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6th July, 2020

Mr. Michael Sialai, EBS
Clerk of the National Assembly
National Assembly
Parliament Buildings
NAIROBI

THE NATIONAL ASSEMBLY
PAPERS LAID

DATE: 15 JUL 2020

DAY: []

TABLED BY: []

CLERK-AT THE-TABLE: []

Dear *Sialai*,

RE: SUBMISSION OF LEGAL NOTICE NO. 114 OF 2020 ON THE AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS TO THE NATIONAL ASSEMBLY

The National Treasury and Planning, on behalf of the Government of Kenya, concluded an Agreement for the Avoidance of Double Taxation with respect to taxes on income (DTA) with the Government of Mauritius.

The Agreement was published in the Kenya Gazette on 30th June, 2020 (Legal Notice No. 114 of 2020). Section 11(1) of the Statutory Instruments Act, 2013 requires that any Statutory Instrument made be forwarded to the National Assembly within seven days after publication.

NATIONAL ASSEMBLY
RECEIVED

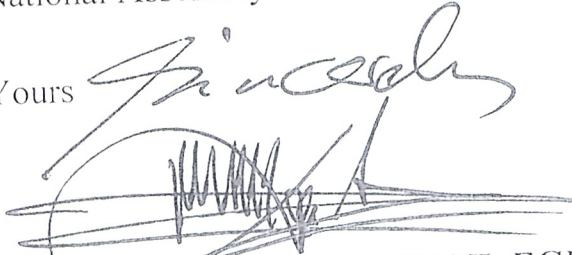
SENIOR DEPUTY CLERK
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P.O. Box 41842 - 00100, NAIROBI

NATIONAL ASSEMBLY
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CLERK'S OFFICE
P.O. Box 41842, NAIROBI

In this regard, I herewith enclose a copy of the Legal Notice for consideration by the National Assembly.

Yours



HON. (AMB.) UKUR YATANI, EGH
CABINET SECRETARY/THE NATIONAL TREASURY AND PLANNING

Encls.

Copy to: **Hon. Paul K. Kariuki, EGH**
Attorney General
State Law Office
Sheria House
NAIROBI

Amb. Raychelle Omamo, SC, EGH
Cabinet Secretary
Ministry of Foreign Affairs
Harambee Avenue
NAIROBI



REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

EXPLANATORY MEMORANDUM TO THE AGREEMENT BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE
GOVERNMENT OF THE REPUBLIC OF MAURITIUS FOR THE
AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES
ON INCOME

LEGAL NOTICE NO. 114 of 2020

PART I

| | |
|--|--|
| Name of the Statutory Instrument: | Agreement between the Government of the Republic of Kenya and the Government of the Republic of Mauritius for the Avoidance of Double Taxation with respect to taxes on income |
| Name of the Parent Act: | The Income Tax Act (Cap. 470) |
| Enacted Pursuant to: | Section 41 of the Income Tax Act (Cap. 470) |
| Name of the Ministry/ Department: | The National Treasury and Planning |
| Gazetted on: | 30 th June, 2020 |

PART II

1. Purpose of the Statutory Instrument

To provide a legal framework for the elimination of double taxation of the residents of Kenya and Mauritius with respect to taxes on their income, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

2. Legislative Context

The Agreement between the Government of the Republic of Kenya and the Government of the Republic of Mauritius creates a legal framework for use by the Revenue Authorities of the two countries for the avoidance of double taxation with respect to taxes on income.

3. Policy Background

The primary purpose of tax treaties is mainly ‘for the avoidance of double taxation’ of income arising from cross-border transactions. Double taxation stifles trade and investment between countries as it penalises businesses that trade between such two countries. Tax treaties also address other issues such as the prevention of tax evasion and non-discrimination. This ensures that businesses do not avoid taxation in the two contracting States. It also provides for the non-discrimination of businesses trading in the two countries.

Currently, there is no Agreement on the Avoidance of Double Taxation between Kenya and Mauritius. The Agreement between the two countries was therefore negotiated as a result of the need to have a legal framework for the administration of avoidance of double taxation with respect to taxes on income between the two countries.

