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Citation of the OECD Model Tax Convention by the United Nations Model Tax Convention

Note by the Secretariat *

Summary

This Secretariat note responds to a request made by the Committee of Experts on International Cooperation in Tax Matters at its Second Annual Session in 2006. The Secretariat was asked to coordinate with the OECD Secretariat "as to the manner in which the text of OECD Commentaries is incorporated in the Commentaries to the United Nations Model".

The note recognises that the UN Model Commentaries will often extensively quote the Commentaries to the OECD Model Tax Convention and proposes a way in which this can be done while: respecting intellectual property rights, including by attribution of sources; remaining clear and readable; answering the questions that will arise for users; avoiding distractions from the key differences between the two Models; achieving a general consistency in approach across the Commentaries in the UN Model and avoiding suggesting a "subservient" status for the UN Model.

This note also addresses some consequential issues relating to addressing the citation issues in the new Article 27 (Assistance in the Collection of Taxes) approved for inclusion in the United Nations Model Convention at last year's Annual Session (E/C.18/2006/3/rev.1).

The issues addressed by this note are not currently on the draft agenda for the Third Annual Session, but the Secretariat recommends that this note be considered at the Annual Session, as it affects the drafting of other papers and, more immediately, suggests that some slight changes to the text of Article 27 and the Commentary (as agreed at the Second Annual Session) may be appropriate to make proper attribution of the OECD source.

* This note was prepared by the Secretariat, upon the request of the Committee at its Second Annual Session in 2006, for consideration by the Committee. The views and opinions expressed do not necessarily represent those of the United Nations or of the Committee.

Contents

I. Introduction and Summary

1. At the Second Annual Session of the Committee of Experts on International Cooperation in Tax Matters in 2006, the Secretariat was asked to coordinate with the OECD Secretariat "as to the manner in which the text of OECD Commentaries is incorporated in the Commentaries to the United Nations Model."[1] This note responds to that request and reflects an informal paper distributed to the Committee itself earlier this year. No comments were received on that informal paper.

2. Ultimately, the Committee's approach to citation of the OECD Model may be affected by a larger question, which has previously arisen in the Committee and on which there appear to be different views: should the UN Commentary aim to be a *comprehensive* Commentary on the Articles of the UN Model, or should it rather only seek to comment in any detail on *differences* between the Articles in the two Models?

3. This paper notes, but does not reach conclusions on that issue, which is separately before the Committee. Instead, it looks at the issue of citation of the OECD Model Commentaries by asking the question: if there *are* cases when the Committee wants to extensively cite the OECD Model Commentaries in the UN Model Commentaries, how can this be best achieved in line with the need to:

- respect intellectual property rights, including by attribution of sources;
- be clear and readable;
- answer the questions that will arise for users;
- avoid distracting from the key differences between the two Models;
- achieve a general consistency in approach across the Commentaries in the UN Model; and
- avoid suggesting a "subservient" status for the UN Model.

4. This note takes the view that achieving the best balance of these factors will *not* be achieved by extensive quotation of the OECD Model without something that clearly points to its source. It suggests the following general guidance in citing from the OECD Model:

- using a slightly smaller font and indentation for long quotations;
- *not* using quotation marks for indented paragraphs in a smaller font, as they are not necessary;
- for short quotations of a sentence or two imbedded into the UN text, quotations in the normal font and using quotation marks would still be appropriate;

[1] Report of the Second Annual Session, (E/2006/45 E/C.18/2006/10) Para 64.

- using the original OECD paragraph numbering at the start of each paragraph in a long quotation, but italicised to prevent any confusion with the UN Commentary paragraph numbering;

- continuing current "best practice" of having a description early in each Commentary of the main differences from the OECD Model, but preferably with a subheading in each Commentary indicating that more clearly; and

- greater use of headings and subheadings generally, especially for issues of particular relevance to developing countries.

5. This note suggests that using less "solid walls" of OECD text, but instead relying more on key paragraphs, paraphrasing what they say in simpler language in accordance with the "style" of the UN Model (with a footnote reference) and using more linking phrases, might assist the clarity and readability of the UN Model. It recognises, however, that consideration of this is perhaps linked to the wider issues for Committee consideration of whether and how much citation there should be in the UN Model of the OECD Model Commentaries. This note makes some consequential suggestions about slightly modifying the new Article 27 on Assistance in Collection, adopted at the Second Annual Session in 2006 (E/C.18/2006/3/rev.1).

6. This note addresses quotation of the Commentaries on the Articles, and does not make any suggestions regarding the text of Articles themselves. Articles of the OECD and UN Models are widely copied in bilateral and wider agreements, without specific attribution, and there is abundant attribution of the actual OECD Articles in the UN Commentaries. This approach also avoids the complex question of the true parentage of particular provisions – the League of Nations, particular countries, the UN or the OECD.

7. Any "mechanical" or "non substantive" improvements to the UN Model Commentaries, could be prepared by the Secretariat on the Committee's authority, with sufficient direction. The Secretariat could also, if requested by the Committee or Chairperson, prepare a comparison document between the OECD text cited in the current UN Model (usually the 1997 OECD text), and the current (2005) OECD text, which would show the Committee the changes between the OECD Model as quoted in the UN Model and the OECD Model as it now exists.

II. Background

8. The views of the OECD Secretariat have been sought and taken account of in preparing this note, though the recommendations are those of the UN Secretariat. As well as discussing the matter with the OECD Secretariat, the UN Secretariat has drawn upon the following guiding principles which they saw as either flowing from the debate at the 2006 Annual Session, or as naturally deriving from the UN Model's nature and purpose:

- the OECD's authorship of its Commentaries should be respected, including by attribution of quotations to their OECD source;

- cross referencing to the OECD Model by the UN Model should be done in a way that does not unnecessarily "re-invent the wheel" where the product of OECD work is, upon

due consideration, appropriate to tax treaties involving developing countries, but rather focuses attention on clearly explaining the key differences between the two Models;

- cross referencing should not be done in a way that might suggest the UN Model as in any way subservient or of secondary status to the OECD Model;

- cross referencing should be done in a way that enhances rather than detracts from, the readability of the UN Model, including for those whose first language is not a UN language;

- there should be a general consistency in approach across the Commentaries in the UN Model, although achieving this for some of the older Commentaries may take some time, except for pure formatting issues where the Secretariat could be instructed to make changes; and

- where there is a quotation, it should be made clear which version of the OECD Model is being referred to, and as far as possible this should be the most up to date one available when a new UN Model is published - keeping these cross references up to date in the most "resource-economical" way could assist in the readability and practical usefulness of the UN Model.

A possible preliminary issue

9. Ultimately, the Committee's approach to citation of the OECD Model may be affected by a larger question, which has previously arisen in the Committee and on which there appear to be different views. This is the question of whether the UN Commentary should aim to be a *comprehensive* Commentary on the Articles of the UN Model, or should rather only seek to comment on *differences* between the Articles in the two Models.

10. Those favouring the UN Model as a comprehensive document often cite the following types of argument:

- the UN Model cannot achieve its true role if it is effectively a "supplement" to the OECD Model, and such an approach could wrongly suggest that a shared view was the "property" of the OECD, while the truth of its development may be more complex historically and in policy terms (involving the work of the League of Nations, the UN's predecessor, for example);

- there are also convenience factors favouring completeness – every Article that is part of the UN Model should have a comprehensive commentary included in the one volume – otherwise there would be effectively almost no guidance on Article 27, for example, as users would simply be referred to the Commentaries on the OECD Model Article which it replicates, and which are generally only available for purchase; and

- even if the OECD Commentary on particular text (of an Article in both Models) is agreed with, it is best to make that clear. To leave the issue to the OECD Commentary will at the very least raise uncertainty if the OECD Commentary on that provision changes. In the time between the OECD change and the further consideration of the

matter by the UN Committee, it could be mistakenly assumed that the UN Committee is in agreement with the OECD changes, which may not be regarded as appropriate for developing countries for example. The *earlier* OECD Commentary text may also not be readily available once it has been changed or removed, even though there will be many treaties using the wording.[2]

11. Those favouring the UN Model Commentaries *not* dealing with matters where there is agreement with the OECD Commentary often cite the following types of argument:

- the limited UN Committee resources are best used to address only the *differences* between the UN and OECD Models – to seek to comprehensively deal with every aspect of the text of all the Articles text would reduce the Committee's ability to properly address the differences between the two Models, the key issue for developing countries in particular. A disproportionate amount of time could, in particular, be spent on ultimately unproductive discussions about what are effectively minor drafting issues and over-finessing of the text;

- even if the Committee wished to, neither it nor the Secretariat as currently resourced could keep pace with the increasingly regular changes to the OECD Model, and therefore the part of the Commentary shared with the OECD Model would be fated to be always out of date – which reduces the credibility and usefulness of the UN Model; and

- the language adopted by the OECD in its Model really belongs to the OECD and it would be wrong and confusing for the UN Committee to reinterpret it. If the Committee wishes to take a different interpretation to the OECD on the text of an Article shared by the two Models, it should use different wording in the Article itself, especially since the wording was often chosen by the OECD and the OECD Commentary will often reflect an "international tax meaning" for the Article or provision being commented upon.

