

(Legislative Supplement No. 61)

LEGAL NOTICE NO. 169

THE INCOME TAX ACT

(Cap. 470)

THE DOUBLE TAXATION RELIEF (NETHERLANDS) NOTICE, 2017

IN EXERCISE of the powers conferred by section 41 of the Income Tax Act, the Cabinet Secretary for the National Treasury declares that the arrangements made between the Government of the Republic of Kenya and the Kingdom of the Netherlands in the articles of a convention set out in the Schedule and signed on the 22nd July, 2015 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 in relation to income tax under the Act.

SCHEDULE

The Government of the Republic of Kenya and the Government of the Kingdom of the Netherlands, desiring to conclude a Convention to avoid double taxation and to prevent fiscal evasion with respect to taxes on income;

HAVE AGREED as follows:

ARTICLE 1

PERSONS COVERED

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

ARTICLE 2

TAXES COVERED

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

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

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

(a) in the case of the Netherlands:

- de inkomstenbelasting (income tax);
- de loonbelasting (wages tax);

- de vennootschapsbelasting (company tax) including the Government share in the net profits of the exploitation of natural resources levied pursuant to the Mijnbouwwet (the Mining Act);

- de dividendbelasting (dividend tax);

(hereinafter referred to as "the Netherlands tax");

(b) in the case of Kenya, the income tax chargeable in accordance with the provisions of the Income Tax Act, Cap. 470;

(hereinafter referred to as "Kenyan tax").

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

### ARTICLE 3

#### GENERAL DEFINITIONS

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

- (a) the terms "a Contracting State" and "the other Contracting State" mean the Kingdom of the Netherlands (the Netherlands) or Kenya, as the context requires;
- (b) the term "the Netherlands" means the part of the Kingdom of the Netherlands that is situated in Europe, including its territorial sea, and any area beyond the territorial sea within which the Netherlands, in accordance with international law, exercises jurisdiction or sovereign rights;
- (c) 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;
- (d) the term "person" includes an individual, a company and any other body of persons;
- (e) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- (f) 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;
- (g) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting State 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;
- (h) the term "competent authority" means:
  - (i) in the case of the Netherlands the Minister of Finance or his authorised representative;

- (ii) in the case of Kenya the Cabinet Secretary responsible for Finance or his authorised representative;
- (i) the term "national" means:
  - (i) any individual possessing the nationality or having the citizenship of that Contracting State; and
  - (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;

2. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

#### ARTICLE 4

##### RESIDENT

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, and also includes that State and any political subdivision or local authority thereof. This term does not include any person who is liable to tax in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1 of this Article an individual is a resident of both Contracting States, then his status shall be determined as follows:

- (a) he shall be deemed to be a resident only of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident only of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
- (b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident only of the Contracting State in which he has an habitual abode;
- (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident only of the Contracting State of which he is a national;
- (d) if the residence status of an individual cannot be determined in accordance with the provisions of subparagraphs (a), (b) and (c) above, then the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 of this Article a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

#### ARTICLE 5

##### PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop, and
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment only if it lasts more than nine months.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 7 applies - is acting on behalf of an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. Notwithstanding the preceding provisions of this article, an insurance enterprise of a Contracting State shall, except in regard to re-insurance, be deemed to have a permanent establishment in the other Contracting State if it collects premiums in the territory of that other State or insures risks situated therein through a person other than an agent of an independent status to whom paragraph 7 applies.

7. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker,

general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

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.

## ARTICLE 6

### INCOME FROM IMMOVABLE PROPERTY

1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as immovable property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

4. The provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise and to income from immovable property used for the performance of independent personal services.

## ARTICLE 7

### BUSINESS PROFITS

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3 of this Article, 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 incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. Insofar 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 of this Article 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. No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

7. Where profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

## ARTICLE 8

### SHIPPING AND AIR TRANSPORT

1. Profits from the operation of ships or aircraft in international traffic shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.

2. Notwithstanding paragraph 1 of this Article where an enterprise derives profits from the operation of ships in international traffic in the other Contracting State:

- (a) such profits shall be deemed to be an amount not exceeding 5 per cent of the full amount received by the enterprise on account of the carriage of passengers or freight embarked in that other State; and
- (b) the tax chargeable in that other state shall be reduced by an amount equal to fifty per cent thereof.

3. If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be situated in the Contracting State in which the home harbour of the ship is situated, or, if there is no such home harbour, in the Contracting State of which the operator of the ship is a resident.

