Fixed Ratio Thin Capitalization Rules in Conflict with the Arm’s Length Principle and Relative Issues of Deductibility

Taxation differences and corporate behaviour result in source countries protecting their tax revenue by limiting the tax deductibility of interest under thin capitalization rules or general anti-avoidance rules, in addition to applying the standard transfer pricing rules. The author considers the relationship between certain approaches to thin capitalization rules and the arm’s length principle.

1. Introduction

Thin capitalization of a subsidiary together with the application of inappropriate use of transfer pricing rules has been a popular method of shifting the taxable base from one country to another. The method of thin capitalization is typically used by a parent company to increase the amount of debt financing in high-tax countries in order to benefit from the deductibility of interest. Therefore, a subsidiary located in a high-tax country will decrease its taxable base through the transfer of profit to its parent company in the form of interest and not in the form of a non-deductible dividend. In this regard, the fact that little or no withholding tax is levied on the interest paid abroad as a result of domestic law or an applicable income tax treaty, would create a “preferential interest regime” allowing group companies to shift profits at no cost.

Taxation differences and corporate behaviour result in source countries protecting their tax revenue by limiting the tax deductibility of interest under thin capitalization rules or general anti-avoidance rules, in addition to applying the standard transfer pricing rules. Further, empirical studies suggest that the leverage of affiliate companies is a declining function of the after-tax rate of interest, if no thin capitalization rule is imposed. Then, a lower interest rate and a higher tax rate would lead to an increase in the leverage. However, if a thin capitalization rule is imposed in the source country and it is binding, the leverage will be reduced and will show less tax sensitivity.

As the use of debt financing rather than equity financing may have consequences for tax revenue, countries have implemented measures, but there is no generally accepted international view about the approach which should be adopted to the various problems involved (and only some guidance is given by the OECD). Thin capitalization rules are basically drafted in order to prevent cases of hidden equity capitalization. A relatively high debt-to-equity ratio could be a sign or indication that a company is trying to achieve tax advantages but that, as the OECD states “[…][a relatively high debt-to-equity ratio] constitutes therefore merely an indication, not proof, of hidden capitalization.”

Consequently, the concept of a safe harbour or fixed ratio rule as such, is right from the beginning based on a doubtful assumption of tax evasion.


2.1. Role of tax treaties and domestic provisions

The purpose of bilateral income tax treaties, as typically expressed in their preamble, is “the avoidance of double taxation and the prevention of fiscal evasion.”

On the one hand, the domestic law of most countries provides for the prevention of double taxation of their residents, while on the other hand the main function of tax treaties is to distribute taxing rights accordingly. The prevention of fiscal evasion primarily refers to cases where taxpayers “fraudulently conceal income in an international setting and rely on the inability of an administration to obtain information from abroad.”

In this way, a tax treaty is intended to provide the taxpayers with a right to require the respect of the limitation of taxing rights made by its provisions, which are enforceable before the tax authorities of a treaty party. This justice will be meted out in this case as a matter for the constitutional law of each country, but in many cases it is necessary for each country to carry out some formal legislative process, such as approval of the tax treaty by parliament.

Moreover, tax treaty provisions are intended to have precedence over any inconsistent provisions of domestic tax law.

1. A.P. Dourado and R. de la Feria, Thin Capitalization Rules in the Context of the CCCTB, Oxford University Centre for Business Taxation, WP 08/04, at 22.


3. OECD Model Tax Convention on Income and on Capital, Preamble (2010), n. 1, Models IBFD.

Again, how this is effected is a matter of the constitutional law of the countries concerned. A common practice is to insert such a provision into either the law giving effect to the treaty or the domestic tax law itself. The usual result of such a provision under the law of most countries is, apart from the administrative treaty provisions on the mutual agreement procedure and the exchange of information, to set limits on the operation of domestic tax law but not to expand its operation.

According to Van Raad, “Taxation is based on internal tax law while a tax treaty may restrict such taxation.” Consequently, tax treaties exist to limit a contracting state’s taxing rights in order to avoid international double taxation. Thus, a treaty provision should not be construed to restrict in any manner any exclusion, exemption, deduction or credit, nor any allowance accorded by the domestic laws of the treaty partners.

