

Beneficial ownership

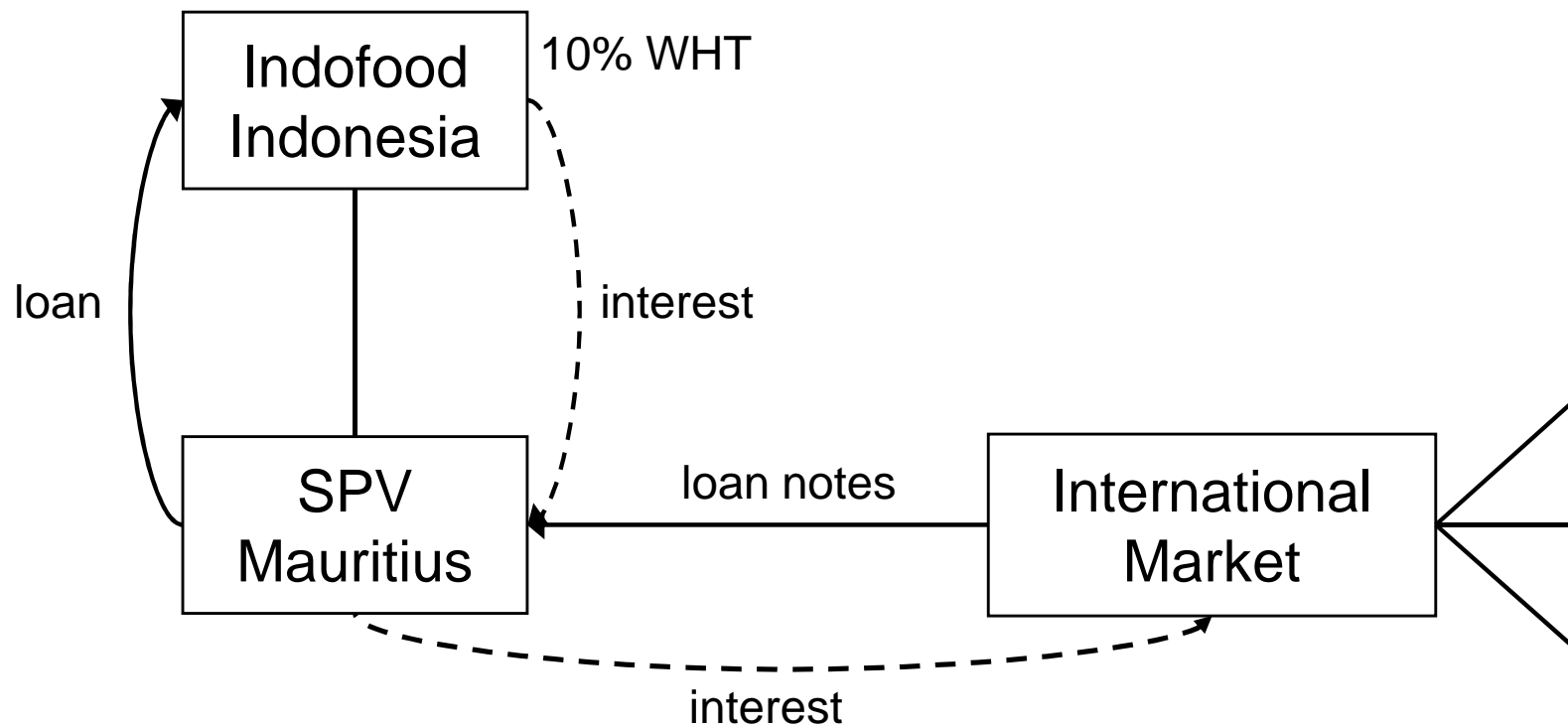
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- ❖ Treaty Entitlement: Art 1 and Art 4 par 1 OECD Model Convention
- ❖ Art 10, 11 and 12 OECD Model Convention: Additional „Requirement“ for the Application of the Treaty in the Source State „Beneficial Ownership“