4. Consultations Outcome

In the preparation and negotiation of the Agreement on the Avoidance of Double Taxation between Kenya and Mauritius, consultations were held with key stakeholders and the public. Consultative meetings were convened with the Kenya Revenue Authority, the Ministry of Foreign Affairs and the Office of the Attorney General to synchronize the underlying policy and legal matters. A Public Notice was also issued and uploaded on the National Treasury and Planning website soliciting views of the public by 18th May, 2020.

The consultations yielded useful feedback which was used to negotiate the final Agreement. The comments received included:

- i) That Article 1 on “Personal Scope” needed to be beefed up to enhance clarity of the scope/circumstances under which the residents of the two

- countries will be taxed. This was done by adding Paragraphs 2 and 3 of Article 1.
- ii) That clarity needed to be made on Article 4 on “Resident” to enhance the definition of “Place of Effective Management” to clarify on the treatment of a person other than an individual who is a resident of both Contracting States. This was addressed by adding paragraph 4 in Article 4.
 - iii) That Article 5 on “Permanent Establishment” should use the United Nations (UN) Model Double Taxation Agreement text to provide a more comprehensive definition of the term “Permanent Establishment” (PE). This was considered and the text used provides a comprehensive definition of “what constitutes” and “what does not constitute” a PE.
 - iv) That the proposed taxation rate of 5 percent for dividends under Article 10 on “Dividends” should be reviewed upwards. In addition, a provision should be made to allow for taxation (in accordance with the laws) of profits earned by a company which is a resident of a contracting State and has a PE in the other contracting State. The taxation rate was renegotiated and raised from 5 percent to 8 percent (paragraph 2 of Article 10). Paragraph 6 of Article 10 was introduced to provide for taxation (of profits earned by a company which is a resident of a contracting State and has a PE.
 - v) That the proposed rate of 10 percent for taxation of royalties under Article 12 on “Royalties” should be reviewed upwards. This was addressed by enhancing the taxation rate for royalties to 12 percent (Paragraph 2 of Article 12).
 - vi) That the Agreement should introduce an Article on “Technical Fees” to enable the country tax income earned by persons who come to offer technical services, such as consultancies. This was addressed by introducing Article 12A.

- vii) That a provision should be made in Article 20 on “Students and Apprentices” to cover grants, scholarships and remuneration for employment by students and business apprentices. This was addressed by introducing Paragraph 2 of Article 20.
- viii) That there was need to make a provision in Article 21 on “Other Income” to cover any other items of income of a resident of a Contracting State not dealt with in the other Articles of the Agreement. This was addressed by introducing Paragraph 3 of Article 21.
- ix) That there was need to cover “stateless persons” in Article 23 on “Non-Discrimination”. This was addressed by introducing Paragraph 1A in Article 23 which provides that 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 otherwise or more burdensome than the taxation and the connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.
- x) That the Agreement should introduce an Article on “Entitlement of Benefits” to guide how benefit under the Agreement shall be treated. This was addressed by introducing Article 27A.

5. Highlights of the Agreement

The Agreement provides the intention of the Government of the Republic of Kenya and the Government of the Republic of Mauritius desiring to conclude an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

Article 1: Provides that the Agreement shall apply to persons who are residents of one or both of the Contracting States.

Article 2: Provides the scope of the taxes to be covered by the Agreement. The Agreement shall apply to taxes on income imposed on behalf of a Contracting State or its political subdivisions, irrespective of the manner in which they are

levied. These will include all taxes imposed on total income or on elements of income

Article 3: The Article provides the general definitions of the terms used in the Agreement.

Article 4: Provides the meaning of the term "resident of a Contracting State".

Article 5: Provides the meaning of the term "permanent establishment".

Article 6: Provides the meaning of the term "immovable property" and how income derived from Immovable Property shall be taxed.

Article 7: The Article provides how profits from business shall be taxed.

Article 8: Provides how profits of an enterprise from the operation or rental of ships or aircraft in international traffic shall be taxed.

Article 9: The Article provides how profits accruing to enterprises associated with the main enterprise shall be taxed.

