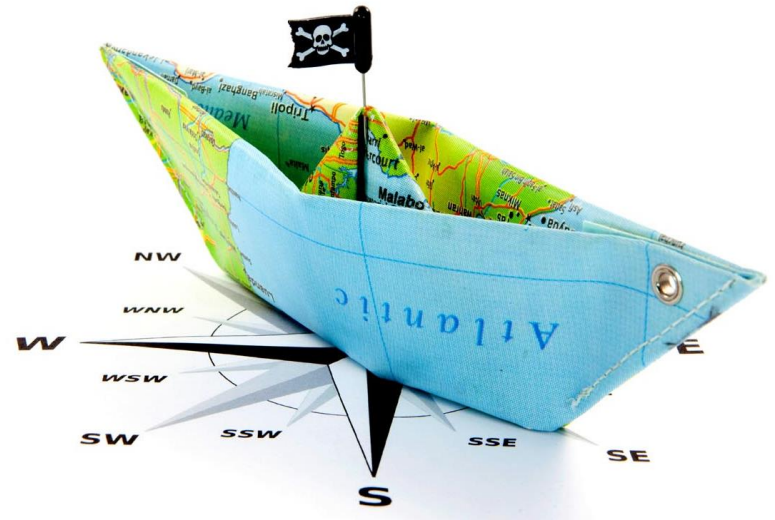


Responsible Tax



Agenda

- **Introduction**

- **Treaty abuse**

Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

- **Hybrid mismatches**

Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty and Law)

- **Challenges of the Digital Economy**

Address the Tax Challenges of the Digital Economy



Introduction

BEPS rapporten

- BEPS Action Plan July 2014: 14 actions of BEPS character + digital economy
- Political feasibility/expected output
- Recent Discussion Drafts:
 - 14 March: Abuse of tax treaties
 - 19 March: Neutralise effect of Hybrid Mismatches
 - 24 March: Challenges of the digital economy



Preventing the Granting of Treaty Benefits in Inappropriate Circumstances

Action 6

Current treaty provisions against abuse of treaties

- Netherlands Supreme Court: no treaty abuse if not mandated by the treaty
- Article 17: artist company (1977)
- Article 10, 11 and 12: beneficial owner (1977)
- Commentary article 5: split of contracts
- Commentary article 5: fragmentation of place of business
- Commentary to article 15: hiring out of labour
- Commentary article 1: refusal to grant treaty benefits as anti-abuse is inherent in the treaty

- Overview: United Nations Commentary to article 1 UN Model Convention

Discussion Draft “Action 6: Preventing the Granting of Treaty Benefits in Inappropriate Circumstances”

- 14 March 2014
- Three measures proposed:
 - Include limitation-on-benefits provision (a “SAAR”)
 - Include a “GAAR”
 - Include a statement that tax avoidance/treaty shopping is not intended
- SAAR – Specific anti-abuse rule
- GAAR – General anti-abuse rule

Include a limitation-on-benefits provision

- Treaty benefits are only granted if the resident is a “qualified person”
- A person is a “qualified person” (amongst other things) if:
 - it’s an individual
 - it’s a charitable fund, pension fund etc. in either State
 - it’s a company with shares that are listed on a recognized stock exchange
 - 50% of the shareholders are qualified persons and less than 50% of the payments made to non-residents is deductible (unless paid in the ordinary course of business)
- A resident is entitled to treaty benefits on a certain item of income if:
 - the resident is engaged in an active trade or business and
 - the item of income is derived in connection with that trade or business
- New Commentary will explain the “main features”

Include a “GAAR”

- Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income if it is **reasonable to conclude**, having regard to the relevant **facts and circumstances**, that obtaining that benefit was **one of the main purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the **object and purpose** of this Convention.”

Introduction of a SAAR against

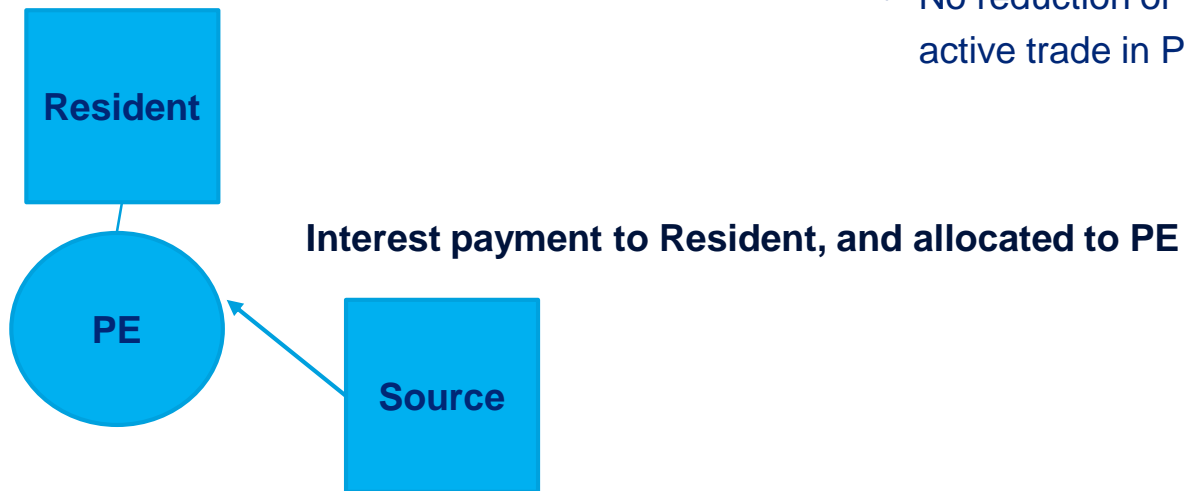
- Turning a dividend into a capital gain (escape WHT)
- Raising the shareholding above 25% (fall into the 5% instead of 15% WHT)
- Diluting the value of immovable property (get the land-rich company out of article 13(4))

Replacement of the tie-breaker for residence by mutual agreement

- Article 4(3)
- Now: “shall be deemed to be a resident only of the State in which the place of its effective management is situated”
- Future: “the competent authorities ... shall endeavour to determine by mutual agreement the ... State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated ... and any other relevant factor.”
- What if there is no mutual agreement?