The result of this relationship between tax treaties and domestic law suggests an important guideline for drafting domestic tax provisions themselves. If the domestic rules follow the rules typically found in tax treaties, this will simplify the question of the relationship between tax treaties and domestic law, and will also provide transparency to foreign investors and indicate (even in the absence of an extensive tax treaty network) the intention of the country to adopt internationally accepted standards.

That is, article 9(1) of the OECD Model regarding intercompany financial relationships (thin capitalization) originally focused on “conditions” of intergroup financial relations as from the 1987 Thin Capitalisation Report of the OECD and the following OECD Commentary (1992) where the inclusion of the Thin Capitalisation Report conclusions took place. In that respect, the OECD thesis would be that in cases where thin capitalization rules have international implications, it is important that their application be in accordance with the arm’s length principle as delineated in article 9(1) of the OECD Model.

As a general rule, residents of the contracting states under a tax treaty must rely on domestic tax law as the authority to levy tax, taking into consideration that tax treaties do not broaden taxing rights. In that respect, one of the purposes of article 9(1) is to achieve an equitable allocation of taxing rights. Article 9 allows any rewriting of accounts (reallocation of profits) to be made only in accordance with the above-mentioned arm’s length principle. Whether or not a contracting state may avail itself of this treaty authorization, depends on its own domestic law. Thus, article 9 does not create any legal basis for such a rewriting of accounts. In that regard, as suggested by Klaus Vogel’s commentary on the OECD Model, the treaty provision will act only as a safeguard that any adjustments made by the tax authorities will not go beyond the arm’s length standard.

Moreover, article 9(1) of the OECD Model originally focuses on “conditions” of intergroup financial relations, and the OECD does not limit the application of article 9(1) regarding thin capitalization rules. Paragraph 3 of the Commentary on Article 9(1) of the OECD Model states: “As discussed in the Committee on Fiscal Affairs’ Thin Capitalisation Report, there is interplay between tax treaties and domestic rules on thin capitalisation relevant to the scope of the Article.”

Further, the OECD approach regarding the arm’s length principle concerning thin capitalization rules in the context of article 9 of the OECD Model is summarized as follows in the OECD Thin Capitalisation Report:

a) The Article is relevant when countries are applying their domestic rules about thin capitalisation.

b) The Article is not only relevant in adjusting the rate of interest, but also, in appropriate circumstances, in determining whether what is presented as a loan should be considered as a contribution to equity capital.

c) The Article does not prevent the application of national rules on thin capitalisation insofar (but only insofar) as their effect is to assimilate the profits of the borrower to an amount corresponding to the profits which would have accrued in an arm’s length situation.

In the Thin Capitalisation Report, the OECD makes comments regarding the “relevance” of article 9 when it comes to thin capitalization rules. There is no mention of recharacterization of income or other reference to the restriction of taxing rights of the states concerned. Also, OECD Member countries decided to address the thin capitalization issue fundamentally in article 9, where the OECD introduces the method officially accepted by the OECD for distributing taxing rights in the case of transactions between affiliated companies. Consequently, any guidance given about thin capitalization rules cannot refer to anything but proper allocation of income and taxing rights.

2.2. Arm’s length principle as a yardstick for thin capitalization rules

Unlike the other distributive articles in tax treaties, article 9 of the OECD Model deals with the taxation of two enter-

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8. See Vann, supra n. 4, at 728.


11. Id. at 109.


13. OECD Model Tax Convention on Income and on Capital: Commentary on Article 9 para. 3; emphasis added, Models IBFD.

14. OECD, Thin Capitalisation, supra n. 2, at 37 (emphasis added).

15. Articles 10 and 11 deal with the issue of recharacterization of the income on the fundamental condition that domestic law so permits and the non-discrimination article (art. 24) is relevant only when it leaves out of its regulatory scope those cases where articles 9(1), 11(6) and 12(5) are applicable.
prises based in two different states. Where profit has been diverted from an enterprise in one state to an associated enterprise in another state because such enterprises do not operate at arm’s length, article 9(1) allows the tax authorities of the first state to adjust the profits of the enterprise established there and to attribute the diverted profit to the enterprise’s tax base.