4. The provisions of paragraphs 1 and 2 of this Article shall also apply to profits from the participation in a pool, a joint business or an international operating agency.

## ARTICLE 9

### ASSOCIATED ENTERPRISES

1. Where:

- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or
- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises,

but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

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

## ARTICLE 10

### DIVIDENDS

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed

- (a) 10% of the gross amount of the dividends in case the company paying the dividends is a resident of Kenya; and
- (b) 15% of the gross amount of the dividends in case the company paying the dividends is a resident of the Netherlands.

3. Notwithstanding the provisions of paragraph 2, the Contracting State of which the company is a resident shall not levy a tax on dividends paid by that company, if the beneficial owner of the dividends is:

- (a) a company the capital of which is wholly or partly divided into shares and which is a resident of the other Contracting State and holds directly at least 10 per cent of the capital of the company paying the dividends; or
- (b) a pension fund that is recognised and controlled according to the statutory provisions of the other Contracting State.

4. The provisions of paragraphs 2 and 3 shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

5. The term "dividends" as used in this Article means income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

6. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State, of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or a

fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

7. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

8. No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with an assignment of the dividends, or with the creation or assignment of the shares or other rights in respect of which the dividend is paid, or with the establishment, acquisition or maintenance of the company that is the beneficial owner of the dividends and the conduct of its operations, to take advantage of this Article.

## 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, subject to the provisions of paragraph 3 of this Article, such interest may also be taxed in the Contracting State in which it arises and according to the law of that State, but if the beneficial owner of the interest is a resident of the other Contracting State the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. Notwithstanding the provisions of paragraph 2 of this Article, interest referred to in paragraph 1 shall be taxable only in the Contracting State of which recipient is a resident, if such resident is the beneficial owner of such interest and if one of the following conditions is met:

- (a) such recipient is a Contracting State, a local authority or a statutory body thereof, including the Central Bank of that State; or such interest is paid by one of those States, local authorities or statutory bodies;
- (b) such interest is paid in respect of a debt-claim or of a loan directly or indirectly guaranteed or insured or subsidised by a Contracting State or by any other person sponsored or directly or indirectly controlled by a Contracting State;
- (c) such interest is paid to a pension fund that is recognised and controlled according to the statutory provisions of a 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.



5. The provisions of paragraphs 1, 2 and 3 of this Article shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or a fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be shall apply.

6. Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision, or a local authority thereof or a resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

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 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.

8. No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with an assignment of the interest or with the creation or assignment of the debt-claim in respect of which the interest is paid or with the establishment acquisition or maintenance of the company that is the beneficial owner of the interest and the conduct of its operations to take advantage of this Article. The competent authority of the Contracting State has to grant the benefits shall consult with the competent authority of the other Contracting State before denying the benefits under this paragraph.

## 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 law of that State, but if the beneficial owner is a resident of the other Contracting State, the tax so charged shall not exceed 10 percent of the gross amount of the royalties.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, 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 such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5. Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political sub-division, or a local authority thereof or 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 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 or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

7. No relief shall be available under this Article if it was the main purpose or one of the main purposes of any person concerned with the assignment of the royalties or with the creation or assignment of the rights in respect of which the royalties are paid or with the establishment acquisition or maintenance of the company that is the beneficial owner of the royalties and the conduct of its operations, to take advantage of the Article. The competent authority of the Contracting State which has to grant the benefits shall consult with the competent authority of the other Contracting State before denying the benefits under this paragraph.

### 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 Contracting State may be taxed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic 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 from the alienation of any property other than that referred to in paragraphs 1, 2 and 3, shall be taxable only in the Contracting State of which the alienator is a resident.

## ARTICLE 14

## INDEPENDENT PERSONAL SERVICES

1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:

- (a) if he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or
- (b) if his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve-month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.

2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

## ARTICLE 15

## INCOME FROM EMPLOYMENT

1. Subject to the provisions of Articles 16, 18, 19 and 20 salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned;
- (b) the remuneration is paid by or on behalf of an employer who is not a resident of the other State; and
- (c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived by a resident of a Contracting State in respect of an employment exercised aboard a ship or aircraft operated in international traffic, shall be taxable only in that State.