Anti-abuse rule for low-taxed PEs in 3rd states

- Treaty R-S reduces WHT to 0%
 - Tax rate in PE State is 2%
 - Resident State exempts PE income
 - General rate CIT in State R is 20%
-
- No reduction of WHT, unless connected to active trade in PE



Saving clause

- To keep domestic law's anti-abuse rules effective
- E.g. French Schneider decision: article 7 prevents the application of France's CFC rules
- Article 7: “the profits of [Schneider Switz] shall be taxable only in [Switzerland], unless [Schneider Switz] has a PE in France.”
- “This Convention shall not affect the taxation, by a Contracting State, of its residents, except with respect to ...”
- Effect on:
 - Domestic GAAR (Netherlands: *fraus legis*)
 - CFC rules
 - Exit tax (article 13(5))



Include statement that tax avoidance/treaty shopping is not intended

- Preamble: “State A and B ... intending to conclude a [tax treaty] without creating opportunities for non-taxation or reduced taxation through tax evasion and avoidance (including through treaty shopping arrangements aimed at obtaining reliefs ... for the indirect benefit of residents of third States)”
- The closing stone for interpretation (ordinary meaning, context, object and purpose)

Neutralise the Effects of Hybrid Mismatch Arrangements (Treaty and Law)

Action 2

INLEIDING

- **SAMENHANG MET BEPS-ACTIE 6**
- **TWEE DELEN**
 - **AANPASSING NATIONALE REGELGEVING**
 - **AANPASSING VERDRAGEN**
- **PARTNERSHIPREPORT 1999**
- **HYBRIDS REPORT 2012**

VERDRAGSAANPASSINGEN

- **UITGANGSPUNTEN**
 - **GARANDEREN DAT DUAL RESIDENTS NIET ONBEPERKT BELASTINGPLICHTIG ZIJN**
 - **GARANDEREN DAT TRANSPARANTE ENTITEITEN NIET ONBEPERKT BELASTINGPLICHTIG ZIJN**
- **WIJZIGING ART. 4(3) OESO**
- **VERBREDING ART. 1 OESO MET TWEEDE LID:**
 - **INKOMEN VAN EEN IN EEN LAND (GEDEELTELIJK) TRANSPARANTE ENTITEIT**
 - **ALLEEN VERDRAGSINKOMEN INDIEN HET NAAR NATIONAAL RECHT VAN DIE STAAT INKOMEN IS**
 - **ZONIET: BEPERKING VERDRAGSVOORDELEN**
- **SAMENHANG NATIONALE EN VERDRAGSMAATREGELEN:**
 - **ART. 23A(4) OESO-MV: VERBOD TOEPASSING VRIJSTELLINGSMETHODE INDIEN BRONSTAAT:**
 - **ART. 10(2) EN 11(2) OESO-MV TOEPAST**
 - **DE BETALING IN DE BRONSTAAT AFTREKBAAR IS**
 - **VERREKENINGSMETHODE I.P.V. VRIJSTELLINGSMETHODE**

AANPASSINGEN NATIONAAL RECHT

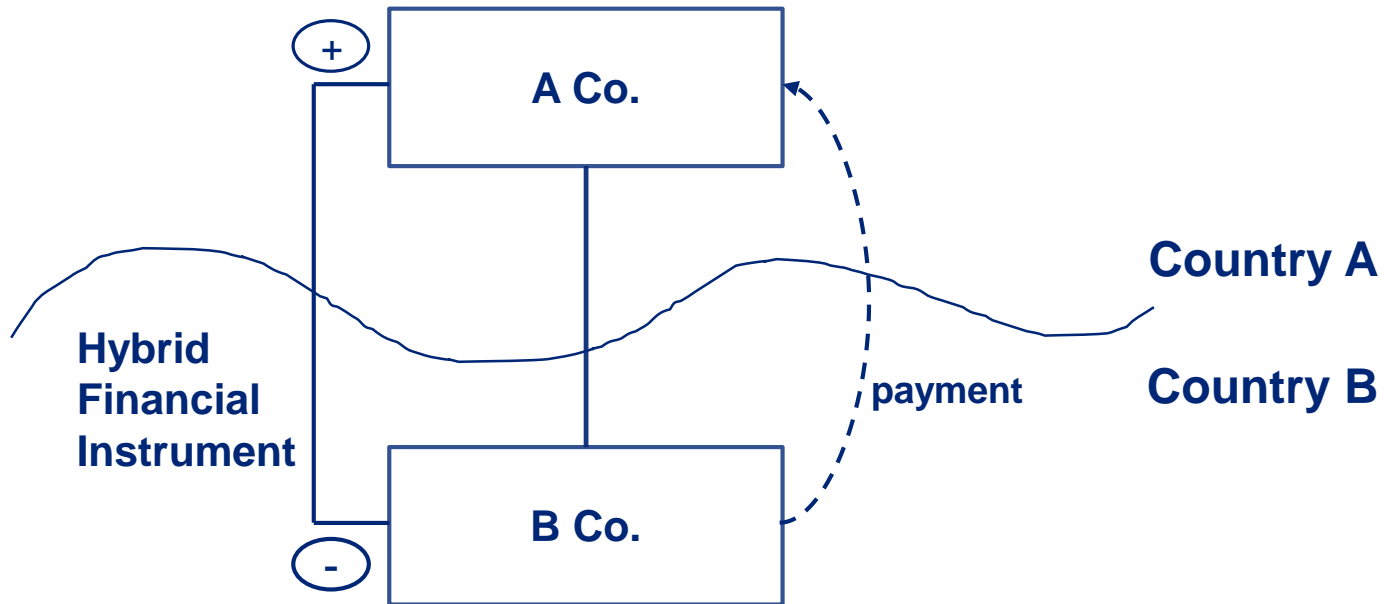
- **GERICHT OP:**
 - D/NI-STRUCTUREN
 - D/D-STRUCTUREN

