INTERNATIONAL

Source Taxation of Consideration for Technical Services and Know-How

with Particular Reference to the Treaty Policy of China, India and Thailand

Edwin van der Bruggen

Edwin van der Bruggen is a Tax Lawyer, Eurasian Structured Finance, Hong Kong. Lecturer Faculty of Law, Assumption University, Bangkok, Thailand.

The author wishes to thank Saravut Krailadsiri, Senior Legal Advisor Eurasian Structured Finance for his help in writing this article.

I. INTRODUCTION

A. North versus south?

The costs of labour, land and finance are often minute compared to the cost of technology in setting up new plants in developing countries. This is stimulated by the governments of those countries, who are eager to attract the newest technology around for their country.

This technology has a price-tag. All too often the profits of the factories are completely erased by the heavy technology service fees that (un-)related companies are charging the taxpayer in the developing country. The revenue department is not blind to this development and is fully aware that of this income from technological assistance, technology fees, technological services, technical consulting or whatever names one might come up with, not one penny is dropped in the Treasury of the developing country. They are, after all, services, claims the taxpayer, business expenses, which are only taxable in the residence country of the performer of the service (Art. 7 OECD Model DTC).[1]

The tax characterization of payments for technology-related rights and services poses problems especially when the payer is located in a country imposing a withholding tax on royalties, as developing countries often do. In such cases, the tax authorities may be tempted to characterize the payment as a royalty in order to levy withholding tax. The taxpayer may be equally overanxious in (mis-)characterizing the income.

In this article, I discuss the different possibilities open to the tax authorities for source-country taxation of technological services, with particular reference to the domestic law and double taxation conventions of three major centres of foreign investment: China, India and Thailand.

B. Delineation of the subject and terminology

The first problem we encounter is that of the delineation of the subject matter. Neither "technical services", "technical fees", "technical consulting" nor "technical assistance" are clearly defined[2] and separated from other consulting services (commercial, marketing, management, financial, etc.) nor has it been clearly separated from the engineering activities related to construction as meant in Article 5 Paragraph 3 of the OECD DTC.

Descriptions that may be found in domestic laws of different countries and DTCs are, however, all characterized by a wide scope of services and payments that are deemed to be covered by the different terms used.

To define the term in the title, and at the same time delineate the subject from other related subjects, one can be inspired by the following definitions from bilateral treaties:

> "Fees for technical services" means payments of any kind to any person, other than payments to an employee of the person making the payments and to any *individual for independent personal services in consideration for services of a managerial, technical, or consultancy nature, including the provision of services of technical or other personnel*.[3]
>
> Fees for "Included Services" may be subject to 15 per cent withholding tax, while technical fees – meaning *payments in consideration for any services of a technical, managerial, or consultancy nature* – may be subject to 10 per cent withholding tax.[4]

Also the definitions included in bilateral treaties of India, Pakistan and Malaysia give a wide scope to the term "tech-

1. "Double Taxation Convention" is abbreviated in this article as "DTC". "OECD Model DTC" refers to the "Model Tax Convention on Income and on Capital" (1997) by the OECD; "UN Model DTC" refers to the "1980 Model Convention" by the United Nations.
2. "The term 'technical assistance has not yet clearly been defined"; Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 801.
3. Kawatra, Gagan Kumar, "India's Approach to Negotiating Tax Treaties", *TNI* 8, p. 169.
4. Gregoriou. A., "Cyprus, India Finalize Income Tax Treaty", *TNI*, p. 848.

nical services/fees/assistance" which are defined as "*payments in consideration for any services of a technical, managerial or consultancy nature*".[5]

As will be seen in this article, the fact that the performed service is not strictly linked to any technological activity is typical and will be important for the remainder of the study.

For lack of a definition, and because it seems to imply a larger field of payments, I will use the term "technical fee", being fully aware that it is easily interchangeable with technical assistance, services, consulting, etc. "Fee" just means payment and consequently leaves the question open whether it concerns a payment for a service or a payment for a transfer of knowledge. Distinguishing between the two is one of the issues discussed in this study. Some of the suggestions in this article will, given the inclusion of non-technical knowledge in the scope of "technical fees", equally apply to service income of another nature, such as financial advice or management consulting, though functionally, from a perspective of business organization, they are distinguishable.

Also the terminological difference between "royalties" and "technical fees" is not always clear, as can be illustrated by David B. Oliver's concern in his Intertax editorial about the Proposed EU Interest and Royalties Direct ive: "What if a state called the (royalties) something else e.g. technical fees?"[6]

Not covered in this study, though I must admit it is not unrelated, is the relation between technical and other services concerning construction sites, and the definition of PE. The taxation of salaried employees in technical jobs and indirect taxation are also left out of the scope of this article.

C. Practical importance of the study

The financial impact for developing countries by base erosion through international payments for technical or management assistance, services, consulting, etc. guarantees that a vigilant tax authority will try to maximize source taxation of said services.

Using a broad definition of royalties to maximize (withholding) taxes is one obvious way to achieve that goal. Policies of this nature have sometimes sparked critique from taxpayers:

> Spraque, Whatley and Weisman remark that "tax authorities of some nations in the Asia-Pacific region view (every) such payment as royalties subject to withholding tax".[7]
>
> Or, as Kitipong Urapeepatanapong (Thailand) puts it, "At present, any payment for the use of information concerning industrial, commercial or scientific experience may be considered a royalty from the Government's point of view".[8]
>
> Vietnam applies a wide interpretation to its concept of royalty. Burke notes that: "Royalties may cover payments for transactions that would normally not be classified as such in other jurisdictions".[9]
>
> Indian tax law provides that technical services payable by a resident are deemed to be derived from India and as such subject to Indian income tax,[10] and hence tries to include a special reference to such income in tax treaties.
>
> And finally in Malaysia, the taxation of technical fees by the Malaysian tax authorities as royalties has led to renegotiation between the two contracting states and a new Protocol.[11]

It is therefore safe to say that the tension between technical fees and royalties has created discussions both between taxpayers and their tax authorities, and between treaty partners, which more than merit a closer look.

But taxing technical fees as royalties (under domestic law, eventually restricted by DTA provisions) is not the only way open to tax authorities to retain taxing power over these kinds of income. If considered business profits, internal law may provide for source taxation if the income can be connected to a branch. Furthermore, the income may be regarded as professional independent services income, taxable in the source country with or without a "fixed base" in that country.

D. Overview of taxation of technical fees in the source country

Source taxation under domestic law may, as is shown below with respect to China, India and Thailand, be possible under different names and categories.

With respect to the DTC, source taxation of technical fees paid by an enterprise to a foreign beneficiary may be appropriate under one of the following articles:

(1) the payment constitutes business profits which are connected to a permanent establishment (PE) of the supplier of the service in the source country (Art. 7);
(2) the payment can be regarded as "independent personal service" income, which is attributed to a fixed base (FB) in the source country, or because of another rule provided in the DTC (Art. 14);
(3) the payment can be regarded as a royalty paid by a resident of the source country (Art 12); or
(4) the payment is subject to a specific rule included in the DTC, which allows the source country to tax income of this nature (for instance an article dedicated to "Technical Fees" or "Included Services").

5. See the DTCs between Malaysia–Malta; Malaysia–Albania; Malaysia–Netherlands; Pakistan–UK; Pakistan–Sweden; Pakistan–PRC.
6. Oliver, J.D.B., "The Proposed EU Interest and Royalties Directive", *Intertax* (1999), p. 204.
7. Sprague G.D., Whatley, E.T., Weisman, R.L., "An Analysis of the Proper Tax Treatment of International Payments for Computer Software Products", *Asia-Pacific Tax Bulletin* (1995), p.158.
8. Kitipong Urapeepatanapong and Chaiyong Ngampravatdee, "Taxation of Intellectual Property Transfers in Thailand", *Asia-Pacific Tax Bulletin* (1997), p. 385 (389)
9. Burke, F. and Maier, F., "Taxation of Intellectual Property Transfers in Thailand", *Asia-Pacific Tax Bulletin* (1997), p. 385 (387).
10. Secs. 4 and 9(1) of the Indian Income Tax Act; Tandon Sandeep, "Taxability of Royalties and Technical Fees Arising in India", *Bulletin for International Fiscal Documentation* (1997), p. 416 (see below).
11. Cox, T., "Australian Tax Treaty Update (December 1996)", 13 *Tax Notes Int'l*, p. 1922.

Ward suggests that technical assistance payments which are not royalties nor business profits, may be treated as "other income" (Art. 21), but this situation lies beyond the boundaries of commercial operations and is not further dealt with in this article.[12]

II. TAXATION OF TECHNICAL FEES IN THE SOURCE COUNTRY AS BUSINESS PROFITS OF A PERMANENT ESTABLISHMENT

A. Treatment under the OECD model treaty

Technical fees may be taxable in the source country if they are deemed business profit that is connected to a permanent establishment in that country.

For a permanent establishment to exist, the following conditions must be met:
– a place of business;
– the place of business must be fixed;
– the carrying on of the business of the enterprise through this fixed place of business.

That technical assistance may lead to the performer of the service having a permanent establishment in the source country, is certainly *possible but not very likely* under the OECD Model DTC.

There are several arguments to support this:

(1) In many cases the foreign performer of services will not have nor need a fixed place of business in the source country, but merely performs his services in the factory, offices or other facilities of the customer. It seems that making available certain premises to the performer of services only for accomplishing an assignment, is not enough to assume a PE exists with respect to the performer of the service.[13] If the latter only uses the premises to perform his contract with the client, and has no relations with other (possible) clients, his use of the premises does not constitute a PE.[14]

(2) The servicing of a know-how contract, even if done through a "fixed place of business" is an activity that has a *preparatory or auxiliary character*, and cannot in itself lead to taxation in the source country.[15] Technical assistance is after all always required when a machine or production line is purchased, and such services should not be seen as separated from the main contract.