## ARTICLE 16

## DIRECTORS' FEES

Directors' fees and other remuneration derived by a resident of a Contracting State in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

## ARTICLE 17

## ENTERTAINERS AND SPORTSPERSONS

1. Notwithstanding the provisions of Articles 7, 14 and 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from his personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson in his capacity as such accrues not to the entertainer or sportsperson himself but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3. The provisions of paragraphs 1 and 2 shall not apply to income derived by a resident of a Contracting State from activities exercised in the other Contracting State, if the visit to that other State is wholly or mainly supported by public funds of one or both of the Contracting States or political subdivisions or local authorities thereof, or takes place under a cultural agreement between the Governments of the Contracting States. In such case, the income shall be exempt from tax in the Contracting State in which the activities are exercised.

## ARTICLE 18

## PENSIONS, ANNUITIES AND SOCIAL SECURITY PAYMENTS

1. Pensions, annuities and other similar remuneration, arising in a Contracting State and paid to a resident of the other Contracting State, may be taxed in the first-mentioned State. The preceding sentence shall also apply to pensions paid and other payments made under the provisions of the social security legislation of a Contracting State.

2. The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make payments in return for adequate and full consideration in money or money's worth.

3. The provisions of this Article shall also apply in case a lump sum payment is made in lieu of a pension, an annuity or other similar remuneration before the date on which the pension, the annuity or other similar remuneration commences.

4. A pension, an annuity or other similar remuneration shall be deemed to arise in a Contracting State if and insofar as the contributions or payments associated with the pension, annuity or similar remuneration, or the entitlements received from it qualified for tax relief in that State. The transfer of a pension from a pension fund or an insurance company in a Contracting State to a pension fund or an insurance company in another State shall not restrict in any way the taxing rights of the first-mentioned State under this Article.

## ARTICLE 19

## GOVERNMENT SERVICE

1. (a) Salaries, wages and other similar remuneration paid by a Contracting State or a political subdivision or a local authority thereof, to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State:

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

- (i) is a national of that State; or
- (ii) did not become a resident of that State solely for the purpose of rendering the services.

2. The provisions of Articles 15, 16, 17 and 18 shall apply to salaries, wages and other similar remuneration in respect of services rendered in connection with a business carried on by a Contracting State or a political subdivision or a local authority thereof.

#### ARTICLE 20

##### PROFESSORS AND TEACHERS

1. Notwithstanding the provisions of Article 15, a professor or teacher who makes a temporary visit to a Contracting State 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 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 and such remuneration is subject to tax in that other State.

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

#### ARTICLE 21

##### STUDENTS AND BUSINESS APPRENTICES

Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of his education or training receives for the purpose of his maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

#### ARTICLE 22

##### OTHER INCOME

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State.

2. The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, if the recipient of such income, being a resident of a Contracting State, carries on business in the other Contracting State through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply.

#### ARTICLE 23

##### ELIMINATION OF DOUBLE TAXATION

1. The Netherlands, when imposing tax on its residents, may include in the basis upon which such taxes are imposed the items of income which, according to the provisions of this Convention, may be taxed or shall be taxable only in Kenya.

2. However, where a resident of the Netherlands derives items of income which according to paragraphs 1, 3 and 4 of Article 6, paragraph 1 of Article 7, paragraph 6 of Article 10, paragraph 5 of Article 11, paragraph 4 of Article 12, paragraphs 1 and 2 of Article 13, paragraph 1 of Article 14, paragraph 1 of Article 15, paragraph 1 of Article 18, paragraph 1(a) of Article 19 and paragraph 2 of Article 22 of this Convention may be taxed in Kenya and are included in the basis referred to in paragraph 1, the Netherlands shall exempt such items of income by allowing a reduction of its tax. This reduction shall be computed in conformity with the provisions of the Netherlands law for the avoidance of double taxation. For that purpose the said items of income shall be deemed to be included in the amount of the items of income which are exempt from Netherlands tax under those provisions.

3. Further, the Netherlands shall allow a reduction from the Netherlands tax so computed for the items of income which according to paragraph 2 of Article 8, paragraph 2 of Article 10, paragraph 2 of Article 11, paragraph 2 of Article 12, Article 16, paragraphs 1 and 2 of Article 17 and paragraph 3 of Article 18 of this Convention may be taxed in Kenya to the extent that these items are included in the basis referred to in paragraph 1. The amount of this reduction shall be equal to the tax paid in Kenya on these items of income, but shall, in case the provisions of the Netherlands law for the avoidance of double taxation provide so, not exceed the amount of the reduction which would be allowed if the items of income so included were the sole items of income for which the Netherlands gives a reduction under the provisions of the Netherlands law for the avoidance of double taxation.

