INDONESIA

The New Income Tax Treaty with the Netherlands in Practice*

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This paper is an updated version of a presentation the authors made at the "Debt Restructuring and Finance Structures" seminar held together with ABN AMRO Bank and White&Case/Ali Budiardjo, Nugroho, Reksodiputro in Jakarta on 28 May 2003.

1. GENERAL BACKGROUND

The Republic of Indonesia (Indonesia) and the Kingdom of the Netherlands (the Netherlands) signed a favourable double taxation agreement (DTA) on 29 January 2002. As the ratification procedures[1] were completed in December 2003, the new DTA became effective on 1 January 2004.[2]

The previous DTA of 1973, which was significantly amended in 1991,[3] was terminated at Indonesia's request as of 1 January 2001. The request is said to have been motivated by the wish to apply a higher effective tax rate to branch profits. Indonesia referred in this connection to other Indonesian DTAs in which a higher tax rate for such profits had been agreed.[4] Negotiations commenced soon after the request[5] and resulted in full agreement on the provisions of a new DTA on 2 February 2001. It was also agreed that for the period 1 January 2001 to 1 January 2004, the old DTA could still be applied as if it had remained in force.[6]

The new DTA and accompanying protocol largely correspond to the old DTA (and protocol) in terms of structure, subjects covered and wording.

In a Decree dated 5 February 2004, the Dutch State Secretary of Finance (SSF) indicated that regulations implementing the new DTA would be published in the Dutch Government Gazette during the course of this year. Until the publication of these new regulations, the implementing regulations to the old DTA will continue to apply.[7]

Below, we will discuss the most significant changes to the old DTA, including their practical implications. We will also summarize several provisions that have not been changed but which we believe must be mentioned in order

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1. We received an e-mail from the Dutch Embassy in Jakarta dated 31 December 2003 stating that the required diplomatic notification formalities had been met by both countries. This was confirmed in a Decree of the Dutch State Secretary of Finance (SSF) dated 5 February 2004, No. IFZ 2004/44, which referred to 30 December 2003 as the effective date. However, the revised issue of the Dutch Treaty Gazette (Trb. 2004, 25 H) states that the new DTA entered into force on 31 December 2003.
2. Art. 31 of the new DTA.
3. The Protocol of 22 July 1991 was amended by the Protocol of 23 August 1993.
4. Press release of the Dutch Ministry of Finance (MoF) dated 7 July 2000, No. 00-155.
5. Pursuant to the Dutch explanatory notes to the new DTA, 2001-2002, No. 28 417, Nos. 376 and 1, the approach of the Netherlands was aimed at minimizing the damage resulting from the termination of the old DTA as much as possible and at creating a "level playing field" with the business communities of Indonesia's other DTA partners.
6. Press releases of the Dutch MoF dated 3 November 2000 (No. 00-228) and 9 February 2001 (No. 01-045), and two Decrees of the Dutch SSF dated 8 January 2001 (No. IFZ 2000/1374) and 10 May 2001 (No. Stb. 2001,222).
7. Decree of Dutch SSF dated 5 February 2004 (see also "Netherlands Publishes Decree on Regulations to New Treaty with Indonesia" published in the May/June 2004 (Vol. 10, No. 5/6) issue of the *Asia-Pacific Tax Bulletin*). The Dutch MoF is now working on a general simplification of the existing implementing regulations regarding dividend withholding tax reductions under the Dutch DTAs.

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for the reader to obtain a good overall view of the new DTA.

2. DEFINITION OF APPLICABLE TAXES

The taxes to which the new DTA applies are, in particular:[8]

- in the case of the Netherlands:
  - the income tax;
  - the wage tax;
  - the corporate income tax;[9]
  - the dividend withholding tax;
- in the case of Indonesia:
  - the income tax.

The subdivision of Indonesian taxes that was made in the old DTA was no longer necessary in the new DTA because, on 1 January 1984, the Indonesian Income Tax Law 1984 replaced the Corporation Tax Ordinance 1925, the Income Tax Ordinance 1944 and the Law on the Tax on Interest, Dividends and Royalties 1970.[10] According to the explanatory notes to the new DTA, Indonesian "income tax" now includes income tax, dividend tax, wage tax and corporate income tax.[11]

3. INTEREST

The most important difference between the old and new DTA is the introduction under the latter of an *exemption from withholding tax* for certain categories of interest.[12] As a result of this exemption, which is *unique for Indonesian DTAs*, attractive tax planning opportunities have arisen.

Pursuant to Art. 11(4) of the new DTA, an exemption from interest withholding tax applies if (1) the recipient is the beneficial owner of the interest, (2) this recipient is a resident of the other state and (3) the interest is paid (a) on a loan made for a period of more than two years *or* (b) in connection with the sale on credit of any industrial, commercial or scientific equipment.[13]

If only the first two conditions are met, a reduced interest withholding tax rate of 10% is applicable. A 10% rate was also the general rule under the interest provision of the old DTA.

The new DTA provides that the two states may, by mutual agreement, settle the mode of application of, inter alia, the exemption.[14] As similar mutual agreement provisions in certain other Indonesian DTAs have not led to the imposition of additional conditions for the claiming of benefit from these DTAs, we do not expect additional conditions to be introduced.[15]

According to the Dutch MoF, the withholding tax exemption in respect of interest paid on a loan made for a period of more than two years is applicable to interest paid during the two-year period.[16] In other words, the formally agreed term of the loan is decisive for the application of the exemption to all interest paid on the loan. Should Indonesia interpret Art. 11(4) differently or impose additional conditions, both states could endeavour to resolve any such difference by mutual agreement in accordance with Art. 27 of the new DTA.

3.1. In practice: Finance structures

If an Indonesian group intends to attract debt capital in the international capital markets, it would normally structure the issued debt via a foreign special purpose company. The reasons for interposing a foreign finance company are generally the following:

- easier access to international capital markets;
- currency regulations;
- political factors; and
- reduction of the domestic Indonesian withholding tax.

The intermediary finance company is often located in the Netherlands.[17] Until recently, Mauritian companies were also popular for this purpose.[18]

By using a Mauritian finance structure, for instance, the Indonesian withholding tax is reduced to 10% under the DTA between Mauritius and Indonesia, and very little or no Mauritian corporate income tax is due on the remuneration. However, in principle, this DTA will cease to apply to Indonesia as of 1 January 2005.[19] Consequently, it would be prudent for Indonesian groups that are currently using a Mauritian finance structure to start reconsidering their position.