(3) Technical services are often accessory to another contract, for instance the sale of a machine, a plant or know-how. The provisions of the OECD Commentary concerning after-sale service are relevant in this regard, and they clearly indicate that such services have, in principle, a preparatory or auxiliary character.[16] As Skaar puts it: "In most cases post sales activities cannot be said to be the general purpose of the enterprise, unless performed through a separate legal entity".[17]

(4) Also the OECD Commentary concerning the leasing of equipment is relevant, as it states that for the leasing of tangibles and intangibles (such as know-how) such activity usually does not lead to having a permanent establishment even if "the lessor supplies personnel after installation to operate the equipment provided that their responsibility is limited solely to the operation or maintenance of the equipment under the direction, responsibility and control of the lessee."[18]

(5) Technical fees are often payments that refer to the hiring out of skilled technicians or consultants. The technicians or consultants involved will then perform their work in the source country, the country of the client. Their presence in the source country usually does not constitute a PE.[19]

B. Treatment under the UN model treaty

The UN Model DTC, however, extends the meaning of permanent establishment with regard to furnishing of services:

> The furnishing of services, including consultancy services, by a resident of one of the Contracting States through employees or other personnel, provided activities of that nature continue (for the same or a connected project) within the other Contracting State for a period or periods aggregating more than six months within any twelve-month period.

Even if the enterprise furnishing the services has no fixed place of business in the source country, the mere fact that the service or the consultancy is supplied, means it is deemed to have a permanent establishment, and may consequently be taxed on the income by the source country.

The conditions are, however:

(1) The activity of furnishing services or consultancy is performed within the source state. This is a major difference with taxation of technical fees as royalties since, in the latter case, only the source of the payment is relevant. Services which are performed in the residence state of the service-performer, or in any other state besides the source country, are not within the scope of this rule. Such may often be the case for design of plans, writing manuals, and expert opinions.

(2) The activity continues for more than six months in that source state for the same or a connected project. In bilateral negotiations, however, different periods have been agreed upon.[20] Notable examples are reductions to 90 days, and different time thresholds in case of associated enterprises.[21]

12. Ward, D., Avery Jones, J.F., "The Other Income Article of Income Tax Treaties", *B.T.R.* (1994), p. 367; also Tandon Sandeep, "Taxability of Royalties and Technical Fees Arising in India", *Bulletin for International Fiscal Documentation* (1997), p. 419.
13. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 287.
14. Skaar, A., *Permanent Establishment. Erosion of a tax treaty principle* (Kluwer, Deventer: 1991), p. 304.
15. OECD Model Commentary Art. 5 Para. 23.
16. OECD Model Commentary Art. 5 Para. 25.
17. Skaar, loc. cit., p. 300.
18. OECD Model Commentary Art. 5 Para. 8.
19. OECD "Taxation Issues Relating to International Hiring-out of Labor", 1984, 22; Skaar, p. 333.
20. I.e. China–Malta (8 months), China–Slovenia (12 months).
21. I.e. Thai–US. India–Canada, India–Australia.

(3) The six-month requirement must be fulfilled within any 12-month period, irrespective of the tax year for which the service provider is being assessed. If this specification is omitted, as is often the case, the minimum period must be reached within the tax year concerned. In some treaties, the period of reference has been replaced by a longer time (24 months).[22]

This furnishing of services PE was included specifically to create a possibility of source taxation of payments for technological (in the broad sense of the word) services.[23]

According to a 1997 study of the International Bureau of Fiscal Documentation, around 25% of the world's tax treaties between 1980 and 1997 contain a specific provision for the furnishing of services.[24]

In practice, developing countries seem fond of the "furnishing of services" provision to curb base erosion where possible.[25]

C. Source taxation of technical fees as business profit of a PE in China

Foreign companies with establishments in China are subject to taxation on their China-source income in generally the same manner as "Foreign Investment Enterprises" (which are resident in China but have at least partly foreign ownership).

Establishments are defined to include management and business establishments, offices, factories, etc. and sites for the furnishing of services. Thus, Chinese domestic tax law incorporates the "furnishing of services PE" that is described in the UN Model Tax Convention. This certainly has potential for the source taxation of technical fees that are deemed business profits.

But, to date, foreign enterprises have rarely been allowed to establish a branch office in China, as the government sees joint ventures with local partners as a better way to develop the economy with foreign investment. Consequently, source taxation of technical fees as business profits of a Chinese branch of the performer of the service is currently unusual.[26] Still, possibilities may exist in situations where the performer has a representative office or is engaged in a contracted project.

Representative offices are the most widespread form of branches (if they can in fact be deemed a branch).[27] They are deemed to be taxable establishments in China, even though they are in theory not allowed to engage in business transactions with third parties. Representative offices limiting their activities to market surveys, collecting business information, providing business liaison, consultation and other services exclusively on behalf of their head offices, can qualify for an exemption of income tax. Certain technical services might qualify for this exemption, but this is unlikely to be the case when services are performed to third parties.

If a foreign performer of technical services provides services through the intermediary of a representative office, the taxable profit may be calculated in different ways, i.e. on actual income or on deemed profit.[28]

Foreign performers of technical services engaged in a contracted project in China are deemed to have a taxable establishment there, unless a DTC provides otherwise.

Contracted projects are usually large-scale projects in which a foreign enterprise agrees with a Chinese entity to provide services in the area of design, construction, installation and assembly.[29]

Typically, technical services are an important part of contracts of this kind. The net income derived from the contracting activity is subject to the normal 33% income tax-rate (including local tax).

Some payments for technical services are not to be included in the taxable profit of the foreign contractor, however. The Circular lists, among others, "amounts received in respect of data analysis and processing performed outside the PRC under a separate contract" and "amounts received in respect of design services performed outside the PRC". Determination of taxable profit on a gross-income basis is possible with approval of local tax authorities, usually between 10-15%.[30]

Chinese treaties usually adhere to the UN concept of PE, including the reference to furnishing of services over a minimum six-month period.

D. Source taxation of technical fees as business profit of a PE in India

Indian tax law has a specific rule providing non-resident taxation for technical fees, as for royalties (and a corresponding provision in most of its DTAs – see below), which obviously reduces the need for tax authorities to retain source taxation on technical fees by regarding the income as a business profit which is connected to a PE in the country.[31] Nevertheless, source taxation under the general source rules applicable to business profits in Section 9a of the ITA (as opposed to those specifically for royalties and technical fees – Sec. 9d ITA), may be in order for instance, if the income is connected to a PE in India[32] or if the income does not fit the definition of technical fee as found in Explanation 2 of Section 9 (1) vi and vii.[33]

22. I.e. DTC China–Israel, China–Mauritius.
23. UN Model and Commentary, Art 5, Para. 3.
24. Wijnen, W.F.G. and Magenta, M., "The UN Model in Practice", *Bulletin for International Fiscal Documentation* (1997), p. 576.
25. BIR Ruling No. 031-95 14 February 1995 (Philippines tax authorities qualify a French technical advisor to the railway system, as having a permanent establishment under 5(2)I of the Philippines–French DTC).
26. Moser, M.J. and Zee, W.K., *China Tax Guide* (Oxford University Press, Hong Kong: 1999), p. 213.
27. Moser, M.J. loc. cit., p. 219 (Representative offices do not constitute formal branches in the legal sense); Curley, S.C., and Fortunato, D.R., *China; A Preliminary Look*, *TNI*, 4 March 1995.
28. Vanderwolk, J., *Practical China Tax Planning*, Sweet & Maxwell, E3-52/53.
29. Circular 149 MoF, 1983, Provisional Regulations regarding the levy of Industrial and Commercial Consolidated tax and Enterprise Income tax on foreign businesses contracting for project work and providing labour services.
30. Practital, E3-71.
31. Sec. 9(1) vii Indian Income Tax Act (hereafter ITA).
32. Tandon, S., loc. cit., 420; Advance Ruling P. No. 28 of 1999, 105 Taxmann 218 (AAR – N. Delhi); Advance Ruling P. No. 13 of 1995 In Re (1997) 228 ITR 487.
33. Mittal, D.P., *Indian Double Taxation Agreements and Tax Laws* (Taxmann A.S., New Delhi: 1999), pp. 1-284.

India's internal tax law does not refer to the notion of "branch" or PE, but does subject business income of non-residents to taxation in India if the income accrued or arose through or from any business connection or property, or asset or source of income, or transfer of a capital asset, situated in India.[34]

For defining the statutory source principles of Indian income tax law, reference is made to the originating cause of the income, which depends on the nature of the business,[35] the nature of the income, and the geographical location of the source.[36] Isolated transactions do not constitute a business connection.[37]

With respect to services, the source or business connection may be the place where the services were performed,[38] thus opening the possibility for source taxation (under domestic tax law) on technical services, including consulting. After-sale services of a technical nature, however, do not necessarily constitute a sufficient business connection with India, even if the deputation of personnel is involved.[39]

This is also illustrated by case law where a German company sent technicians for setting up and rendering the plant productive that the buyer had bought from the company. Such assistance had to be seen in connection with the main contract, according to the Court.[40] Other examples include situations where the work to set up a plant and make the plant workable is deemed a part of the sale.[41] A technical advisor was not considered an agent of a foreign company.[42]

The furnishing of technical or management services by personnel of group members did constitute a PE to which the service income could be attributed, according to a ruling published in 1999. The Authority considered that the exact nature of the services performed (managerial, technical or otherwise) was not important, and that from the facts it was clear that the employees of the foreign group member were furnishing services to the Indian company.[43] In earlier cases, a business connection was deemed to exist pursuant to a technical cooperation agreement.[44] Generally speaking, however, the mere fact that certain goods are produced in India with the aid of technical know-how obtained abroad from a non-resident company is not sufficient to say that the non-resident company has been carrying on a business operation in India.[45]

E. Source taxation of technical fees as business profit of a PE in Thailand

The taxability of the technical fee derived from Thailand, once assumed it constitutes business profit, will depend on whether or not the beneficiary is deemed to "carry on business in Thailand". If this condition is not met, no (withholding) tax is due. Section 70 of the RC determines which income is taxable for a juristic company or partnership organized under foreign law. This statutory provision refers to income under Section 40 (2)-(6), excluding Section 40 (8), which deals with business profits.

Thus, if a technical fee is deemed a business profit, the foreign beneficiary must be deemed to be carrying on business in Thailand in order to incur income tax.

The RC does not define "carrying on business in Thailand". Section 66 Paragraph 2 merely states that juristic companies or partnerships organized under foreign laws and carrying on business in Thailand are subject to the same tax regime as those organized under Thai law, but only with respect to income arising from or in consequence of the business carried on in Thailand.