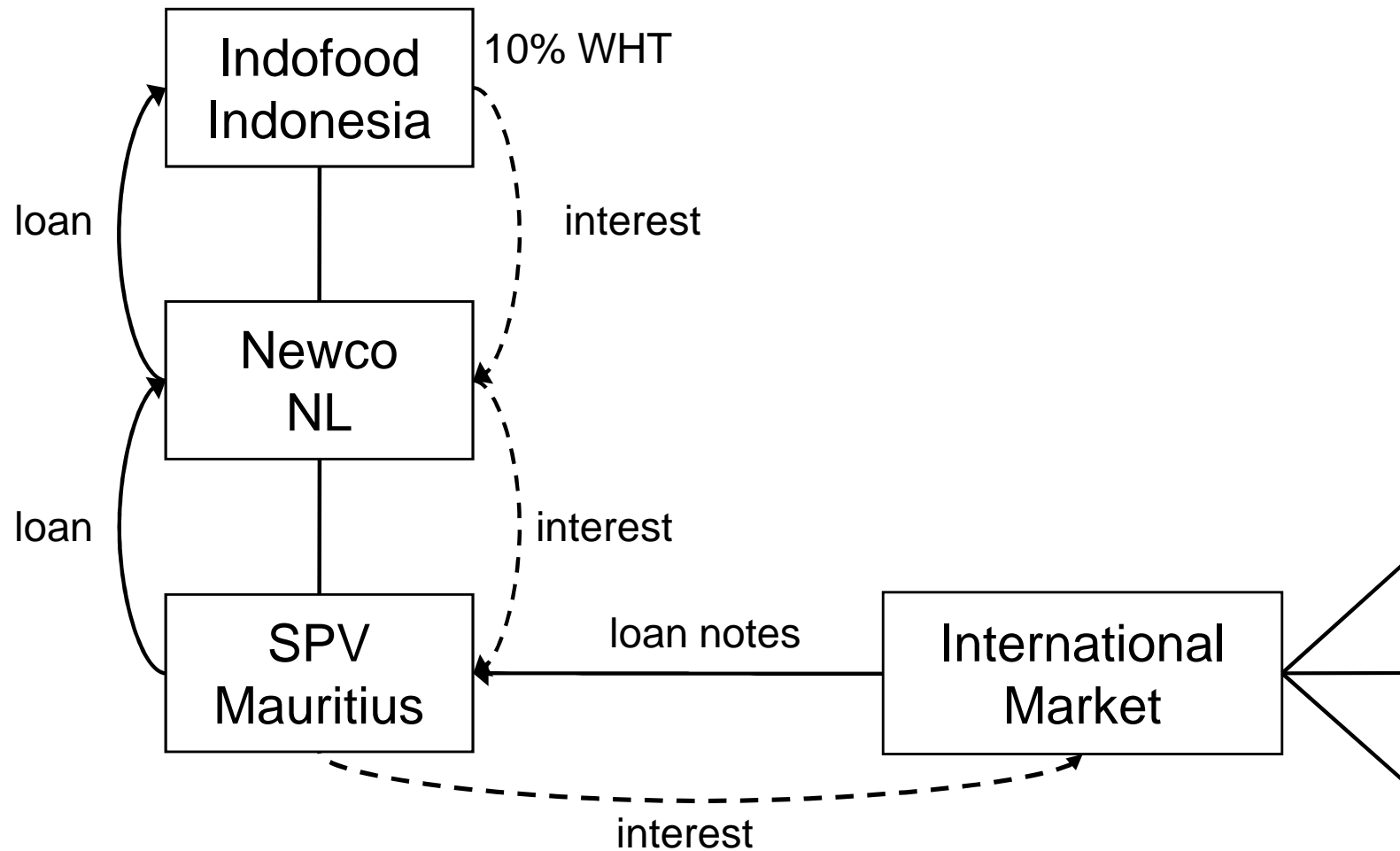
❖ Historical background

- 1963 OECD Model Convention
- 1977 OECD Model Convention
- OECD Conduit Companies Report
- 1992 OECD Model Convention
- 1995 Update
- 1997 Update
- 2003 Update

Indofood (1)