12. Of course there is a spectrum of choices between not even addressing matters dealt with in the OECD Model to the satisfaction of the Committee, on the one hand, and fully quoting the OECD Model Commentaries in such cases, on the other.

13. There may also be a spectrum of views about how rigorously the Committee (at least at this stage of the review of the Model) should examine relevant parts of the OECD Commentary if there are no obvious developing country issues involved.

14. The Secretariat notes that it is for the Committee to determine how it approaches this issue generally and in respect of particular drafts from the various subcommittees and working groups, and this Secretariat note will therefore address the citation issue on the basis of asking, *where, if*

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[2] The popular one volume version of the OECD Model does not indicate the history of changes to the Commentaries, unless mentioned in the Commentaries themselves, although a comprehensive version, including the history, is available. As an unusual example, when Article 14 on Independent Personal Services was removed from the OECD Model, the one volume version of the Model, the most popular version, deleted the entire Commentary on it even though nearly all bilateral treaties had such an article, and the vast majority still do.

at all, the Committee seeks citation of the OECD Model Commentaries in the UN Commentaries, how can this best be achieved in line with the need to:

- respect intellectual property rights, including by attribution of sources;
- be clear and readable;
- answer the questions that will arise for users;
- avoid distracting from addressing the key differences between the two Models;
- achieve a general consistency in approach across the Commentaries in the UN Model; and
- avoid suggesting a "subservient" status for the UN Model.

III. Intellectual Property Issues

15. Both the UN and the OECD make copyright claims for their respective Models. In the Secretariat's view there is greater merit in adopting an approach that respects these claims, rather than testing the limits of that relationship, especially as it does not appear necessary to do so.

16. Were it to take a different approach, the Secretariat to the Committee would have to seek guidance on the minutiae of intellectual property law relating to, and as between, international organisations, but it considers that there is no need for a more "aggressively legalistic" approach, which could itself be counter-productive for a body tasked with improving international tax cooperation.

17. The reason is that although the OECD Commentaries are a commercial product and are not freely available on-line, the OECD has hitherto not raised objections to a very extensive use in the UN Model of quotations from the OECD Commentaries, most notably in the 2001 UN Model.

18. So long as the UN Model fairly quotes the OECD Model and properly attributes the source of that material, it therefore seems that no copyright disputes should in practice arise. That might change if the whole of the OECD Model was in effect incorporated in the UN Model and thus made freely available, but that would make the UN Model very difficult to read, and is not a realistic possibility for that reason alone, quite apart from the distinct role and constituency of the UN Model, including its developing country focus.

IV. Means of Differentiating UN and OECD Text

19. The current method of differentiating OECD Commentary text from original UN text in the UN Model is indentation with quotation marks for each paragraph and with the OECD paragraph numbering removed and then indicated at the end of each paragraph (see an example at Annex 1). The indentation in particular seems necessary to prevent confusion, though the quotation marks are not grammatically necessary in view of the other devices indicating direct quotation.

20. Such quotations from the OECD Model could perhaps be more clearly identified as such by:

- using a slightly smaller font - the UN Model text is in a large font[3], compared to the OECD Model[4], so there is room for reduced font quotations; and

- using the original OECD paragraph number placement (at the start of each paragraph) but italicised to prevent any confusion with the UN Commentary paragraph numbering.

21. If these suggestions are adopted, the use of quotation marks can be discarded as no longer grammatically necessary for the long quoted passages. Retention might be favoured by some on the basis that if a quotation stretches over several pages it may not be immediately clear that it is indented and in smaller type. However text that is indented and in a smaller font appears clearer, more of a coherent whole and easier to read, so on balance the Secretariat considers that these longer passages should *not* have quotation marks as well as being indented and in smaller font.

22. Annex 1 to this document gives examples of how this recommended approach (as compared to an approach retaining quotation marks) might look in practice. It is up to the Committee how it addresses such an issue, but if it gave the Secretariat instructions on a non-substantive issue such as reducing the font of standalone quotations from the OECD Model and reinstituting their OECD paragraph numbering at the start of the paragraph, that could be adopted as the style for the next version of the UN Model and applied by the Secretariat to the Model generally.

23. The Secretariat could also, if requested, prepare a comparison document between the OECD text cited in the current UN Model (usually the 1997 OECD text), and the current (2005) OECD text, which would show the Committee the changes from the OECD Model as quoted in the UN Model and the OECD Model as it now exists. That would allow:

- a 1997 quotation to be treated as a reference to the 2005 text where there has been no changes; and

- the Committee to decide what if anything to do in other cases where there has been a change; to remove or update the quotation, or to quote it as an historic, but now superseded, OECD view.

24. Another possibility is to have a more thoroughgoing change of structure, so that the differences from the OECD Model come first in the Commentary on an Article, and then the "agreed parts" which generally follow the OECD Model could come after, with extensive citation of the OECD Model. On the whole, this could be confusing to readers, however, as there are provisions where there is general agreement between the two Models but some key differences, and readers would generally expect the entirety of the provision to be dealt with together, in logical sequence.

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[3] Font size 11.5.
[4] Font size 10.

25. The "General Considerations" part at the start of each UN Commentary generally outlines differences from the OECD Model. That could be made clearer, as new Commentary is drafted, by changing the heading to: "General Considerations, including Differences from the OECD Model" and ensuring there is a short and up to date introduction for each new or substantially revised Commentary noting the key differences between the Models in relation to the particular Article.

V. Extensive Direct Quotation without *either* Quotation Marks or Indentation?

26. It has been suggested that extensive direct quotation of the OECD Model could be used *without* quotation marks or indentation, the usual indications of a direct quotation. There might be several reasons for favouring such an approach. One might be the feeling that, where the OECD Commentary is agreed with, using the same words without quotation marks or indentation makes clearer that there is agreement on the substance of what is said – it "internalises" that interpretation within the UN Model more than if quotation marks and/or indentation are used.

27. Using quotation marks and/or indentation might be more ambiguous, unless there is some more direct sign that the interpretation has been "adopted" or "internalised" by the UN Committee. It is of course useful for the Committee to specifically state when it agrees with a quoted interpretation, but it is recognised there may be times where the Committee cannot agree or has not looked at the matter as closely as it hopes to later, so that it might as a practical matter sometimes prefer a more ambiguous reference to the OECD text, rather than none at all.

28. Another possible argument for *not* using quotation marks or indentation might be that the direct quotation *without* these devices suggests an independent consideration by the Committee of the points raised, and is therefore more "dignified" for the UN Model.

29. In general, however, it seems likely that extensive direct quotation without the use of either quotation marks or indentation is likely to confuse readers as to what is the product of UN Committee thinking and what is not. The "dignity" of the UN Model will ultimately rest on the quality of its thinking and its character as representational of UN membership, with special consideration to the needs of developing countries and economies in transition.

30. Clearly, also, some readers, especially those with an academic or professional background would find it strange that the UN Model merely reproduces the work of the OECD without acknowledging its source, and the question of why this approach has been taken would be a recurring one. It could distract attention from the original work being done in respect of the UN Model. There is also a risk that if such an approach was taken generally in revising the UN Model, the OECD might look again at the copyright issue, on the basis that its authorship is being insufficiently attributed.