Furthermore, if a foreign company has an employee, a representative or an intermediary to carry on business in Thailand, and thereby derives profits from Thailand, the said foreign company shall be deemed to be carrying on business in Thailand and the employee, representative or intermediary has the duty to file a tax return and pay tax on behalf of the foreign principal (Sec. 76bis RC).

How likely is it that the performer of technical services will be deemed to carry on business in Thailand at the place of business or project of his customer under Thai law?

This is illustrated by Thai Supreme Court decision 3867/2531 where a team of 15 Japanese technicians working on the factory floor for technical assistance to their Thai customer were *not* deemed a PE.

Most DTCs concluded by Thailand include the UN "furnishing of services PE" concept, discussed above, and source taxation may occur within the scope of that definition.

Even if the enterprise furnishing the services has no fixed place of business like an office or a branch in the source country, from the mere fact that the service or the consultancy is supplied it is deemed to have a permanent establishment, and may consequently be taxed on the income by the source country. The services must in that case however have been performed during a six-month period.

A remarkable exception to the six-month rule can be found in the US DTC with Thailand, which provides for only a 90-day period or periods in any 12 months (except when the period is less than 30 days in a tax year). In the same treaty the minimum period is completely abandoned when the services are performed within the source state to a

34. Sec. 9 1 (I) ITA.
35. *American Leaf Blending Co Sdn Bhd v. DG of IR* (1978) STC 561; *CIT v. R.D. Aggarwal* (1965) 56 ITR 20; Rajaratnam, S., and Venkatramaiah, B.V., *Commentary on Double Taxation Agreements* (Snow white, Mumbai: 1999), 1.80.
36. Mittal, D.P., 1.3.
37. Vinod K. Singhania, *Law & Practice of Income Tax*, vol. 1 (Taxmann: 1999), p. 293.
38. Mittal, D.P., 1.19.; Rajaratnam, S., and Venkatramaiah, B.V., loc. cit., 1.105.; see, however, *Steffen, Robertson & Kirsten Consulting Engineers v. CIT* (1997) 95 Taxmann 598 (AAR-New Delhi).
39. *CIT v. Fried.Krupp Industries* (1981) 128 ITR 27 (Mad).
40. *Andrew Yule & Co v. CIT* (1994) 207 ITR 899 (Cal). In another decision the same court ruled that the training of technical personnel, and other basic engineering services were business profits and not royalties. *CIT v. Hindustan Paper Corpn. Ltd.* (1994) 77 Taxman 450.
41. *Tekniskil v. CIT* (1996) 222 ITR 551 (AAR); see also *CIT v. Visakhapatnam Port Trust* (1983) 144 ITR 146.
42. *CIT v. New Consolidated Gold Fields Ltd* (1983), 143 ITR 599/15.
43. Advance Ruling P. No. 28 of 1999, 105 Taxmann 218 (AAR – N. Delhi).
44. *Bharat Heavy Plate & Vessels v. CIT* (1979) 119 ITR 986 (AP).
45. *VDO Tachometer West Germany v. CIT* (1979) 117 ITR 804 (Kar.).

related enterprise.[46] Thus, if services are performed in Thailand on behalf of a US enterprise for 20 days at the end of year 1, continuing for an additional 80 days at the beginning of year 2, a permanent establishment would exist in Thailand, because the 90-day threshold has been passed. But there would be a permanent establishment only in year 2, and not in year 1 and thus only the income of year 2 would be taxed in Thailand.[47]

III. SOURCE TAXATION OF TECHNICAL FEES AS INDEPENDENT PERSONAL SERVICES INCOME

A. Source taxation of technical fees as independent personal service income under the OECD model treaty

In circumstances that are discussed below, the source country may retain taxing power over technical fees paid to a non-resident, if they are deemed to be independent personal services income under the applicable treaty. Article 14 of the DTA is concerned with income from professional services and other activities of an independent character. Well-known examples are scientific, artistic, and teaching activities, and services by lawyers, doctors, etc.

The OECD Model also specifically mentions services by engineers and architects (which are clearly technology-related), but the list is non-exhaustive, and also refers to "other activities of an independent character", a term which is not described in the text of the Model nor in the Commentary.

Exactly which activities fall under the scope of the article is, even within the Fiscal Committee of the OECD, not clear. In a recent report on Issues Related To Art. 14 DTC, the Fiscal Committee had to admit: "It is, however, far from clear which activities fall within article 14".[48]

In practice, the different classification does not always matter, since the principles of PE or fixed base are comparable. Taxation under the one or the other article will lead to the same result. But for many countries, including Thailand, the difference does matter. Thai DTCs are not very coherent regarding the periods required for Article 5 on the one hand and the periods required for Article 14 on the other hand. Where the six-month or 183-day rule was provided for a (consulting) PE and not for a fixed base (see below) or vice versa, the problem stops being purely academic. In Thailand both instances occur. The DTC with Spain for instance includes a six-month rule in Article 5 but not in Article 14.[49] On the contrary, on many occasions the period provided for Article 14 is shorter than that for Article 5.[50] With respect to India, the France/India DTA illustrates this issue as well: there is no reference to a furnishing of services PE in Article 5, but Article 15 of that treaty does provide for a 183-day rule for independent personal services.

Therefore the question, which activities fall under the scope of Article 14 rather than under Article 7, remains important. The term "professional services" is fairly comprehensive and illustrated by examples, including that of an engineer. A clear definition is, however, not available in the DTC nor in the Commentaries with respect to "other activities of an independent character". Vogel assumes that it must concern an activity that can also be performed *dependently*, within the scope of Article 15.[51] Important is, according to this learned author, that what is involved is a service (not manufacturing, or sales) and that it is "similar" to professional services.[52]

This leaves us with a large scope of technical professions and other service providers (technical consultants, production process advisors, telecommunications consultants, programmers, photographers, structure-analysts, organizational consultants, surveyors, geologists, feasibility experts, marketing advisors, e-commerce consultants, quality control and testing consultants, technical support advisors, environmental advisors, management advisors, brokers, financial advisors, etc.) which might be included in Article 14, once it has been established that they perform their services in an independent way.

Often it is thought that payments to a legal person fall out of the scope of Article 14.[53] They do not. The Fiscal Committee of the OECD states: "It has sometimes been argued that the use of the pronoun 'his' in paragraph 1 of Article 14, indicates that the article was intended to apply to individuals only. The Committee however, found the argument to be far from convincing …"[54]

It is true that employees fall under the scope of dependant personal services, and are thus excluded. Therefore, an accountant, employee of a multinational firm, would not fall under Article 14 of the DTC. But an engineer, representing his consultancy company in his capacity of director of the company, would probably qualify under Article 14 of the DTC. What about cases where the acting professional has also concluded an employment contract with his own company? On the basis of Article 3 Paragraph 2 the question whether the person in question must be regarded an independent professional or an employee must be solved with reference to the law of the state applying the DTC.

Further, the concept of fixed base (FB) of Article 14 must be interpreted along the same lines as PE of Article 5.[55]

46. DTC US–Thailand Art. 5(3) b (i) and (ii); Dichter, A.J., "The Thai–US Treaty Explained", *TNI* (1997), p. 484. This provision is not a feature of the US Model, and I therefore assume that it has been adopted at the request of the Thai negotiators.
47. Technical Explanation Thailand Income Tax Convention, US Treasury Department, Para. 65.
48. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 287.
49. See also the DTC's with the Czech Republic, Laos, Mauritius and the PRC.
50. Austria, Canada, Denmark, Finland, Italy (40 days), the Philippines, Sweden, the United States and Uzbekistan.
51. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 860.
52. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 859.
53. See e.g. Skaar, p. 274: "A corporation or similar entity cannot perform personal services".
54. Issues in International Taxation Related to Art. 14 DTC, No. 7, Para. 14.
55. OECD Model DTC Commentary, Art. 14, Para. 3.

B. Source taxation of technical fees as independent personal services income under the UN model treaty

Besides the existence of a fixed base, as in the OECD Model, the UN Model opens the possibility for source taxation on technical fees that may be regarded as independent personal services income, even without having a fixed base, if the performer of the service stays in the source country for a period or periods amounting to or exceeding in the aggregate 183 days in the fiscal year concerned. The comparison with the furnishing of services PE is obvious, and leads to the same result if both provisions were written in the DTA. In practice, that is certainly not always the case.[56]

The UN Model DTC provides another major incentive for developing countries to apply Article 14 of the DTC to technical fees: it provides for source taxation (without other conditions except that the service must be performed in the source country) if the fee is paid by a resident of the source state. As soon as a resident (or PE or FB) has borne the technical fee, the source country may tax the payment in question. The practical importance is obvious and increases significantly the potential use of Article 14 of the DTC to retain source taxation on certain technical fees.

C. Source taxation of technical fees as independent personal services income in China

With regard to non-resident individuals, "Income from payment for labour or services" refers to income of an individual who is engaged in design, decoration, installation, drafting, technical services and other services.[57] Such income is taxable in China if it is derived within China.[58] "Derived in China" means that the source of the income is in China, as is clarified in the Implementing Regulation.[59]

To determine the source of the income, the place of payment is not relevant, nor the residence of the company or enterprise paying the fee.[60] The place where the service is provided (because of a position, employment, or the performance of a contract) is the relevant factor for personal services.[61]

The Chinese tax authorities interpret "personal services" to include: (1) technical services for engineering construction; (2) consulting services in improving the management of Chinese enterprises; (3) consulting services in preparing feasibility studies for investment projects; or (4) technical assistance to redesign, readjust, or manufacture products.[62]

Article 19 of Circular 89 concerns the difference between employment income and remuneration for personal or labour services. The basic differences lie in the independent or non-independent nature of the employer/employee relationship and the independent or non-independent character of the income. In case of uncertainty, tax authorities look at the manner in which the taxpayer performs his work. An independent contractor usually provides his own equipment, is not required to attend a place of work at regular hours, and is not covered by worker's insurance or medical benefits.