Article 10: Provides how dividends shall be taxed. 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. 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 10 per cent of the capital of the company paying the dividends; (b) 10 per cent of the gross amount of the dividends in all other cases.

Article 11: Provides how Interest shall be taxed. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that

other State. 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. Interest arising in a Contracting State shall be exempt from tax in that State if it is derived and beneficially owned by: (a) the Government, a political subdivision or a local authority of the other Contracting State; or (b) any institution, body or board which is wholly owned by the Government, a political subdivision or a local authority of the other Contracting State.

Article 12: The Article provides how Royalties shall be taxed. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State. 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 is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

Article 12A: Provides how fees for technical services will be taxed. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State in accordance with its laws. However, subject to the provisions of Articles 8, 15 and 16, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and subject to the laws of that Contracting State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the fees.

Article 13: Provides how Capital Gains shall be taxed. Capital Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State. Capital 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 permanent establishment (alone or with the whole enterprise), may be taxed in that other State. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships

or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

Article 14: Provides how salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment in the other Contracting State shall be taxed.

Article 15: The Article provides how Directors' Fees and Remuneration of Top-Level Managerial Officials 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 shall be taxed.

Article 16: Provides how income derived by a resident of a Contracting State as an entertainer or as a sportsman, from his personal activities exercised in the other Contracting State shall be taxed.

Article 17: Provides how pensions and other similar payments arising in a Contracting State and paid in consideration of past employment to a resident of the other Contracting State shall be taxed.

Article 18: Provides how salaries, wages, and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that State or subdivision, authority or body shall be taxed.

Article 19: Provides that a professor or teacher who makes a temporary visit to one of the Contracting States for a period not exceeding two years for the purpose of teaching or carrying out research at a university, college, school or other educational institution in that State and who is, or immediately before such visit was, a resident of the other Contracting State shall, in respect of remuneration for such teaching or research, be exempt from tax in the first-mentioned State, provided that such remuneration is derived by him from outside that State.

Article 20: Provides that a student or business apprentice who is present in a Contracting State solely for the purpose of his education or training and who is,

or immediately before being so present was, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments received from outside that first-mentioned State for the purposes of his maintenance, education or training.

Article 21: Provides for how other income (not dealt with in the foregoing Articles of the Agreement) shall be taxed.

Article 22: The Article provides the procedure of how each of the two Contracting States will ensure that double taxation is eliminated. Both Contracting Parties will use the method of allowing a tax credit against the tax on income of that resident an amount equal to the tax paid in the respective Country. Such credit, however, shall not exceed that portion of the tax as computed before the credit is given, which is attributable, to the income, which may be taxed in the respective Country. In the case of Kenya, where, in accordance with the provisions of the Agreement, income derived by a resident of Kenya is exempt from tax in Kenya, Kenya may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

Article 23: The Article provides for the non-discrimination of the nationals of a Contracting State, that such national 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 may be subjected.

Article 24: Provides for a Mutual Agreement Procedure which shall be followed 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 the Agreement.

Article 25: The Article provides how the competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of the Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description, insofar as the taxation thereunder is not contrary to the Agreement.

Article 26: Provides that nothing in the Agreement 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 27: Provides for the kind of assistance that the Contracting States shall lend to each other in the collection of revenue claims.

Article 27A: The Article provides how benefits under the Agreement will be treated. A benefit under the Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Agreement. Where a benefit under the Agreement is denied to a person, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting State to which a request has been made under this paragraph by a resident of the other Contracting State shall consult with the competent authority of the other Contracting State before rejecting the request.

Article 28: Provides the procedures that shall be followed by each Contracting State in bringing the Agreement into force.

Article 29: The Article provides for the procedure to be followed by either of the Contracting States in terminating the Agreement.

6. Impact

The Agreement is expected to foster economic benefits to the two countries, including enhanced investment by residents of the two countries, removing or reducing double taxation on investment and removing tax discrimination on

investors. The Agreement is also expected to foster greater diplomatic and political ties between Kenya and Mauritius.