- **UITGANGSPUNTEN**
 - A. ER MOET SPRAKE ZIJN VAN EEN VERLIES AAN OPBRENGSTEN TEN GEVOLGE VAN DE MISMATCH
 - B. OPLOSSING MOET BREED ZIJN
 - C. AUTOMATISCH VAN TOEPASSING EN NIET AFHANKELIJK VAN FORMALITEITEN
 - D. AFSTEMMING MET REGELS TER VOORKOMING VAN DUBBELE BELASTING
 - E. GEEN VERSTORING MET BETREKKING TOT HET NATIONALE FISCALE STELSEL
 - F. HELDERE EN DUIDELIJKE OPLOSSINGSRICHTINGEN
 - G. CONSISTENT EN FLEXIBEL
 - H. UITVOERBAAR VOOR BELASTINGPLICHTIGEN
 - I. UITVOERBAAR VOOR DE BELASTINGDIENST

- **CATEGORIEËN VAN MISMATCHES**
 - A. HYBRIDE FINANCIERINGEN EN OVERDRACHTEN
 - B. HYBRIDE ENTITEITEN
 - C. OMGEKEERDE HYBRIDE MISMATCHES EN GEÏMPORTEERDE MISMATCHES

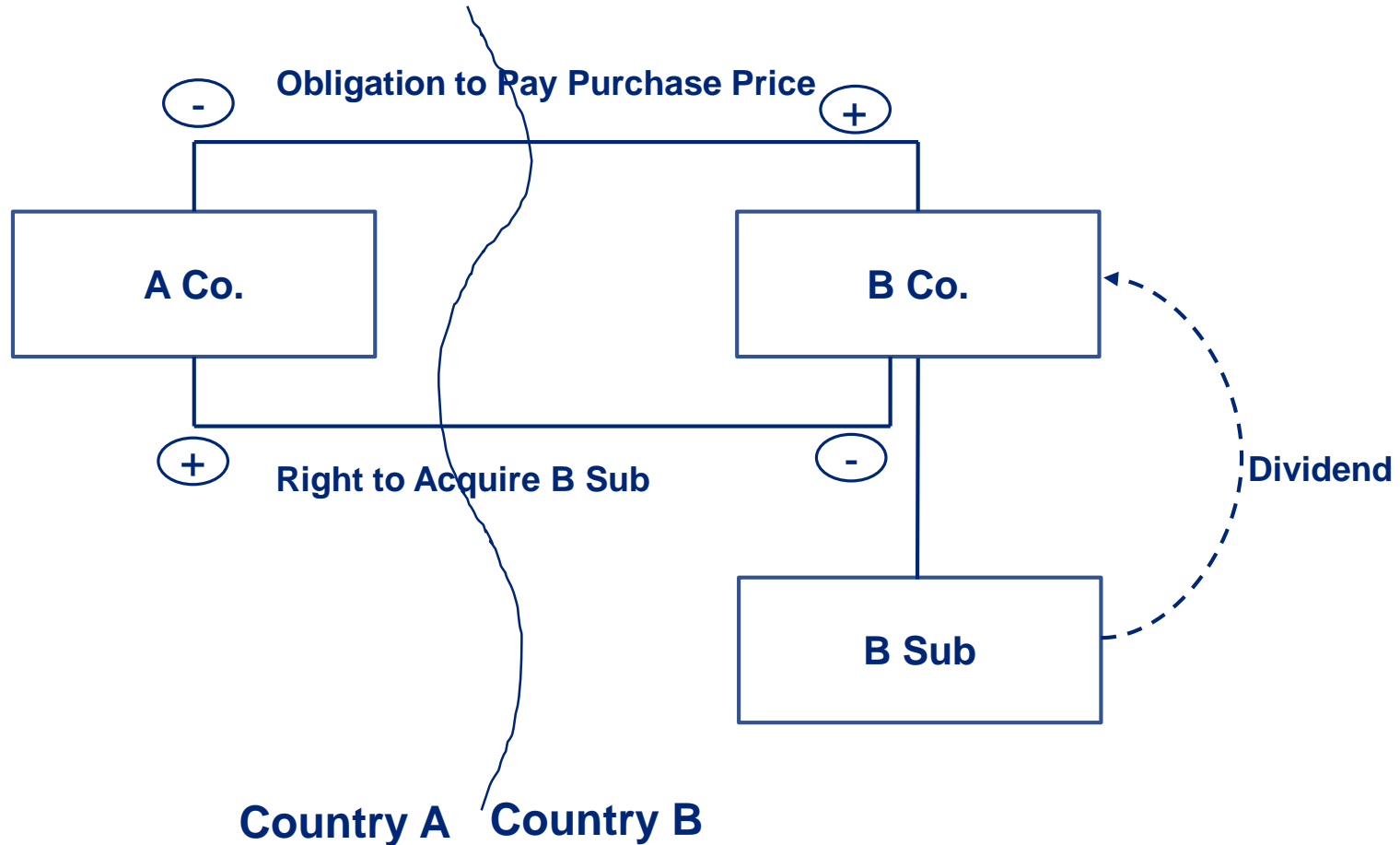
HYBRIDE FINANCIERINGEN EN HYBRIDE OVERDRACHTEN

