Report of the Intersessional Working Group on an Equalization Measure

Submitted by Australia on behalf of the Intersessional Working Group

The Intersessional Working Group on an Equalization Measure held a virtual meeting, facilitated by Australia, over two sessions conducted on 17 and 18 October 2024. Two sessions were held to accommodate different time zones. Representatives from sponsoring and non-sponsoring states, contractors, the secretariat of the Authority and the office of the Interim Director-General of the Enterprise participated in the meeting.

Each session considered the following questions raised during the Thematic Discussion on an Equalization Measure held on 15 July during Part II of the Council's 29th session:

1. Is the Hybrid model's reference to subsidies and tax exemptions redundant given that the 1994 Implementation Agreement[1] bars certain subsidies?
2. Are state owned-enterprise (SOE) Contractors liable for the equalization measure?
3. Are state Contractors liable for the equalization measure?
4. Is, and if so should, the Enterprise be liable for the equalization measure?
5. Is, and if so should, an Enterprise joint-venture, be liable for the equalization measure?

Dr Daniel Wilde of the Commonwealth Secretariat prepared the attached Briefing Note responding to these questions and provided expert input to the discussions (Attachment 1). The Intersessional Working Group thanks Dr Wilde for his continued expert assistance.

In addition to the five questions discussed, participants raised a number of other issues to be considered further including:

- The definitions of Inclusion Criteria, Subsidies, Relevant Activities and Tax Exemptions for the Top Up Profit Share in the Hybrid Model, and
- The definitions of Related Entities, Income and Covered Taxes (based to the greatest extent practicable on the OECD Pillar 2 Global Anti-Base Erosion Model Rules) for the Top Up Profit Share in the Hybrid Model, and
- Whether a mechanism that may be simpler for the Authority to administer could be developed that would still achieve the aims of an equalization measure.

In the Briefing Note, Dr Wilde suggested two further actions for the Intersessional Working Group:

1. To amend the Equalization Measure Draft Standard text to provide clarity that a State Owned Enterprise's (SOE) dividend payments are not creditable.

2. To raise for further discussion by the Council the matters of –

   a) the possible exemption of the Enterprise from the base royalty and equalization measure for a period, and

   b) the relative silence of the draft Exploitation Regulations on the legal form of Enterprise joint ventures.

Participants generally supported these further actions.

Amendments to the draft Equalization Measure Standard definition of:

[1] Available at: Agreement on Part XI UNCLOS

- ‘Sponsoring State Payments’ in Standard II, paragraph 5(a) the Hybrid Model (Option 1), and

- ‘Covered Payments’ in Standard VI, paragraph 1(a) in the Additional Profit Share Model (Option 2)

are marked up in the attached revised text for the draft Equalization Measure Standard (Attachment 2). These are submitted for incorporation into the next version of the consolidated text of the draft Exploitation Regulations.

While the majority of participants considered that dividends paid by SOEs, state-controlled enterprises, or joint ventures between a state enterprise and a private sector enterprise, should not be creditable against the Additional Royalty in the Hybrid model, or the Additional Profit Share model, there was no consensus on this issue. Accordingly, this text is placed in square brackets in the revised text.

Issues around the application of the payment regime to the Enterprise and the legal form of joint ventures with the Enterprise are beyond the remit of the Intersessional Working Group to resolve. Accordingly, the Intersessional Working Group recommends that the interim Director-General of the Enterprise and Council consider these issues further.

Subsequent to the meeting, the Government of India shared written comments which were circulated to the Intersessional Working Group and which are appended to this report.