7. Monitoring and Review

The Agreement will be implemented by the Kenya Revenue Authority and will be reviewed from time to time on need basis to assess its effectiveness.

8. Contact

The Principal Secretary, National Treasury.

THE NATIONAL TREASURY AND PLANNING

6TH JULY, 2020

(Legislative Supplement No. 67)

LEGAL NOTICE NO. 114

THE INCOME TAX ACT

(Cap. 470)

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Cabinet Secretary for the National Treasury and Planning declares that the arrangements made between the Government of the Republic of Kenya and the Government of the Republic of Mauritius, in the articles of the convention set out in the Schedule hereto and signed on the 10th April, 2019, with a view of affording relief from double taxation in relation to income tax and any rates of similar character imposed by the laws of Kenya, shall, notwithstanding anything to the contrary in the Act or any other written law, have effect to income tax under the Act.

SCHEDULE

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS FOR THE AVOIDANCE OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME

The Government of the Republic of Kenya and the Government of the Republic of Mauritius desiring to further develop their economic relationship and to enhance their cooperation in tax matters, intending to conclude an agreement for the elimination of double taxation with respect to taxes on income without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States),

Have agreed as follows:

ARTICLE 1

Personal Scope

1. This Agreement shall apply to persons who are residents of one or both of the Contracting States.
2. For the purposes of this Agreement, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.
3. This agreement shall not affect the taxation, by a Contracting State, of its residents except with respect to benefits granted under paragraph 2 of Article 9 and Articles 18, 20, 22, 23, 24 and 26

Article 2

Taxes Covered

1. This Agreement shall apply to taxes on income imposed on behalf of a Contracting State or its political subdivisions, 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.

3. The existing taxes to which this Agreement shall apply are in particular:

(a) in Mauritius, the income tax;

(hereinafter referred to as "Mauritius tax");

(b) in Kenya, the income tax charged in accordance with the provisions of the Income Tax Act, Cap 470

(hereinafter referred to as "Kenyan tax").

4. This Agreement shall also apply to any other taxes of a substantially similar character which are imposed by either Contracting State after the date of signature of this Agreement in addition to, or in place of, the existing taxes.

5. The competent authorities of the Contracting States shall notify each other of changes which have been made in their respective taxation laws, and if it seems desirable to amend any Article of this Agreement, without affecting the general principles thereof, the necessary amendments may be made by mutual consent by means of an Exchange of Notes.

ARTICLE 3

General Definitions

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

(a) the term "Mauritius" means the Republic of Mauritius and includes:

(i) all the territories and islands which, in accordance with the laws of Mauritius, constitute the State of Mauritius;

(ii) the territorial sea of Mauritius; and

(iii) any area outside the territorial sea of Mauritius which in accordance with international law has been or may hereafter be designated, under the laws of Mauritius, as an area, including the Continental Shelf, within which the rights of Mauritius with respect to the sea, the sea-bed and sub-soil and their natural resources may be exercised;

(b) the term "Kenya" means all territory of Kenya in state boundaries, including internal and territorial waters and also special economic zone and continental shelf, and all installations erected thereon as defined in the Continental Shelf Act, over which Kenya exercises its sovereign rights for the purpose of exploiting natural resources of the seabed, its subsoil and the superjacent waters, in accordance with international law;

(c) the terms "a Contracting State" and "the other Contracting State" mean Mauritius or Kenya, as the context requires;

- (d) the term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;
- (e) the term "competent authority" means:
 - (i) in the case of Mauritius, the Minister responsible for finance or his authorised representative; and
 - (ii) in the case of Kenya, the Cabinet Secretary responsible for finance or his authorised representative.
- (iii) 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;
- (b) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise which 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;
- (c) the term "national" means any individual having the nationality or citizenship of a Contracting State and any legal person, partnership (société) or association deriving its status as such from the laws in force in a Contracting State;
- (d) the term "person" includes an individual, a company, a trust and any other body of persons which is treated as an entity for tax purposes; and
- (e) the term "tax" means Mauritius tax or Kenyan tax, as the context requires.

2. As regards the application of the Agreement 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 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

Resident

1. For the purposes of this Agreement, 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.

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 in accordance with the following rules:

- (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 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 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.