This paragraph shall not restrict allowance now or hereafter accorded by the provisions of the Netherlands law for the avoidance of double taxation, but only as far as the calculation of the amount of the reduction of Netherlands tax is concerned with respect to the aggregation of income from more than one country and the carry forward of the tax paid in Kenya on the said items of income to subsequent years.

4. Notwithstanding the provisions of paragraph 2, of this Article the Netherlands shall allow a reduction from the Netherlands tax for the tax paid in Kenya on items of income which according to paragraph 1 of Article 7, paragraph 6 of Article 10, paragraph 5 of Article 11, paragraph 4 of Article 12, paragraph 2 of Article 13 and paragraph 2 of Article 22 of this Convention may be taxed in Kenya to the extent that these items are included in the basis referred to in paragraph 1, insofar as the Netherlands under the provisions of the Netherlands law for the avoidance of double taxation allows a reduction from the Netherlands tax of the tax levied in another country on such items of income. For the computation of this reduction the provisions of paragraph 3 of this Article shall apply accordingly.

5. In Kenya double taxation shall be eliminated as follows:

- (a) where a resident of Kenya receives income derived from sources within the Netherlands, which, in accordance with the provisions of this Convention, shall be taxable only in the Netherlands and is exempt from Kenyan tax, then Kenya may, in calculating the tax on the remaining income of that person, apply the rate of tax which would have been applicable if the income derived from the sources within the Netherlands had not been exempted;
- (b) where a resident of Kenya receives income derived from sources within the Netherlands, which, in accordance with the provisions of this Convention may be taxed in both Contracting States, then Kenya shall allow as a deduction from the tax on the income of that person an amount equal to the tax paid in the Netherlands. Such a deduction, however, shall not exceed that part of the

Kenyan tax as computed before the deduction is given, which is appropriate to the income derived from the Netherlands.

#### ARTICLE 24

##### NON-DISCRIMINATION

1. Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2. Stateless persons who are residents of a Contracting State shall not be subjected in either Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of the State concerned in the same circumstances, in particular with respect to residence, are or may be subjected.

3. The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

4. Except where the provisions of paragraph 1 of Article 9, paragraph 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. Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

6. Contributions paid by, or on behalf of, an individual who exercises employment or self-employment in a Contracting State to a pension scheme that is recognised for tax purposes in the other Contracting State shall be treated in the same way for tax purposes in the first-mentioned State as a contribution paid to a pension scheme that is recognised for tax purposes in that first-mentioned State:

Provided that:

- (a) such individual was contributing to such pension scheme before he became a resident of the first-mentioned State; and
- (b) the competent authority of the first-mentioned State agrees that the pension scheme generally corresponds to a pension plan recognised for tax purposes by that State.

For the purpose of this paragraph, "pension scheme" includes a pension scheme created under a public social security system.

7. The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

#### ARTICLE 25

##### MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24 to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where:

- (a) under paragraph 1 of this Article, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 of this Article within two years from the presentation of the case to the competent authority of the other Contracting State, any unresolved issues arising from the case shall be submitted to arbitration if the person so requests.

Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

#### ARTICLE 26

##### EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every



kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

3. The Contracting States may release to the panel of arbitrators, established under the provisions of paragraph 5 of Article 25, such information as is necessary for carrying out the arbitration procedure. The members of the arbitration board shall be subject to the limitations on disclosure described in paragraph 2 of this Article with respect to any information so released.

4. In no case shall the provisions of the previous paragraphs be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information 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*).

5. 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 4 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.

6. In no case shall the provisions of paragraph 4 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 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 Convention or any other instrument to which the

Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. The provisions of this Article shall apply only to a revenue claim that forms the subject of an instrument permitting enforcement in the applicant State and, unless otherwise agreed between the competent authorities, that is not contested. However, where the claim relates to a liability to tax of a person as a non-resident of the applicant State, this Article shall only apply, unless otherwise agreed between the competent authorities, where the claim may no longer be contested. The 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 28

##### MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

1. Nothing in this Convention shall affect the fiscal privileges of members of diplomatic missions or consular posts under the general rules of international law or under the provisions of special agreements.

2. For the purposes of the Convention, an individual who is a member of a diplomatic mission or consular post of a Contracting State in the other Contracting State or in a third State and who is a national of the sending State shall be deemed to be a resident of the sending State if he is subjected therein to the same obligations in respect of taxes on income as are residents of that State.

3. The Convention shall not apply to international organisations, organs and officials thereof and members of a diplomatic mission or consular post of a third State, being present in a Contracting State, if they are not subjected therein to the same obligations in respect of taxes on income as are residents of that State.