The Netherlands has traditionally been, and still is, a favourite finance company jurisdiction and could therefore provide an acceptable alternative. Although the traditional tax regime for Dutch intermediary finance com-

8. Art. 2(3) of the new DTA.
9. Including the government share in the net profits from the exploitation of natural resources levied pursuant to the Mining Act of 1810 with respect to concessions issued from 1967, or pursuant to the Netherlands Continental Shelf Mining Act of 1965. The reference to these Acts may seem puzzling, as both were replaced by the Mining Act on 1 January 2003, but this was almost two years after the provisions of the new DTA had already been agreed. Furthermore, pursuant to Art. 2(4), the new DTA will also apply to any identical taxes that are subsequently imposed in addition to, or in place of, the existing taxes.
10. See International Bureau of Fiscal Documentation (IBFD), *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 19, Suppl. No. 214 (June 2002).
11. See explanatory notes to the new DTA, 2001-2002, No. 28 417, Nos. 376 and 1. It is our understanding, however, that the Indonesian Income Tax Law also provides for the withholding of tax on interest.
12. The Indonesian interest withholding tax rate for non-residents is, in principle, 20% (see IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 23, Suppl. No. 214 (June 2002)).
13. Pursuant to Art. 11(3), interest payments by government owned/controlled parties are also exempt (similar to the interest provision in the old DTA).
14. Such a provision is quite common and is normally invoked for the purpose of agreeing on reduction/refund procedures (see also note 7). A similar provision is also included in Arts. 10(3) and 12(4) of the new DTA.
15. According to an e-mail reply from the Dutch MoF dated 22 January 2004, the intention of both states is that the new implementing regulations will deal only with the procedure for refunding withholding tax and will not introduce additional conditions for applying the exemption. We note that it would be unusual for new conditions to be laid down in the implementing regulations.
16. Both the Indonesian and Dutch texts as well as the English text seem to confirm this. Additionally, this was confirmed by the Dutch MoF in the above-mentioned e-mail reply dated 22 January 2004. However, pursuant to the final sentence of the Protocol, if there is any divergence of interpretation between the Indonesian and Dutch texts, the English text will prevail.
17. Luxembourg can also be used.
18. For further background information on Mauritius, see article entitled "A Regional Tax Planning Centre – Tax Planning Opportunities" published in the November/December 2002 (Vol. 8, No. 11/12) issue of the *Asia-Pacific Tax Bulletin*.
19. See "Treaty with Mauritius Terminated", published in the April 2004 (Vol. 10, No. 4) issue of the *Asia-Pacific Tax Bulletin*, where it is stated that the DTA between Mauritius and Indonesia will be terminated.

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panies can no longer be used,[20] the current tax regime for Dutch finance companies (as set out below) is good or even better in meeting today's international taxation standards as advocated by the Organisation for Economic Co-operation and Development (OECD).[21]

As tax authorities become more sophisticated and advanced in their thinking, they are more likely to question whether an intermediary finance company qualifies as a "beneficial owner" within the meaning of Art. 11(4) for Indonesian tax purposes.[22] Generally, such a finance company does not have much substance, runs no economic risks, and pays little or no corporate income tax on the remuneration received from its finance activities. These characteristics could endanger a finance company's ability to meet the "beneficial owner" test.

As the Netherlands radically changed its domestic tax rules for intermediary finance companies in 2001 to make them OECD-proof,[23] and to dispel the criticism of other European Union (EU) Member States,[24] there is good reason for concluding that the "beneficial owner" test will be met by a Dutch finance company[25] qualifying under the current tax regime for such companies. Under this regime, a Dutch finance company is basically required to have substance, to run economic risks and to report an arm's length remuneration[26] on its finance activities in conformity with the OECD transfer pricing guidelines (see further below). Finally, as meeting the "beneficial ownership" test was also a condition for the reduction of the Indonesian interest withholding tax rate to 10% under the old DTA (and the Mauritian DTA), and as such finance structures were established successfully under the old DTA, there should be no reason for this to be different with respect to the exemption under the new DTA.

The above exemption, in combination with the fact that the Netherlands generally does not levy interest withholding tax pursuant to Dutch domestic law, enables Dutch companies[27] to finance Indonesian companies without interest withholding tax.[28] In our practice, we therefore already see Indonesian groups establishing or planning to continue using a Dutch finance company for their future funding.[29]

The only (modest) tax burdens[30] that arise in the Dutch finance structure would be (1) the Dutch corporate income tax at the rate of 34.5% (29% on the first EUR 22,689) on the net remuneration received by the Dutch finance company for its finance activities, (2) Dutch dividend withholding tax at a reduced rate of 10%[31] upon the distribution of such remuneration to the Dutch finance company's Indonesian parent-company, and (3) Dutch capital tax at the rate of 0.55% on any equity contribution to the Dutch finance company. The effective capital tax rate is, however, 0.36%, as the capital tax is a deductible cost for Dutch corporate income tax purposes.[32]

20. Under the old Dutch intermediary finance regime (see model tax rulings published by the tax authority/large enterprises of Rotterdam in September 1993), the Dutch tax authority allowed a standard net spread of at most 12.5 basis points, provided the finance company did not run any currency risk or debtor risk. Pursuant to "grandfathering" regulations as set out in a Decree of the Dutch SSF dated 21 December 2000, No. RTB 2000/3227, Dutch finance companies that were active prior to 1 April 2001 can continue to apply the old ruling regulations until 31 December 2005.

21. Part II(16), in conjunction with Table of Conclusions of the "OECD's Project on Harmful Tax Practices: The 2004 Progress Report" dated 4 February 2004, explicitly states that the current tax regime for Dutch finance companies, unlike the old regime, is not considered potentially harmful (see note 24).

22. See also Paras. 8-17 of the OECD Commentary on Art. 11 and the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies" dated November 1997, reproduced in Vol. II at page R(6)-1. Para. 8 of the OECD Commentary on Art. 11 states that, "The term 'beneficial owner' is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance". The Committee report concludes, "... that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties" (see also notes 46 and 93).