4. For the purpose of paragraph 3 of this Article, the term "place of effective management" means the place where strategic management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made.

ARTICLE 5

Permanent Establishment

1. For the purposes of this Agreement, 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" shall include:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a warehouse, in relation to a person providing storage facilities for others;
- (g) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and
- (h) an installation or structure used for the exploration of natural resources.

3. The term "permanent establishment" likewise encompasses:

- (a) a building site, a construction, assembly or installation project or any supervisory activity in connection with such site or project, but only where such site, project or activity continues for a period of more than 183 days;

For the sole purpose of determining whether the period referred to in this paragraph has been exceeded,

- (i) where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction or installation project and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding 183 days; and
- (ii) where connected activities are carried on at the same building site or construction or installation project during different periods of time, each

exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction or installation project.

- (b) the furnishing of services including consultancy services by an enterprise of a Contracting State through employees or other personnel engaged in the other Contracting State, provided that such activities continue for the same or a connected project for a period or periods aggregating to more than 90 days within any 12-month period commencing or ending in the fiscal year concerned.

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;
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e),

Provided that such activity or, in the case of subparagraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

4A. Paragraph 4 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State, and:

- (a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or
- (b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

Provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

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 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) habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise and these contracts are:
 - (i) in the name of the enterprise, or
 - (ii) for the transfer of ownership of, or for the granting of the right to use property owned by that enterprise or that the enterprise has a right to use or,
 - (iii) for the provision of services by that enterprise,

unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business (other than a fixed place of business to which paragraph 4A would apply), 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 that enterprise;
- (c) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself.

6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

7. 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 6 applies.

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.

9. For the purposes of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person or enterprise shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

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, may be taxed in the Contracting State in which such property is situated.

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 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. 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 determining 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. 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 determining the profits of a permanent establishment, of 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 Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

Article 8

Shipping and Air Transport

1. Profits of an enterprise of a Contracting State from the operation of aircrafts in international traffic shall be taxable only in that Contracting State.

2. Profits of an enterprise of a Contracting State from the operation of ships in international traffic may be taxed in the other Contracting State, provided that such profits are derived from operations in that other Contracting State. However, the tax so charged shall not exceed 50 percent of the tax that is otherwise applicable in that other Contracting State.

3. For the purposes of this Article, profits from the operation of ships or aircraft in international traffic shall include:

(a) profits derived from the rental on a bare boat basis of ships or aircraft used in international traffic,

(b) profits derived from the use or rental of containers or other related equipment, if such profits are incidental to the profits to which the provisions of paragraphs 1 and 2 apply.

4. 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 this Agreement 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, dividends paid by a company which is a resident of a Contracting State may also be taxed in that State 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 8 per cent of the gross amount of the dividends. 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 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 Contracting 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 a case, the provisions of Article 7 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 situated in 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.

6. Notwithstanding any other provision of this Agreement, where a company which is a resident of a Contracting State has a permanent establishment in the other Contracting State, the profits taxable under Article 7 paragraph 1 may be subject to an additional tax in that other State in accordance with its laws but the additional charge shall not exceed 7.5% per cent of the amount of those profits.

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.

3. Interest arising in a Contracting State shall be exempt from tax in that State if it is derived and beneficially owned by:

- (a) the Government, a political subdivision or a local authority of the other Contracting State; or
- (b) any institution, body or board which is wholly owned by the Government, a political subdivision or a local authority of the other Contracting State.

4. 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. The term "interest" shall not include any item which is treated as a dividend under the provisions of Article 10 of this Agreement.

5. The provisions of paragraphs 1, 2 and 3 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 a case, the provisions of Article 7 shall apply.

6. 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.

7. 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 a case,

the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 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 12 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:

- (a) the use of, or the right to use, any copyright of literary, artistic, scientific work, including cinematograph film, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or other like property or right,
- (b) the use of, or the right to use or receipt of, or the right to receive visual images or sounds or both, that are transmitted to the public by satellite, or by cable, optic fibre, or similar technology,
- (c) 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 and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such a case, the provisions of Article 7 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 with which the right or property in respect of which the royalties are paid is effectively connected, 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.