31. Any concern about the UN Model appearing as subservient to, or a "mere follower" of, the OECD Model when there is extensive quotation in quotation marks and/or indentation can, in the Secretariat's view be addressed in other ways, such as by:

- using less "solid walls" of OECD text, but instead relying more on key paragraphs, paraphrasing what they say in simpler language in accordance with the "style" of the UN Model (with a footnote reference to the OECD text) and using more linking phrases such as: "… the OECD Commentary then goes on to explain ….": and

- using more headings and subheadings generally, and integrating the OECD extracts more closely into an "issue by issue" approach, with a clear direction where possible about whether the Committee agrees with the OECD interpretation.

32. These approaches could be coupled with a greater emphasis on the key differences between the Model stated early in the Commentaries of each Article – something already done to some extent under the "General Considerations" heading in the Commentaries, but which could be done more explicitly, preferably with a heading for each Commentary that reads "General Considerations, including Differences from the OECD Model".

33. Of course there is some risk that this will involve some further "investment" of time and resources which might in practice distract from the key work on the differences between the UN and OECD Models. That is part of the larger issue for the Committee discussed above, but certainly such a "differentiated" approach is best used in Articles where there are clear differences between the UN and OECD texts and interpretations.

34. There is also a risk that paraphrasing the OECD Model could unintentionally diverge from its meaning, but such a process could equally indicate areas where the OECD Commentary needs clarification or additional text, if it is also to function effectively in the context of the more developing country-oriented UN Model Commentaries. The continued participation of the OECD Secretariat and OECD countries in this UN work should also make it unlikely that the OECD Commentaries would be incorrectly paraphrased.

35. The discussion above has focussed on long quoted extracts from the OECD Model. It should be noted for completeness that for short quotations of a sentence or two imbedded into the UN text, quotations in the normal font and using quotation marks may still be appropriate. Also the quotation marks in front of other indented text, such as "alternative" provisions can be removed and this has been done in the attached Annexes, using a strikethrough mode.

VI. Article 27 – A Special Case?

Indentation and quotation marks

36. The approach just suggested (use of indentation and a reduced font) is not the approach taken in the text of the new Article 27 on Assistance in Recovery and its Commentary as adopted by the UN Committee last year (E/C.18/2006/3/rev.1). That text directly quoted the OECD Commentaries on Article 27 in their entirety (with some relatively minor additions noted below) and did not use quotation marks or indentation.

37. It is probably the case that the formatting issue was not a key area of focus when the text was approved, but as this relates to the broader question of citation by the UN Committee of the

OECD Model, some direction is needed for the Secretariat and those drafting other proposed Commentary.

38. In the opinion of the UN Secretariat, the approach taken for Article 27 is justified as a special case. The text of the Model Article in the UN Model picks up the OECD Article's language with only a small number of clarifications, obviously on the basis that the OECD Model sufficiently explained the provisions, including from developing country viewpoints, and that the Commentary of the whole Article could therefore be adopted. The UN Commentary adds two extra dash points in paragraphs 1 and 9, and extra sentences at the end of paragraph 8 (last four sentences, from "Finally") and the second last sentence of paragraph 28 (the changes are footnoted in Annex 2 of this note), so that in effect almost the UN Commentary is a quotation of the OECD Model Commentary with some additional clarifications.

39. In referring to, and implicitly adopting, the OECD Commentary, there was probably also a recognition that where the OECD text is satisfactory in the context of the UN Model and its purposes, there is a distinct benefit to treaty negotiators, administrators and other users, in consistency between the two Models.

40. While Article 27 of the OECD Commentary is cited without quotation marks or indentation, the initial draft presented to the Committee by the relevant subcommittee gave clear attribution to the OECD Commentary. There was a note in the introductory paragraphs of the Commentary to Article 27 which stated:

> Article 27 of this Model being mainly similar to Article 27 of the OECD Model, most of the commentary of this latter Model is reproduced below.

41. In the final version as adopted by the Committee, that phrase had disappeared, but the issue does not seem to have been fully debated. *The Secretariat suggests* that the Committee consider reintroducing something similar as a footnote, perhaps most appropriately to the heading of the UN Commentary. That would in its view be necessary for a fair and sufficient attribution to the OECD Model. A possible form of words is provided at Annex 2.

Highlighting differences between the Models

42. This may deal with the issue of attribution, but there is a second issue of highlighting the differences from the OECD Model, so as not to be seen as attributing something of UN authorship to the OECD, and to assist those seeking to evaluate differences in the Models, since those differences are of course the ultimate justification for the existence of two separate Models.

43. *The Secretariat therefore also suggests* that the substantive differences from the OECD Model, the additional dash points in paragraphs 1 and 9 and the additional sentences, at paragraphs 8 and 28, should be highlighted more specifically, *and suggests:*

- two short footnotes to those extra dash points to the following effect: "this factor ["issue" for para 9] is additional to those specifically mentioned in Paragraph [1/ 9] of the Commentary on Article 27 of the OECD Model Convention"; and

- footnotes to the new sentences at paragraphs 8 and 28 noting that they do not appear in the OECD Model Commentary.

44. A copy of Article 27, as adopted in November, but with the suggested additional footnotes is attached as Annex 2. The issue could be discussed in November as part of an additional agenda item on "Citation of OECD Sources/ Relationship to the OECD Model" or similar, if the Committee saw fit. The proposed changes could be put forward on the authority of the Chairperson.

OECD Secretariat views

45. Representatives of the OECD Secretariat would, we understand, prefer the whole of the Commentary to Article 27 to be indented, as well as a clear attribution being made. They consider that the model for the treatment of Article 27 could be Article 15 or Article 24, which largely follow the OECD Commentary, but with minor additions.

46. The UN Secretariat has not recommended an indentation of the whole Commentary as in our view a total indentation rather defeats the purpose of indentation, lacks a context for the indentation – an introductory paragraph, and complicates the treatment of the few additions added in the UN Commentary. If they were the only unindented parts of the Commentary, the formatting would raise more questions than it answered, and the alternative of redrafted Commentary is more likely to unnecessarily reopen a text agreed in 2006 than the "gentler" addition of a small number of footnotes. The use of footnotes would make it less likely that the substantive issues dealt with at the 2006 meeting would be reopened at the 2007 meeting.

47. In view of the OECD Secretariat preference, however, we have included at Annex 3 a version of relevant parts of the Commentary where some additional words have been added to reflect the original UN Committee content, as we understand it, and the OECD content has been indented and produced in a smaller font, for consideration by the Committee.

48. Although we have not proposed the approach most favoured by the OECD in the case of Article 27, it should be stressed that we have suggested clearer attribution to the OECD of quotations from its Commentaries. We consider that it will be only in rare cases where the best balance of the factors noted above (the need to respect intellectual property rights, and to have Commentary which is clear and readable, answers the questions that will arise for users, does not distract from addressing the key differences between the two Models, is consistent in approach across the Commentaries on different articles, and does not suggest that the UN Model has a "subservient" status to the OECD Model) will come down in favour of very extensive quotation without quotation marks or indentation – the Article 27 situation is in practice unlikely to be replicated again.

VII. Which OECD Model?

49. The Commentaries should clearly indicate which version of the OECD Model is being cited, especially now that there tends to be an update every 2 or 3 years. The first thing required is that there be a "baseline" OECD text that is generally used in the UN Commentaries. This setting of a baseline text could easily be achieved by a note in the Introduction or a separate note, in either case along the following lines:

> References to and quotations from the OECD Model Tax Convention, including its Commentaries are [unless otherwise noted] to the version of that Model published in …

50. The "unless otherwise noted" clause would be necessary if there are remnants of earlier versions of the OECD Model in the UN Model which *differ from the baseline OECD version referred to*. As most such references are to the 1997 version of the OECD Model in the current (2001) UN Model, even though the 2000 OECD Model had been published at the relevant time, it will depend on how much of this existing material is updated as to what should be the "baseline" text of the OECD Model for the next UN Model. It would be 1997 or 2005, and provision would need to be made for pointing out non-baseline extracts by some drafting changes.