23. See note 21.

24. The old Dutch intermediary finance company tax regime (see model tax rulings published by the tax authority/large enterprises of Rotterdam in September 1993) was considered potentially harmful (see (1) Sec. (j)(i) financial services, group financing and royalty payments and measure A010 to the Report of the Code of Conduct Group on Business Taxation (established further to the ECOFIN conclusions of 1 December 1997 on the so-called "tax-package") as submitted to the ECOFIN Council on 29 November 1999; (2) OECD Report 1998, "Harmful Tax Competition. An Emerging Global Issue"; and (3) Sec. III (A) OECD Report 2000, "Towards Global Tax Co-operation").

25. This is ultimately an Indonesian tax issue to be answered by the competent Indonesian tax authority. Indonesia is not a member of the OECD or the EU. However, it cooperates with the OECD in the field of international taxation on topics such as transfer pricing and countering harmful tax practices via the OECD Centre for Co-operation with Non-Members (see, among other publications, the taxation reports of the Centre for Co-operation with Non-Members entitled "Emerging Asian Economics Programme 2001" and "Asian and China Programme Report 2003").

26. Indonesia also applies the arm's length principle. See IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 81, Suppl. No. 214 (June 2002).

27. Such as Dutch banks, financial institutions and special purpose companies.

28. To avoid Dutch dividend withholding tax being levied on interest payments made by a Dutch company, it is important that the notes/loan issued by the Dutch company not be characterized as a hybrid loan. Basically, this means that the interest should not be profit-dependent and the maturity should not exceed ten years (Art. 10(1)(d) of the Dutch Corporate Income Tax Act 1969 (CITA)).

29. In a recent case, the Indonesian Serang District Court was not charmed by a Dutch intermediary finance structure. The Court denied a claim of foreign investors against an Indonesian debtor company, PT Tri Polyta, in its decision dated 12 May 2004. See press releases in, amongst others, *the Associated Press* dated 12 May 2004, *Financieel Dagblad* (Dutch financial newspaper) dated 22 May 2004, *Financial Times* dated 24 May 2004 and IBFD's *Tax News Service* issue No. 106 (2004). With regard to similar issues relating to the investment climate in Indonesia, we refer to the petition dated 29 March 2004 filed by the US Securities Industry Association and the US-ASEAN Business Council, Inc. (copy available at <www.sia.com/international/pdf/BoyceTriPolyta32904.pdf>).

30. Pursuant to Art. 11(1)j of the Dutch Value Added Tax (VAT) Act 1968, the remuneration received for finance activities, such as the issuing of interest-bearing loans, is exempt for VAT purposes. As a consequence, the VAT on costs that can be attributed to such finance activities, is in principle, not recoverable. An exception to this rule applies where the finance activities are performed for a recipient established outside the EU (Art. 15(2) of the Dutch VAT Act 1968). The Dutch finance company is, therefore, entitled to deduct the VAT on the costs incurred provided that these costs relate to the finance activity performed for the Indonesian group. We note that certain costs paid by the Dutch finance company, such as foreign commission, legal and advisory fees, require special attention regarding VAT aspects. Under the so-called reverse charge mechanism, which is laid down in Art. 12(3) of the Dutch VAT Act 1968, the VAT liability for such services is shifted to the recipient, i.e. the Dutch finance company. As a consequence, the Dutch finance company must report the 19% Dutch VAT to the Dutch tax authority by filing a VAT return. This VAT can be deducted as input VAT on the same VAT return, if these costs can be allocated to the finance activity performed for the Indonesian parent company. As a result, no VAT will be payable.

31. See 4. below. Further tax planning could reduce this to nil.

32. An exemption from Dutch capital tax could be obtained if the equity contribution is structured appropriately.

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In order for a Dutch finance company to have advance certainty on the treatment of its remuneration for Dutch corporate income tax purposes, it can conclude an advance pricing agreement (APA) with the Dutch tax authority.[33] An APA confirms that the taxable remuneration to be reported by the Dutch finance company in respect of its finance activities will be considered to be at arm's length by the Dutch tax authority.

Under the current APA rules, the Dutch finance company needs to meet two conditions:[34]

– it must have sufficient substance in the Netherlands;[35] and
– it must be exposed to economic risks in respect of its finance activities.[36,37]

If the Dutch finance company meets the above conditions, a suitable arm's-length remuneration for its activities must subsequently be determined.[38] In practice, the conceptual model that the Dutch tax authorities want companies to apply is based on a functional analysis, using third-party comparables.[39]

Based on our experience to date, the Dutch finance company must probably report a total *gross remuneration*, i.e. before expenses, ranging from 4 to 12.5 basis points of the outstanding loan or the notes issued by the Dutch finance company.[40]

3.2. In practice: Sale on credit

The sale on credit of any industrial, commercial or scientific equipment by a Dutch company to an Indonesian company will not result in any Indonesian withholding tax on interest payments made by the Indonesian company. Therefore, tax-efficient structures can be achieved by interposing a Dutch company.

3.3. In practice: 10% Indonesian interest withholding tax

Even if the reduced 10% Indonesian interest withholding tax rate applies, it can still be attractive to interpose a Dutch finance company. As the Dutch finance company

33. The report by the OECD, as mentioned in note 21, explicitly states that it does not consider the Dutch APA practice to be potentially harmful.

34. A Dutch finance company must also take into account the Dutch securities and banking laws and regulations. In short, this means that it must comply with the exemption regulations issued pursuant to the Securities Trade (Supervision) Act 1995, as amended, and the Credit System (Supervision) Act 1992, as amended, in order to be exempt from the prohibitions contained in both these Acts.

35. For the Dutch finance company to have sufficient substance in the Netherlands, the following minimum requirements must be met (Annex to the Service-Providing Companies Decree of the Dutch MoF dated 30 March 2001 No. IFZ 2001/294):

– at least half of the company's board of directors must be resident in the Netherlands;
– the board members residing in the Netherlands must have the professional expertise necessary to fulfil their duties. The duties of the board members collectively include, at a minimum, the making of decisions, for which the company itself is responsible but which are subject to normal group influence, about all transactions entered into by the company and the proper implementation of such transactions. The company must have personnel who are qualified to carry out and register the transactions entered into;
– the key management decisions must be made in the Netherlands;
– the company's main bank account must be kept in the Netherlands;
– the records must be kept in the Netherlands;
– the company must fulfil all its filing obligations (tax returns, etc.);
– the company's business address must be in the Netherlands and the company must not also be resident for tax purposes in another country; and
– the company's equity must be appropriate in light of its activities, taking into account both the assets used and the risks incurred.