- HYBRIDE FINANCIERINGEN



HYBRIDE FINANCIERINGEN EN HYBRIDE OVERDRACHTEN

- HYBRIDE OVERDRACHTEN



HYBRIDE FINANCIERINGEN EN HYBRIDE OVERDRACHTEN

- **PRIMAIRE CORRECTIEREGEL**
 - **GEEN AFTREK INDIEN NIET NORMAAL BELAST**

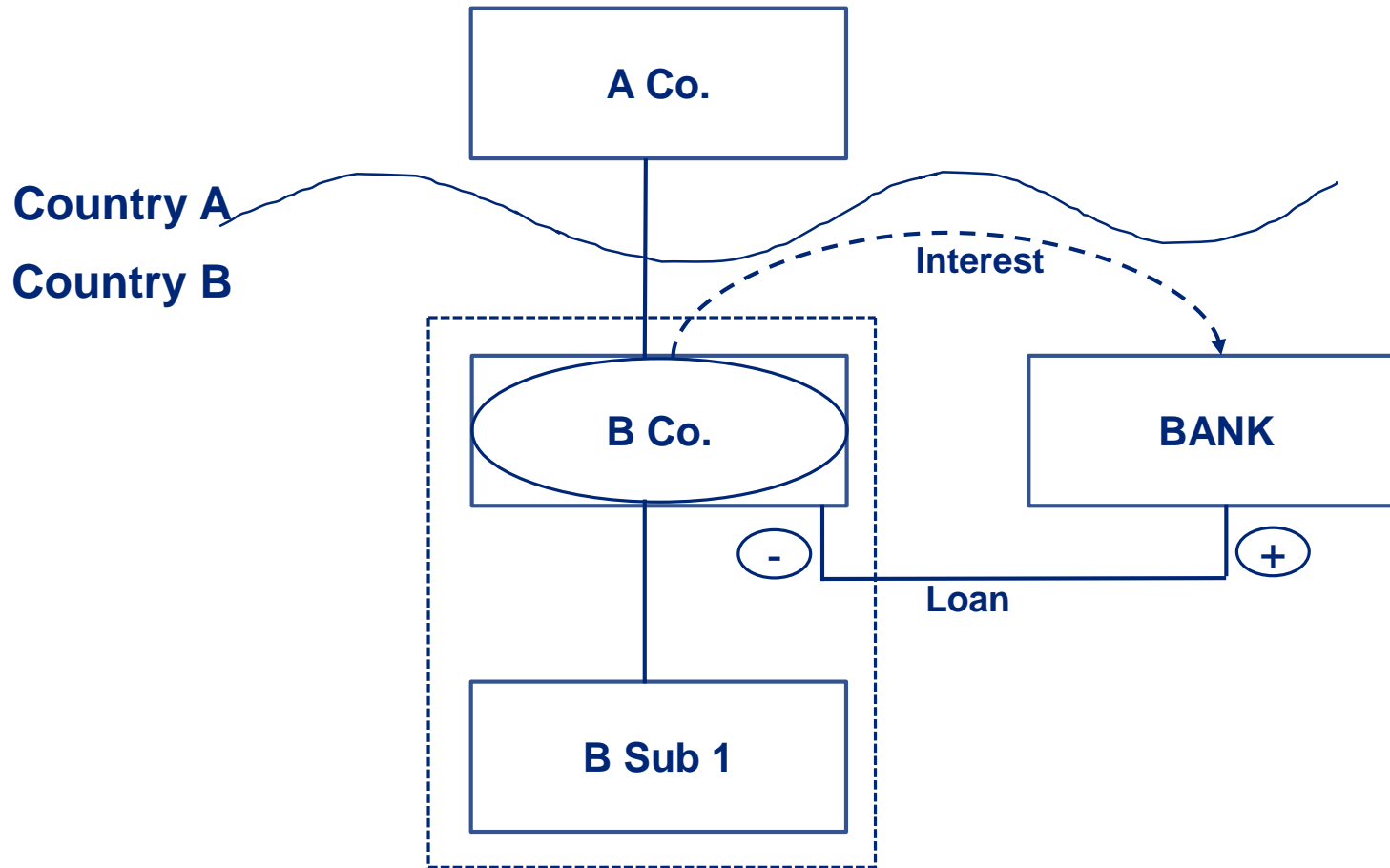
- **SUBSIDIAIRE CORRECTIEREGEL**
 - **INDIEN GEEN AFTREKUITSLUITING DAN NORMAAL BELAST**

