or under a separate one, the musical performance is recorded and the artist has stipulated that he be paid royalties on the sale or public playing of the records, then so much of the payment received by him as consists of such royalties falls to be treated under Article 12.” [para. 18]

“It is further pointed out that variable or fixed payments for the working of mineral deposits, sources or other natural resources are governed by Article 6 and do not, therefore, fall within the present Article. [If two Contracting States should have difficulty from the legal standpoint in applying this distinction in regard to consideration for the use of, or the right to use, equipment, they could add to the text of paragraph 2, after the words ‘industrial, commercial or scientific equipment’, the words ‘not constituting immovable property referred to in Article 6’.]” [para. 19]

13. Reference is made to the revision of the Commentary on Article 12 concerning software payments that has been approved by the OECD Fiscal Affairs Committee which would replace the Commentary quoted above.

14. Paragraph 2 of Article 12 of the OECD Model Convention (corresponding to paragraph 3 of article 12 of the United Nations Model Convention) was amended by deleting the words “or the use of, or the right to use, industrial, commercial or scientific equipment”

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by the Report entitled “The Revision of the Model Convention” adopted by the Council of the OECD on 23 July 1992. However, a number of OECD member countries have entered reservations on this point.

15. The Group considered the problems of distinguishing royalties from types of income properly subject to other articles of the Convention. A member from a developed country asserted that the problem was that the “royalties” definition makes an imperfect distinction between revenues that constituted royalties in the strict sense and payments received for brain-work and technical services, such as surveys of any kind (engineering, geological research etc.). The member also mentioned the problem of distinguishing between royalties akin to income from capital and payments received for services. Given the broad definition of “information concerning industrial, commercial or scientific experience”, some countries tend to regard the provision of brain-work and technical services as the provision of “information concerning industrial, commercial or scientific experience” and to regard payment for it as royalties.

16. In order to avoid those difficulties, this member proposed that the definition of royalties be restricted by excluding payments received for “information concerning industrial, commercial or scientific experience”. The member also suggested that a protocol should be annexed to the treaty making it clear that such payments should be deemed to be profits of an enterprise to which article 7 would apply and that payments received for studies or surveys of a scientific or technical nature, such as geological surveys, or for consultant or supervisory services, should also be deemed to be business profits subject to article 7. The effect of these provisions would be that the source country could not tax such payments unless the enterprise had a permanent establishment in that country and that taxes should only be imposed on the net income element of such payments attributable to that permanent establishment.

17. Some members from developing countries interpreted the phrase “information concerning industrial, commercial or scientific experience” to mean specialized knowledge, having intrinsic prop-

erty value relating to industrial, commercial, or managerial processes, conveyed in the form of instructions, advice, teaching or formulas, plans or models, permitting the use or application of experience gathered on a particular subject. They also pointed out that the definition of the term royalties could be broadened through bilateral negotiations to include gains derived from the alienation of any such right or property that were contingent on the productivity, use or disposition thereof. The Group agreed that literary copyrights could be interpreted to include copyrights relating to international news.

Paragraph 4

18. This paragraph reproduces with modifications Article 12, paragraph 3, of the OECD Model Convention, which states that paragraph 1 does not apply to royalties beneficially owned by a person having a permanent establishment or permanent base in the source country if the right or property from which the royalties derive is effectively connected with the permanent establishment or fixed base. The Group decided to modify paragraph 3 of the OECD Model Convention by introducing a limited force of attraction principle. In addition to royalties excluded from the application of paragraph 1 by paragraph 3 of the OECD Article, paragraph 4 of the United Nations Model Convention excludes royalties which are received in connection with business activities described in subparagraph (c) of paragraph 1 of article 7 (business activities of the same or similar kind as those of a permanent establishment in the source country), even if the business activities are not carried on through a permanent establishment or a fixed base. The United Nations Model Convention also modifies the paragraph to refer to paragraph 2 as well as paragraph 1.

Paragraph 5

19. This paragraph, which provides that royalties are considered income from sources in the residence country of the payer of the royalties, is an innovation of the United Nations Model Convention, not found in Article 12 of the OECD Model Convention.

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20. As in the case of interest, some members suggested that some countries may wish to substitute a rule that would identify the source of a royalty as the State in which the property or right giving rise to the royalty (the patent etc.) is used. Where, in bilateral negotiations, the two parties differ on the appropriate rule, a possible solution would be a rule which, in general, would accept the payer's place of residence as the source of royalty; but where the right or property for which the royalty was paid was used in the State having a place of use rule, the royalty would be deemed to arise in that State.

Paragraph 6

21. This paragraph reproduces Article 12, paragraph 4, of the OECD Model Convention, the Commentary on which reads as follows:

“The purpose of this paragraph is to restrict the operation of the provisions concerning the taxation of royalties in cases 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 paid exceeds the amount which would have been agreed upon by the payer and the beneficial owner had they stipulated at arm's length. It provides that in such a case the provisions of the Article apply only to that last-mentioned amount and that the excess part of the royalty shall remain taxable according to the laws of the two Contracting States, due regard being had to the other provision of the Convention.” [para. 22]

“It is clear from the text that for this clause to apply the payment held excessive must be due to a special relationship between the payer and the beneficial owner or between both of them and some other person. There may be cited as examples cases where royalties are paid to an individual or legal person who directly or indirectly controls the payer, or who is directly or indirectly controlled by him or is subordinate to a group having common interest with him. These examples, moreover,

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are similar or analogous to the cases contemplated by Article 9.” [para. 23]

“On the other hand, the concept of special relationship also covers relationship by blood or marriage and, in general, any community of interests as distinct from the legal relationship giving rise to the payment of the royalty.” [para. 24]

“With regard to the taxation treatment to be applied to the excess part of the royalty, the exact nature of such excess will need to be ascertained according to the circumstances of each case, in order to determine the category of income in which it should be classified for the purpose of applying the provisions of the tax laws of the States concerned and the provisions of the Convention. If two Contracting States should have difficulty in determining the other provisions of the Convention applicable, as cases required, to the excess part of the royalties there would be nothing to prevent them from introducing additional clarifications in the last sentence of paragraph 4, as long as they do not alter its general purport.” [para. 25]

“Should the principles and rules of their respective laws oblige the two Contracting States to apply different Articles of the Convention for the purpose of taxing the excess, it will be necessary to resort to the mutual agreement procedure provided by the Convention in order to resolve the difficulty.” [para. 26]

22. Some members of the Group of Experts pointed out that there are very artificial devices entered into by persons to take advantage of the provisions of article 12 through, inter alia, creation or assignment of agreements for the use, right or information with respect to intangible assets for which royalties are charged. While substance over form rules, abuse of rights principles or any similar doctrine could be used to counter such arrangements, Contracting States which may want to specifically address the issue may include a clause on the following lines in their bilateral tax treaties:

“The provisions of this article shall not apply if it was the main purpose, or one of the main purposes, of any persons con-

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cerned with the creation or the assignment of the rights in respect of which the royalties are paid to take advantage of this article by means of that creation or assignment.”