In this regard, the aims of taxpayers involved in the thin capitalization would conflict with the object and purpose of article 9(1) of the OECD Model. In the same line, according to paragraph 3(b) of the Commentary on Article 9 of the OECD Model, the said article is relevant for purposes of determining both whether the interest is charged at an arm’s length rate and whether the amount of a loan should be regarded as debt or equity.16

However, this latter purpose has been criticized in literature, as it is argued that article 9(1) of the OECD Model allows the tax authorities of the residence state of the borrower to adjust profits only if the interest rate is not arm’s length, but it would not permit a recharacterization of debt into equity.17

Regarding the power of article 9 to recharacterize interest payments, it has been suggested in theory that following a textual approach of the OECD Model, the part of article 9(1) which states, “conditions […] made or imposed between the two enterprises in their […] financial relations”, makes the existing financial relations the starting point rather than the subject of article 9(1) of the OECD Model. As a result, the Commentary related to article 9 states that “no re-writing of the accounts of associated enterprises is authorized if the transactions between such enterprises have taken place on normal open market terms”.18

In the same line, it has been asserted by Michielse that it is clear that only excessive remuneration may be changed by applying article 9(1). Under the OECD Model, however, excessive interest payments are covered more specifically in article 11(6). In this regard, only if a broad interpretation of the term “conditions” were adopted could article 9(1) apply to domestic thin capitalization rules.19

Besides, article 11(6) of the OECD Model may still apply together with article 9(1) under certain circumstances in order to allow a tax authority to adjust the rate of interest to that which would have been paid between independent parties and, thus, both provisions will have the same result. According to the Commentary:

the purpose of this paragraph [article 11(6)] is to restrict the operation of the provisions concerning the taxation of interest in cases where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest paid exceeds the amount which would have been agreed upon by the payer and the beneficial owner had they stipulated at arm’s length. It provides that in such a case the provisions of the Article apply only to that last mentioned amount and that the excess part of the interest shall remain taxable according to the laws of the two Contracting States, due regard being had to the other provisions of the Convention.20

Also, the Commentary on the same article clarifies that: “This paragraph [article 11(6)] permits only the adjustment of the rate at which interest is charged and not the reclassification of the loan in such a way as to give it the character of a contribution to equity capital. (…)”21

The above Commentary clearly shows that it is article 11(6) which permits the adjustment of interest rates and not the reclassification of a loan in such a way as to give it the character of a contribution to equity capital. For such an adjustment to be possible under article 11(6), it would be necessary to substitute other words for the phrase “having regard to the debt claim for which it is paid”. Further, article 11(6) could affect not only the recipient but also the payer of excessive interest, and, if the law of the source country so permits, the excess amount could be disallowed as a deduction, due regard being had to the other provisions of the tax treaty.22

On the contrary, it could be argued that article 9(1) of the OECD Model and the relevant Commentary state that the application of the arm’s length principle is also responsible for the amount of debt that is included in a corporation’s capital. In this regard:

the Article [9(1)] is relevant not only in determining whether the rate of interest provided for in a loan contract is an arm’s length rate, but also whether a PRIMA FACIE loan can be regarded as a loan or should be regarded as some other kind of payment, in particular a contribution to equity capital […]23

Thus, the OECD intends in article 9(1) to regulate the area of thin capitalization. Further, paragraph 3 of the Commentary on Article 9 of the OECD Model discusses a possible increase in the calculation of the ‘taxable profits’. This can only be effected by denying the deduction of further interest payments connected to an excessive amount of debt, determined as such under thin capitalization rules. A textual approach of the Commentary regarding the phrase “financial relations” would not be enough to place within the scope of the arm’s length principle only the interest rate. The OECD clarifies this when it states that: “[…] if the transactions between such enterprises have taken place on normal open market terms”,24 referring to the requirements of “re-writing the accounts”, and, second, when it clearly specifies the scope of article 9 in the above-mentioned paragraph 3(b) of the Commentary on Article 9 of the OECD Model.