These substance criteria are obviously also important for determining where the Dutch finance company is located for DTA purposes. Pursuant to Art. 4 (3) of the new DTA (similar to the old DTA), the place of residence is where the place of effective management is situated. If both Indonesia and the Netherlands consider the place of effective management to be present in their state, they will settle this question (of fact) by mutual agreement (see Art. 27 of the new DTA). It is important that the place of effective management of the Dutch finance company be situated in the Netherlands. Otherwise, the Dutch finance company will be held to be resident in Indonesia by both Indonesia and the Netherlands. Consequently, the Dutch finance company will be unable to benefit from the new DTA and, as a result, the Dutch finance structure will be unable to benefit from the zero Indonesian withholding tax on interest payments and will also be subject to Indonesian income tax. For further background information on the underlying "place of effective management" concept, see (1) Para. 24 of the OECD Commentary on Art. 4(3), (2) the OECD draft discussion paper "The Impact of the Communications Revolution on the Application of 'Place of Effective Management' as a Tie Breaker Rule" dated February 2001, (3) OECD discussion draft paper "Place of Effective Management Concept: Suggestions for Changes to the OECD Model Tax Convention" dated 27 May 2003 and (4) article entitled "The Evolving Concept of 'Place of Effective Management' as a Tie-Breaker Rule under the OECD Model Convention and Italian Law" published in the September 2001 (Vol. 41, No. 9) issue of IBFD's *European Taxation* journal.

36. Pursuant to Art. 8c of the Dutch CITA in conjunction with the Service-Providing Companies Decree of the Dutch MoF dated 30 March 2001, No. IFZ 2001/294, the Dutch finance company will be deemed to bear sufficient risk if its equity equals or exceeds the lesser of (1) 1% of its outstanding loans, or (2) EUR 2 million, provided that the finance company can prove that its equity will actually be affected if a risk materializes (see 3.1. above for capital tax liability).

37. If a Dutch finance company does not meet the substance and risk requirements referred to in notes 35 and 36, it is nonetheless free to conduct its finance activities without an APA, provided it reports an arm's length remuneration.

38. It is rumoured that a new decree from the Dutch SSF, which should give further clarity on the substance and risk requirements as well as the remuneration, will be issued in the course of this year. This decree would introduce, inter alia, additional equity requirements besides the 1%/EUR 2 million thresholds. As we understand it, the decree will take its lead from the last "substance" condition referred to in note 35, which requires that the company's equity be appropriate in light of its activities. The Basel Capital Accord (see (1) 1988 Basel Committee on Banking Supervision report "International Convergence of Capital Measurement and Capital Standards" and (2) draft 2003 paper "Overview of the New Basel Capital Accord"), most of whose provisions will be effective as from 1 January 2007 according to a press release in, inter alia, the *Financieel Dagblad* (Dutch financial newspaper) dated 28 June 2004, would be the starting point for determining how much additional equity capital is required. The amount would depend mainly on the facts and circumstances of each specific case, including risk weightings, whether any guarantees have been issued, the solvency of the Indonesian Group, the availability of credit ratings, etc. Depending on the specific circumstances, no additional capital may be required at all.

39. An underlying transfer pricing report substantiating the remuneration is now required pursuant to Art. 8b(3) of the Dutch CITA.

40. Instead of reporting a spread, it could also follow the cost-plus method with a profit mark-up of approximately 10%, which was approved by the Court of Appeal of Amsterdam in its decision dated 20 August 2003, No. 4 01/4083. The Dutch SSF explicitly withdrew his appeal of that decision to the Dutch Supreme Court on 6 May 2004, but continued to assert that a spread depending on the principal amount outstanding is the *only correct way* to calculate an arm's length remuneration (see his explanatory Decree of 9 April 2004, No. 4 DGB 2004-1122). Based on this case law and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 1995-1999, we feel, however, that good arguments can be made in support of the application of the cost-plus method as the basis for an arm's length calculation. Pursuant to Chapter 2 in conjunction with Paras. 1.68 and 4.9 of these OECD Transfer Pricing Guidelines, an arm's length remuneration can be calculated in different ways. These guidelines also apply in the Netherlands pursuant to the Transfer Pricing and Advance Pricing Agreement Decrees dated 30 March 2001, No. IFZ 2001/292 and No. IFZ 2001/295. The main question is, however, whether a simple cost-plus remuneration would be sufficient to pass the beneficial owner test for Indonesian tax purposes (see also our comments in 3.1. above regarding "beneficial owner").

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can obtain a full[41] credit for the Indonesian withholding tax, the Dutch corporate income tax payable can be reduced to nil.[42]

4. DIVIDEND

The Dividend Article[43] in the new DTA also contains an important change from its predecessor. Under the old DTA, the dividend withholding tax rate[44] was reduced to 10% if the beneficial owner was a company holding directly at least 25% of the capital of the company paying the dividends,[45] whereas under the new DTA, the dividend withholding tax rate is 10%[46] regardless of the percentage of shares held by the recipient.[47] This is, of course, very attractive for minority shareholders. In addition, individuals (and not only companies) who beneficially own shares in the company paying the dividend[48] can also take advantage of the 10% rate under the new DTA.

5. BRANCH PROFITS TAX

As indicated in 1. above, Indonesia revoked the DTA in 2000 because it wished to apply a higher effective branch profits tax rate to the oil and gas sector. Consequently, it is not surprising that the branch profits tax rate has been increased under the new DTA.

Pursuant to Art. 10(8) of the new DTA, the branch profits tax is now 10% of the profits of the permanent establishment (PE) after the deduction of income tax from such profits. Most Indonesian DTAs provide for a branch profits tax at a rate of 10%.[49] This means that the combined tax rate on the taxable profits of an Indonesian permanent establishment (PE) would be 37%[50] as opposed to 36.3% under the old DTA.

The Netherlands does not levy a branch profits tax. Therefore, the profits of a PE located in the Netherlands will only be subject to corporate income tax at a rate of 34.5% (29% on the first EUR 22,689).