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 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 beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such a case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

ARTICLE 12A

Technical Fees

1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other Contracting State in accordance with its laws.

2. However, subject to the provisions of Articles 8, 15 and 16, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and subject to the laws of that Contracting State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed 10% of the gross amount of the fees.

3. The term "fees for technical services" as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:

- (a) to an employee of the person making the payment;
- (b) for teaching in an educational institution or for teaching by an educational institution; or
- (c) by an individual for services for the personal use of an individual.

4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other Contracting State and the fees for technical services are effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that Contracting State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment in connection with which the obligations to pay the fees was incurred, and such fees are borne by the permanent establishment.

6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that Contracting State and carries on business in the other Contracting State or a third Contracting State through a permanent establishment situated in that other Contracting State or the third Contracting State and such fees are borne by that permanent establishment.

7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services 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 fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

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 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 or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

4. Gains derived by a resident of a Contracting State from the alienation of shares or comparable interests, such as interests in a partnership or trust, may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.

5. Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State from the alienation of shares of a company which is a resident of the other Contracting State, may be taxed in that other Contracting State if the alienator, at any time during the 12-month period preceding such alienation, held directly or indirectly at least 50 per cent of the capital of that company.

6. Gains from the alienation of any property other than that referred to in the preceding paragraphs of this Article shall be taxable only in the Contracting State of which the alienator is a resident.

ARTICLE 14

Dependent Personal Services

1. Subject to the provisions of 1517, 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 12-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 may be taxed in the Contracting State in which the place of effective management of the enterprise is situated.

ARTICLE 15

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 16

Entertainers and Sportspersons

1. Notwithstanding the provisions of Articles 7 and 14, 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 and 14, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3. Notwithstanding the provisions of paragraphs 1 and 2, income derived from activities, referred to in paragraph 1, performed under a cultural agreement or arrangement between the Contracting States shall be exempt from tax in the Contracting State in which the activities are exercised if the visit to that State is wholly or substantially supported by funds of either Contracting State, political subdivision, a local authority or public institution thereof.

ARTICLE 17

Pensions

1. Subject to the provisions of paragraph 2 of Article 18, pensions and other similar payments arising in a Contracting State and paid in consideration of past employment to a resident of the other Contracting State, shall be taxable only in that other 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

Government Service

1. (a) Salaries, wages, and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that State or subdivision, authority or body 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.

2. (a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that State or subdivision, authority or body 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 State.

3. The provisions of Articles 14, 15, 16 and 17 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, local authority or statutory body thereof.

ARTICLE 19

Professors and Teachers

1. Notwithstanding the provisions of Article 14, a professor or teacher who makes a temporary visit to one of the Contracting States for a period not exceeding two years for the purpose of teaching or carrying out research at a university, college, school or other educational institution in that State and who is, or immediately before such visit was, a resident of the other Contracting State shall, in respect of remuneration for such teaching or research, be exempt from tax in the first-mentioned State, provided that such remuneration is derived by him from outside that State.

2. The provisions of this Article shall not apply to income from research if such research is undertaken not in the public interest but wholly or mainly for the private benefit of a specific person or persons.

ARTICLE 20

Students and Business Apprentices

1. A student or business apprentice who is present in a Contracting State solely for the purpose of his education or training and who is, or immediately before being so present was, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments received from outside that first-mentioned State for the purposes of his maintenance, education or training.

2. In respect of grants, scholarships and remuneration for employment not covered by paragraph 1, a student or business trainee or apprentice described in paragraph 1, shall

in addition, be entitled during such education or training to the same exemptions, reliefs or reductions in respect of taxes available to residents of the Contracting State which he is visiting.

ARTICLE 21

Other Income

1. Subject to the provisions of paragraph 2 of this Article, items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income other than income from immoveable 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 a case, the provisions of Article 7 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 the Agreement and arising in the other Contracting State may also be taxed in that other State.