51. Obviously the optimum solution would be for the UN Model to, as far as possible, reflect consideration of the most recent OECD language, to prevent confusion. A new version of the OECD Model is expected in the first half of 2008, but the 2005 version is the current version.

VIII. Summary of Suggested Approaches

52. This note suggests that the Committee should consider dealing with the intended form of the next version of the UN Model, including its relationship to the OECD Model, at its Third Annual Session in Geneva, to give further guidance to the subcommittees and working groups in drafting proposed Commentary text, and to give guidance to the Secretariat in its role of assisting the Committee.

53. This note also proposes that specific consideration be given to whether some additional text should be introduced to Article 27 (as agreed at the Second Annual Session - E/C.18/2006/3/rev.1) to deal with the relationship between the current text and the OECD Model text. The text of some proposed additional footnotes to address this are attached at Annex 2. An alternative involving some redrafting of the substance of the Commentary to Article 27 is provided at Annex 3.

54. This note also suggests the following general guidance in citing from the OECD Model:

- using a slightly smaller font and indentation for long quotations;
- *not* using quotation marks for indented paragraphs in a smaller font, as they are not necessary and detract from the flow of the text;
- for short quotations of a sentence or two imbedded into the UN text, quotations in the normal font and using quotation marks may still be appropriate;
- using the original OECD paragraph numbering at the start of each paragraph in a long quotation, but italicised to prevent any confusion with the UN Commentary paragraph numbering;
- continuing current "best practice" of having a description early in each Commentary of the main differences from the OECD Model, but preferably with a subheading indicating that more clearly; and

- greater use of subheadings generally, especially for issues of particular relevance to developing countries.

55. Finally, this note suggests that as far as possible the Committee seek to ensure that references to the OECD Model are to the latest available version, and that the references are kept systematically updated.

Annex 1: Suggested General Style Changes – an Example

Current (from Commentary to Article 11):

6. This paragraph reproduces Article 11, paragraph 1, of the OECD Model Convention, the Commentary on which reads as follows:

> "Paragraph 1 lays down the principle that interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the latter. In doing so, it does not stipulate an exclusive right to tax in favour of the State of residence. The term 'paid' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom." [para. 5]
>
> "The Article deals only with interest arising in a Contracting State and paid to a resident of the other Contracting State. It does not, therefore, apply to interest arising in a third State or to interest arising in a Contracting State which is attributable to a permanent establishment which an enterprise of that State has in the other Contracting State..." [para. 6]

Option with indentation, smaller font and quotation marks with OECD numbering style:

6. This paragraph reproduces Article 11, paragraph 1, of the OECD Model Convention, the Commentary on which reads as follows:

> "*5.* Paragraph 1 lays down the principle that interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the latter. In doing so, it does not stipulate an exclusive right to tax in favour of the State of residence. The term 'paid' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom." ~~[para. 5]~~
>
> "*6.* The Article deals only with interest arising in a Contracting State and paid to a resident of the other Contracting State. It does not, therefore, apply to interest arising in a third State or to interest arising in a Contracting State which is attributable to a permanent establishment which an enterprise of that State has in the other Contracting State..." ~~[para. 6]~~

Alternative Option (as for previous option but with quotation marks removed):

6. This paragraph reproduces Article 11, paragraph 1, of the OECD Model Convention, the Commentary on which reads as follows:

> *5.* Paragraph 1 lays down the principle that interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in the latter. In doing so, it does not stipulate an exclusive right to tax in favour of the State of residence. The term 'paid' has a very wide meaning, since the concept of payment means the fulfilment of the obligation to put funds at the disposal of the creditor in the manner required by contract or by custom." ~~[para. 5]~~
>
> *6.* The Article deals only with interest arising in a Contracting State and paid to a resident of the other Contracting State. It does not, therefore, apply to interest arising in a third State or to interest arising in a Contracting State which is attributable to a permanent establishment which an enterprise of that State has in the other Contracting State..." ~~[para. 6]~~

Annex 2: Suggested Specific Article 27 Changes

(Proposed additions in ***bold italics,*** deletions in ~~strikethrough~~ – which appears as underlining in the case of superscript quotation marks removed from indented paragraphs as unnecessary**)**

Article 27

ASSISTANCE IN THE COLLECTION OF TAXES[1]

1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

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[1] In some countries, national law, policy or administrative considerations may not allow or justify the type of assistance envisaged under this Article or may require that this type of assistance be restricted, e.g. to countries that have similar tax systems or tax administrations or as to the taxes covered. For that reason, the Article should only be included in the Convention where each State concludes that, based on the factors described in paragraph 1 of the Commentary on the Article, they can agree to provide assistance in the collection of taxes levied by the other State.

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to carry out measures which would be contrary to public policy (ordre public);

c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;

d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

COMMENTARY ON ARTICLE 27
CONCERNING THE ASSISTANCE IN THE COLLECTION OF TAXES[2]

1. This Article provides the rules under which Contracting States[3] may agree to provide each other assistance in the collection of taxes. In some States, national law or policy may prevent this form of assistance or set limitations to it. Also, in some cases, administrative considerations may not justify providing assistance in the collection of taxes to another State or may similarly limit it. During the negotiations, each Contracting State will therefore need to decide whether and to what extent assistance should be given to the other State based on various factors, including

- the stance taken in national law to providing assistance in the collection of other States' taxes;
- whether and to what extent the tax systems, tax administrations and legal standards of the two States are similar, particularly as concerns the protection of fundamental taxpayers' rights (e.g. timely and adequate notice of claims against the taxpayer, the right to confidentiality of taxpayer information, the right to appeal, the right to be heard and present argument and evidence, the right to be assisted by a counsel of the taxpayer's choice, the right to a fair trial, etc.);
- whether assistance in the collection of taxes will provide balanced and reciprocal benefits to both States;
- whether each State's tax administration will be able to effectively provide such assistance;
- whether the cost of assistance is not too high for the requested State with regard to the money at stake[4];
- whether trade and investment flows between the two States are sufficient to justify this form of assistance;
- whether for constitutional or other reasons the taxes to which the Article applies should be limited.

The Article should only be included in the Convention where each State concludes that, based on these factors, they can agree to provide assistance in the collection of taxes levied by the other State.

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2 ***Article 27 of this Model being in most respects the same as Article 27 of the OECD Model Tax Convention, the Commentary to the OECD Model Article is reproduced in this Commentary. Additions are noted by footnotes 4 to 7.***

3 Throughout this Commentary on Article 27, the State making a request for assistance is referred to as the "requesting State" whilst the State from which assistance is requested is referred to as the "requested State".

4 ***This factor is additional to those specifically mentioned in paragraph 1 of the Commentary on Article 27 of the OECD Model Convention.***

2. The Article provides for comprehensive collection assistance. Some States may prefer to provide a more limited type of collection assistance. This may be the only form of collection assistance that they are generally able to provide or that they may agree to in a particular convention. For instance, a State may want to limit assistance to cases where the benefits of the Convention (e.g. a reduction of taxes in the State where income such as interest arises) have been claimed by persons not entitled to them. States wishing to provide such limited collection assistance are free to adopt bilaterally an alternative Article drafted along the following lines:

"*Article 27*
Assistance in the collection of taxes

1. The Contracting States shall lend assistance to each other in the collection of tax to the extent needed to ensure that any exemption or reduced rate of tax granted under this Convention shall not be enjoyed by persons not entitled to such benefits. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
b) to carry out measures which would be contrary to public policy (ordre public)."

Paragraph 1

3. This paragraph contains the principle that a Contracting State is obliged to assist the other State in the collection of taxes owed to it, provided that the conditions of the Article are met. Paragraphs 3 and 4 provide the two forms that this assistance will take.

4. The paragraph also provides that assistance under the Article is not restricted by Articles 1 and 2. Assistance must therefore be provided as regards a revenue claim owed to a Contracting State by any person, whether or not a resident of a Contracting State. Some Contracting States may, however, wish to limit assistance to taxes owed by residents of either Contracting State. Such States are free to restrict the scope of the Article by omitting the reference to Article 1 from the paragraph.