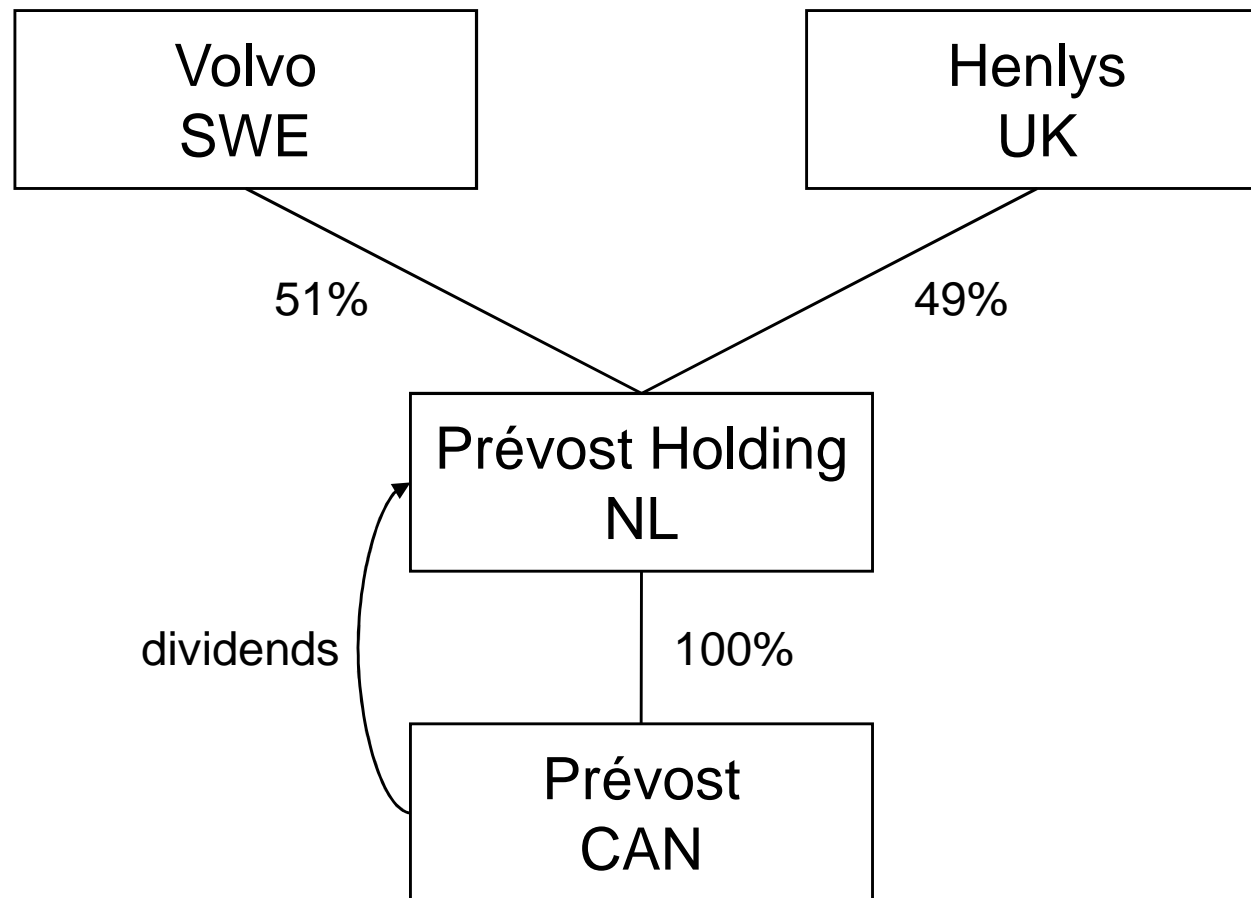
Indofood (2)



Indofood (3)

- ❖ „International fiscal meaning“
- ❖ „full privilege to directly benefit from the income“
- ❖ „no technical and legal but commercial and practical approach“
- ❖ „Bound to pay“?
- ❖ Solution: NewCo is „mere administrator of the income“, therefore not *beneficial owner*

Prévost (1)



- ❖ No definition of *beneficial owner/ownership*
- ❖ „Domestic solution[s]“ for *beneficial ownership*
 - „who receives dividends for his own use and enjoyment and assumes the risk and control of the dividends received“
 - „for the owner’s own benefit and this person is not accountable to anyone for how he deals with the income“
 - „no predetermined or automatic flow of funds“
- ❖ Solution: Prévost Holding was not a conduit, therefore, was *beneficial owner*

Relevance of Domestic Law of the State of Residence?

- ❖ Idea Already Expressed in the OECD Partnership Report
- ❖ „Subject-to-tax-Clause“
- ❖ No tax Treaty Protection, if Person Receiving the Income and Beneficial Owner are Residents of Different States
- ❖ Beneficial Ownership Concept no „Tie Breaker“ for Allocation Conflicts

- ❖ Autonomous Interpretation: „Context“
According to Art 3 par 2 OECD Model
Convention
- ❖ Criteria :
 - Tax Treatment in State of Residence
 - Extent of Person`s Discretion to Acquire
Asset
 - Premises
 - Assets and Functional Capacity Needed
 - Time Lag Between Payments

❖ Criteria (Continued):

- Relation to the Person Paying the Income
- Transactions as Part of Ordinary Course of Business
- Factual Relationship Between Transactions
- Guarantees
- Spread from the Transaction

❖ Critical Remark:

- Combination of Existing Criteria in Various States (“Evaluation on a Case-By-Case-Basis”)
- Source State: Why Being More Restrictive than for Domestic Purposes

Conclusion

- ❖ Autonomous Interpretation
- ❖ Beneficial Ownership: Mere „Clarification“
- ❖ No Differences between Art 10, 11 and 12 OECD Model Convention and other Distributive Rules (e.g. Art 13 OECD Model Convention)
- ❖ Narrow Interpretation
- ❖ Relevance of Treatment in Source State
- ❖ „Signal Function“: Passive Income – in General no Formal Approach – Object and Purpose