Article 22

Elimination of Double Taxation

Double taxation shall be eliminated as follows:

1. In the case of Mauritius:

(a) (i) Where a resident of Mauritius derives income from Kenya the amount of tax on that income payable in Kenya in accordance with the provisions of this Agreement may be credited against the Mauritius tax imposed on that resident.

(ii) Where a company which is a resident of Kenya pays a dividend to a resident of Mauritius who controls, directly or indirectly, at least 5% of the capital of the company paying the dividend, the credit shall take into account (in addition to any Kenyan tax for which credit may be allowed under the provisions of subparagraph (a) of this paragraph) the Kenyan tax payable by the first-mentioned company in respect of the profits out of which such dividend is paid.

Provided that any credit allowed under this subparagraph shall not exceed the Mauritius tax (as computed before allowing any such credit), which is appropriate to the profits or income derived from sources within Kenya.

(b) For the purposes of allowance as a credit the tax payable in Kenya shall be deemed to include the tax which is otherwise payable in Kenya but has been reduced or waived by Kenya in order to promote its economic development.

2. In the case of Kenya:

(a) where a resident of Kenya derives income which in accordance with the provisions of this Agreement, may be taxed in the Republic of Mauritius, Kenya shall allow as credit against the tax on the income of that resident an amount equal to the tax paid in the Republic of Mauritius. Such credit, however, shall not exceed that portion of the tax as computed before the credit is given, which is attributable, to the income, which may be taxed in the Republic of Mauritius;

- (b) where, in accordance with the provisions of this Agreement, income derived by a resident of Kenya is exempt from tax in Kenya, Kenya may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income.

ARTICLE 23

Non-Discrimination

1. The 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.

1A. 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 the connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

2. 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 resident 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.

3. 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 that first-mentioned State are or may be subjected.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 7 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.

5. The provisions of this Article shall apply to taxes covered by this Agreement.

ARTICLE 24

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 Agreement, 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 23, 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 this 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 Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. 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 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 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.

Article 25

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 Agreement 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 Agreement. 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 for 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. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

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.

ARTICLE 26

Diplomatic Agents and Consular Officers

Nothing in this Agreement 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 27

Assistance in the Collection of Taxes

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 Agreement 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 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 27A

Entitlement to Benefits

1. Subject to paragraph 2, a benefit under this Agreement shall not be granted in respect of an item of income if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

2. Where a benefit under this Agreement is denied to a person under the provisions paragraph 1, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement. The competent authority of the Contracting State to which a request has been made under this paragraph by a resident of

the other Contracting State shall consult with the competent authority of the other Contracting State before rejecting the request.

ARTICLE 28

Entry Into Force

1. Each of the Contracting Parties shall notify to the other the completion of the procedures required by its law for the entering into force of this Agreement. The Agreement shall enter into force on the date of the later of these notifications.
2. The provisions of this Agreement shall apply:
 - (a) in Mauritius, on income for any income year beginning on or after the first day of January next following the date upon which this Agreement enters into force; and
 - (b) in Kenya:
 - (i) to taxes withheld at source, on amounts paid or accrued on or after the first day of January next following the date upon which the Agreement enters into force; and
 - (ii) to other taxes, on income arising for years of income beginning on or after the first day of January next following the date upon which the Agreement enters into force.

ARTICLE 29

Termination

1. This Agreement shall remain in force indefinitely but either of the Contracting States may terminate the Agreement through diplomatic channels, by giving to the other Contracting State written notice of termination not later than 30 June of any calendar year starting five years after the year in which the Agreement entered into force.
2. In such event the Agreement shall cease to have effect:
 - (a) in Mauritius, on income for any income year beginning on or after the first day of January next following the calendar year in which such notice is given; and
 - (b) in Kenya:
 - (i) to taxes withheld at source, on amounts paid or accrued on or after the first day of January next following the calendar year in which such notice is given; and
 - (ii) to other taxes, on income arising for years of income beginning on or after the first day of January next following the calendar year in which such notice is given.

Legal Notice No. 108/2020 is hereby revoked.

Dated the 30th June, 2020.

UKUR YATANI,
Cabinet Secretary for National Treasury and Planning.