16. L. De Broe, International Tax Planning and Prevention of Abuse: A Study under Domestic Tax Law; Tax Treaties and EC Law in Relation To Conduit and Base Companies (IBFD, 2008), Chapter 6, at 504-505.
18. OECD Model: Commentary on Article 9 (2010), para. 2.
20. OECD Model: Commentary on Article 11 (2010), para. 32.
22. See OECD, Thin Capitalisation, supra n. 2, at 32-36.
23. OECD Model: Commentary on Article 9 (2010), para. 3(b).
24. OECD Model: Commentary on Article 9 (2010), para. 2.
2.3. Arm’s length principle as a two-way street

As the role of the associated enterprises article is to allocate taxing rights between contracting states, the arm’s length principle, in accordance with the Commentary, may apply to both the interest rate and the classification of the capital of a company, as permissible debt and, consequently, as deductible interest or not. Thus, thin capitalization rules that would include an arm’s length provision together with a fixed ratio, according to the Thin Capitalisation Report would be compatible with the arm’s length principle.

On the other hand, if the tax authorities are given no option under domestic thin capitalization rules to prove that the arm’s length debt financing of the company is below that which is permissible according to the fixed ratio, the provision seems rather one-sided. The relevant Commentary challenges only thin capitalization rules that would restrict the taxpayer beyond an arm’s length limitation. In the absence of a specific domestic provision, the implemented article 9(1) would not permit the tax authorities to prove the arm’s length financing of the company, regardless of any fixed debt-to-equity ratio as analysed above, and allow adjustments that would properly allocate taxable profit and deductible interest payments.

Specifically, as thin capitalization rules are acceptable insofar as their function is to determine arm’s length lending conditions, the OECD should endorse such a possibility. In this case, an arm’s length analysis would thereby involve an analysis of the factors such as the terms of the loan agreement, the company’s creditworthiness, the applicable currency and the duration of the loan. Nevertheless, taxpayers will usually not have a legal claim for an override of fixed debt-to-equity ratios as analysed above, and allow adjustments that would properly allocate taxable profit and deductible interest payments.

2.4. Thin capitalization rules as part of general anti-abuse legislation: outside the scope of the arm’s length principle?

A deviation from the arm’s length principle could be explained if a thin capitalization rule were placed under a general anti-abuse provision. In this regard, the OECD Thin Capitalisation Report avoids giving an answer to what happens when thin capitalization rules are a response to abusive arrangements:

Where abusive arrangements are relevant in this context and general anti-evasion or anti-avoidance rules [...] are invoked to deem interest to be a distribution of profit, it is for consideration whether or not the tax law should require the authorities to ensure that taxation arising from the impact of such measures conforms with the arm’s length principle. The Committee however makes no comment on the point.

The place of the arm’s length principle in the case of general anti-abuse legislation is not determined. However, it is the author’s opinion that also under these circumstances, article 9 of the OECD Model, properly implemented, should be taken into consideration. By adopting the OECD approach mentioned in the Commentary, article 9 is allocating taxing rights without restricting them. Thus, countries have the right to impose general anti-abuse measures “as restricted […] by the provisions of tax conventions...”

If article 9 is allocating taxing rights, anti-abuse measures may apply, but at a second level in accordance with guidance given by the treaty. Consequently, no actual conflict takes place, as “anti-avoidance rules are part of the basic domestic rules set by domestic tax laws for determining which facts give rise to a tax liability”, and in this regard “they are not addressed in the tax treaties and therefore not affected by them”. In other words, a tax treaty would play the role of coordinating the differences in the domestic tax laws which have been enacted by the contracting states according to financial policies followed, and it would determine the taxing rights of the two contracting states based on treaty provisions. Further, anti-abuse legislation will not contravene the Vienna Convention on the Law of Treaties, which states that, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

The same answer would apply where a domestic provision denies the deductibility of interest payments even if they are classified as such. In fact, tax treaties do not determine the way a country should tax its residents. Such treatment may increase the possibility of economic double taxation, but still this would be outside the scope of a treaty. Taking into account that no conflict of characterization or classification exists, as both countries accept and define the amount that is paid as interest, the country that disallows the deduction of interest based exclusively on domestic tax law considerations cannot be considered as violating the tax treaty. Even if thin capitalization rules, according to OECD suggestions, should allow taxpayers to prove the arm’s length nature of inter-company financing, the deductibility of interest payments is left to domestic tax law to determine. In this case, recourse on behalf of the states to the mutual agreement procedure should be examined.