6. CAPITAL GAINS

The Capital Gains Article[51] still stipulates that capital gains will be taxed in the state where, in the case of immovable property or property attributable to a PE, the property or the PE concerned is located. Gains from the alienation of any other property will be taxable only in the state of which the alienator is a resident.[52]

With regard to capital gains realized by individuals upon the alienation of their shares, the rights of the source state to levy tax have been extended under the new DTA due to changes to the Dutch personal income tax.[53] If certain conditions are met, the Netherlands may levy tax on gains derived by an individual, who is resident in Indonesia, from the alienation of shares in a Dutch company, if such individual has been a resident of the Netherlands in the course of the ten years preceding the year of alienation (and vice versa).[54] Under the old DTA, this time period was five years.[55]

6.1. In practice: Dutch holding company

As a result of the favourable new Dividend Article in combination with the Capital Gains Article, the use of a Dutch holding company can be very attractive for Indonesian groups.

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41. Under the old Dutch intermediary finance regime only a limited credit could be obtained (see model tax rulings publication issued by the tax authority/large enterprises of Rotterdam in September 1993).
42. The credit can be denied if the risk test, as explained in note 36, is not met. Pursuant to Art. 8c of the Dutch CITA, the interest paid and received by a Dutch finance company is excluded from its tax base if the risk test is not met. Where interest paid to the Dutch finance company does not form part of its tax base, Art. 24(4) of the new DTA does not require the Netherlands to grant a tax credit for Indonesian withholding tax (similar to Art. 22 (3) of the old DTA).
43. Art. 10 of the new DTA.
44. The Dutch domestic rate is 25% (Art. 5 of the Dutch Dividend Withholding Tax Act 1965), while the Indonesian domestic rate for non-residents is 20% (see IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 27, Suppl. No. 214 (June 2002)).
45. Pursuant to Art. 9(2b) of the old DTA, the applicable dividend withholding tax rate was 15% in all other cases.
46. Provided that the recipient is the beneficial owner of the dividends. We refer to Paras. 12 to 12.2 of the OECD Commentary on Art. 10, which are similar to Paras. 8 to 8.2 of the OECD Commentary on Art. 11 (see also 3.1. above). See also Dutch interpretation memorandum in reply to Art. 4(3) of the Dutch Dividend Tax Act 1965, 2000-2001, 27 896 and 28 246, No. 117B. Art. 4(3) of the Dutch Dividend Withholding Tax Act 1965 provides for a domestic definition of the term "beneficial owner", or, more accurately, "non-beneficial owner" with retroactive effect as from 27 April 2001 (i.e. before the entering into force of the DTA). Art. 4(1) and (3) basically state that no credit for dividend withholding tax is granted if the recipient of the dividend is not the beneficial owner of the dividends. This is deemed to be the case if the recipient has provided compensation in exchange for the dividends as part of several related transactions and the dividends are entirely or partially, directly or indirectly paid for the benefit of companies entitled only to a lower credit or refund and these companies have directly or indirectly obtained or retained shares, profit-sharing certificates or profit-sharing bonds in the dividend-paying company to such an extent that the legal position is the same as before the related transactions took place. The term "several related transactions" includes transactions on a listed stock exchange or transactions for the purchase of dividend coupons or the establishment of short-term beneficial rights. See <http://ip-online2.ibfd.org/data/gi31108/gi/I-net.doc.p0000.htlm>.
47. A similar provision is included in certain other Indonesian DTAs, such as with Jordan, the Slovak Republic, the United Arab Emirates, and in the income tax agreement with Taiwan.
48. See definition of the term "dividends" in Art. 10(5) of the new DTA: profit-dependent interest falls within the scope of the Dividend Article instead of the Interest Article (Art. 11(6)).
49. The Indonesian domestic branch profits tax rate is 20% (see IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 47, Suppl. No. 214 (June 2002)).
50. This is based on the current Indonesian income tax rate of 30% + 7% (10% branch profit tax x (100%-/-30%)).
51. Art. 14 of the new DTA.
52. Art. 14(4) of the new DTA. However, pursuant to Art. 14(3), gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships and aircraft are taxable only in the state of which the enterprise is a resident.
53. The introduction of the substantial interest rules as from 1 January 1997.
54. Art. 14(5) of the new DTA.
55. The ten-year period is in line with the Dutch exit levy under Art. 25(8) of the Collection Act 1990 in conjunction with Art. 2 of the implementation regulations to the Collection Act 1990. If a Dutch individual holding a substantial interest (i.e. at least 5% of the shares in a Dutch company (see Art. 4.6 of the Income Tax Act 2001)) emigrates from the Netherlands, he will be considered to have alienated his substantial interest immediately preceding the date of emigration. The Dutch tax inspector will impose a provisional assessment on the fictitious capital gain, but will grant an extension of payment if the taxpayer files a request thereto and, in the case he emigrates to a non-EU state, provides sufficient collateral. The provisional assessment will be collected if, inter alia, the shares comprising the substantial interest are actually alienated within this ten-year period.

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The Netherlands has always been and remains one of the most popular holding company jurisdictions. The main reasons for this are the Dutch participation exemption and the extensive Dutch DTA network with low withholding tax rates on both incoming and outgoing dividends.

Under the Dutch participation exemption, any dividend income received by the Dutch holding company from its qualifying shareholdings, and any capital gains realized by the Dutch holding company on the sale of these shareholdings, will be exempt from Dutch corporate income tax at the level of the Dutch holding company.[56] Although capital losses realized on the sale of its qualifying shareholdings are not deductible to the Dutch holding company, liquidation losses[57] and losses resulting from the write-down of these shareholdings[58] are still deductible, provided certain conditions are met. Interest payments made on loans used for the acquisition of a shareholding are also tax deductible, although certain limitations on this deduction may apply.[59,60]

The distribution or redistribution of dividends and gains by the Dutch company to its Indonesian parent-company is subject to a reduced 10% Dutch dividend withholding tax, regardless of the percentage of ownership.[61]

Capital gains on the sale of shares in a Dutch company realized by an Indonesian resident company or individual are normally exempt from Dutch tax. Consequently, such capital gains, if at all, will only be taxed in Indonesia.