A recent notice of the State Administration of Taxation (Guo Shui Fa 2000, No. 82, 12 May 2000) discusses the taxation of foreign consultancies in the PRC. One of the major impacts of that notice is that income from a foreign consultancy may be deemed to be income from a business establishment in China, even if the services were provided on their own or independent from the China-based consultancy. Consequently, not the flat rate of 20% (often reduced to 10% under the tax treaties) but the corporate income tax rate of 33% would apply. The scope of the notice is, however, limited to services in tax, accounting, audit, legal and business consultancy.

Income from personal services is taxed at a flat rate of 20% but "abnormally high payments" for personal services may be taxed higher.[63]

Chinese treaties will in almost all cases assign taxing power to China if the performer of the independent personal service has a fixed base in China for the purpose of performing his activities, or stays in China for a period of (or periods aggregating) 183 days.

Exceptionally, the treaty with Jamaica provides a third possibility for source taxation in China, namely when the income exceeds USD 15,000, as does the treaty with Malta (USD 10,000) and with Papua New Guinea (USD 5,000).

The treaty with Malaysia contains a similar rule for an amount of USD 4,000 paid by a Chinese resident. Furthermore, a fixed base in China of a Malaysian resident justifies Chinese-source taxation, but not vice versa. The treaty with Thailand allows China to tax income from independent personal services if it was derived from a resident, as an alternative possibility to the "fixed base" and "183-day rule", which are both provided as well.

D. Source taxation of technical fees as independent personal services income in India.

"Income from a profession" is calculated on the same basis as income from business.[64] It has been held that what may not amount to "business" may amount to "profession".[65] The expression "profession" involves the idea of an occupation requiring purely intellectual skill or manual skill controlled by the intellectual skill of the operator as distinguished from an occupation or business which is substantially the production or sale or arrangements for the production or sale of commodities.

56. See above.
57. Art. 8 (4) Implementing Regulation Individual Income Tax, (IRIIT) State Council No. 142, 28 January 1994.
58. Art. 1 Sec. 1 Para. 2 Individual Income Tax Law (IIT), Third Plenum of the Fifth National People's Congress of China, 10 September 1980.
59. Art. 4 IRIIT.
60. Arts. 5 and 6 IRIIT. Specific rules apply for income received by persons who are resident more than one year but less than five years in China, and those who reside longer than five years in China (Art. 5-7 IRIIT).
61. Art. 5 (1) IRIIT.
62. Ministry of Finance Notice (87) Cai Shui Xie Zi, No. 009, 1 April 1987.
63. Art. 3, Para. 4 IIT.
64. Sec. 28-44AB ITA; Vinod, loc. cit., 651.
65. Lala Indra Sen, In Re 1940, 8 ITR, 187 (All); *Barenda Prosad Roy v. ITO* 1981, 6 Taxmann 19 (sc).

An expert professional may be involved in business activities as well. He may equip plants and machinery with which he, with the aid of his professional skill and in collaboration with qualified assistants, is able to turn out an activity which is not a strictly professional activity.[66]

India generally follows the UN Model with respect to income from professional services and other activities of an independent character. Generally, a fixed base is required to warrant source taxation.

Even without a fixed base, India retains taxing power according to most treaties, if the performer of the service stayed at least 183 days in India. Some treaties reduce the 183 days to 90 or 120 days.

In some treaties, the mere fact that the remuneration was paid by a resident of India (or a foreign resident but borne by a PE in India) suffices to allow source taxation. This "paid by a resident" test may be used as an alternative condition (Canada), or as the only one (Brazil).

The treaties with Austria and Greece provide that independent personal services may be taxed in India, if such services are performed in India.

In other treaties, the amount of days is reduced, namely with Hungary (90 days), Indonesia (91 days), Malta (90 days), Singapore (90 days) the United States (90 days) and the United Kingdom (90 days).

In the case of Mauritius, only the fixed base may lead to source taxation. Merely staying within India (even if longer than 183 days) cannot lead to source taxation.

The Thai–Indian treaty is quite particular as it provides that independent personal services may be taxed in India, unless the performer did not stay at least 183 days in India, and the performer did not maintain a fixed base in India for at least 183 days, and the income is not borne by an Indian enterprise or PE.

E. Source taxation of technical fees as independent personal services income in Thailand

Technical fees, as defined for this article, may be taxable in Thailand with regard to personal services income under Section 40 (6) of the RC, which describes income from liberal professions. This includes engineering and architecture besides the law, medicine, art and accounting professions. Independent personal services which fall out of the scope of Section 40 (6) may be taxable under Section 40 (2) as income from duty, posts or hire of work other than in salaried employment. The remuneration of an economist under a consulting agreement is not income from a liberal profession, but income from hire of work in the sense of Section 40 (2).[67] Under domestic law, the category under which the income resorts is important with regard to tax deductions. If the income is taxed under Section 40 (2) of the RC, a standard deduction for expenses is limited to THB 60,000 (about USD 1,500), while under Section 40 (6) of the RC a 30% deduction applies without ceiling.[68]

Noteworthy is that income from personal services must, as a principle, be attributed to a natural person, consequently taxable in the personal income tax. Under the Thai RC, there is little room to argue that independent personal services may also be performed by juristic persons, as is the interpretation of the OECD (see above).

The Thai Supreme Court has characterized consideration for survey of location, training, design of machinery, etc. as income under Section 40 (6) of the RC (liberal professions – engineering).[69]

Section 41 Paragraph 1 of the RC describes the source rules for the income to be taxable in Thailand.

The income under Section 40 of the RC is taxable if during the previous year:
- duty is in Thailand;
- activity is in Thailand;
- business of the employer is in Thailand;
- assets are in Thailand.

"Duty" (Thai) must be understood as the obligation to carry out a contract, which can be an employment or a service agreement.

By "activity in Thailand" is meant the business activity of the taxpayer realizing the income, and not the business activity of, e.g. the client of a technical advisor. Thus, the performance of technical services outside of Thailand will not incur tax liability, once it is determined that they constitute income under Section 40 (2) or 40 (6) of the RC.

The net income, after deductions, is taxed at progressive rates from 5%-37%.

IV. TAXATION OF TECHNICAL FEES AS ROYALTIES

Taxation as royalties is only appropriate if (i) the technical fee fits the definition of a royalty and (ii) the grantor has no PE or fixed base in the source country. Indeed, the Articles 7 and 14 of the DTC take precedence over Article 12 of the DTC.

A. Definition of "royalty" in the OECD model treaty

In the double taxation conventions (DTCs) based on the OECD Model, the term "royalty" is defined for the purposes of the treaty as follows:

> 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 copyright of motion picture, any patent, trademarks, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.[70]

Largely the same definition is used in the proposed EC Interest and Royalty Directive:[71]

66. *Dr P. Vadamalyan v. CIT* (1969) 74 ITR 94 (Mad.).
67. Tax Ruling No. Kor Kor 0802/25935, 30 November 1998.
68. Sec. 42 bis, 44 RC; Sec. 6 Royal Decree No. 11.
69. Case 3923/2531; Case 994/2531.
70. OECD Model DTC Art. 12 (3).
71. Art. 2 Sec. 1(b) Interest and Royalty Directive, *O.J.*, C 123, 22 March 1998.

> 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 *or software* including *cinematographic films*, any patent, trademark, design or model, plan, secret formula or process, *or for the use of or the right to use industrial, commercial or scientific equipment*, or for information concerning industrial, commercial or scientific experience. *Variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources shall be excluded, as well as payments for the use of or the right to use, software when ownership is transferred.* (Differences between OECD and proposed EC Directive are italicized by the author.)

Many treaties also include reference to "payments for the use of, or the right to use, industrial, commercial, or scientific equipment" (leasing/rent) in the article concerning royalties. In 1992, the OECD decided to move such income from the royalty article to business profits.

With regard to technology transfers, the OECD Commentary[72] further defines what is a royalty. "Information concerning industrial, commercial or scientific experience" refers to the concept of know-how. The OECD Commentary states that it must concern previously undisclosed technical information that is necessary for the industrial reproduction of a product or process, directly and under the same conditions; inasmuch as it is derived from experience, know-how represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of technique.[73]

Another definition can be found in Commission Regulation EC No. 240/96.[74] In EC law, this was described as "non-patented technical information such as descriptions of manufacturing processes, recipes, formulae, designs or drawings".

The *difference between services and know-how* is specifically addressed by the OECD Commentary:

> In the know how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public.[75] (On the principle of imparting, see below.)
>
> Know how differs from contracts for the provision of services, in which one of the parties undertakes to use the customary skills of his calling to execute work himself for the other party.
>
> Thus, payments for the consideration for after sale services, services rendered by a seller under a guarantee, for pure technical assistance or for expert opinions given by an engineer, an advocate or an accountant do not constitute royalties within the meaning of par. 2.

B. Proposed amendment to the OECD commentary on royalties with reference to technical fees

In order to further elaborate on the difference between technical services and transfer of know-how, an amendment to the OECD Commentary was discussed by the OECD Committee on Fiscal Affairs Working Party No. 1. The text above is proposed to read in the future:

> Thus, payments for the consideration for after sale services, services rendered by a seller under a guarantee, for so-called basic or detailed engineering in connection with the erection extension or renovation of an industrial plant (including documentation for operation and maintenance of the plant) as well as for training of the purchaser's personnel, for contract research for contract studies and for technical assistance or for expert opinions given by an engineer, an advocate or an accountant do not constitute royalties.

Although no detailed definition of the terminology is provided, the purpose of the amendment is to state that:
- engineering consulting for the making of factories;
- training staff of the buyer of a plant; and
- research and studies,

is not transfer of know-how.

The amendment also suggests deleting the word "pure" in the Commentary with reference to technical assistance. Since neither "technical assistance" nor "pure technical assistance" are clearly defined terms, one can hardly interpret the intention of the amendment, beyond saying merely grammatically that omission of the adjective "pure" leaves a more general notion of "technical assistance".

At the time of writing this article, the amendment has not yet been adopted by the Council, but it seems likely that this will happen sooner or later.

C. The "imparting principle" as criterion for the definition of know-how

The criterion for the difference between what is a payment for the use of know-how (royalty) and what is a technical service (business profit) in the OECD Model Treaty is the principle of imparting. Such is not only explicitly stated in the OECD Model Commentary, but also seems to correspond to an international consensus between scholars on the matter.[76]

"Imparting" is passing on knowledge as a teacher does to a student. The purpose of the exchange for the receiver is to learn how to do something, so that he knows how to do it himself the next time. Applied to know-how, it means paying for information on certain industrial, commercial or scientific experience, with the purpose of using that information and experience to perform that industrial, commercial or scientific process. In those cases there is, for the purpose of the treaty, a right to use information concerning industrial, commercial or scientific experience, payments for which are subject to Article 12 (royalty).