Further, the application of the same provision to resident companies with parent corporations resident in the same state would eliminate the possibility of application of the non-discrimination clause of the treaty. In this way, the specific rules cannot be considered either anti-avoidance measures or any kind of reflection of the arm’s length principle. In this regard, nothing can limit states from adopting this kind of legislation for public revenue reasons under the veil of general anti-avoidance measures.

Finally, thin capitalization rules intend to prevent excessive interest deduction and hidden profit distributions between related parties. The OECD Model gives some...
general guidance on the application of such rules in accordance with the arm's length principle. In this respect, the wording, as well as the object and purpose of article 9 of the OECD Model, provides for the allocation of profit among related parties before the power to tax under domestic law is applied.

3. General Considerations on Thin Capitalization Rules under Domestic Law and Their Relationship with the Arm's Length Principle regarding Interest Deductibility

Often countries protect their tax revenues by limiting the tax deductibility of interest under thin capitalization rules or a general interest barrier and/or anti-avoidance rules, in addition to applying the standard transfer pricing rules. This could be illustrated by a fixed thin capitalization ratio that would only allow a deduction as regards interest on a portion of debt incurred by the company, or by a legal provision that would prohibit the deductibility of interest.

In the example of a taxpayer resident in a treaty country where (1) thin capitalization rules that would include a fixed ratio are applicable and (2) the taxpayer could prove the excess interest payments are in line with the arm's length principle, then in line with article 9(1) of the tax treaty concluded with the country of the associated enterprise, the first question that could arise concerns how these two sets of rules would interact.

In a treaty context, paragraph 3(c) of the Commentary on Article 9 of the OECD Model, requires that, "The application of rules designed to deal with thin capitalisation should normally not have the effect of increasing the taxable profits of the relevant domestic enterprise to more than the arm's length profit, and that this principle should be followed in applying existing tax treaties." 31

Thus, by applying thin capitalization rules, arm's length debt financing – according to the Commentary – should be considered as a limitation on any disallowance of interest deductions, even if no guidance is given as to how this arm's length profit is to be calculated. Therefore, the arm's length tax treaty provision could be a safe harbour limitation on the application of thin capitalization rules.

Where a fixed debt-to-equity ratio applies and is exceeded, tax authorities will deny a deduction as regards interest on the amount of debt corresponding to the taxpayer under the applicable tax treaty, as thin capitalization should normally not have the effect of increasing the taxable profit of the relevant domestic enterprise to more than the arm's length profit. In this regard, the arm's length principle can be interpreted as a rather wide and encompassing concept. Therefore, it may sometimes be difficult for both taxpayers and tax authorities to know, in very practical terms, how to approach the preparation or indeed audit of a thin capitalization case. As parties at arm's length can and do agree to debt funding across a variety of forms and conditions, this means that a variety of funding arrangements and supporting documentation may satisfy the arm's length principle, depending on the individual circumstances of each taxpayer. 34

Where no such arm's length provision exists, thin capitalization rules are not in line with article 9 as defined by the OECD. 35 Regarding the question as to which rules will supersede, taking into account that (1) with the exception of only a few countries, 36 treaty law stands at a higher level in the hierarchy than domestic law, and considering that (2) the scope of article 9 contains a solely taxing right allocation power, the tax administration would have to determine the deductibility of the amount based on its domestic law, but should take into consideration the arm's length amount of debt corresponding to the taxpayer under the applicable tax treaty, as thin capitalization should normally not have the effect of increasing the taxable profit of the relevant domestic enterprise to an amount greater than the arm's length profit. Further, thin capitalization rules that will not take into account the arm's length allocation

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31. OECD Model: Commentary on Article 9 (2010), para. 3(c) (emphasis added).
33. OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, para. 3.61.
35. OECD Model: Commentary on Article 9 (2010), para. 3(c).
36. Countries that apply the 'doctrine of parliamentary sovereignty' such as Finland, Israel, Jamaica, New Zealand, Papua New Guinea, the Solomon Islands and the United Kingdom.
of interest payments between resident and non-resident entities would fall within the scope of the non-discrimination provision in article 24(4), as they will no longer fall under the exception provided for rules drafted in accordance with article 9(1).  