#### ARTICLE 29

##### TERRITORIAL EXTENSION

1. This Convention may be extended, either in its entirety or with any necessary modifications, to Aruba, Curaçao, Sint Maarten, or the Caribbean parts of the Kingdom of the Netherlands (Bonaire, Saba and Sint Eustatius), if the part concerned imposes taxes substantially similar in character to those to which the Convention applies. Any such extension shall take effect from such date and shall be subject to such modifications and conditions, including conditions as to termination, as may be specified and agreed in notes to be exchanged through diplomatic channels.

2. Unless otherwise agreed the termination of the Convention shall not also terminate any extension of the Convention to any country to which it has been extended under this Article.

#### ARTICLE 30

##### ENTRY INTO FORCE

This Convention shall enter into force on the last day of the month following the month after the latter of the dates on which the respective Contracting Parties have notified each other in writing that the formalities required by its law for the bringing into force of this Agreement have been complied with. Its provisions shall thereupon have effect as follows:

- (a) in the Netherlands for taxable years and periods beginning on or after the first day of January in the calendar year following that in which the Convention has entered into force;

(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 Convention 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 Convention enters into force.

#### ARTICLE 31

#### TERMINATION

1. This Convention shall remain in force indefinitely. Either Contracting State may terminate the Convention through diplomatic channels, by giving to the other Contracting State written notice of termination not later than the 30th June of any calendar year starting five years after the year in which the Convention entered into force.

2. In such event the Convention shall cease to have effect:

- (a) in the Netherlands: on income for the taxable year or period beginning on or after the first day of January next following the calendar year in which such notice is given;
- (b) in Kenya:
  - (i) with regard to taxes withheld at source, on amounts paid or accrued after the end of the calendar year in which such notice is given; and
  - (ii) with regard to other taxes, on income arising for years of income beginning after the end of the calendar year in which such notice is given.

HENRY ROTICH,

*Cabinet Secretary for the National Treasury.*

#### PROTOCOL

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

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

II It is understood that if the competent authorities of the Contracting States, by mutual agreement, have reached a solution within the context of the Convention, for cases in which double taxation or double exemption would occur:

- (a) as a result of the application of paragraph 2 of Article 3 with respect to the interpretation of a term not defined in the Convention; or
- (b) as a result of differences in qualification (for example of an item of income or of a person), this solution-after publication thereof by both competent

authorities - shall also be binding in other similar cases in the application of the provisions of the Convention.

### III Ad Article 1

1. Notwithstanding Article 1, a company which is treated as a *vrijgestelde beleggingsinstelling* (tax exempt investment institution) according to article 6a Wet op de Venootschapsbelasting 1969 (Dutch Corporate Income Tax Act 1969) or any identical or substantially similar regime introduced after today shall not be entitled to the benefits of Articles 10, 11, 12, 13, 22 and 23 of the Convention and the corresponding articles of the Protocol.

2. The competent authorities of the Contracting States shall by mutual agreement decide to which extent other specific categories of residents of one of the Contracting States shall not be entitled to the benefits of this Convention.

### IV Ad Article 4

A company shall be regarded to be liable to tax:

- (a) in the Netherlands, if the company is a resident of the Netherlands for the purposes of the company tax;
- (b) in Kenya, if the company has its place of management in Kenya, provided that the income derived by that company is treated under the tax laws of that State as income of that company.

### V Ad Article 4

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

### VI Ad Article 7

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

### VII Ad Article 7

In relation to paragraph 1 of Article 7, it is agreed that, if an enterprise of a Contracting State sells goods or merchandise of the same or similar kind as those sold by the permanent establishment, or carries out business activities of the same or similar kind

as those carried out by the permanent establishment, the profits of such sales or activities may be attributed to the permanent establishment if it is demonstrated:

- (a) that these profits are related to the activities of the permanent establishment; and
- (b) that no sound business reasons exist for not conducting the activities through the permanent establishment.

#### VIII Ad Article 7 and 15

Payments received as a consideration for technical services, including studies or surveys of a scientific, geological or technical nature, or for consultancy or supervisory services shall be deemed to be payments to which the provisions of Article 7 or Article 14, as the case may be, apply.

#### IX Ad Article 7

The competent authorities of the Contracting States may by mutual agreement adopt a new method of attribution of profits to permanent establishments as developed by the OECD or the UN.

#### X Ad Articles 7 and 9

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

#### XI Ad Article 8

It is understood that the provisions of Article 8 shall also apply to taxes on income levied on the basis of the gross receipts in respect of the carriage of passengers and cargo in international traffic.