72. OECD Commentary Art. 12/11.
73. OECD Commentary Art. 12/11.
74. Commission Regulation EC No. 240/96 of 31 January 1996 on the application of Art. 85(3) of the Treaty to Certain Categories of Technology Transfer Agreement [o] 1966, No. L31/2 (Para. 4).
75. OECD Model DTC Commentary Art. 12 Para. 11.
76. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 790; Baker, Ph., *Double Taxation Conventions and International Tax Law* (Sweet & Maxwell, London: 1994), 12-08; Malherbe, J., *Droit Fiscal International* (Larcier, Brussels: 1998), p. 455; Gouthierre, B., *Operations Internationales* (EFL, Paris: 1994); Peeters, B., *Dubbelbelastingverdragen* (Ced. Samson, Brussels: 1991), p. 165; Flux, D. and Smith, D., *Hong Kong Taxation* (Chinese University Press: 1999), p. 202; Sprague G.D., Whatley, E.T., Weisman, R.L., "An Analysis of the Proper Tax Treatment of International Payments for Computer Software Products", *Asia-Pacific Tax Bulletin* (1995), p. 158.

In the case of the rendering of "technical services" there is no imparting. The performer of the service will use his skills to solve the problem himself for the other party. The purpose of the exchange for the receiver is not to learn, but to have the performer of the service execute the work or mission concerned.[77] The transferor uses his own know-how to give the receiver advisory services.

The principle of "imparting" is easier to explain in theory than in practice. All too often the purpose of the parties is not or is poorly expressed, or a complex transaction involves a mix of technical service *and* imparting know-how. One author argues (about technical services) as follows:

> Of course, an element of know how transfer from contractor to customer also takes place at the same time. This is, however, either a side-effect which cannot be avoided (hence, not part of the performance agreed upon in the contract) or operational know how (it is self-evident that the buyer of an industrial plant must be instructed how to use it). This instruction is incidental to the act of handing over the plant and cannot be regarded as being a service in its own right.[78]

In most cases it will be useful to ask the question: "What can the receiver do with the information he obtained through the exchange?" If the answer is that, predominantly, he can now master an industrial reproduction of a product or a process under the same conditions as the grantor, which would have been difficult or impossible without the grantor's experience on the subject, there was an imparting of knowledge.

Or, from the point of view of the grantor: "What does the grantor have to do in preparing the exchange?" If the answer predominantly involves the experience the grantor already has, without getting too much involved in the receiver's particular situation, there is most likely an imparting of knowledge, not a technical service.[79]

Some of the following considerations seem relevant to me in order to distinguish the one from the other. One criterion alone will probably not suffice to determine whether a payment is for services or for imparting know-how. A combination of several factors will in most cases be necessary to clearly identify the nature of the income.

(1) The denomination of the contract is in most jurisdictions irrelevant to determine the true legal nature of its content. Calling something a service contract does not in itself make it so.[80] In practice, however, it can set tax authorities off on the wrong foot, and often takes quite an effort to set the record straight again.

(2) Know-how cannot be general knowledge. It requires experience that must be more than mere knowledge of the business, more than a manufacturer can find out by himself by studying the product made with the know-how in question.[81] For EC law purposes, know-how must be secret. To be secret means: "the know how package as a body or in the precise configuration and assembly of its components is not generally known or easily accessible, so that part of its value consists in the lead which the licensee gains when it is communicated to him; it is not limited to the narrow sense that each individual component should be totally unknown".[82] On the other hand, know-how need not be patented. It suffices that it is not public knowledge. The existence of a "confidentiality"-clause does not in itself mean that there was an imparting of information.[83]

(3) As a principle, there is no guarantee[84] of any result by the licensor of know-how, contrary to what is generally the case for services.

(4) The information involved in know-how, and the main commerce or industry of the receiver are often in the same sector[85] or closely related to each other. The receiver of know-how will probably use the imparted information to obtain business income.[86]

(5) Keeping a client or a buyer informed of new developments related to a previous transaction is a service, not imparting of know-how.[87] After sales service under a guarantee by a contract is not imparting of know-how.[88]

(6) In the many cases where there is a mix between service and imparting of know-how (such as franchising) only the part of the payment that corresponds to the imparting of know-how can be treated as a royalty.[89]

(7) Technological service is, rather than merely imparting knowledge, getting involved in the particular situation of the receiver.[90] When you transfer know-how, you need not involve yourself much with the receiver's own situation. Your own experience, which is, already available to you, suffices.[91] Technological assistance is rather than merely imparting knowledge, getting involved in the problems of the receiver.[92]

(8) In order to give rise to royalties, the intellectual property must be, and remain, the property of the grantor.[93]

77. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 794. Sprague G.D., Whatley, E.T., Weisman, R.L., "An Analysis of the Proper Tax Treatment of International Payments for Computer Software Products", *Asia-Pacific Tax Bulletin* (1995), p. 158.
78. Sonntag, K., "The Tax Treatment of Engineering in International Large-Project Contracting", *Intertax* (1997), pp. 9-12.
79. Concurring: Anupantu Kijnijcheewa, loc. cit., p. 71; D.P. Mittal, loc. cit., 1.277; Jinyan Li, loc.cit., 1981.
80. Dika 3867/2531.
81. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 794.
82. EC Regulation 240/96 Art. 9 (8).
83. Dika 3867/2531.
84. OECD Model DTC Commentary, Art. 12 Para. 11; see also Thai Supreme Court as quoted by Suparut Kawatkul, loc. cit., pp. 60-61.
85. EC Regulation 240/96 (8); Dika Court 3867/2531.
86. Dika 3923/2531; 3867/2531; CIAT Secretariat in "The Exchange of Information under Tax Treaties", *BIFD* 25, p. 156.
87. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 791.
88. OECD Model DTC Commentary, Art. 12 Para. 11.
89. OECD Model DTC Commentary, Art. 12 Para. 11; Dika 410/2532.
90. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 801; CIAT Secretariat in "The Exchange of Information under Tax Treaties", *BIFD* 25, p. 156.
91. Technical Explanation to the US Model Treaty; Gordon, L., "Services, Licensing and Technical Sales Contracts under the US Treaties", *TNI* (1997), p. 27142; Bundesfinanzhof, 16 December 1970, ET, 1971, II/96 (Germany).
92. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 801; CIAT Secretariat in "The Exchange of Information under Tax Treaties", *BIFD* 25, p. 156.
93. *Boulez v. Commissioner* (US) 83 TC 548 (1984); *Kramer v. United States* 152 F Supp. 66 (Ct. Cl 1957). The first case concerns a conductor of an orchestra.

With this principle in mind, some authors deduce that if the grantor is not the owner of the know-how, the payments received cannot be royalties.[94] In my opinion the question whether or not the grantor may or may not under civil or common law be the owner of the know-how he imparts, is irrelevant to the characterization as a royalty for the purposes of the treaty.[95] How do we know if any licence for know-how, or any other intellectual property, is valid or invalid until tested by the courts? Many contracts may be invalid but never questioned, or valid until one of the parties invokes her right to invalidate it. In most countries, tax law has to be applied to the legal reality as it presents itself to the taxpayer, not another one that might arise if the legitimacy of a certain contract would have been questioned.[96] The issue is important for licenses with ex-employees of companies that have built up know-how that the ex-employee later imparts to others.

(9) It is clear that the receiver does not obtain the ownership of the know-how due to the exchange. Such is difficult to imagine in practice without the sale of at least some part of the grantor's company, the payment for which would not be a royalty but an investment. The payer of royalties only obtains a right to use the know-how,[97] but not to dispose of it as an owner is allowed to do. The receiver of services does own the result.

(10) A payment for services is usually not variable with the amount of income or profit of the receiver, contrary to payments for know-how.

D. Treatment under the United Nations model treaty

The treatment of royalties under the United Nations Model DTC (always paying more attention to the interests of developing countries) differs from the OECD Model DTC.

The main differences are that:
(1) royalties are deemed to arise in the country where the one who pays them is a resident, but also royalties borne by a permanent establishment of a resident in another country (contracting state or not) fall under the scope of the UN Model DTC Article 12;
(2) it includes a withholding tax for royalties, which is why many developing nations prefer to use the UN Model for treaty negotiations;
(3) It expressly includes films or tapes used for radio and television broadcasting, which is also contained in the interpretation of the OECD Model DTC.[98]

It is clear that developing nations are wary that royalties would be paid not to make new production processes possible, but merely to transfer profits to capital-exporting countries. In the discussion by the experts of the United Nations, it was mentioned that in some cases only patents and processes that have already been fully exploited elsewhere were licensed to developing countries, perhaps even after they had become obsolete,[99] a fear that is shared by some OECD countries.[100] The financial consequences of technical services performed by developed countries to developing countries are considerable.[101]

This explains why several countries, including Thailand, have made reservations to the text of the OECD Model DTC regarding the definition of royalties.[102]

The UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries specifically addresses the question of payments for technical assistance and know-how in Guideline 12. In the discussion it was raised that technical services were not sufficiently distinguished from know-how in the OECD Model DTC and that the UN Model DTC should adopt a provision, either in the definition of royalties or in a Protocol, excluding payments of this kind from treatment as royalties. Others disagreed and argued that technical services should be included in the definition of "information concerning industrial, commercial or scientific experience".

The Group reached a compromise; Guideline 12 qualifies payments for technical services as business profits, but the definition of "permanent establishment" will be changed to include the provision of these services if they take longer than six months.