Moreover, another question could be raised as to whether an interest payment, even if it were recognized as such under domestic law and the corresponding allocation of taxing rights based on the tax treaty, should be deductible. It is the author’s opinion that in the example where a country is following the OECD Guidelines and allows the taxpayer to present evidence under the thin capitalization provisions that the company’s financing is arm’s length, this would mean that the particular rules have been drafted as a reflection of the arm’s length principle, but ultimately, a deduction should be allowed under domestic law. Also, if the thin capitalization rules adopt strict debt-to-equity ratios, again it would be a matter of domestic law whether or not the interest payments would be deductible depending on that specific ratio.

In other words, if thin capitalization rules provide only a fixed debt-to-equity ratio which, as analysed above, would not be compatible with the OECD recommendations, the question of deductibility will again depend on domestic law, and the tax treaty and article 9(1) will have no impact on those thin capitalization rules that “have the effect of increasing the taxable profits of the relevant domestic enterprise to more than the arm’s length profit...”

37. OECD Model Treaty (2010), art. 24(4) (“Except where the provisions of paragraph 1 of Article 9, [...] apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State”).
enterprise to more than the arm’s length profit [...]. All the above is illustrated in Figure 1.


The arm’s length principle is drafted by the OECD as a fundamental rule in allocating taxable profits among associated enterprises. Thin capitalization rules may (1) be included in transfer pricing regulations or (2) have an arm’s length escape clause next to a fixed debt-to-equity ratio; even when only a fixed debt-to-equity ratio is applied, article 9 will apply before domestic thin capitalization rules determine whether the excessive income is deductible.

In practice, many countries, in their domestic law, rely on a specific debt-to-equity ratio with or without an escape clause. A fixed ratio itself alone is not compatible with the OECD guidance on the application of the arm’s length principle in respect of thin capitalization. Also, the fact that tax authorities may disallow any deduction based on a non-arm’s length rule would prima facie appear to conflict with the non-discrimination article found in tax treaties that have been drafted in accordance with the OECD Model if resident related entities would not face such penalties regarding intra-group transactions under the same circumstances. In this regard, thin capitalization rules should normally not give rise to adjustments causing the profit of the debtor company to exceed an arm’s length profit.

From the perspective of the taxation of the permanent establishment, the 2010 OECD Report on the Attribution of Profits to Permanent Establishments recognizes the thin capitalization approach as one of the accepted methods for the attribution of an enterprise’s ‘free’ capital to a PE. Under the thin capitalization approach, a state would require that the PE have the same amount of capital as an independent enterprise carrying on the same or similar activities under the same or similar conditions in the host country of the PE. The final determination of the amount of debt and free capital would be a matter of examination of the specific range of the actual capital structures of independent host country enterprises carrying on the same or similar activities as the PE under the same or similar conditions. The OECD also suggests the ‘safe harbour approach – quasi thin capitalization/regulatory minimum capital approach’, which indicates a safe harbour (fixed ratios) but recognizes the objective difficulties of finding reliable comparables. The Report concludes, regarding the above-mentioned methods, by referring to the OECD Guidelines, as the issue regarding the use of safe harbours “will be subject to subsequent work”. Specifically, the OECD stresses the disadvantages of the ‘safe harbour approach – quasi thin capitalization/regulatory minimum capital approach’, which ‘relies on sector benchmarks which may not meet comparability standards, and the more refined and wide ranging the approach becomes the more it resembles the thin capitalization approach (and therefore loses the advantages of administrative simplicity).’

In this case, the OECD reveals the problem of safe harbour ratios: administrative simplicity but not really arm’s length. Finally, the OECD finds itself in a dilemma. In its effort to fight abusive structures, the OECD has long linked the assessment of intercompany transactions with the arm’s length standard. On the other hand, time- and cost-effectiveness are to be found in fixed ratios. States are left to consider the pros and cons of suggested methods in view of eliminating abusive structures as well as double taxation.

38. OECD Model: Commentary on Article 9 (2010), para. 3(c).
39. The OECD states in paragraph 137 of the 2010 Report on the Attribution of Profits to Permanent Establishments that ‘since interest expense is generally deductible for tax purposes, it is necessary to ensure an arm’s length attribution of the enterprise’s “free” capital to a PE in order to ensure an arm’s length attribution of profits to the PE.’
40. Id. at Part I, para. 138.
41. Id., at Part I, para. 137.