- **VOORWAARDEN VOOR TOEPASSING**
 - **MISMATCH MOET VOORTVLOEIEN UIT HYBRIDE ELEMENT IN FINANCIËLE INSTRUMENT**
 - **ALLEEN EFFECT VAN MISMATCH MAG WORDEN BESTREDEN**

- **METHODEN**
 - **BOTTOM-UP-BENADERING**
 - **TOP-DOWN-BENADERING**

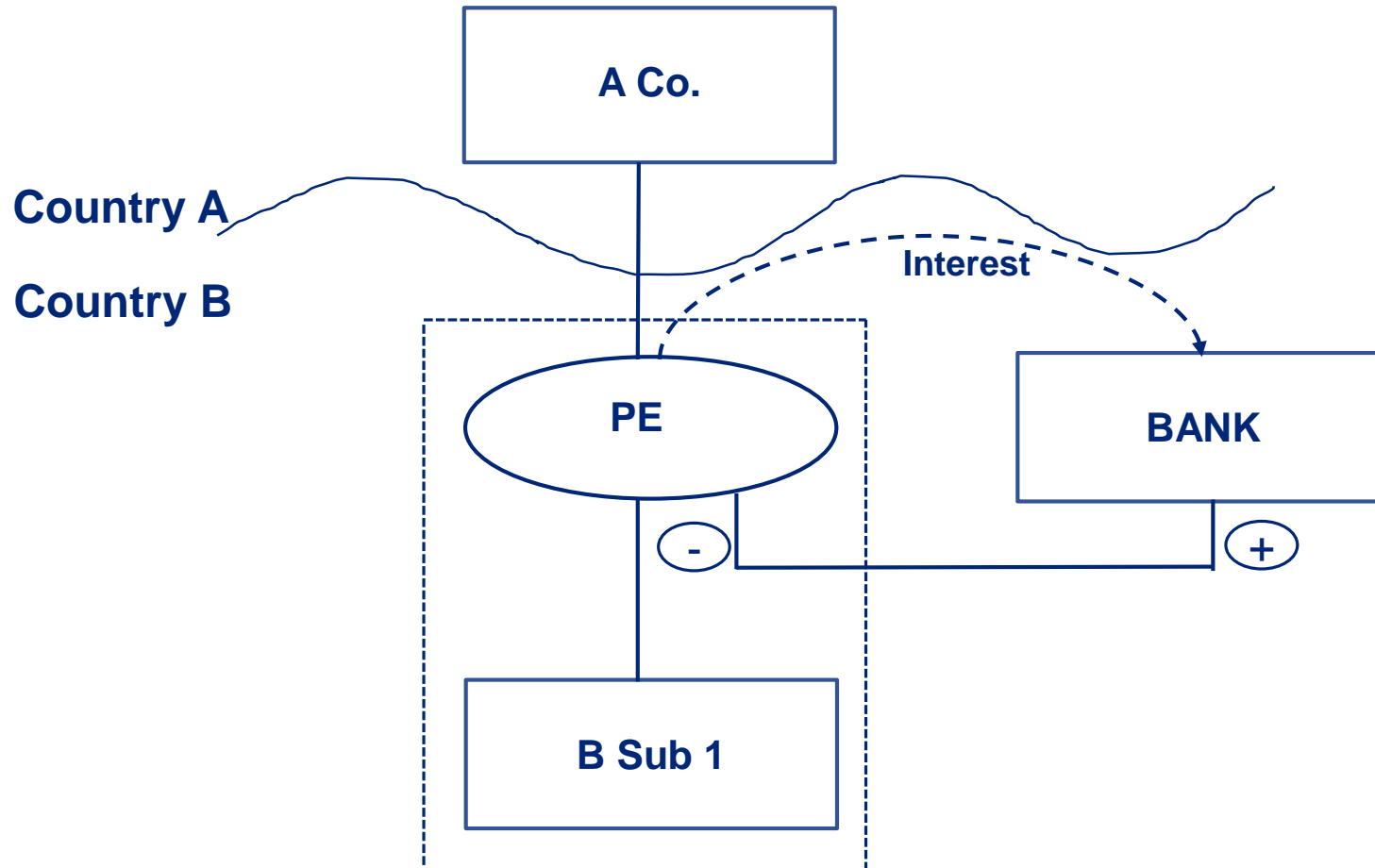
HYBRIDE ENTITEITEN

- KWALIFICATIEVERSCHIL (TRANSPARANT/NON-TRANSPARANT)