> In order to solve the problem of the definition of royalties, the Group agreed to consider income from such activities as business profits and to include in Guideline 5 par. 3 [on permanent establishments] a new subparagraph (b) which provides that the term permanent establishment should likewise encompass "the furnishing of services, including consultancy services, by an enterprise through employees or other personnel, where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than six months within any twelve-month period".[103]

The discussion and guidelines on the definition of royalties with regard to "information concerning industrial, commercial or scientific experience" in the UN Manual does not differ from the OECD Model Convention and Commentary. On the contrary, the Manual specifically states that:

> The Group agreed to recommend as a suggested text for an article in a bilateral tax treaty relating to the taxation of royalties, the text of article 12 of the OECD Model Convention with a number of substantive changes in paragraph 1 (Taxation in the Resident State) and 4 (Special Relationship), and

94. Gordon, L., "Services, Licensing and Technical Sales Contracts under the US Treaties", *TNI* (1997), p. 27142.
95. Compare to Sec. 386(8) of the Taxes Act 1970 (UK) "...taxable royalty whether legally valid or not…"; Contra: Gordon, L. l.c.
96. Deane, K.D., "Taxation Aspects of Trademarks and Confidential Information", B.T.R. (1983), p. 301.
97. *High Court of Australia, F.C.T. v. Sherritt Gordon Mines Ltd* 1977, 17, ALR, 607 (Australia).
98. OECD Model DTC Commentary, Art. 12 Para. 10.
99. Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries" (UN, New York: 1979), p. 75.
100. Greece and Mexico made a reservation to exclude from the scope of the article, royalties arising from property or rights created or assigned mainly for the purpose of taking advantage of this Article and not for "bona fide commercial reasons" OECD Model DTC and Commentary, c(12)12.
101. Mansury, R.,"Tax Treaties from the Perspective of a non-OECD Country", p. 150.
102. Non-Member Countries Positions, OECD, Paris, 1996 (Argentina, the Philippines and Brazil are the other non-OECD member countries that made the same reservation).
103. Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries" (UN, New York: 1979), p. 77.

> the insertion of a new par. 2 (withholding tax) and a new par. 5 (Source of Royalties). [The definition of royalties is in Article 12 Paragraph 2, unchanged in the UN Model.] The Commentary on Article 12 of the OECD Model Convention is therefore relevant mutatis mutandis to Guideline 12.[104]

Vogel also asserts that the OECD Commentary is relevant for the interpretation of DTCs with or among non-OECD members if the text of the provision coincides with the OECD Model DTC, and its context suggests no other interpretation. With regard to treaties with developing nations, the UN commentary must also be considered.[105] Also Baker agrees that "there is no reason why reference should not be made to them".[106]

Since the text of the UN DTC and the OECD DTC coincide, and the UN Guideline even explicitly states that the Model Commentary on Article 12 applies with reference to the definition of royalties, there can be little doubt that the principle of imparting (and its practical consequences as discussed above) is just as relevant for treaties with or between non-OECD members, as for OECD-members.

E. Extension of the definition of royalties in bilateral treaties to include technical fees

The fact that consideration for technical services is most often not to be treated as a royalty according to the OECD Commentary, was apparently not compatible with the policy of some countries, both members and non-members of the OECD. Several of these countries have made reservations concerning the definition of royalties with the specific purpose of being able to include technical fees in the definition in bilateral treaties.

This is the case with Portugal, Spain, Argentina, the Philippines, Thailand and Brazil.[107] (For India, see below.)

Thailand has only in the DTCs with Australia, Nepal and Korea diverged from the OECD Model DTC with regard to the definition of royalties (see below).

Portugal has included technical services in Article 12 in the treaties with the United States and Venezuela.

Spain has included technical services in Article 12 in the treaties with the United States, Sweden, Brazil and India.

Of course, making such a reservation does not always mean that the country in question also succeeded in making the other country agree to such a provision, and there are examples of countries that made such a reservation to the OECD Model DTC and Commentary but which do not actually have many treaties diverging from the Model.[108]

For instance Argentina tries to include in the definition of royalties "and includes payments for the rendering of technical assistance"[109] sometimes limited to "but only where such assistance is rendered outside the State in which they arise.[110]

Brazil has formulated its reservations to the OECD definition of royalties, and in most of its treaties includes in Article 12 "income derived from rendering technical services or technical assistance".[111]

In certain treaties with developed countries, Indonesia extends the title of Article 12 to "Royalties and Fees for Technical Services".[112] In the text of the article, "fees for technical services" is defined as "payments of any kind to any person, other than payments to an employee of the person making the payments, in consideration for any services of a managerial, technical or consultancy nature rendered in the Contracting State of which the payer is resident".

F. Source taxation of technical fees as royalties in China[113]

The term "royalties" is not found in Chinese tax laws. Instead, the term "fees for the use of proprietary rights" is used. The term "royalties" fails to capture the full scope of the Chinese term "texuquan shiyongfei", which can be translated in part as royalties.

Under Article 59 of the implementing regulations for the Enterprise Income Tax Law "fees for the use of proprietary rights" is described. It includes (1) fees for the use in China of trademarks, copyright, or patents; and (2) fees for the use of other proprietary property, such as fees for technical training, technical services, technical documentation, and other relevant information.[114]

Mainly because of the reference to "technical services", the notion of "royalties" under Chinese domestic law appears to be broader than that under the model treaties. According to Prof. Jinyan Li, Chinese tax authorities follow the treaty definition in practice; payments for technical services are not considered to be royalties unless the transfer of technology or "know-how" is involved.[115] This can also be deduced from the fact that services of this kind may be considered personal services under the Individual Income Tax Law.[116]

Prof. Jinyan Li gives the example of a contract for the sale of equipment to China. It is common for the foreign sup-

104. Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries" (UN, New York: 1979), p. 75.
105. Vogel, K., *Double Taxation Conventions* (Kluwer, Deventer: 1997), at 45-46.
106. Baker, Ph., *Double Taxation Conventions and International Tax Law* (Sweet & Maxwell, London: 1994), C-17.
107. These reservations can be found in the OECD Model Treaty and Commentary for OECD members Spain and Portugal, and for non-member countries in the OECD Report on Non-Member Countries Positions, 1996.
108. Thailand (only the DTCs with Australia, Nepal and Korea diverge from the Model DTC with regard to the definition of royalties), Portugal (United States, Venezuela), Spain (United States, Sweden, Brazil, India).
109. See the DTC with the Netherlands, Canada, United Kingdom.
110. See the DTC with Denmark and Norway.
111. Often in the Protocols. See the Brazilian DTCs with Canada, Denmark, Germany, Hungary, India, Luxembourg, the Netherlands, Norway, Portugal, Spain and Sweden.
112. Indonesia–Luxembourg.
113. Jinyan Li, "China's Tax Treaties and Their Impact on Foreign Investment", *TNI* (1995), p. 1891.
114. FIT regulations, Article 59; State Administration of Taxation Notice (82) Cai Shui Wai Zi No. 143 of 14 October 1982; Provisional Regulations of the Ministry of Finance Regarding the Reduction of and Exemption from Income Tax on Fees for the Use of Proprietary Technology, (82) Cai Shui Zi No. 326 of 13 December 1982.
115. Jinyan Li, loc. cit, 1891; Moser, M.J., loc, cit., p. 213.
116. See above; Ministry of Finance Notice (87) Cai Shui Xie Zi, No. 009, 1 April 1987; Wang Xuanhui, "Taxation in China", *FT LAW&TAX* (1997), p. 180.

plier to transfer the relevant technology to the Chinese purchaser. Fees payable under these contracts are generally treated as follows: (1) fees for the proprietary rights are "royalties"; (2) fees for the supply of documents and designs in relation to proprietary rights and the technical training of Chinese personnel are also considered to be "royalties"; and (3) fees for the supply of documents and designs and training of Chinese personnel in relation to the installation and operation of the equipment or machinery are not considered to be royalties.[117]

Most of China's tax treaties follow the OECD Model on royalties, except with respect to withholding taxes. Generally, China reserves itself the right to retain maximum 10% withholding tax on royalties, though this is often reduced for leasing.[118] The definition of "royalties" follows the OECD Model closely, with the possible exception of equipment leasing.

The treaty with Australia is an exception to the rule. The supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any intellectual property right, use or right to use equipment, or know-how, is also included in the definition of royalty.

The treaty with India assimilates "fees for technical services" with royalties (see below). The treaties with the United Kingdom and Pakistan contain a separate article on "Fees for Technical Services". In those treaties, the income is defined as any consideration for the provision of services in rendering managerial, consultancy, or technical services (with the exclusion of certain services related to construction, and employees).

The treaty with Italy specifically states in the Protocol that payments for know-how are deemed royalties. Some other treaties use the term "know-how" instead of the OECD terminology "information concerning industrial, commercial or scientific experience".[119]

Royalties derived from China by non-residents are taxable at a flat 10% rate.

G. Source taxation of technical fees as such in India

India has statutorily defined technical fees as a separate category of taxable income, and has succeeded in most cases to include that definition in tax treaties. We will limit our discussion to source taxation under this category, although taxation as (domestically defined) royalty may also be in order.

The domestic definition of technical fees can be found in Explanation 2 to Section 9 (1) vii: "For the purposes of this clause, fees for technical services means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'".

Installing a mobile phone system with training of the Indian personnel[120] constitutes a technical fee. Technical drawings may constitute a part of the sale price of the machine they relate to, and are not necessarily technical fees.[121] An agreement involving data processing of production information is in part royalty and in part a technical fee.[122]

The difference between technical fees and royalties is not always clear in domestic Indian law, as was noted by Rajaratnam.[123] There is some case law suggesting that the difference can be found in the secret character of the technology transferred; where there is no secrecy clause, the income concerns technical services rather than royalties.[124]

Learned writers have noted that any payment made by a person resident in India for technical fees will be taxable in India.[125] Tax liability will, however, not be incurred for technical services utilized outside India. Certain transactions between non-residents may also fall within the scope of the statute, with obvious enforcement problems as fees for technical services payable by a non-resident are deemed to arise in India if the payment is related to a business or profession carried on by him in India or to any other source of his income in India.[126]

The domestic tax rate for technical fees (and royalties) was reduced in 1997 from 30% to 20%.[127]

The definition and terminology regarding technical fees differs significantly from treaty to treaty. In most cases, it is the treaty policy of India to define technical fees fairly similarly to its domestic example, thus with reference to "payments for consideration of services of a managerial, technical or consultancy nature, including the provision of services of technical or other personnel". Payments that fall under the scope of employees' salary are excluded, but independent personal services income is not in all cases excluded as well (see table 2).