5. Paragraph 1 of the Article applies to the exchange of information for purposes of the provisions of this Article. The confidentiality of information exchanged for purposes of assistance in collection is thus ensured.

6. The paragraph finally provides that the competent authorities of the Contracting States may, by mutual agreement, decide the details of the practical application of the provisions of the Article.

7. Such agreement should, in particular, deal with the documentation that should accompany a request made pursuant to paragraph 3 or 4. It is common practice to agree that a request for assistance will be accompanied by such documentation as is required by the law of the requested State, or has been agreed to by the competent authorities of the Contracting States, and that is necessary to undertake, as the case may be, collection of the

revenue claim or measures of conservancy. Such documentation may include, for example, a declaration that the revenue claim is enforceable and is owed by a person who cannot, under the law of the requesting State, prevent its collection or an official copy of the instrument permitting enforcement in the requesting State. An official translation of the documentation in the language of the requested State should also be provided. It could also be agreed, where appropriate, that the instrument permitting enforcement in the requesting State shall, where appropriate and in accordance with the provisions in force in the requested State, be accepted, recognised, supplemented or replaced, as soon as possible after the date of the receipt of the request for assistance, by an instrument permitting enforcement in the latter State.

8. The agreement should also deal with the issue of the costs that will be incurred by the requested State in satisfying a request made under paragraph 3 or 4. In general, the costs of collecting a revenue claim are charged to the debtor but it is necessary to determine which State will bear costs that cannot be recovered from that person. The usual practice, in this respect, is to provide that in the absence of an agreement specific to a particular case, ordinary costs incurred by a State in providing assistance to the other State will not be reimbursed by that other State. Ordinary costs are those directly and normally related to the collection, i.e. those expected in normal domestic collection proceedings. In the case of extraordinary costs, however, the practice is to provide that these will be borne by the requesting State, unless otherwise agreed bilaterally. Such costs would cover, for instance, costs incurred when a particular type of procedure has been used at the request of the other State, or supplementary costs of experts, interpreters, or translators. Most States also consider as extraordinary costs the costs of judicial and bankruptcy proceedings. The agreement should provide a definition of extraordinary costs and consultation between the Contracting States should take place in any particular case where extraordinary costs are likely to be involved. It should also be agreed that, as soon as a Contracting State anticipates that extraordinary costs may be incurred, it will inform the other Contracting State and indicate the estimated amount of such costs so that the other State may decide whether such costs should be incurred. It is, of course, also possible for the Contracting States to provide that costs will be allocated on a basis different from what is described above; this may be necessary, for instance, where a request for assistance in collection is suspended or withdrawn under paragraph 7 or where the issue of costs incurred in providing assistance in collection is already dealt with in another legal instrument applicable to these States. Finally, the agreement shall take into account the differences in development of Contracting States[5]. It could therefore be agreed that all costs, including ordinary costs, will be borne by one State only. In such a case, the Contracting States will have to agree on the costs. These could for instance be determined on the basis of a fixed amount.

9. In the agreement, the competent authorities may also deal with other practical issues such as:

- whether there should be a limit of time after which a request for assistance could no longer be made as regards a particular revenue claim;

- what should be the applicable exchange rate when a revenue claim is collected in a currency that differs from the one which is used in the requesting State;

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[5] ***This sentence and the following sentences until the end of this paragraph do not appear in the Commentary to Article 27 of the OECD Model.***

- how should any amount collected pursuant to a request under paragraph 3 be remitted to the requesting State;

- whether there should be minimum threshold below which assistance will not be provided[6].

Paragraph 2

10. Paragraph 2 defines the term "revenue claim" for purposes of the Article. The definition applies to any amount owed in respect of all taxes that are imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the Convention or other instrument in force between the Contracting States. It also applies to the interest, administrative penalties and costs of collection or conservancy that are related to such an amount. Assistance is therefore not restricted to taxes to which the Convention generally applies pursuant to Article 2, as is confirmed in paragraph 1.

11. Some Contracting States may prefer to limit the application of the Article to taxes that are covered by the Convention under the general rules of Article 2. States wishing to do so should replace paragraphs 1 and 2 by the following:

> "1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Article 1. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.
>
> 2. The term "revenue claim" as used in this Article means any amount owed in respect of taxes covered by the Convention together with interest, administrative penalties and costs of collection or conservancy related to such amount."

12. Similarly, some Contracting States may wish to limit the types of tax to which the provisions of the Article will apply or to clarify the scope of application of these provisions by including in the definition a detailed list of the taxes. States wishing to do so are free to adopt bilaterally the following definition:

> "The term "revenue claim" as used in this Article means any amount owed in respect of the following taxes imposed by the Contracting States, together with interest, administrative penalties and costs of collection or conservancy related to such amount:
>
> *a*) (in State A): …
> *b*) (in State B): ..."

13. In order to make sure that the competent authorities can freely communicate information for purposes of the Article, Contracting States should ensure that the Article is drafted in a way that allows exchanges of information with respect to any tax to which this Article applies.

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[6] ***This issue is additional to those specifically mentioned in paragraph 9 of the Commentary on Article 27 of the OECD Model Convention.***

14. Nothing in the Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims, in particular when the provisions concerning the entry into force of their convention provide that the provisions of that convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations.

Paragraph 3

15. This paragraph stipulates the conditions under which a request for assistance in collection can be made. The revenue claim has to be enforceable under the law of the requesting State and be owed by a person who, at that time, cannot, under the law of that State, prevent its collection. This will be the case where the requesting State has the right, under its internal law, to collect the revenue claim and the person owing the amount has no administrative or judicial rights to prevent such collection.

16. In many States, a revenue claim can be collected even though there is still a right to appeal to an administrative body or a court as regards the validity or the amount of the claim. If, however, the internal law of the requested State does not allow it to collect its own revenue claims when appeals are still pending, the paragraph does not authorise it to do so in the case of revenue claims of the other State in respect of which such appeal rights still exist even if this does not prevent collection in that other State. Indeed, the phrase "collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State" has the effect of making that requested State's internal law restriction applicable to the collection of the revenue claim of the other State. Many States, however, may wish to allow collection assistance where a revenue claim may be collected in the requesting State notwithstanding the existence of appeal rights even though the requested State's own law prevents collection in that case. States wishing to do so are free to modify paragraph 3 to read as follows:

> "When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State that met the conditions allowing that other State to make a request under this paragraph."

17. Paragraph 3 also regulates the way in which the revenue claim of the requesting State is to be collected by the requested State. Except with respect to time limits and priority (see the Commentary on paragraph 5), the requested State is obliged to collect the revenue claim of the requesting State as though it were the requested State's own revenue

claim even if, at the time, it has no need to undertake collection actions related to that taxpayer for its own purposes. As already mentioned, the phrase “in accordance with the provisions of its law applicable to the enforcement and collection of its own taxes” has the effect of limiting collection assistance to claims with respect to which no further appeal rights exist if, under the requested State‘s internal law, collection of that State's own revenue claims are not permitted as long as such rights still exist.

18. It is possible that the request may concern a tax that does not exist in the requested State. The requesting State shall indicate where appropriate the nature of the revenue claim, the components of the revenue claim, the date of expiry of the claim and the assets from which the revenue claim may be recovered. The requested State will then follow the procedure applicable to a claim for a tax of its own which is similar to that of the requesting State or any other appropriate procedure if no similar tax exists.

Paragraph 4

19. In order to safeguard the collection rights of a Contracting State, this paragraph enables it to request the other State to take measures of conservancy even where it cannot yet ask for assistance in collection, e.g. when the revenue claim is not yet enforceable or when the debtor still has the right to prevent its collection. This paragraph should only be included in conventions between States that are able to take measures of conservancy under their own laws. Also, States that consider that it is not appropriate to take measures of conservancy in respect of taxes owed to another State may decide not to include the paragraph in their conventions or to restrict its scope. In some States, measures of conservancy are referred to as “interim measures” and such States are free to add these words to the paragraph to clarify its scope in relation to their own terminology.