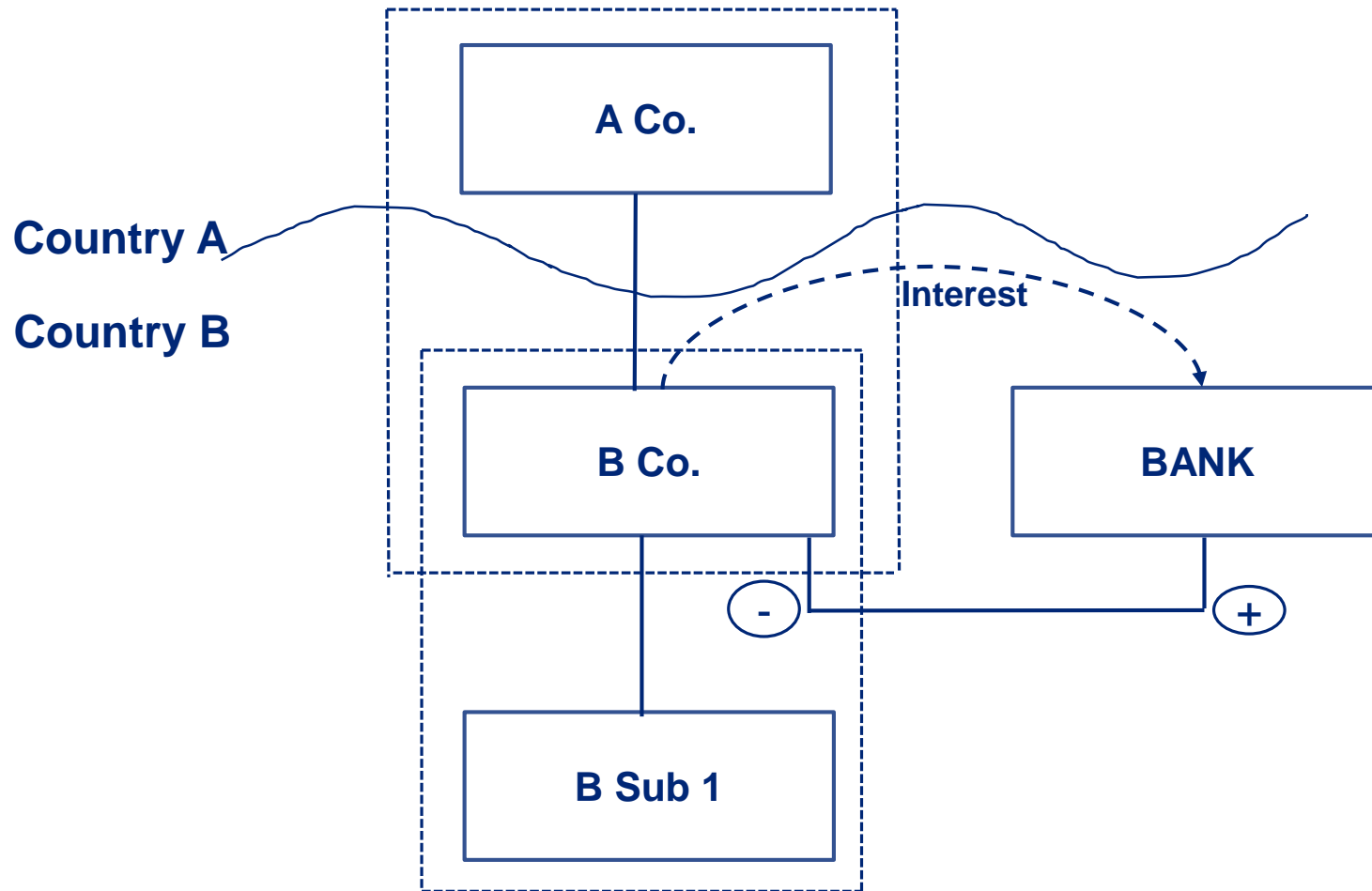
HYBRIDE ENTITEITEN

- GEBRUIK VASTE INRICHTINGEN



HYBRIDE ENTITEITEN

- DUAL RESIDENTS



HYBRIDE ENTITEITEN

- **OPLOSSINGEN DOUBLE-DEDUCTION**

- **PRIMAIRE CORRECTIEREGEL**

- **GEEN AFTREK IN INVESTERINGSLAND BOVEN BEDRAG DAT ALDAAR ALS DUBBEL INKOMEN WORDT BELAST IN ZELFDE PERIODE**
- **DOORSCHUIVING EVENTUEEL RESTANT NAAR VOLGEND JAAR**
- **RESTANT ALSNOG IN AFTREK ALS 'LAST RESORT' MITS GEEN AFTREK IN ANDERE STAAT**