H. Source taxation of technical fees as royalties in Thailand

"Royalties" are not as such defined by the Thai revenue code. They are taxable as "value received for goodwill, copyright or any other rights".[128] The Supreme Court has interpreted "any other rights" as including all rights which

117. State Tax Bureau Notice (86) Cai Shui Xie Zi No. 024, 11 November 1986.
118. The treaty with Brazil provides for 25% on trademark royalties and 15% on others; the treaty with Romania reduces withholding taxes to 7%; the treaty with Thailand only to 15%.
119. Jamaica, Korea, Kuwait, Malaysia, Malta, Mongolia, the Netherlands, New Zealand, Norway, Poland, Romania, Singapore, Sweden, the United Kingdom, the United States.
120. *Ericsson Telephone Corporation India AB v. CIT* (1997) 224 ITR 203 (AAR).
121. *Klayman Porcelains Ltd. v. ITO* (1984) 8 ITD 265.
122. *NV Philips v. CIT* (1988) 172 ITR 541 (Cal).
123. Rajaratnam, S., and Venkatramaiah, B.V., loc. cit., 1.240.
124. *Hindustan Electrographites v. IAC* (1984) 145 ITR 84 (MP); *NV Philips v. CIT* (1988) 172 ITR 541 (Cal).
125. Sandeep Tandon, loc. cit., p. 417; Rajaratnam, S., and Venkatramaiah, B.V., loc. cit., 1.208.
126. Sec. 9 (1) VII point c ITA; Vinod, K. Singhania, loc. cit., 303.
127. Sec. 115A ITA; Finance Act 1997 with effect from 1 April 1998.
128. Sec. 40 (3) RC.

have a similar nature to copyright and goodwill, namely all payments for intellectual property rights including copyright, patents and trademarks.[129] The right to use movable property or equipment is under Thai law taxable under the category of rent income,[130] not the category of business profits.[131]

Royalties paid from or in Thailand to a non-resident juristic company or juristic partnership are subject to a 15% withholding tax.[132] Foreign companies carrying on business in Thailand must include royalties in their net-profit calculation, which will be taxed at 30%.

The Thai Revenue Department (TRD) adheres to a wide interpretation of Section 40 (3) of the RC so that it includes most technology-related transactions.[133]

The service and instalment of a telecommunication system, including the training of employees by a French company is a business profit, but the payment for software delivered should be regarded as a royalty under the Thai–French double taxation convention (DTC), according to the TRD.[134]

Again according to the TRD, a payment for a contract involving delivering software, programs, maintenance, emergency advice, training and consulting is in its entirety subject to a withholding tax for royalties. Article 12 (royalties) of the Thai–German DTC applies.[135]

In another tax ruling concerning a Japanese autoparts manufacturer who provided services and information in the framework of a "technical assistance agreement" the payment was deemed a royalty under Sections 40 (3) of the RC and 12(3) of the Thai–Japanese DTC.[136]

The payment for expert services of an interior designer from Japan was deemed a royalty as well.[137] The Revenue Department attaches particular importance to confidentiality clauses in agreements that provide technological services.[138]

The interpretation by the TRD does not seem to differ in case a DTC applies.

The difference between technical services and royalties has been discussed by the Thai Supreme Court (Dika) on several occasions.

In case 3867/2531 the payments made by a Thai paper factory concerning a "technical assistance agreement" with a Japanese company, were deemed to be royalties. The Japanese company sent experts to give assistance and to control the planning and production process of the paper factory. The court attached little importance to the denomination of the contract, but rather to its true legal contents. The technical team of 15 people did not constitute a permanent establishment, since their presence clearly related to the business of the Thai company, not the Japanese company.

In case 410/2532 the taxpayer concluded an agreement with a lump sum for both royalty and financial, managerial, marketing and engineering services. The court decided that not the whole payment may be regarded as a royalty subject to withholding tax, but only the part which is a transfer of technology.

Of particular importance is the Thai Supreme Court case (3923/2531). The court considered there to be no evidence that consideration paid by a Thai company to a US company represented a payment for the transfer of knowledge about operating methods, so there could be no royalty. This consideration of the Supreme Court is in the opinion of this author an explicit confirmation of the condition of "imparting" in order to qualify the payment as a royalty. It concerned a consideration called a "service fee" for the design, plans and building of a plastic factory. Contrary to another "licence agreement" for production process formulas that the same Thai company concluded with a Hong Kong licensor, which are indeed royalties, the payment to the United States was mere income from independent personal services. The revenue department suggests that the existence of a "confidentiality clause" in the contract shows that there was a transfer of know-how. The Supreme Court decided that even with such a clause, there is not necessarily a royalty.

Consideration for planning and installation of factories is most often considered by the Supreme Court to be independent personal service remuneration if the income fits the other requirements of Section 40 (6).[139]

There is, except in the cases discussed below, no deviation from the OECD definition with regard to "information concerning industrial, commercial or scientific experience" (know-how) in Thailand's tax treaties. This means that without a specific reference to technical services in the royalty article, this kind of payment can only in extraordinary circumstances be regarded as royalties. This, with reference to Thailand, is explicitly confirmed in the Thai–US treaty Technical Explanation, where it is stated that:

> Know how may also include, in limited cases, technical information that is conveyed through technical or consultancy services. It does not include general educational training of the user's employees, nor does it include information developed especially for the users, for example a technical plan or design developed according to the user's specifications. Thus, as provided in par. 11 of the Commentary to art. 12 OECD Model, the term "royalties" does not include payments received as consideration for after sales service, for services rendered by a seller to a purchaser under a guarantee, or for pure technical assistance.[140]

Nevertheless, Thailand has formulated a *reservation* to the OECD Model DTC definition of royalties, with the spe-

129. Case 1271/2531; see also: Anupantu Kijcheewa, "Royalties under Sec. 40 (3) of the Revenue Code" (in Thai), Sanprakornsan (June 1991), p. 70.
130. Sec. 40 (5)a RC.
131. Sec. 40 (8).
132. Sec. 70, 40(3) and 50(2)a RC; if the right itself for which the royalties are paid, has been subjected to custom duties, an exemption applies. (DG Notification No. 18.)
133. Kitipong Urapeepatanapong and Chaiyong Ngampravatdee, "Taxation of Intellectual Property Transfers in Thailand", *Asia-Pacific Tax Bulletin* (1997), p. 385 (387); Suparut Kawatkul, "Royalty Taxation under Double Taxation Agreements" (in Thai), Sampakornsarn (July 1990), pp. 60-61.
134. Gaw Kaw (Ruling), 5 September 2538, 0802/19845.
135. Gaw Kaw (Ruling), 3 October 2539, 0802/3299.
136. Gaw Kaw (Ruling), 3 November 2538, 0802/24174.
137. Gaw Kaw (Ruling), 27 May 2537, 0802/8899.
138. Suparut Kawatkul, loc. cit., pp. 60-61.
139. Dika 3923/2531; 994/2531.
140. Technical Explanation DTC US–Thailand, US Treasury, Para. 176.

cific purpose to be able to include technical services in bilateral DTCs.[141] Together with Argentina and the Philippines, Thailand reserves the right to include fees for technical services in the definition of royalties. Until now, this has only been effected in a few treaties (see table).

V. SPECIAL TREATY PROVISIONS CONCERNING TECHNICAL FEES

Developing countries have identified fees for services as a major fiscal drain early on in conceiving their tax treaty policy. Some countries have taken the position that the UN Model DTC amendment concerning the furnishing of services is not sufficient to assure a fair share in the tax revenue on such income, and have taken the initiative to include a special treaty provision concerning technical services or consulting services that allows a withholding tax.

Rather than changing the definition of the royalty article, some countries like Pakistan and Malaysia prefer to create a (new) Article 13 "Technical Fees" which are defined as "payments in consideration for any services of a technical, managerial or consultancy nature".[142]

As was shown above, it is the treaty policy of India to create a special article dedicated to "fees for technical services" in the treaty, but the treaty partners could not always be persuaded to agree. China only has two treaties (United Kingdom and Pakistan) which include a special article for "technical fees". With respect to Thailand, only the DTC with Malaysia contains a special "Technical Fees" Article 20A, included by the Protocol. This will only apply to Technical Fees of the Joint Development Area. The Joint Development Area means the area defined in Section 2 of the Malaysia–Thailand Joint Authority Act 1990. Technical fees derived from the JDA may be taxed in both states. Where such technical fee is taxable in both states, the tax chargeable in each state shall be reduced by an amount equal to 50% thereof. The term "technical fees" as used in this DTC means payments to anyone other than an employee of the person making the payments in consideration for any services of a technical, managerial or consultancy nature.

Clearly, the scope of the services covered by this definition is large: the income defined is the consideration for services; no imparting of know-how is necessary. It does not seem necessary that the services are performed in the source country. It suffices that they are paid by a resident of the source country.

The services need not be related to technology; a technical, managerial or consultancy nature will suffice. This definition reminds us of the UN Model "furnishing of services" PE. Thus, the description "technical, managerial or consultancy" cannot be taken literally, but as exemplary of all commercially-related consulting.

VI. CONCLUSIONS ON THE TREATY POLICY OF DEVELOPING COUNTRIES WITH RESPECT TO TECHNICAL FEES: CHINA, INDIA AND THAILAND IN PARTICULAR

(1) The battle for the taxation of technical services is largely a battle between north and south. Such battles are ended at the time of the signing of the DTC, and do not continue afterwards without the risk of treaty override.

Early drafts of the UN Model have demonstrated the suspicion the developing nations have, probably not without reason, towards payments for know-how and technical services. Developing countries rely heavily on new plants and factories being set up, and the cost of technology for such ventures often far outweighs any other cost of production as labour, raw material and finance.

For a country to obtain a right of source taxation on such income is (at least in theory) most efficiently settled by a reference to technical services income, to be included in the DTC. India has been successful in its treaty practice to do so.

In practice, however, the other contracting state must agree to such article, and often agreement cannot be reached on this subject.

Indeed the first conclusion from this study must concern why there are not more "technical services" inclusions in Article 12 or simply extra "Technical Fees" articles in DTC? With Portugal, Spain, Argentina, the Philippines, Thailand and Brazil[143] all having made reservations to this effect to the OECD Model DTC and its Commentary, and India, Pakistan and Malaysia (not being included in the non-Member Country Positions Report) which demonstrated similar policy, one would expect quite a worldwide distribution of a "Technical Fees" article.