If a Dutch holding company is used to hold shares in Indonesian companies, dividends received from such Indonesian companies will be subject to Indonesian dividend withholding tax at the reduced rate of 10%. At the level of the Dutch holding company, the Dutch participation exemption can be applied to the dividend income.[62] Capital gains realized upon the alienation of the shares in the Indonesian company are, pursuant to the DTA, only taxable in the Netherlands, and, as a result of the application of the Dutch participation exemption, these gains would not be taxed at all.[63]

7. PENSIONS, ANNUITIES AND SOCIAL SECURITY PAYMENTS

The new DTA contains an updated and adapted Article in respect of private pensions and similar remuneration.[64] Under the old DTA, the source state may only tax pensions and similar remuneration under certain conditions. These conditions are no longer imposed under the new DTA.

The Netherlands and Indonesia both have a similar system regarding pension build-up and deductibility of pension contributions.[65] In view thereof, both states agreed that under the new DTA, the source state has a full right to levy tax on pensions and similar remuneration.

In addition, the new Article has been extended to also cover annuities[66] as well as pension and other payments made under the provisions of a social security system,[67] which may consequently likewise be taxed in the source state.

Pursuant to the new Art. 19(1), a pension or other similar remuneration or annuity is deemed to be derived from one of the two states if and to the extent the contributions or payments associated therewith qualified for tax relief in that state. This provision prevents Indonesia from being able to tax pensions and annuities where the taxpayer in question has deducted the contributions or payments related to such income from the taxable base in the Netherlands (and vice versa).[68] For this reason, the new Pension Article also states in Para. 4 that the transfer of a pension from a pension fund or an insurance company in, for example, the Netherlands to a pension fund or an insurance company in Indonesia, does not in any way restrict the taxing rights of the Netherlands (and vice versa).

56. Provided certain conditions are met pursuant to Art. 13 of the Dutch CITA. The main conditions are (1) the shareholding must constitute an interest of at least 5% of the nominal paid-up capital of the company in which the shares are held (less than 5% if held as a business asset), (2) the shareholding must not be held as a portfolio investment, and (3) the company in which the shares are held must be subject to a local profits tax.
57. Art. 13d of the Dutch CITA.
58. If, during the first five years after acquiring a qualifying shareholding of at least 25%, its fair market value drops below its historic cost price, a tax deductible write-down can be taken under Art. 13ca of the Dutch CITA. However, pursuant to Art. 13ca(3) of the Dutch CITA, a recapture takes place after five years making this a temporary cash flow facility.
59. There are three interest deduction limitations that may apply with regard to non-hybrid loans to related parties, i.e. (1) pursuant to Art. 10a(2) of the Dutch CITA, interest payments are not deductible if they are made to a related party and the loan in question is used to acquire shares in a related entity (except to the extent that the interest of the ultimate beneficial owner of that entity is changed as a result of the acquisition), (2) pursuant to Art. 10d of the Dutch CITA, loan financing from a related entity is subject to thin capitalization rules (introduced as of 1 January 2004). If the debt to equity ratio exceeds one of the following ratios, costs related to the "excess financing" are not deductible for Dutch corporate income tax purposes. The ratios are (a) 3:1 ratio on a stand-alone basis, and (b) the group ratio in the event that the 3:1 ratio is exceeded. The interest deduction is denied only in respect of the costs of related party loans, and (3) pursuant to Art. 15ad of the Dutch CITA, if a Dutch company borrows funds from a related party for the acquisition of a Dutch target company and subsequently forms a fiscal unit with that target company, the profits of the target company can temporarily (i.e. during the first eight years) not be offset against the interest payments on the loan. However, these interest deduction limitations can be avoided by structuring the financing appropriately.
In addition, pursuant to the parliamentary history to Art. 10d of the Dutch CITA (2003-2004, 29 210, No. C and No. 25), the Dutch tax authority still adheres to its advance tax ruling policy that an acquisition of foreign shares must be financed with at least 15% equity to obtain a holding company tax ruling.
60. Pursuant to Bill No. 29 381, the acquisition costs for a shareholding qualifying for the participation exemption, such as due diligence costs, will not be tax deductible.
61. See 4. above. Further tax planning could reduce this to 7% or even nil.
62. See note 56.
63. The answer to the question whether the distribution of its earnings by the Dutch holding company triggers Dutch dividend withholding tax depends on the location of the Dutch holding company's parent company.
64. Art. 19 of the new DTA.
65. See the Dutch explanatory notes to the new DTA, 2001-2002, No. 28 417, Nos. 376 and 1.
66. This includes lump-sum payments in lieu of the right to an annuity.
67. Pursuant to its fiscal treaty policy, the Netherlands strives to have any pension and other payments made under the provisions of a social security system of one of the two states taxed by the source state, as such payments are similar to governmental pensions (see Dutch fiscal treaty policy 1987, Para. 7d).
68. See also 10. below.

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8. OTHER INCOME

At the request of the Netherlands, a new Article regarding other income has been included in the new DTA. Under this Article, items of income not dealt with in the other provisions of the DTA, like alimony, will be taxable only in the state of which the recipient is a resident.[69] As Indonesia did not wish to lose its tax proceeds on income in the form of lotteries and prizes, both states agreed to an exception to this rule for such income.

9. OFFSHORE ACTIVITIES

At the request of the Netherlands, a new Article regarding offshore activities, i.e. activities carried on offshore in connection with the exploration or exploitation of the seabed and its subsoil and their natural resources, has been incorporated in the new DTA.[70] Under the new Article, an enterprise carrying on offshore activities will be deemed to be carrying on a business in the source state through a PE therein, unless the activities in question are carried on in the source state for a period or periods not exceeding, in aggregate, 30 days in any 12-month period. This means that these offshore activities will generally be taxable in the source state. Under the old DTA, offshore activities did not often give rise to a PE.[71]

10. NON-DISCRIMINATION

The old non-discrimination provisions have been retained and, additionally, a specific provision has been included to prevent the discriminatory treatment of contributions paid by an Indonesian resident individual to a pension plan in the Netherlands (and vice versa).[72] Consequently, Indonesia is required to allow the deduction of qualifying pension contributions paid to a Dutch pension fund by a employee who has temporarily been seconded to Indonesia.