- **SUBSIDIAIRE CORRECTIEREGEL**

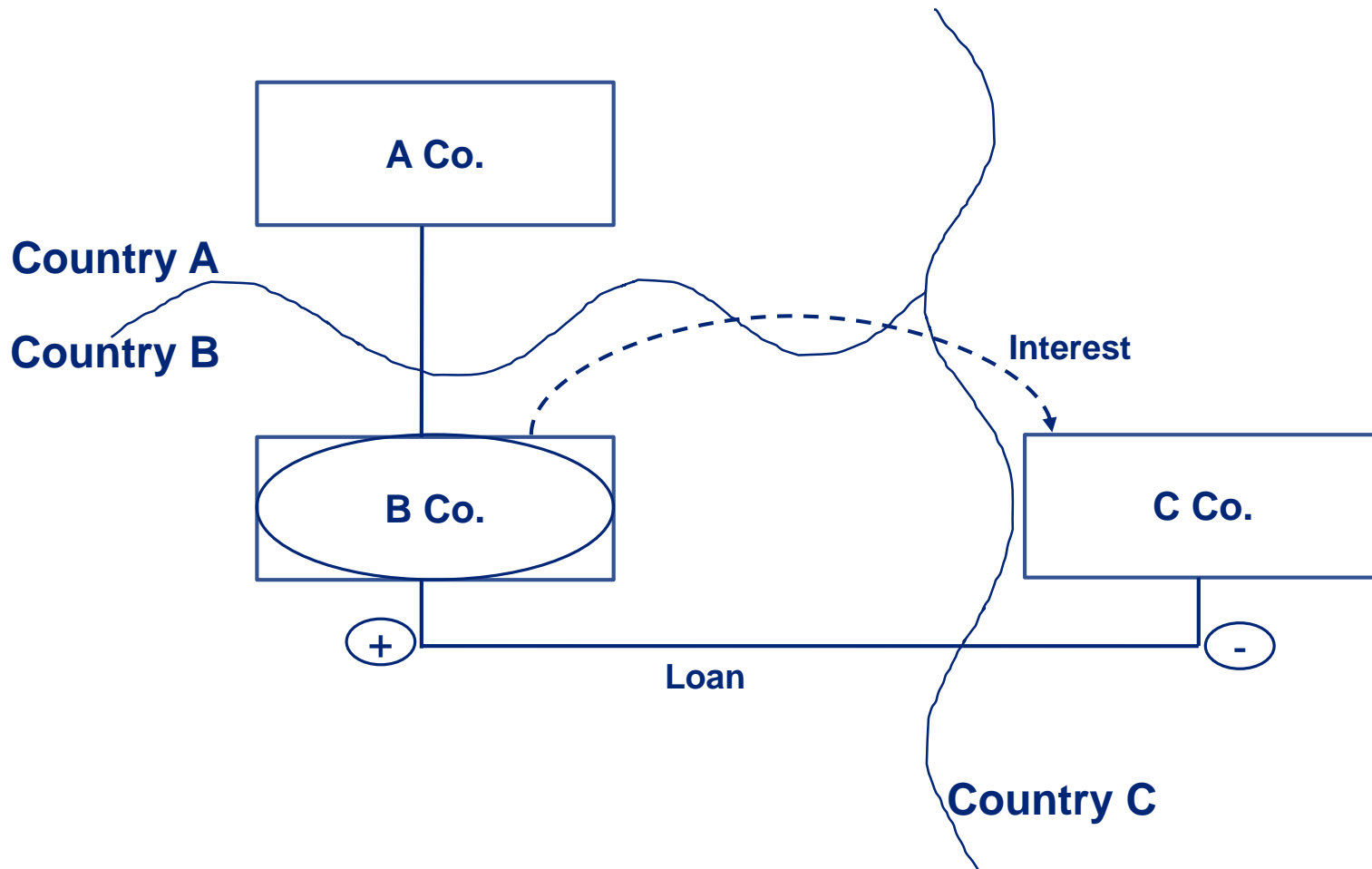
- **GEEN AFTREK IN BRONSTAAT BOVEN BEDRAG DAT ALDAAR ALS DUBBEL INKOMEN WORDT BELAST IN ZELFDE PERIODE**
- **DOORSCHUIVING EVENTUEEL RESTANT NAAR VOLGEND JAAR**
- **RESTANT ALSNOG IN AFTREK ALS 'LAST RESORT' MITS GEEN AFTREK IN ANDERE STAAT**

HYBRIDE ENTITEITEN

- **OPLOSSINGEN DEDUCTION/NO-INCLUSION**
 - **PRIMAIRE CORRECTIEREGEL**
 - **GEEN HOGERE AFTREK IN INVESTERINGSSTAAT DAN HET BEDRAG DAT ALS DUBBEL INKOMEN IN DIE STAAT WORDT BELAST**
 - **SUBSIDIAIRE CORRECTIEREGEL**
 - **GERECHTIGDE TOT BETALING DIEN BETALING ALS NORMAAL INKOMEN AAN TE MERKEN VOORZOVER DAT HOGER IS DAN HET BEDRAG DAT IN DE BETAALSTAAT DOOR DE BETALER IN AFTREK IS GEBRACHT BOVEN HET ALDAAR ALS DUAL INKOMEN IN AANMERKING GENOMEN BEDRAG**

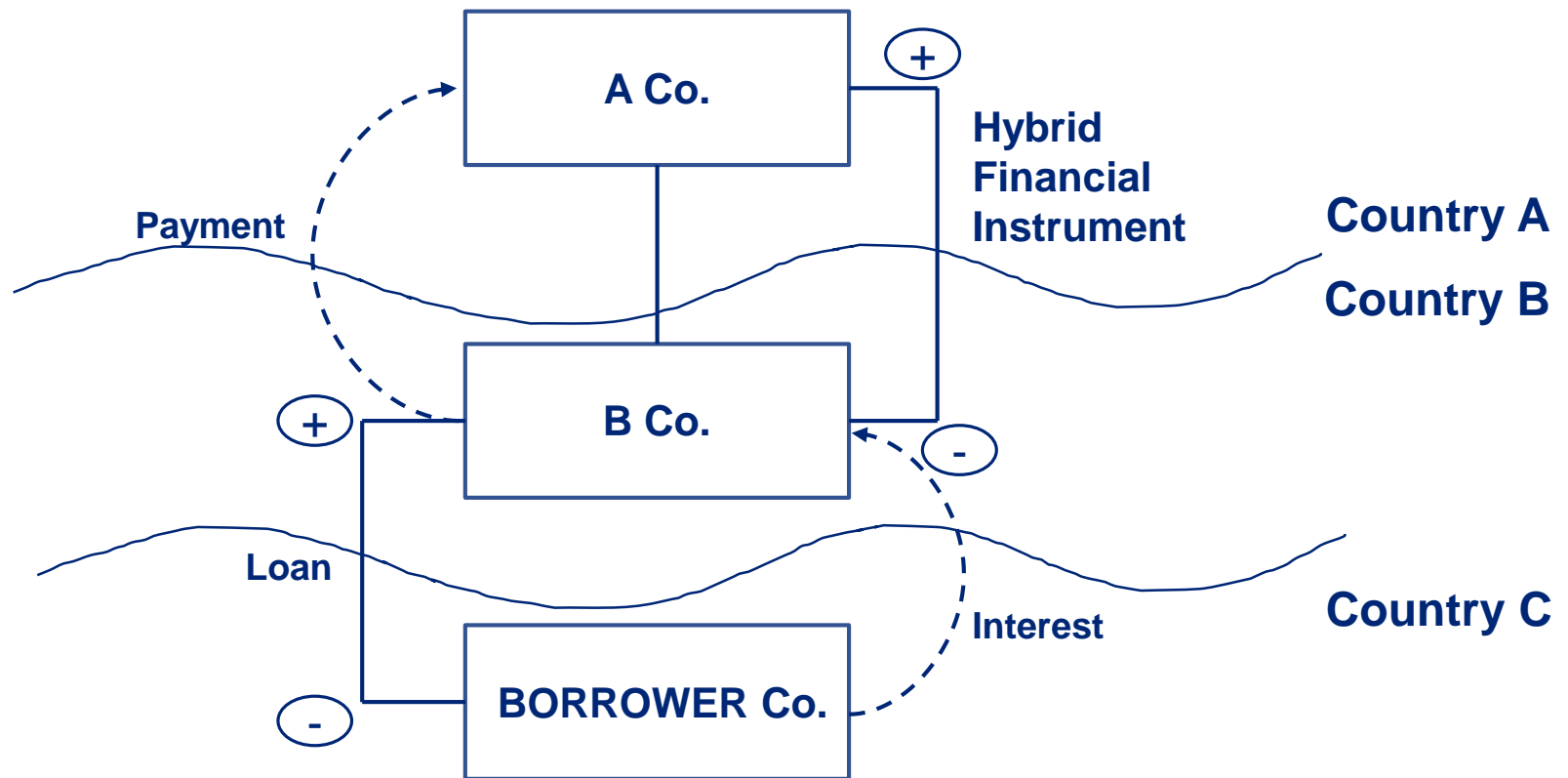
OMGEKEERDE HYBRIDE EN GEÏMPORTEERDE MISMATCHES