The fact that this is not the case goes to show that the interests at stake in north-south negotiations are so large, that it is hard to reach an agreement on the subject. If the example of Thailand might be taken, only four treaties contain explicit reference to technical services, where a special reference to technical fees was included in the DTC.[144] Confronted with this particular problem, the Thai Revenue Department has, according to some observers, resorted to unilaterally applying a larger interpretation of "royalty" than is acceptable under the OECD and UN models.

China's domestic tax law seems by the terminology used in the statute to follow suit, but in practice, the domestic interpretation of "royalty" is quite comparable to the OECD and UN models.

(2) The inclusion of a UN-type furnishing of services PE is the second best chance of a developing country to retain

141. Non-Member Countries Positions, OECD, Paris, 1997, p. 23.
142. See the DTCs between Malaysia–Malta; Malaysia–Albania; Malaysia–Netherlands; Pakistan–UK; Pakistan–Sweden; Pakistan–PRC.
143. These reservations can be found in the OECD Model Treaty and Commentary for OECD members Spain and Portugal, and for non-member countries in the OECD Report on Non-Member Countries Positions, 1996.
144. What is more, the treaties that do include such a provision, are all concluded with treaty partners that are promoters of such provision themselves.

source taxation on technical fees, but the main restriction remains a six-month minimum period.

India has apparently not insisted on having such provision in most of its treaties, but has (even when a special reference to technical fees was included in the treaty) not only negotiated a "furnishing of services PE" but also had the threshold period reduced to 90 days in its treaties with Australia, Canada, Singapore, Switzerland, the United Kingdom and the United States. Though it is true that the application of Article 12 excludes Article 5 in many of those treaties, it still shows the resolve India has to maintain source taxation on (technical) service income.

Thailand has concluded much of its treaties with important trade partners before the UN model introduced the furnishing of services PE. Consequently, the treaties with for instance France, Germany and the United Kingdom does not contain such a provision. The more recent treaties with the United States, Spain and Luxembourg show that the policy of Thailand is to have the provision included where possible.

China has the advantage of having concluded almost all of its treaties after the UN model was introduced, and consequently all major trade partners except Japan and the United Kingdom have agreed to a furnishing of services PE.

(3) Source taxation of technical fees as professional services income, or other income taxed in a similar way, is possible under the domestic tax laws of all three of the examined jurisdictions. The main restriction, under domestic and treaty law, is that the performer of the service will have to be an individual, or at least a company owned by such individual.

With that, admittedly important, limitation the developing country has a real potential of retaining source taxation on technical fees. Thailand has been particularly attentive of including in many treaties a rule allowing source taxation even without a fixed base, if the income was deducted by a resident. India has tried to maintain taxing power on independent personal service income by reducing the minimum period for stay in India to 90 days in its treaties with the United Kingdom, the United States, and Singapore. The Chinese treaty policy is limited to requiring a fixed base or a 183-day stay within China to allow source taxation.

(4) Comparing the treaty policies of the three examined countries, it is clear that China, India and Thailand have all given due consideration to the possibility of base erosion by the deductible technical services performed by non-residents. The suspicion developing countries have, probably not without reason, towards such expenses was clearly mentioned during the deliberations of the UN model convention, and is confirmed by the particular treaty policy Thailand and India have towards services performed by associated enterprises.[145] China, taking advantage of developing its treaty policy largely after the introduction of the UN model, has successfully negotiated a UN-style PE in almost every treaty, a strategy that Thailand is sure to pursue in future treaties and renegotiations as well. India has little need to follow suit, if it continues its current success in having treaty partners accept a special reference to "fees for technical services", which is probably the most effective way for a developing country of retaining source taxation on such income in as many cases as possible. It is, however, also the most costly solution for developed countries, and consequently the hardest negotiating result to achieve for a developing country.

145. Thai–US, India–US, India–UK, India–Switzerland.

TABLE 1

Double Taxation Convention China–	Does the furnishing of services, including consulting services for a period of 6 months (or total aggregate) for the same or a connected project, constitute a PE under the treaty?
Australia	yes (6 months within any 12-month period)
Austria	yes (Protocol ad. Art 5: No PE if consulting in connection with sale or lease of machinery)
Belgium	yes
Bulgaria	yes, but no PE if consulting in connection with sale or lease of machinery
Canada	yes
Czech Republic	yes
Denmark	yes
Estonia	no
France	yes (Protocol Point 1.: Supervising assembly or installation of equipment or industrial or commercial machinery, does not constitute a PE if the price of such services do not exceed 5% of the total sales price)
Germany	yes
Hungary	yes, but more than 12 months
Iceland	yes
India	yes ("other than technical services defined in art. 12") more than 183 days
Israel	yes, but 12 months (within a 24-month period) instead of 6 months
Italy	yes
Jamaica	yes, but 12 months (within a 24-month period) instead of 6 months
Japan	no
Korea	yes
Kuwait	yes, 6 months without describing the period within
Luxembourg	yes

Double Taxation Convention China–	Does the furnishing of services, including consulting services for a period of 6 months (or total aggregate) for the same or a connected project, constitute a PE under the treaty?
Malaysia	yes
Malta	yes, but 8 months without describing the period within
Mauritius	yes, but 12 months (within a 24-month period) instead of 6 months
Mongolia	yes, but 18 months
Netherlands	yes
New Zealand	yes
Norway	yes
Singapore	yes
Slovenia	yes, but 12 months without describing the period within
Spain	yes
Sweden	yes
Switzerland	yes, but according to Protocol, no PE if consultancy (about installation, materials, training, design related to installation) in connection with a sale or lease of equipment
Thailand	yes (183 days within any 12 months)
Turkey	yes, but 12 months without describing the period within
United Kingdom	no
United States	yes

TABLE 2

Double Taxation Convention India–	Does the furnishing of services for a period of 6 months (or total aggregate) for the same or a connected project, constitute a PE under the treaty?
Australia	yes, but 90 days for not-associated enterprises/no minimum threshold for associated enterprises/technical fees in the sense of the treaty are excluded
Austria	no
Belgium	no
Canada	yes, but 90 days within any 12 months for not-associated enterprises/no minimum threshold for associated enterprises/included services in the sense of the treaty excluded
China (PRC)	no
Czech Republic	no
Denmark	no
France	no
Germany	no
Hungary	no
Indonesia	yes, but 91 days in any 12-month period
Israel	no
Italy	no
Japan	yes: “Provide services or facilities”, 6 months
Korea	no
Malaysia	no
Mauritius	no
Netherlands	no
Nepal	yes (183 days) in any 12 months
New Zealand	no
Norway	yes, more than 6 months within any 12 months
Russian Federation	no
Singapore	yes, but 90 days in any fiscal year for not-associated/30 days for associated enterprises
Spain	no
Sweden	no
Switzerland	90 days for not-associated/30 days for associated enterprises
Thailand	yes (183 days)
United Kingdom	yes, but 90 days for not-associated/30 days for associated enterprises
United States	yes, but 90 days in 6 months for not-associated/immediately for associated enterprises

TABLE 3

Double Taxation Convention Thailand–	Does the furnishing of services for a period of 6 months (or total aggregate) for the same or a connected project, constitute a PE under the treaty?
Australia	yes, more than 183 days within any 12 months
Austria	no
Bangladesh	no
Belgium	no
Canada	yes, more than 6 months within any 12 months
China	yes, more than 183 days within any 12 months
Czech Republic	yes, more than 6 months within any 12 months
Denmark	no
Finland	yes, more than 183 days
France	no
Germany	no
Hungary	yes, more than 6 months within any 12 months
India	yes, more than 183 days
Indonesia	yes, more than 183 days
Israel	yes, more than 6 months within any 12 months
Italy	no
Japan	yes, more than 6 months within any 12 months
Korea	no
Laos	yes, more than 6 months within any 12 months
Luxembourg	yes, more than 6 months within any 12 months
Malaysia	no
Mauritius	yes, more than 6 months within any 12 months
Netherlands	no
Nepal	yes, more than 183 days within any 12 months.
New Zealand	yes, more than 6 months within any 12 months
Norway	no
Pakistan	yes, more than 183 days
Philippines	yes, more than 183 days
Poland	no
Romania	yes, more than 183 days
Singapore	no
South Africa	yes, more than 6 months within any 12 months
Spain	yes, more than 6 months within any 12 months
Sri Lanka	yes, more than 183 days within any 12 months
Sweden	yes, more than 6 months within any 12 months
Switzerland	yes, more than 6 months within any 12 months
United Kingdom	no
United States	yes, if: (a) the service performed more than 90 days within any 12 months, but such period must not be less than 30 days in such taxable year; or (b) the services performed is for an associated enterprise.
Uzbekistan	yes, more than 6 months within any 12 months
Vietnam	no

TABLE 4

Double Taxation Convention Thailand–	Is there any specific source taxation for technical services provided in the royalty article (or in a separate article)?
Australia	yes (the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c))
Austria	no
Bangladesh	no
Belgium	no
Canada	no
China	no
Czech Republic	no
Denmark	no
Finland	no
France	no
Germany	no
Hungary	no
India	no

Double Taxation Convention Thailand–	Is there any specific source taxation for technical services provided in the royalty article (or in a separate article)?
Indonesia	no
Israel	no
Italy	no
Japan	no
Korea	yes (not explicitly) (information concerning industrial, commercial or scientific knowledge, experience, or skill)
Laos	no
Luxembourg	no
Malaysia	technical fee derived from the Joint Development Area may be taxable in both countries, the tax chargeable in each country shall be reduced by an amount equal to 50% thereof (Protocol)
Mauritius	no
Netherlands	no
Nepal (Protocol)	yes, except for any construction, assembly or similar project undertaken by the recipient
New Zealand	yes (the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c))
Norway	no
Pakistan	no
Philippines	no
Poland	no
Romania	no
Singapore	no
South Africa	no
Spain	no
Sri Lanka	no
Sweden	no
Switzerland	no (but it was confirmed in Protocol Clause 1 that it will be business profit)
UK	no
US	no
Uzbekistan	no
Vietnam	no