#### XII Ad Articles 8, 13, and 22

1. For the purposes of Articles 8, 13 and 22 the place of effective management of the aircraft enterprise of Koninklijke Luchtvaartmaatschappij N.V. (KLM N.V.) shall be deemed to be situated in the Netherlands, as long as the Netherlands has an exclusive taxing right with respect to the aircraft enterprise of KLM N.V. under the Agreement between the Government of the Kingdom of the Netherlands and the Government of the French Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (with Protocol); Paris, 16 March 1973, as amended by the Protocol of the 7th of April 2004.

2. The provision of paragraph 1 of this Article shall also apply if the aircraft enterprise of the existing KLM N.V. is continued fully or substantially by another person.

#### XIII Ad Article 10

The provisions of paragraph 3 of Article 10 shall apply as long as, under the provisions of the Income Tax Laws of the Contracting State of which the company that beneficially owns the dividends is a resident applies a full tax exemption to dividends which that company receives from a company which is resident of the other Contracting State.

#### XIV Ad Article 10

The determination of the purpose referred to in paragraph 8 of Article 10 shall be based on all facts and circumstances including:

- (a) the nature and volume of the activities of the company in its country of residence in relation to the nature and volume of the dividends;
- (b) both the historical and the current ownership of the company; and
- (c) the business reasons for the company residing in its country of residence including the extent to which the company that beneficially owns the dividends would be entitled to treaty benefits comparable to those afforded by this Convention if it had been a resident of the country of residence of the majority of its shareholders.

The competent authority of the Contracting State which has to grant the benefits shall consult with the competent authority of the other Contracting State before denying the benefits under paragraph 8 of Article 10.

#### XV Ad Articles 10, 11 and 12

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

#### XVI Ad article 12

Notwithstanding paragraph 2 of Article 12 the competent authorities of the Contracting States may decide by mutual agreement on exemption at source of royalties paid as a consideration for the use or the right to use agricultural or environmental technologies.

#### XVII Ad Articles 10 and 13

1. Notwithstanding the provisions of paragraphs 1, 2 and 7 of Article 10 dividends paid by a company whose capital is divided into shares and which under the laws of the Netherlands is a resident of the Netherlands, to an individual who has a qualified shareholding in that company and who is a resident of Kenya may be taxed in the Netherlands in accordance with its own laws.

2. Notwithstanding the provisions of paragraph 4 of Article 13, the Netherlands may, in accordance with its own laws, including the interpretation of the term "alienation", levy tax on gains derived by an individual who and is a resident of Kenya from the alienation of shares in, "jouissance" rights or debt-claims on a company whose capital is divided into shares and which, under the laws of the first-mentioned Contracting State, is a resident of that State, and from the alienation of part of the rights attached to the said shares, "jouissance" shares or debt-claims, provided that individual has a qualified shareholding in that company.

3. The term "qualified shareholding" means a shareholding by an individual - either alone or with his or her spouse - or one of their relations by blood or marriage in the direct line directly or indirectly of at least 5 per cent of the issued capital of a particular class of shares in a company.

#### XVIII Ad Articles 10 and 13

1. It is understood that income received in connection with the (total or partial) liquidation of that company or a purchase of own shares or a purchase or redemption of own profit sharing certificates by that company, such income is treated as income from shares and not as capital gains.

2. Notwithstanding paragraphs 1, 2 and 3 of Article 10 and paragraph 4 of Article 13, the Netherlands may apply the following provisions relating to the prevention of tax avoidance:

Article 17, paragraph 3, subparagraph (b) in connection with article 17a, paragraph 1, subparagraph c of the Corporate Income tax act 1969, or any identical or substantially similar provisions replacing these articles.

**IXX Ad Article 16**

Where a company is a resident of the Netherlands, the term “member of the board of directors” includes both a “bestuurder” and a “commissaris”. The terms “bestuurder” and “commissaris” mean respectively persons who are charged with the general management of the company and persons who are charged with the supervision thereof.

**XX Ad Article 25**

The competent authorities of the States may also agree, with respect to any agreement reached as a result of a mutual agreement procedure as meant in Article 25, if necessary contrary to their respective national legislation, that the State in which there is an additional tax charge as a result of the aforementioned agreement shall not impose any increases, surcharges, interest and costs with respect to this additional tax charge, to the extent that a corresponding deduction of tax is made in the other State as a result of the agreement and no interest is payable in that State with respect to such a reduction of tax.

**HENRY ROTICH,**  
*Cabinet Secretary for the National Treasury.*