11. EXCHANGE OF INFORMATION

The Exchange of Information Article has been extended to cover information relating to any type of Dutch social security.[73]

The Dutch tax authority can, amongst others, proceed to a spontaneous exchange of information with the Indonesian tax authority.[74]

With regard to Dutch finance structures, this applies in particular where the substance and risk requirements, as set out in notes 35 and 36, have not been met. A notification to the Dutch finance company that the Dutch tax authority is seeking to spontaneously exchange information with the Indonesian tax authority may be made (1) following a request by the Dutch finance company for a certificate of residence, (2) in the course of the review of the Dutch finance company's corporate income tax return, or (3) at the time of the final corporate income tax assessment. The decision of the Dutch tax authority to exchange information can be appealed by the Dutch finance company and the exchange will, therefore, not necessarily be effected.[75]

12. HYBRID ENTITIES

Where an entity that is treated as a body corporate for tax purposes, is liable to tax as a body corporate in a state,[76] but its income is also effectively subject to tax in the other state as income of the participants in that body corporate (which results in double taxation), Indonesia and the Netherlands are required to take measures, on a case-to-case basis, to eliminate this double taxation.[77]

This could apply, for example, to participations in Dutch partnerships, limited partnerships and all forms of Indonesian partnerships (e.g. a Dutch partnership ("VOF") is a transparent entity for Dutch tax purposes, while it is a taxable entity for Indonesian tax purposes).[78]

69. Art. 23 of the new DTA. A similar article is included in the OECD Model Tax Convention on Income and on Capital, which is based on the principle of residence.

70. However, certain activities are explicitly excluded from the definition of offshore activities under Art. 25(4) of the new DTA.

71. Although the OECD Model Tax Convention on Income and on Capital does not contain an Article relating to offshore activities, the inclusion of such an Article in the DTAs of coastal states is rather common. Since the extension, as of 1 January 1990, of the Dutch fiscal jurisdiction to the Dutch part of the continental shelf, the Dutch fiscal treaty policy has aimed at making such domestic right to levy tax also applicable under a DTA. See Dutch fiscal treaty policy 1998, Para. 4.3.1.4.4.

72. Art. 26(5) of the new DTA.

73. Under Art. 28 of the new DTA, in conjunction with Article X of the Protocol, the exchange of information procedure can be used in connection with any national taxes and, in the case of the Netherlands, also social security.

74. This was also possible under the old DTA (for other methods of exchanging information, see, amongst others, Para. 9 of the OECD Commentary on Art. 26).

75. See Service-Providing Companies Decree of the Dutch MoF dated 30 March 2001, IFZ 2001/294.

76. Under Art. 3(e) of the new DTA in conjunction with Art. 3(d), and Art. 4 of the new DTA in conjunction with Art. 1, such an entity can claim the DTA protection.

77. The Netherlands made a reservation to the OECD Report "The application of the OECD model tax convention to partnerships" (see Annex II to this report). A specific provision on this type of double taxation has, therefore, been introduced in the new DTA (see Art. I of the Protocol). Under Art. I of the Protocol, the states are also required to take measures to keep income from escaping taxation merely as a result of the application of the new DTA. Pursuant to the Dutch explanatory notes to the new DTA, 2001-2002, No. 28 417, Nos. 376 and 1, the mutual agreement procedure under Art. 27 of the new DTA should be followed in order to decide on such measures. In our view, the Art. 27 procedure (see reservation of Art. 27(3)) would be appropriate for the purpose of agreeing on a *general* approach to the tax treatment of hybrid entities. However, we feel that the exchange of information procedure of Art. 28 of the new DTA should be followed in *particular* cases wherein no tax needs to be paid at all as a result of using a hybrid entity. We can imagine that taxpayers may wish to object to such an exchange of information and it would seem improper to us for the Dutch tax authority to be able to deprive a taxpayer of its right of appeal by following the mutual agreement procedure. See also the Resolution of International Tax Conflicts adopted by the ICC Council which indicates that the taxpayer's position in a mutual agreement procedure should be strengthened: "The taxpayer should have the right to reject any unsatisfactory mutual agreement. The remedies of national tax law should in such cases always be open to him" (The Resolution of Tax Treaty Conflicts by Arbitration, Proceedings of a Seminar held in Florence, Italy in 1993 during the 47th Congress of the International Fiscal Association, Volume 18e, pp. 97-101, Deventer: Kluwer Law and Taxation Publishers, 1994).

78. See the Dutch explanatory notes to the new DTA, year 2001-2002, No. 28 417, Nos. 376 and 1.

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13. UNCHANGED TREATY ARTICLES

13.1. Permanent establishment

The concept of PE includes, among other things:[79]

- a place of management;
- a branch;
- an office;
- a mine, an oil-well, quarry or other place of extraction of natural resources;
- a building site, a construction, assembly or installation project or supervisory activities in connection therewith, but only where such site, project or activities continue for a period of more than six months; and
- the furnishing of services, including consultancy services by an enterprise through an employee or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue within the state for a period or periods aggregating more than three months within any twelve-month period.

The term "PE" does not include activities that have a preparatory or auxiliary character.[80] The DTA's interpretation of preparatory or auxiliary activities deviates, however, from the interpretation thereof contained in the OECD Model Tax Convention on Income and on Capital. Contrary to the OECD Model Convention, the DTA does not stipulate that the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of delivery is a preparatory or auxiliary activity.[81] Therefore, under the DTA, stock will still be treated as a PE even if it is maintained for the sole purpose of delivery.

Furthermore, an agent who, for example, does not have the authority to conclude contracts will normally not qualify as a PE. However, as to insurance companies, the scope of the term "PE" has been extended under the DTA.[82] Pursuant to Art. 5(6) of the new DTA, an insurance enterprise will be deemed to have a permanent representative in the other state by reason only of collecting premiums in the territory of that other state or insuring risks situated therein through an employee or a representative who is not an independent agent.

13.2. Business profits[83]

In its negotiations with its DTA partners, the Netherlands adheres as much as possible to the principle that the state in which a PE is situated may levy tax on the profits of the enterprise but only to the extent they are attributable to that PE.[84]

In view of this, we note that under the new DTA, the PE Article still contains a so-called "limited force of attraction" clause. As a result of this clause, profits derived within Indonesia[85] from the sale of goods or merchandise of the same kind as those sold, or from other business transactions of the same kind as those effected, through the PE in Indonesia, may also be subject to tax in Indonesia.