20. One example of measures to which the paragraph applies is the seizure or the freezing of assets before final judgement to guarantee that these assets will still be available when collection can subsequently take place. The conditions required for the taking of measures of conservancy may vary from one State to another but in all cases the amount of the revenue claim should be determined beforehand, if only provisionally or partially. A request for measures of conservancy as regards a particular revenue claim cannot be made unless the requesting State can itself take such measures with respect to that claim (see the Commentary on paragraph 8).

21. In making a request for measures of conservancy the requesting State should indicate in each case what stage in the process of assessment or collection has been reached. The requested State will then have to consider whether in such a case its own laws and administrative practice permit it to take measures of conservancy.

Paragraph 5

22. Paragraph 5 first provides that the time-limits of the requested State, i.e. time limitations beyond which a revenue claim cannot be enforced or collected, shall not apply to a revenue claim in respect of which the other State has made a request under paragraph 3 or 4. Since paragraph 3 refers to revenue claims that are enforceable in the requesting State and paragraph 4 to revenue claims in respect of which the requesting State can take

measures of conservancy, it follows that it is the time-limits of the requesting State that are solely applicable.

23. Thus, as long as a revenue claim can still be enforced or collected (paragraph 3) or give rise to measures of conservancy (paragraph 4) in the requesting State, no objection based on the time-limits provided under the laws of the requested State may be made to the application of paragraph 3 or 4 to that revenue claim. States which cannot agree to disregard their own domestic time-limits should amend paragraph 5 accordingly.

24. The Contracting States may agree that after a certain period of time the obligation to assist in the collection of the revenue claim no longer exists. The period should run from the date of the original instrument permitting enforcement. Legislation in some States requires renewal of the enforcement instrument, in which case the first instrument is the one that counts for purposes of calculating the time period after which the obligation to provide assistance ends.

25. Paragraph 5 also provides that the rules of both the requested (first sentence) and requesting (second sentence) States giving their own revenue claims priority over the claims of other creditors shall not apply to a revenue claim in respect of which a request has been made under paragraph 3 or 4. Such rules are often included in domestic laws to ensure that tax authorities can collect taxes to the fullest possible extent.

26. The rule according to which the priority rules of the requested State do not apply to a revenue claim of the other State in respect of which a request for assistance has been made applies even if the requested State must generally treat that claim as its own revenue claim pursuant to paragraphs 3 and 4. States wishing to provide that revenue claims of the other State should have the same priority as is applicable to their own revenue claims are free to amend the paragraph by deleting the words “or accorded any priority” in the first sentence.

27. The words “by reason of their nature as such”, which are found at the end of the first sentence, indicate that the time limits and priority rules of the requested State to which the paragraph applies are only those that are specific to unpaid taxes. Thus, the paragraph does not prevent the application of general rules concerning time limits or priority which would apply to all debts (e.g. rules giving priority to a claim by reason of that claim having arisen or having been registered before another one).

Paragraph 6

28. This paragraph ensures that any legal or administrative objection concerning the existence, validity or the amount of a revenue claim of the requesting State shall not be dealt with by the requested State’s courts and administrative bodies. Thus, no legal or administrative proceedings, such as a request for judicial review, shall be undertaken in the requested State with respect to these matters. The main purpose of this rule is to prevent administrative or judicial bodies of the requested State from being asked to decide matters which concern whether an amount, or part thereof, is owed under the internal law of the other State. Any legal actions contesting the recovery measures taken by the requested State can of course be brought before the competent judicial authorities of that State[7].

[7] ***This sentence does not appear in the Commentary to Article 27 of the OECD Model***.

States in which the paragraph may raise constitutional or legal difficulties may amend or omit it in the course of bilateral negotiations.

Paragraph 7

29. This paragraph provides that if, after a request has been made under paragraph 3 or 4, the conditions that applied when such request was made cease to apply (e.g. a revenue claim ceases to be enforceable in the requesting State), the State that made the request must promptly notify the other State of this change of situation. Following the receipt of such a notice, the requested State has the option to ask the requesting State to either suspend or withdraw the request. If the request is suspended, the suspension should apply until such time as the State that made the request informs the other State that the conditions necessary for making a request as regards the relevant revenue claim are again satisfied or that it withdraws its request.

Paragraph 8

30. This paragraph contains certain limitations to the obligations imposed on the State which receives a request for assistance.

31. The requested State is at liberty to refuse to provide assistance in the cases referred to in the paragraph. However if it does provide assistance in these cases, it remains within the framework of the Article and it cannot be objected that this State has failed to observe the provisions of the Article.

32. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice or those of the other State in fulfilling its obligations under the Article. Thus, if the requesting State has no domestic power to take measures of conservancy, the requested State could decline to take such measures on behalf of the requesting State. Similarly, if the seizure of assets to satisfy a revenue claim is not permitted in the requested State, that State is not obliged to seize assets when providing assistance in collection under the provisions of the Article. However, types of administrative measures authorised for the purpose of the requested State's tax must be utilised, even though invoked solely to provide assistance in the collection of taxes owed to the requesting State.

33. Paragraph 5 of the Article provides that a Contracting State’s time limits will not apply to a revenue claim in respect of which the other State has requested assistance. Subparagraph *a*) is not intended to defeat that principle. Providing assistance with respect to a revenue claim after the requested State’s time limits have expired will not, therefore, be considered to be at variance with the laws and administrative practice of that or of the other Contracting State in cases where the time limits applicable to that claim have not expired in the requesting State.

34. Subparagraph *b*) includes a limitation to carrying out measures contrary to public policy (ordre public). As is the case under Article 26 (see paragraph 19 of the Commentary on Article 26), it has been felt necessary to prescribe a limitation with regard to assistance which may affect the vital interests of the State itself.

35. Under subparagraph *c*), a Contracting State is not obliged to satisfy the request if the other State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice.

36. Finally, under subparagraph *d*), the requested State may also reject the request for practical considerations, for instance if the costs that it would incur in collecting a revenue claim of the requesting State would exceed the amount of the revenue claim.

37. Some States may wish to add to the paragraph a further limitation, already found in the joint Council of Europe-OECD multilateral Convention on Mutual Administrative Assistance in Tax Matters, which would allow a State not to provide assistance if it considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles.

Annex 3: Alternative Specific Article 27 Changes

[Use of changes in the body of the text rather than footnotes]

Article 27

ASSISTANCE IN THE COLLECTION OF TAXES[1]

…

COMMENTARY ON ARTICLE 27
CONCERNING THE ASSISTANCE IN THE COLLECTION OF TAXES

1. ***This Article is, in nearly all respects, the same as Article 27 of the OECD Model, and for that reason the Commentary of that Model is reproduced in this Commentary. The OECD Commentary is as follows:***

This Article provides the rules under which Contracting States[2] may agree to provide each other assistance in the collection of taxes. In some States, national law or policy may prevent this form of assistance or set limitations to it. Also, in some cases, administrative considerations may not justify providing assistance in the collection of taxes to another State or may similarly limit it. During the negotiations, each Contracting State will therefore need to decide whether and to what extent assistance should be given to the other State based on various factors, including

- the stance taken in national law to providing assistance in the collection of other States' taxes;
- whether and to what extent the tax systems, tax administrations and legal standards of the two States are similar, particularly as concerns the protection of fundamental taxpayers' rights (e.g.

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1 In some countries, national law, policy or administrative considerations may not allow or justify the type of assistance envisaged under this Article or may require that this type of assistance be restricted, e.g. to countries that have similar tax systems or tax administrations or as to the taxes covered. For that reason, the Article should only be included in the Convention where each State concludes that, based on the factors described in paragraph 1 of the Commentary on the Article, they can agree to provide assistance in the collection of taxes levied by the other State.

2 Throughout this Commentary on Article 27, the State making a request for assistance is referred to as the "requesting State" whilst the State from which assistance is requested is referred to as the "requested State".

timely and adequate notice of claims against the taxpayer, the right to confidentiality of taxpayer information, the right to appeal, the right to be heard and present argument and evidence, the right to be assisted by a counsel of the taxpayer's choice, the right to a fair trial, etc.);

- whether assistance in the collection of taxes will provide balanced and reciprocal benefits to both States;
- whether each State's tax administration will be able to effectively provide such assistance;
- whether trade and investment flows between the two States are sufficient to justify this form of assistance;
- whether for constitutional or other reasons the taxes to which the Article applies should be limited.