- OMGEKEERDE HYBRIDE MISMATCHES



OMGEKEERDE HYBRIDE EN GEÏMPORTEERDE MISMATCHES

- GEÏMPORTEERDE MISMATCHES



OMGEKEERDE HYBRIDE EN GEÏMPORTEERDE MISMATCHES

- **PRIMAIRE CORRECTIEREGEL**
 - **BETALING BELAST IN ONTVANGENDE INVESTERINGSLAND (A)**
 - **INDIEN LAND A NIET BELAST: HERKWALIFICATIE INKOMEN ZODAT LAND B BELAST**
 - **KENMERKEN:**
 - **STAAT A: GELIEERDE EN NIET-GELIEERDE PARTIJEN**
 - **STAAT B: BELANG VAN INVESTEERDER > 50%**

- **SUBSIDIAIRE CORRECTIEREGEL**
 - **BETALING NIET AFTREKBAAR IN BRONSTAAT**
 - **KENMERKEN:**
 - **ALLE ENTITEITEN ZIJN GELIEERD: > 50%; EN/OF**
 - **BETALING MAAKT DEEL UIT VAN ONTGAANSSTRUCTUUR**

- **VOORWAARDE: GOEDE INFORMATIEUITWISSELING**

Address the Tax Challenges of the Digital Economy

Action 1

Digital economy

- Discussion Draft BEPS Action 1: Address the Tax Challenges of the Digital Economy (24 March 2014)
- 1996: US Treasury: residence State taxation
- 2001: India, Doernberg: do away with physical presence (PE)
- 1997-2003: BP TAG: Commentary article 5: PE kept
 - Underestimation of development digital economy
- Discussion Draft 2014: “dematerialized” taxation nexus

- Problematic area: US no review of allocation taxation rights
- Back to double taxation?

- Final report 2014: “identifying issues ... and possible actions to address them”

General BEPS concerns for digital economy

- Artificial fragmentation into multiple POBs and group entities
- Commissionaires
- Artificial segregation of income (risks, assets) and activities that generate it
- Maximising deductions in Market Jurisdictions
- Use of preferential regimes
- Reduction of tax in Residence State (relaxed CFC rules)

General Actions against BEPS in digital economy

- Action 6: prevent treaty abuse
 - Treaty shopping
 - Dual resident companies
 - General denial of treaty benefits if double non-taxation
- Action 7: prevent artificial avoidance of PE status
 - Review of agency PE paragraphs
 - Challenge defragmentation
 - ! Par. 151: more than commissionaires?
- Action 2: neutralise the effects of hybrid mismatch arrangements
- Actions 4/9: limit base erosion via interest deductions etc.
- Action 5: counter harmful tax practices
- Actions 8-10: transfer pricing outcomes to be in line with value creation
 - Contractual risk allocation versus capacity to bear risk and management of risk
 - Review guidance to recharacterise or disregard the tax payer's transactional form
- Action 3: strengthen CFC rules

Potential specific options for digital economy

- In the DD proposals by 3rd parties
- No conclusions reached in the Task Force

- Modify exemptions of the PE status
 - 5-4-a through 5-4-d could be core functions for a business
 - Eliminate 5-4 entirely

- For “fully dematerialised digital activities” (FDDA) if in a “significant digital presence” (SDP)
 - FDDA: e.g. nothing but a server, contracts through internet, payment by credit card
 - SDP: de minimis threshold
 - Profit allocation rules (for PE or in general)

- Virtual PE:
 - Maintain a website on a server in the Market Jurisdiction
 - Agency PE if conclusion contracts through a machine

- Withholding tax on digital transactions



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