Other aspects of the Business Profits Article have also remained unchanged. As to turnkey projects,[86] this means that in the case of contracts for the survey, supply, installation or construction of (1) industrial, commercial or scientific equipment or (2) premises or (3) public works, when the enterprise has a PE, the profits of such PE will be determined not on the basis of the total amount of the contract, but only on the basis of that part of the contract which is effectively carried out by the PE in the state where the PE is situated.[87] Consequently, under the DTA, a Dutch contractor is protected from Indonesian withholding tax on the *whole* contract value.[88]

In the determination of the profits of a PE, expenses that are incurred for the purposes of the PE, such as executive and general administrative expenses, are tax deductible.[89] An exception applies in respect of amounts charged, otherwise than with respect to expenses actually incurred, by the head office of the enterprise or any of its other offices to the PE (and vice versa), by way of, amongst others, royalties and interest.[90]

Profits attributable or deemed to be attributable to the activities of a PE in one of the states will be subject to corporate income tax in that state. In addition, branch profits tax at the rate of 10% will be levied if the PE is located in Indonesia (see 5. above).

13.3. Royalties[91]

The Indonesian tax on royalty payments[92] can be reduced to 10% (a similar rate was prescribed in the old DTA).[93] The Netherlands does not levy any withholding tax on royalties.

13.3.1. In practice: Technical services

The definition of "royalties" still excludes payments for technical services.[94] This means that such payments (including payments for consultancy services or super-

79. Art. 5 of the new DTA.
80. Art. 5(4) of the new DTA as well as the OECD Model Tax Convention on Income and on Capital.
81. Compare Art. 5(4)b of the OECD Model Tax Convention on Income and on Capital with Art. 5(4)b of the new DTA.
82. Except with regard to reinsurance (see Art. 5 (6) of the new DTA).
83. Art. 7 of the new DTA.
84. Dutch fiscal treaty policy 1987, Para. 2.a.
85. The limited force of attraction clause has no effect in respect of a PE in the Netherlands, as under domestic law (Art. 17(3)a of the Dutch CITA) the Netherlands does not have the right to tax profits realized by a non-resident, if and to the extent such profits are not attributable to the PE in the Netherlands.
86. Art. IV of the Protocol to the new DTA.
87. This is in accordance with the Dutch fiscal treaty policy 1998 (see Para. 4.3.1.4.2 thereof).
88. See also IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 56, Suppl. No. 214 (June 2002).
89. Art. 7(3) of the new DTA.
90. Art. V of the Protocol to the new DTA. In the case of a banking enterprise, the amounts charged by way of interest on moneys made available to the PE are tax deductible, while such amounts charged by the PE to the head office are not taken into account.
91. Art. 13 of the new DTA.
92. The Indonesian royalty withholding tax rate is 20%, if the recipient is a non-resident. See also IBFD, *Taxes and Investment in Asia and the Pacific*, Indonesia, p. 31, Suppl. No. 214 (June 2002).
93. Provided that the recipient is the beneficial owner of the royalties. See Paras. 4 to 7 of the OECD Commentary on Art. 12, whereby Paras. 4 to 4.2 are similar to Paras. 8 to 8.2 of the OECD Commentary on Art. 11 (see also 3.1. above).
94. As defined in Art. IX of the Protocol to the new DTA in conjunction with Art. 12(3) of the new DTA.

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visory services) will be exempt from Indonesian withholding tax on royalties. Consequently, Indonesian withholding tax on royalties could be avoided by using a Dutch company to provide such technical services.[95]

13.4. Salary income

Salary income is normally taxable in the state in which the employment is exercised.[96] However, the state in which the employee resides may levy tax on salary income, if:

– the employee is present in the state where the employment is exercised for an aggregate period not exceeding 183 days in any 12-month period; and
– the remuneration is paid by or on behalf of an employer who is not a resident of the state in which the employment is exercised; and
– the remuneration is not borne by a PE or a fixed base which the employer has in the state where the employment is exercised.

The above basically means that salary income will be taxable in Indonesia if an employee, who is a resident of the Netherlands, (1) is seconded to Indonesia for more than 183 days, or (2) is seconded for less than 183 days and the secondment is for the account of an Indonesian company or PE.

The new and old DTA contain specific provisions regarding independent personal services, artists, athletes, professors, teachers and students.[97]

13.5. Directors' fees

Under the new DTA, directors' fees remain taxable in the state in which the paying company is a resident.[98]

13.6. Elimination of double taxation[99]

Indonesia applies the credit method to prevent double taxation, while the Netherlands applies the exemption method or, for certain categories of income, such as interest, dividend and royalties, the credit method. Whereas under the old DTA the exemption method was applicable to directors' fees, now the credit method applies in respect of this type of income.[100]

14. NO "GRANDFATHERING"

As no "grandfathering" arrangements were made between Indonesia and the Netherlands, the new DTA provisions became directly applicable on 1 January 2004.[101]

15. CONCLUDING REMARKS

The new DTA may offer fresh tax planning opportunities for international capital market transactions by Indonesian companies.

In this respect, the newly introduced interest withholding tax exemption is of particular importance. The Netherlands' OECD-proof finance company tax regime, both as such and in combination with non-tax factors (such as an easy access to the international capital markets, currency regulations and a stable political situation), makes the Netherlands an attractive host country for Indonesian finance structures in today's international tax environment.

The use of a Dutch company may also be tax efficient for Indonesian holding structures, in view of the availability of the reduced DTA dividend withholding tax rate of 10% regardless of the percentage of shares held in the dividend-paying entity.

95. The Netherlands strives to lay down in its DTAs that payments for technical services fall under the Business Profits Article or Independent Personal Services Article rather than under the Royalties Article. See also Dutch fiscal treaty policy 1987, Para. 3.d.
96. Art. 16 of the new DTA.
97. Arts. 15, 18, 21, and 22 of the new DTA.
98. Art. 17 of the new DTA.
99. Art. 24 of the new DTA.
100. This is in accordance with the Dutch fiscal treaty policy 1998 (see Para. 4.3.4.4). The Netherlands prefers the application of the credit method for directors' fees in order to avoid abuse, because in some cases (1) either the levy of tax in the other state is not always ensured as it usually involves temporary activities, or (2) a special regime is applicable in the other state.
101. The new DTA will remain in force until terminated by one of the states. Either state may terminate it on or before 30 June of any calendar year following the expiry of a period of five years from 2004. In that event, the new DTA will cease to have effect in the following year.

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