The Article should only be included in the Convention where each State concludes that, based on these factors, they can agree to provide assistance in the collection of taxes levied by the other State.

2. In relation to this paragraph, the Committee noted an additional factor not specifically mentioned in the OECD Commentary, but consistent with it, that of whether the cost of assistance is not too high for the requested State with regard to the money at stake. The OECD Commentary continues as follows:

2. The Article provides for comprehensive collection assistance. Some States may prefer to provide a more limited type of collection assistance. This may be the only form of collection assistance that they are generally able to provide or that they may agree to in a particular convention. For instance, a State may want to limit assistance to cases where the benefits of the Convention (e.g. a reduction of taxes in the State where income such as interest arises) have been claimed by persons not entitled to them. States wishing to provide such limited collection assistance are free to adopt bilaterally an alternative Article drafted along the following lines:

"*Article 27*
Assistance in the collection of taxes

1. The Contracting States shall lend assistance to each other in the collection of tax to the extent needed to ensure that any exemption or reduced rate of tax granted under this Convention shall not be enjoyed by persons not entitled to such benefits. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
b) to carry out measures which would be contrary to public policy (ordre public)."

Paragraph 1

3. This paragraph contains the principle that a Contracting State is obliged to assist the other State in the collection of taxes owed to it, provided that the conditions of the Article are met. Paragraphs 3 and 4 provide the two forms that this assistance will take.

4. The paragraph also provides that assistance under the Article is not restricted by Articles 1 and 2. Assistance must therefore be provided as regards a revenue claim owed to a Contracting State by any person, whether or not a resident of a Contracting State. Some Contracting States may, however, wish to limit assistance to taxes owed by residents of either Contracting State. Such States are free to restrict the scope of the Article by omitting the reference to Article 1 from the paragraph.

5. Paragraph 1 of the Article applies to the exchange of information for purposes of the provisions of this Article. The confidentiality of information exchanged for purposes of assistance in collection is thus ensured.

6. The paragraph finally provides that the competent authorities of the Contracting States may, by mutual agreement, decide the details of the practical application of the provisions of the Article.

7. Such agreement should, in particular, deal with the documentation that should accompany a request made pursuant to paragraph 3 or 4. It is common practice to agree that a request for assistance will be accompanied by such documentation as is required by the law of the requested State, or has been agreed to by the competent authorities of the Contracting States, and that is necessary to undertake, as the case may be, collection of the revenue claim or measures of conservancy. Such documentation may include, for example, a declaration that the revenue claim is enforceable and is owed by a person who cannot, under the law of the requesting State, prevent its collection or an official copy of the instrument permitting enforcement in the requesting State. An official translation of the documentation in the language of the requested State should also be provided. It could also be agreed, where appropriate, that the instrument permitting enforcement in the requesting State shall, where appropriate and in accordance with the provisions in force in the requested State, be accepted, recognised, supplemented or replaced, as soon as possible after the date of the receipt of the request for assistance, by an instrument permitting enforcement in the latter State.

8. The agreement should also deal with the issue of the costs that will be incurred by the requested State in satisfying a request made under paragraph 3 or 4. In general, the costs of collecting a revenue claim are charged to the debtor but it is necessary to determine which State will bear costs that cannot be recovered from that person. The usual practice, in this respect, is to provide that in the absence of an agreement specific to a particular case, ordinary costs incurred by a State in providing assistance to the other State will not be reimbursed by that other State. Ordinary costs are those directly and normally related to the collection, i.e. those expected in normal domestic collection proceedings. In the case of extraordinary costs, however, the practice is to provide that

these will be borne by the requesting State, unless otherwise agreed bilaterally. Such costs would cover, for instance, costs incurred when a particular type of procedure has been used at the request of the other State, or supplementary costs of experts, interpreters, or translators. Most States also consider as extraordinary costs the costs of judicial and bankruptcy proceedings. The agreement should provide a definition of extraordinary costs and consultation between the Contracting States should take place in any particular case where extraordinary costs are likely to be involved. It should also be agreed that, as soon as a Contracting State anticipates that extraordinary costs may be incurred, it will inform the other Contracting State and indicate the estimated amount of such costs so that the other State may decide whether such costs should be incurred. It is, of course, also possible for the Contracting States to provide that costs will be allocated on a basis different from what is described above; this may be necessary, for instance, where a request for assistance in collection is suspended or withdrawn under paragraph 7 or where the issue of costs incurred in providing assistance in collection is already dealt with in another legal instrument applicable to these States.

3. The Committee noted, in respect of the agreement referred to in the paragraphs quoted, that such an agreement shall take into account the differences in development of Contracting States. It could therefore be agreed that all costs, including ordinary costs, will be borne by one State only. In such a case, the Contracting States will have to agree on the costs. These could for instance be determined on the basis of a fixed amount. The OECD Commentary continues as follows:

9. In the agreement, the competent authorities may also deal with other practical issues such as:

- whether there should be a limit of time after which a request for assistance could no longer be made as regards a particular revenue claim;
- what should be the applicable exchange rate when a revenue claim is collected in a currency that differs from the one which is used in the requesting State;
- how should any amount collected pursuant to a request under paragraph 3 be remitted to the requesting State.

4. In relationship to this paragraph, the Committee noted an issue not specifically mentioned in the OECD Commentary, but consistent with it, of whether there should be a minimum threshold below which assistance will not be provided. The OECD Commentary continues as follows:

Paragraph 2

10. Paragraph 2 defines the term “revenue claim” for purposes of the Article. The definition applies to any amount owed in respect of all taxes that are imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the Convention or other instrument in force between the Contracting States. It also applies to the interest, administrative penalties and costs of collection or conservancy that are related to such an amount. Assistance is therefore not

restricted to taxes to which the Convention generally applies pursuant to Article 2, as is confirmed in paragraph 1.

11. Some Contracting States may prefer to limit the application of the Article to taxes that are covered by the Convention under the general rules of Article 2. States wishing to do so should replace paragraphs 1 and 2 by the following:

> "1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Article 1. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.
>
> 2. The term "revenue claim" as used in this Article means any amount owed in respect of taxes covered by the Convention together with interest, administrative penalties and costs of collection or conservancy related to such amount."

12. Similarly, some Contracting States may wish to limit the types of tax to which the provisions of the Article will apply or to clarify the scope of application of these provisions by including in the definition a detailed list of the taxes. States wishing to do so are free to adopt bilaterally the following definition:

> "The term "revenue claim" as used in this Article means any amount owed in respect of the following taxes imposed by the Contracting States, together with interest, administrative penalties and costs of collection or conservancy related to such amount:
>
> *a*) (in State A): …
> *b*) (in State B): ..."

13. In order to make sure that the competent authorities can freely communicate information for purposes of the Article, Contracting States should ensure that the Article is drafted in a way that allows exchanges of information with respect to any tax to which this Article applies.

14. Nothing in the Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims, in particular when the provisions concerning the entry into force of their convention provide that the provisions of that convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations.

Paragraph 3

15. This paragraph stipulates the conditions under which a request for assistance in collection can be made. The revenue claim has to be enforceable under the law of the requesting State and be owed by a person who, at that time, cannot, under the law of that State, prevent its collection. This will be the case where the requesting State has the right, under its internal law, to collect the revenue claim and the person owing the amount has no administrative or judicial rights to prevent such collection.

16. In many States, a revenue claim can be collected even though there is still a right to appeal to an administrative body or a court as regards the validity or the amount of the claim. If, however, the internal law of the requested State does not allow it to collect its own revenue claims when appeals are still pending, the paragraph does not authorise it to do so in the case of revenue claims of the other State in respect of which such appeal rights still exist even if this does not prevent collection in that other State. Indeed, the phrase "collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State" has the effect of making that requested State's internal law restriction applicable to the collection of the revenue claim of the other State. Many States, however, may wish to allow collection assistance where a revenue claim may be collected in the requesting State notwithstanding the existence of appeal rights even though the requested State's own law prevents collection in that case. States wishing to do so are free to modify paragraph 3 to read as follows:

> "When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State that met the conditions allowing that other State to make a request under this paragraph. "

17. Paragraph 3 also regulates the way in which the revenue claim of the requesting State is to be collected by the requested State. Except with respect to time limits and priority (see the Commentary on paragraph 5), the requested State is obliged to collect the revenue claim of the requesting State as though it were the requested State's own revenue claim even if, at the time, it has no need to undertake collection actions related to that taxpayer for its own purposes. As already mentioned, the phrase "in accordance with the provisions of its law applicable to the enforcement and collection of its own taxes" has the effect of limiting collection assistance to claims with respect to which no further appeal rights exist if, under the requested State's internal law, collection of that State's own revenue claims are not permitted as long as such rights still exist.

18. It is possible that the request may concern a tax that does not exist in the requested State. The requesting State shall indicate where appropriate the nature of the revenue claim, the components of the revenue claim, the date of expiry of the claim and the assets from which the revenue claim may be recovered. The requested State will then follow the procedure applicable to a claim for a tax of its own which is similar to that of the requesting State or any other appropriate procedure if no similar tax exists.

Paragraph 4

19. In order to safeguard the collection rights of a Contracting State, this paragraph enables it to request the other State to take measures of conservancy even where it cannot yet ask for assistance in collection, e.g. when the revenue claim is not yet enforceable or when the debtor still has the right to prevent its collection. This paragraph should only be included in conventions between States that are able to take measures of conservancy under their own laws. Also, States that consider that it is not appropriate to take measures of conservancy in respect of taxes owed to another State may decide not to include the paragraph in their conventions or to restrict its scope. In some States, measures of conservancy are referred to as "interim measures" and such States are free to add these words to the paragraph to clarify its scope in relation to their own terminology.

20. One example of measures to which the paragraph applies is the seizure or the freezing of assets before final judgement to guarantee that these assets will still be available when collection can subsequently take place. The conditions required for the taking of measures of conservancy may vary from one State to another but in all cases the amount of the revenue claim should be determined beforehand, if only provisionally or partially. A request for measures of conservancy as regards a particular revenue claim cannot be made unless the requesting State can itself take such measures with respect to that claim (see the Commentary on paragraph 8).

21. In making a request for measures of conservancy the requesting State should indicate in each case what stage in the process of assessment or collection has been reached. The requested State will then have to consider whether in such a case its own laws and administrative practice permit it to take measures of conservancy.

Paragraph 5

22. Paragraph 5 first provides that the time-limits of the requested State, i.e. time limitations beyond which a revenue claim cannot be enforced or collected, shall not apply to a revenue claim in respect of which the other State has made a request under paragraph 3 or 4. Since paragraph 3 refers to revenue claims that are enforceable in the requesting State and paragraph 4 to revenue claims in respect of which the requesting State can take measures of conservancy, it follows that it is the time-limits of the requesting State that are solely applicable.

23. Thus, as long as a revenue claim can still be enforced or collected (paragraph 3) or give rise to measures of conservancy (paragraph 4) in the requesting State, no objection based on the time-limits provided under the laws of the requested State may be made to the application of paragraph 3 or 4 to that revenue claim. States which cannot agree to disregard their own domestic time-limits should amend paragraph 5 accordingly.

24. The Contracting States may agree that after a certain period of time the obligation to assist in the collection of the revenue claim no longer exists. The period should run from the date of the original instrument permitting enforcement. Legislation in some States requires renewal of the enforcement instrument, in which case the first instrument is the one that counts for purposes of calculating the time period after which the obligation to provide assistance ends.

25. Paragraph 5 also provides that the rules of both the requested (first sentence) and requesting (second sentence) States giving their own revenue claims priority over the claims of other creditors shall not apply to a revenue claim in respect of which a request has been made under paragraph 3 or 4. Such rules are often included in domestic laws to ensure that tax authorities can collect taxes to the fullest possible extent.

26. The rule according to which the priority rules of the requested State do not apply to a revenue claim of the other State in respect of which a request for assistance has been made applies even if the requested State must generally treat that claim as its own revenue claim pursuant to paragraphs 3 and 4. States wishing to provide that revenue claims of the other State should have the same priority as is applicable to their own revenue claims are free to amend the paragraph by deleting the words “or accorded any priority” in the first sentence.

27. The words “by reason of their nature as such”, which are found at the end of the first sentence, indicate that the time limits and priority rules of the requested State to which the paragraph applies are only those that are specific to unpaid taxes. Thus, the paragraph does not prevent the application of general rules concerning time limits or priority which would apply to all debts (e.g. rules giving priority to a claim by reason of that claim having arisen or having been registered before another one).

Paragraph 6

28. This paragraph ensures that any legal or administrative objection concerning the existence, validity or the amount of a revenue claim of the requesting State shall not be dealt with by the requested State’s courts and administrative bodies. Thus, no legal or administrative proceedings, such as a request for judicial review, shall be undertaken in the requested State with respect to these matters. The main purpose of this rule is to prevent administrative or judicial bodies of the requested State from being asked to decide matters which concern whether an amount, or part thereof, is owed under the internal law of the other State. States in which the paragraph may raise constitutional or legal difficulties may amend or omit it in the course of bilateral negotiations.

5. The Committee noted in relation to this paragraph that any legal actions contesting the recovery measures taken by the requested State can of course be brought before the competent judicial authorities of that State. The OECD Commentary continues as follows:

Paragraph 7

29. This paragraph provides that if, after a request has been made under paragraph 3 or 4, the conditions that applied when such request was made cease to apply (e.g. a revenue claim ceases to be enforceable in the requesting State), the State that made the request must promptly notify the other State of this change of situation. Following the receipt of such a notice, the requested State has the option to ask the requesting State to either suspend or withdraw the request. If the request is suspended, the suspension should apply until such time as the State that made the request informs the other State that the conditions necessary for making a request as regards the relevant revenue claim are again satisfied or that it withdraws its request.

Paragraph 8

30. This paragraph contains certain limitations to the obligations imposed on the State which receives a request for assistance.

31. The requested State is at liberty to refuse to provide assistance in the cases referred to in the paragraph. However if it does provide assistance in these cases, it remains within the framework of the Article and it cannot be objected that this State has failed to observe the provisions of the Article.

32. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice or those of the other State in fulfilling its obligations under the Article. Thus, if the requesting State has no domestic power to take measures of conservancy, the requested State could decline to take such measures on behalf of the requesting State. Similarly, if the seizure of assets to satisfy a revenue claim is not permitted in the requested State, that State is not obliged to seize assets when providing assistance in collection under the provisions of the Article. However, types of administrative measures authorised for the purpose of the requested State's tax must be utilised, even though invoked solely to provide assistance in the collection of taxes owed to the requesting State.

33. Paragraph 5 of the Article provides that a Contracting State's time limits will not apply to a revenue claim in respect of which the other State has requested assistance. Subparagraph *a*) is not intended to defeat that principle. Providing assistance with respect to a revenue claim after the requested State's time limits have expired will not, therefore, be considered to be at variance with the laws and administrative practice of that or of the other Contracting State in cases where the time limits applicable to that claim have not expired in the requesting State.

34. Subparagraph *b*) includes a limitation to carrying out measures contrary to public policy (ordre public). As is the case under Article 26 (see paragraph 19 of the Commentary on Article 26), it has been felt necessary to prescribe a limitation with regard to assistance which may affect the vital interests of the State itself.

35. Under subparagraph *c*), a Contracting State is not obliged to satisfy the request if the other State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice.

36. Finally, under subparagraph *d*), the requested State may also reject the request for practical considerations, for instance if the costs that it would incur in collecting a revenue claim of the requesting State would exceed the amount of the revenue claim.

37. Some States may wish to add to the paragraph a further limitation, already found in the joint Council of Europe-OECD multilateral Convention on Mutual Administrative Assistance in Tax Matters, which would allow a State not to provide assistance if it considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles.