

Distr.: Restricted
25 October 2007

ENGLISH ONLY

**Economic and Social Council
Committee of Experts on International Cooperation
in Tax Matters**

Third session

Geneva, 29 October-2 November 2007

**Proposed commentary on article 26 (proposed 2007) of
the United Nations Model Double Taxation Convention
between Developed and Developing Countries**

**Proposed general considerations and commentary prepared
by the Interim Coordinator of the Subcommittee on Exchange
of Information***

Comparison of Convener's 2007 Draft to 2001 Commentary

United Nations Commentary (Comparison of Convener's 2007 Draft to 2001 Commentary)

Article 26 EXCHANGE OF INFORMATION

A. GENERAL CONSIDERATIONS

1. Article 26 embodies rules under which information may be exchanged to the widest possible extent, both to facilitate the proper application of the treaty and to assist the Contracting States in the enforcement of their domestic tax laws. Consequently, the obligation to exchange income under this Article should be interpreted broadly, and the limitations on that obligation should not be extended by analogy beyond their specific meaning. In particular, the Article should be understood to require the Contracting States to promote an effective exchange of information.

1.1. In a global economy, cooperation among nations on fiscal matters has become increasingly important, and the former reluctance of nations to concern themselves with the revenue laws of other countries mostly has disappeared. Article 26 provides a basis for the effective exchange of information between the Contracting States, whereas Article 27 provides for assistance in collection. From the perspective of many developing countries, Article 26 is particularly important not only for curtailing cross-border tax evasion and avoidance but also to curtail the capital flight that is often accomplished through such evasion and avoidance.

1.2. Much of the language of Article 26 is also found in the comparable article of the OECD Model Convention. Consequently, the OECD Commentary to that article generally is relevant in interpreting Article 26 of the United Nations Model Convention—reproduces Article 26 of. It should be understood, nevertheless, that Article 26 is intended to be broader in a number of respects than the comparable provision in the OECD Model Convention—with three substantive changes in paragraph 1, namely, the insertion of the phrase “in particular for the prevention of fraud or evasion of such taxes” in the first sentence, the insertion of the phrase “However, if the information is originally regarded as secret in the transmitting State” in the fourth sentence and the addition of a new sentence (sixth and last sentence). The latter sentence is the key to the approach advocated by the Group; it would stress the importance of the competent authorities in implementing fully the provisions on the exchange of information and will give them the necessary authority.

2. The words “in particular for the prevention of fraud or evasion of such taxes” were inserted at the request of members of the Group, mainly from developing countries, who wanted to emphasize that the exchange of information under article 26 covers the purpose of preventing fraud or evasion. The exchange of information for the prevention of fraud or evasion is subject to the general condition embodied in the first sentence of paragraph 1, that the taxation involved is not contrary to the Convention.

3. Since article 26 of the United Nations Model Convention reproduces the substance of all the provisions of Article 26 of the OECD Model Convention, the preliminary remarks

~~contained in the Commentary on the latter Article are relevant. These remarks read as follows:~~

~~“There are good grounds for including in a convention for the avoidance of double taxation provisions concerning cooperation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the Convention are to be applied. Moreover, in view of the increasing internationalization of economic relations,~~

1.3. Although Article 26 imposes reciprocal obligations on the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular Article of the Convention.” [para. 1]

~~“Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic laws of the Contracting States concerning taxes covered by the Convention and for the application of specific provisions of the Convention. The text of the Article makes it, it does not allow a developed country to refuse to provide information to a developing country on the ground that the developing country does not have an administrative capacity comparable to the developed country. Reciprocity has to be measured by reference to the overall effects of a treaty, not with respect to the effects of a single article.~~

1.4. The text of paragraph 1 of Article 26 makes clear that the exchange of information is not restricted by Article 1, so that (Persons covered) or Article 2 (Taxes covered). Consequently, the information may include particulars about non-residents.” [para. 2]

~~“The matter of administrative assistance for the purpose of tax collection is not dealt with in the Article. This matter is dealt with in the Convention on Mutual Administrative Assistance in Tax Matters, a multilateral convention that entered into force on 1 April 1995. This Convention was drawn up within the Council of Europe on the basis of a first draft prepared by the Committee on Fiscal Affairs and is open to the signature of the Member States of the Council of Europe and Member countries of the OECD. This matter can also form the subject of a separate bilateral agreement that can be negotiated between~~
exchanged may relate to persons who are not resident in either Contracting State and to the administration or enforcement of taxes not mentioned in Article 2. Some countries may object to the extension of paragraph 1 to all taxes, for constitutional reasons or other reasons. Those concerns are addressed in Section B, below.

1.5. Following the pattern of the 2005 OECD revisions, paragraph 1 of Article 26 was broken up into three separate paragraphs, now paragraphs 1, 2, and 7. This paragraphing change was made for clarity and has no substantive significance.

2. Article 26 was modified substantially in 2007, with a view to clarifying certain issues, expanding the scope of the Article, and limiting exceptions to the obligation to exchange information. In some cases, the changes made were not intended to be

substantive but rather were intended to remove doubts as to the proper interpretation of the Article. For example, the term “necessary” in paragraph 1 was changed to “may be relevant” to clarify the intended meaning of the prior language. In contrast, the change in that paragraph providing for an exchange of information with respect to taxes not mentioned in Article 2 was intended to be a substantive change.

2.1. In some cases, the issue of whether a change made to Article 26 is intended as substantive or interpretative depends on the prior practices of the Contracting States. For example, in some cases, the addition of paragraph 5, which removes, *inter alia*, domestic bank secrecy laws as a basis for refusing to exchange information, may simply clarify the meaning of the limitations on the exchange of information contained in paragraph 3. In other cases, it may modify that paragraph substantively. The effect of the change depends in part on the particular prior practices of the Contracting States. The position taken in the OECD Commentary is that paragraph 5 is primarily interpretative with respect to treaties between its member states. This issue may be of particular importance in interpreting treaties that were entered into prior to the adoption of the 2007 changes to Article 26.

2.2. One difference in the wording of Article 26 and the comparable provision of the OECD Model Convention is that Article 26 includes in paragraph 1 the following sentence: “In particular, information shall be exchanged that would be helpful to a Contracting State in preventing fraud or evasion of such taxes or in combatting tax avoidance.” The phrase “or combatting tax avoidance” was inserted in 2007. That change was thought to be useful by members of the committee, especially members from developing countries, to make clear in the text of Article 26 a point that already was clear in the Commentary and was implicit in the language of the last sentence of prior paragraph 1, now moved to paragraph 7. The statement of the purposes of information exchanges in the text of Article 26 is intended to provide guidance to the Contracting States on the basis of the Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims adopted by the Committee on Fiscal Affairs on 29 June 1979; alternatively, the provisions on assistance in the field of tax collection may be introduced in the double taxation convention, whenever proper interpretation of the Article.

2.3. Although tax evasion is illegal and tax avoidance is not, both result in the same loss of revenue to the government, and, by definition, both defeat the intent of the government in enacting its taxing statutes. Consequently, mutual assistance in combatting tax avoidance is an important aspect of mutual cooperation on tax matters. In addition, some forms of aggressive tax avoidance are so close to the line between avoidance and evasion that a Contracting States find it preferable.” [para. 3] State is unlikely to know for sure whether the information it is requesting deals with avoidance or evasion until after it obtains the requested information. Information on tax avoidance may be extremely useful to a Contracting State in its efforts to close possible loopholes in its taxing statutes.

3. The term “exchange of information” should be understood broadly to include an exchange of documents and an exchange of information unrelated to specific taxpayers.

3.1. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State should provide information under Article 26 in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the extent feasible. Under paragraph 3, the requested State may decline to provide the

information in the specific form requested if, for instance, the requested form is not known or permitted under its law or administrative practice. A refusal to provide the information in the form requested does not affect the obligation to provide the information.

3.2. Contracting States may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Indeed, the Contracting States may be obligated to provide requested information in electronic form if such action is necessary for an effective exchange of information. Contracting States which are required, according to their law, to observe data protection laws, may wish to include provisions in their bilateral conventions concerning the protection of personal data exchanged. Data protection concerns the rights and fundamental freedoms of an individual, and in particular, the right to privacy, with regard to automatic processing of personal data. In no event is a Contracting Party relieved of its obligation to exchange information simply because its domestic laws do not allow it to provide the information in the form requested.

3.3. The scope of exchange of information covers all tax matters without prejudice to the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. Exchange of information for criminal tax matters can also be based on bilateral or multilateral treaties on mutual legal assistance (to the extent they also apply to tax crimes).

3.4. Article 26 specifically provides for the exchange of information in at least three modes: exchange by specific request, automatic exchange, and other exchanges, understood to include spontaneous exchanges. According to the Commentary to the OECD Model Convention, that same result is reached by implication, without any specific language authorizing the three modes of exchange in the text of the OECD Model Convention. It is anticipated that the competent authorities will adopt procedures that will provide for the mode of exchange best suited to achieve an effective exchange of information.

3.5. Nothing in the United Nations Model Convention prevents the application of the provisions of Article 26 to the exchange of information that existed prior to the entry into force of the Convention, as long as the assistance with respect to this information is provided after the Convention 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 information, in particular when the provisions of that convention will have effect with respect to taxes arising or levied from a certain time.

4. The Committee of Experts has suggested some guidelines for arrangements regarding the implementation of appropriate exchanges of information. See Section C, below. Those guidelines are in the form of an inventory of options available to the competent authorities. The inventory is not intended to be exhaustive or to impose any procedural obligations on a Contracting State. Instead, the inventory is a listing of suggestions to be examined by competent authorities in developing procedures for an effective exchange of information.

B. COMMENTARY ON THE PARAGRAPHS OF ARTICLE 26

Paragraph 1

~~26. As noted above, this paragraph, while incorporating all the provisions of Article 26, paragraph 1, of the OECD Model Convention also contains three additions. The Commentary on that paragraph is therefore relevant: “The main rule (General rule)~~

5. The first sentence of paragraph 1 sets forth the basic obligation of the Contracting States concerning the exchange of information is contained in the first sentence of the paragraph. It requires, subject to the limitations of paragraph 3, that the competent authorities exchange such information as may be relevant for the proper application of the Convention or for the administration or enforcement of their domestic tax laws, as long as taxation under those laws is not inconsistent with the Convention.

5.1. Prior to the 2007 changes to Article 26, the term “necessary” was used instead of the term “may be relevant”. The view of the committee and the OECD Commentary has been that these terms have similar if not identical meanings. That is, the term “necessary” is understood to mean “appropriate and helpful,” not “essential”. In any event, whatever the phrase chosen, the requesting state is not obliged to demonstrate its need for the requested information before the obligation to provide that information arises.

5.2. The standard of “may be relevant” is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to request information about a particular taxpayer that is highly unlikely to be relevant to the tax affairs of that taxpayer. Contracting States may agree to an alternative formulation of this standard that is consistent with the scope of the Article. For example, they might replace “may be relevant” with “necessary” or “relevant” or “foreseeably relevant” (the OECD formulation) if those terms are understood to require an effective exchange of information. In the interests of clarity, however, the term “may be relevant” is preferred.

5.3. The information covered by paragraph 1 is not limited to taxpayer-specific information. The competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example, risk analysis techniques or tax avoidance or evasion schemes. They may also share information they have obtained about aggressive tax avoidance schemes, such as those promoted by some international accounting firms. In addition, the competent authorities may exchange information relating to a whole economic sector (e.g., the oil, fishing, or pharmaceutical industry, the banking sector, etc.) and not to particular taxpayers.

6. The scope of the obligation to exchange information is not limited by Articles 1 or 2. That is, the obligation applies not only with respect to information relevant to the proper application of the Convention or to the administration or enforcement of domestic taxes mentioned in Article 2 but also to all other domestic taxes, including subnational taxes. In this respect, the United Nations Model Convention and the OECD Model Convention, as amended in 2005, are identical.

6.1. Some members of the committee from developing countries expressed concern that sharing of information with respect to all taxes, particularly subnational taxes, might prove

burdensome or might raise constitutional and political issues for them. They suggested that the obligation to provide information might be limited to taxes covered by the Convention plus one or two important taxes, such as the value-added tax (VAT). To accomplish that outcome, the following language might be substituted for paragraph 1:

1. The competent authorities of the Contracting States shall exchange such information as ~~is necessary to secure the correct application~~ may be relevant for carrying out the provisions of the ~~is~~ Convention or for the administration or enforcement of the domestic laws of the Contracting States ~~concerning taxes covered by the Convention even if, in the latter case, a particular Article of the Convention need not be applied. Some countries replace 'necessary' with 'relevant' in their bilateral conventions, regarding this as a better way to express the sense of the provisions; in the view of the Committee on Fiscal Affairs, either word may be used in that context. In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only~~ and [insert specific taxes] of a Contracting State, in so far as the ~~national tax in question is covered by the Convention and the taxation under the domestic taxation laws concerned~~ taxation thereunder is not contrary to the Convention. An illustration may be cited in this connection: a request for the imposition of a sales tax need not be complied with by the requested State as it is not covered by the Convention.” [para. 5]

~~“The following examples may clarify the principle dealt with in paragraph 5 above. In all such cases information can be exchanged under paragraph 1.” [para. 6]~~

~~“Application of the Convention~~

~~(a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident for information concerning the amount of royalty transmitted.~~

~~(b) Conversely, in order to grant the relief provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last mentioned State and the beneficial owner of the royalties. (c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).” [para. 7] “Implementation of the domestic laws~~

~~(a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws. (b) A company in State A sells goods through a company in State C (possibly a low tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods. (c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for~~

6.2. The obligation to provide requested information applies whether or not the person, with respect to whom the information is requested, is a resident of either Contracting State or is engaged in economic activity in either Contracting State. For example, a Contracting State may request information about the ~~prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g., prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of subparagraph (c) of paragraph 2 relating to business and other secrets.” [para. 8]~~

~~“The rule laid down in paragraph 1 allows information to be exchanged in three different ways:~~

~~“(a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before request for information is made to the other State; (b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State...” (c) spontaneously, for example in the case of a State having acquired, through certain investigations, information which it supposes to be of interest to the other State.” [para. 9] “The manner in which the bank deposits of an individual who is resident in some third state.~~

7. The obligation imposed under paragraph 1 is for an effective exchange of information ~~agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States.” [para. 10]~~

~~“Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their cooperation. At the same time maintenance of such secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 1 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.” [para. 11]~~

~~“The information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes covered by the Convention. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for other purposes than those referred to, that State may not use the information for such other purposes but it must resort to means specially designed for those purposes (e.g., in case of a non-fiscal crime, to a treaty concerning judicial assistance).” [para. 12]~~

~~“Under this Article, information may not be disclosed to authorities that supervise the general administration of the Government of a Contracting State, but are not involved specifically in tax matters. In their bilateral negotiations, however, Member countries may agree to provide for disclosure to such supervisory bodies.” [para. 12.1]~~

~~“As stated above, the information obtained can be communicated to the persons and authorities mentioned but it does not follow from this that it can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. The last sentence of the paragraph, however, opens up this possibility. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this does not mean that the persons and authorities mentioned in paragraph 1 are allowed to provide on request additional information received. If either or both of not avoid its obligations under paragraph 1 through unreasonable time delays or by imposing unreasonable or burdensome procedural barriers.”~~

8. The examples in paragraphs 8.1 and 8.2, below, illustrate the application of paragraph 1 of the Convention in particular cases. Some of these examples are drawn from, but are not identical to, the examples provided in paragraphs 6 and 7 of the OECD Commentary on Article 26. In all of these examples, the requested state (the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.” [para. 13]

~~27. With regard to the additions to Article 26, paragraph 1, of the OECD Model Convention, the Group of Experts observed that the reference to fraud or evasion in paragraph 1 was intended to focus attention on the importance of exchanges of State that has been asked for information) has the obligation under paragraph 1 of the convention to provide the requested information.~~

8.1. Application of the Convention (between State A and State B)

(a) State A, where the recipient of royalties under a royalty contract is resident, is attempting to applying Article 12 (Royalties). It asks State B, where the payer of the royalty is resident, for information concerning the amount of royalty transmitted.

(b) In deciding whether it is proper to grant to the recipient of a royalty the relief claimed under Article 12, State B asks State A whether the recipient is in fact a resident of State A and is the beneficial owner of the royalties.

(c) In computing the taxable profits of a permanent establishment that is located in State A and has its head office in State B, State A may request information from State B about the expenses and profits of the head office and the dealings of the head office with other permanent establishments and associated companies.

(d) Similarly, if an associated company, within the meaning of Article 9, is located in State A and another associated company is located in State B, then State A may request information from State B about the profits and expenses of the associated company located in State B and about the dealings of that associated company with any other associated companies and permanent establishments.

(e) State A or State B may request information that ~~would assist the treaty partners in combating such practices. Since a number of countries were concerned with the need~~ may be relevant for the purposes of applying Article 25 (Mutual agreement procedure).

(f) State B is attempting to tax an employee resident in State A in accordance with Articles 15 (Dependent personal services). The employment has been exercised for more than 183 days in State B. That state may request that State A provide it with information on the amount of the income exempted from taxation in State A in accordance with Article 23 A (Exemption method for relieving double taxation).

(g) State A is attempting to impose a corporate income tax on an entity claiming to be a partnership. State A may request information from State B that would be helpful to it in properly classifying the entity for tax purposes, including information about the way the entity is classified for tax purposes by State B.

(h) State A is being asked to provide to one of its residents a tax credit under Article 23 B for income taxes allegedly paid to State B. State A may request from State B information about whether the alleged payment of the tax actually occurred.

8.2. Implementation of domestic laws

(a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods supplied, with a view to a correct application of the provisions of its domestic value-added tax.

(b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between State A and State B, State A, with a view to ensuring the correct application of the provisions of its domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.

(c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information ~~to assist in the administration of specific statutory provisions against tax avoidance and others were concerned with the need for information to assist in detecting other aspects of tax avoidance, the Group considered it advisable to include the reference in the last sentence of paragraph 1 to exchanges of information~~

regarding tax avoidance where the treaty partners deemed it appropriate. The reference in the same sentence to the consultations aimed at developing appropriate conditions, methods and techniques was designed to enable the treaty partners to work out the modalities for exchanges of information between them. 28. In the course of the discussion, members from developing countries observed that the proliferation of transnational corporations and the ever-growing sophistication and complexity of the forms taken by international business transactions were resulting in increasing tax avoidance and evasion. The view was expressed that such a situation might have reached a point where it could negate completely the effects of treaties for the avoidance of double taxation and raised the question whether steps should be taken outside and in addition to the existing framework of such treaties. One member from a developing country, supported by other members from developing countries, suggested that the quickest and most effective way of ensuring the exchange of information required to combat tax evasion efficiently would be through the conclusion of a multilateral agreement dealing specifically with the exchange of information and mutual assistance in tax administration.

29. While discussing the problems of tax havens, the Group felt that as a protection against improper manipulation of treaty benefits, consideration should be given in bilateral negotiations to the inclusion of a separate article along the following lines: “Each about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable State A to check the prices charged by the company in that state by direct comparison (e.g., prices charged by a company or a group of companies in a dominant position).”

(d) A resident of State A holds a bank account in State B, and the income from that account is exempt from tax under the domestic laws of State B. State A may request that State B provide information on the amount of interest income earned on that account.

(e) A financial intermediary invests money of its account holders in State A, earning therein dividends and interest. State A requires that the financial intermediary keep records of the beneficial owners of the accounts but does not routinely request those records in enforcing its domestic laws. State B suspects that some of the beneficiaries of the account holders of the financial intermediary are its residents and are properly taxable under its domestic laws. State B may request that State A obtain for it the information about the account holders from the financial intermediary.

(f) A corporation resident in State A has affiliated companies located in State B and State C. State B believes that the affiliated company doing business in its territory has been skimming profits into the affiliated company located in State C. State B may request that State A provide it with information about the profits and expenses of the affiliated company located in State C.

Paragraph 2 (Obligation to confidentiality)

9. A Contracting State cannot be expected to provide confidential financial information to another Contracting State unless it has confidence that the information will not be disclosed to unauthorized persons. To provide the assurance of secrecy required for effective information exchange, paragraph 2 provides that information communicated under the provisions of the convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.

10. Of course, the information received under Article 26 would be useless to the requesting State (the Contracting State requesting the information) if the prohibition against disclosure were absolute. Paragraph 2 provides that information received under Article 26 can be disclosed to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes mentioned in paragraph 1. In addition, it is understood that the information may also be communicated to the taxpayer, his proxy, or to witnesses in a civil or criminal proceeding.

10.1. As stated in paragraph 10, the information obtained can be communicated to the persons and authorities mentioned and on the basis of the last sentence of paragraph 2 of the Article can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this disclosure to the public does not mean that the persons and authorities mentioned in paragraph 2 are allowed to provide on request additional information received.

~~10.2. If either or both of the Contracting States should endeavour to collect on behalf of the other Contracting State such taxes imposed by that other Contracting State to the extent necessary to ensure that any exemption or reduced rate of tax granted under the treaty by that other Contracting State should not be enjoyed by persons not entitled to such benefits."~~

Paragraph 2

~~30. Since this paragraph reproduces Article 26, paragraph 2, of the OECD Model Convention, the Commentary on that paragraph is fully relevant:~~

~~"This paragraph contains certain limitations to the main rule in favour of the requested State. 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 in putting information at the disposal of the other Contracting State. However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized, even though invoked solely to provide information to the other Contracting State. Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to~~object to information obtained under Article 26 being

made public by courts, or, once the information has been made public in this way, to the information being used for other purposes, they should state this objection expressly in their convention.

~~11. In general, the information received under this Article. A Contracting State that under its domestic law is required to notify the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance.” [para. 14]~~

~~“Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that by a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system.” [para. 15]~~

~~“Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved, under the proviso may be used only for the purposes mentioned in paragraph 15 above.” [para. 16]~~

~~“The requested State is at liberty to refuse to give information in the cases 1. If the information appears to be of value to the receiving State for purposes other than those referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the Convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.” [para. 17]~~

~~“If the structure of that paragraph, that State may not use the information systems of two for such other purposes without the authorization of the competent authority of the supplying State. That authorization should not be unreasonably withheld.~~

11.1. In some cases, a Contracting States is very different, the conditions under subparagraphs (a) and (b) of paragraph 2 will lead to the result that State may prosecute a taxpayer for tax evasion and also for an additional crime, such as money laundering, that arises out of the same set of facts. In such circumstances, the receiving state may use the information provided for both purposes.

11.2. The information received by a Contracting State may not be disclosed to a third country without the authorization of the competent authority of the other Contracting State unless there is an express provision in the bilateral treaty between the Contracting States

~~exchange very little information or perhaps none at all. In such a case, allowing such disclosure.~~

11.3. Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2:

Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

12. The OECD Model Convention, as amended in 2005, includes a provision that would allow the sharing of information obtained under Article 26 with persons charged with the oversight of the persons allowed to obtain such information. This provision is not included in paragraph 2, due to opposition from some members of the Committee of Experts from developing countries, who feared that the oversight bodies, which typically are political entities, would not be subject under domestic law to the same strict rules of confidentiality as tax officials.

12.1. Excluding oversight bodies from the persons entitled to receive confidential information obtained through information exchange presents problems in some countries because their oversight bodies typically expect to have access to such information in order to fulfill their oversight duties. Contracting States wishing to address this issue without providing a blanket authorization for oversight bodies to receive confidential information might add the following language to the end of paragraph 2 of Article 26:

In appropriate cases, the competent authorities may agree to allow the sharing of information received under paragraph 1 with an oversight body if that information is necessary for the oversight body to fulfill its oversight duties. In such cases, members of the oversight body must be subject to confidentiality requirements at least as strict as those applicable to tax administration and enforcement officials.

12.2. Countries wishing to adopt the position taken in the OECD Model Convention with respect to the sharing of information obtained under paragraph 1 with oversight bodies may modify paragraph 2 as follows (the changed language shown in italics):

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, *or the oversight of the above*. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

12.3. If paragraph 2 is amended to permit information to be disclosed to oversight bodies, that disclosure should be limited to information necessary for those bodies to fulfill their oversight duties. Such oversight bodies include authorities that supervise tax administration and enforcement authorities as part of the general administration of the Government of a Contracting State. Such sharing is permitted only if the persons engaged in oversight activities are subject to confidential requirements at least as strict as those applicable to tax administration and enforcement officials. The competent authorities shall agree as to the bodies that constitute an oversight body within the meaning of this paragraph.

Paragraph 3 (Limitations on obligation to exchange information)

13. Paragraph 3 of Article 26 contains provisions that limit the obligation of the requested State under paragraph 1. The limitations provided in paragraph 3, however, may be superceded by the provisions contained in paragraphs 4, 5, and 6. The provisions of paragraph 3, read in conjunction with the provisions of paragraphs 4, 5, and 6, should not be read in a way that would prevent an effective exchange of information between the Contracting States ~~may find it appropriate to broaden the scope of~~. In addition, a Contracting State must disclose to the other Contracting State before it enters into a convention any specific provisions of its laws and administrative practice that it believes entitle it to avoid an obligation otherwise imposed by paragraph 1.

14. Paragraph 3(a), subject to the limitations provided in paragraph 4, 5, and 6, contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. For example, if a requested State is not permitted under its laws or administrative practice to seize private papers from a taxpayer without court authorization, it is not required to make such a seizure without court authorization on behalf of a requesting State even if the requesting State could make such a seizure without court authorization under its own laws or administrative practice. The purpose of this rule is to prevent Article 26 from creating an unintentional conflict between a Contracting State's obligation under Article 26 and its obligations under domestic law.

14.1. Domestic provisions requiring that information obtained by the tax authorities be kept secret should not be interpreted as constituting an obstacle to the exchange of information.” ~~[para. 18]~~

~~“In addition to the limitations referred to above, subparagraph (e) of paragraph 2 contains a reservation concerning~~ under paragraph 3(a) because the tax authorities of the requesting State are obligated under paragraph 2 to observe secrecy with regard to information received under this Article.

14.2. Paragraph 1 obligates a requested State to provide information with respect to all of the taxes of the requesting State, even if the requested State does not have a comparable tax. Paragraph 3(a) does not remove the obligation to provide information relating to taxes that the requested State does not impose. For instance, a requested State cannot avoid its obligation to provide information helpful to the requesting State in the enforcement of its value-added tax merely because the requested State does not have a value-added tax. Of course, the requested State may avoid the obligation to supply such information if it

cannot obtain that information under its normal administrative procedures, within the meaning of paragraph 3(b).

14.3. The purpose of paragraph 3(a) is to avoid traps for the unwary, not to create such traps. A Contracting State that believes that it is not required to obtain certain types of information on behalf of the other Contracting State because of its own laws or administrative practice (including the laws and administrative practice of its subnational governments) must disclose that position in writing prior to entering into a convention containing Article 26. It must also disclose the likely effects of that position on its ability to provide an effective exchange of information. For instance, if a Contracting State believes that one of its laws prevents it from providing the other Contracting State with information as to the beneficial owners of its resident companies or other juridical persons, it is obligated to give written notice of that position during the negotiation of the convention, with an explanation of the impact of that law on its obligations in relation to mutual assistance. Depending on the facts and circumstances of the particular case, a failure to disclose may eliminate the right of a Contracting State to invoke paragraph 3(a) to avoid its obligations under paragraph 1.

14.4. A Contracting State that changes its laws or administrative practice after entering into a convention containing paragraph 3(a) must disclose that change to the other Contracting State in timely fashion. Depending on the facts and circumstances of the case, such a change may constitute a material breach of the convention. In any event, a failure to provide timely notice of such a change may eliminate the right of a Contracting State to invoke paragraph 3(a) to avoid its obligations arising under paragraph 1.

14.5. A Contracting State that wishes to expand the scope of the limitation currently provided in paragraph 3(a) might modify that subparagraph as follows (new language in italics):

(a) To carry out administrative measures at variance with the laws and administrative practice of that Contracting State or of the other Contracting State even if that Contracting State knows and fails to disclose that specific provisions of its laws or administrative practice are likely to prevent an effective exchange of information;

15. Some countries are required by law to notify the person supplying information and/or the taxpayer subject to an enquiry prior to the release of that information to another country. Such notification procedures may be an important aspect of the rights provided under domestic law. In some cases, notification may help prevent mistakes (e.g., in cases of mistaken identity) and may facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State). Notification procedures may not be applied, however, in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State to prevent fraud or evasion of taxes or to combat tax avoidance. That is, they should not prevent or unduly delay an effective exchange of information. For instance, notification procedures should permit exceptions from prior notification in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the requesting State.

15.1. A Contracting State that under its domestic law is required to notify the person who provided the information and/or the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance. Such information should be provided to the other Contracting State before a convention is concluded and thereafter whenever the relevant rules are modified. Depending on the facts and circumstances of the particular case, a failure to disclose may eliminate the right of a Contracting State to invoke paragraph 3(a) to avoid its obligations under paragraph 1.

16. In general, the requested State is not obligated to carry out administrative measures on behalf of the requesting State that are not permitted under the laws or administrative practice of the requesting State. Thus, a requested State that is permitted under its own administrative practices to seize documents in the possession of a taxpayer without court authorization may refuse to seize such documents on behalf of a requesting State if the requesting State would be precluded by law from making such a seizure itself without court authorization. The purpose of this rule is to prevent a requesting State from using the administrative measures of the requested State to avoid limitations imposed on the requesting State by its own government.

16.1. Different countries will necessarily have different mechanisms for obtaining and providing information. Variations in laws and administrative practice may not be used as a basis for the requested State to deny a request for information unless the effect of these variations would be to limit in a significant way the requesting State's legal authority to obtain and provide the information if the requesting State itself received a legitimate request from the requested State.

16.2. The general rule of paragraph 16 has no application when the legal system or administrative practice of only one country provides for a specific procedure. For instance, a Contracting State requested to provide information about an administrative ruling or advance pricing agreement (APA) it has granted cannot point to the absence of a ruling or APA regime in the requesting State to avoid its obligation under paragraph 1 to provide such information.

17. Most countries recognise under their domestic laws that information cannot be obtained from a person to the extent that such person can claim the privilege against self-incrimination. A requested State, therefore, may decline to provide information if its self-incrimination rules preclude it from obtaining that information or if the self-incrimination rules of the requesting State would preclude it from obtaining such information under similar circumstances. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. In the overwhelming majority of information requests, the objective is to obtain information from third parties such as banks, intermediaries, or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

18. Subparagraph 3(b) allows a requested State to avoid an obligation otherwise imposed by paragraph 1 when it cannot obtain the requested items of information in the normal course of its administration or when the other Contracting State could not have

obtained that information in the normal course of its administration. The purpose of this rule is to prevent the requesting State from imposing unreasonable burdens on the requested State.

18.1. Information is deemed to be obtainable in the normal course of administration if the information is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons. For instance, if the requested State, as part of its audit policies, obtains information about the appropriateness of the transfer prices used by its taxpayers in dealings with associated companies, it is deemed to be able to obtain similar information about its taxpayers and associated companies on behalf of a requesting State.

18.2. Unless otherwise agreed to by the Contracting States, it can be assumed that the information requested by a Contracting State could be obtained by that State in a similar situation unless that State has informed the other Contracting State to the contrary.

18.3. It is often anticipated, when a convention is entered into between a developed country and a developing country, that the developed country will have a greater administrative capacity than the developing country. Such a difference in administrative capacity does not provide a basis under subparagraph 3(b) for either Contracting State to avoid an obligation to supply information under paragraph 1. That is, paragraph 3 does not require that each of the Contracting States receive reciprocal benefits under Article 26. In freely adopting a convention, the Contracting States presumably have concluded that the convention, viewed as a whole, provides each of them with reciprocal benefits. There is no presumption, however, that each of the articles, or each subparagraph of each article, provides a reciprocal benefit. On the contrary, it is commonplace for a Contracting State to give up some benefit in one article in order to obtain a benefit in another article. Reading a specific reciprocity requirement into paragraph 3 of Article 26 would be inconsistent with the normal understanding of how convention negotiations are conducted.

18.4. Although subparagraphs 3(a) and 3(b) do not explicitly provide for reciprocity in benefits, the OECD Commentary to Article 26 has taken the position that a reciprocity requirement can be inferred from the language of subparagraph 3(b), which, *inter alia*, limits the obligation of a Contracting State to supply information obtainable in the normal course of administration of that other Contracting State. In effect, the OECD Commentary is reading the term “obtainable” to mean that the other Contracting State has the actual administrative capacity to obtain that information. The alternative reading is that “obtainable” means that the tax administration has the authority to obtain the information, whether or not it has the capacity to exercise that authority. As noted above, this latter reading is more consistent with the purpose of Article 26. It should also be noted that the OECD Commentary has interpreted the alleged reciprocity requirement narrowly to prevent it from reducing Article 26 to a nullity.

18.5. In light of the position taken in the OECD Commentary, some countries may wish to clarify the matter of a reciprocity requirement by amending subparagraph 3(b) to read as follows:

(b) To supply information that cannot be obtained in the normal course of the administration of that Contracting State or is not obtainable under the laws of that Contracting State or of the other Contracting State;

19. In general, a requested State may decline, under paragraph 3(b), to disclose information that constitutes a confidential communication between an attorney, solicitor, or other admitted legal representative in his role as such and his client to the extent that the communication is protected from disclosure under domestic law.

19.1. The scope of protected confidential communications should be narrowly defined. Such protection does not attach to documents or records delivered to an attorney, solicitor, or other admitted legal representative in an attempt to protect such documents or records from disclosure required by law. Also, information on the identity of a person such as a director or beneficial owner of a company is not protected from disclosure. Although the scope of protection afforded under domestic law to confidential communications may differ among states, the protection provided under subparagraph 3(b) does not extend so broadly so as to hamper the effective exchange of information.

19.2. Notwithstanding the provisions of domestic law in the requested State, that State may decline to supply requested communications between attorneys, solicitors or other admitted legal representatives and their clients only if, and to the extent that, such representatives act in their capacity as attorneys, solicitors or other admitted legal representatives and not in a different capacity, such as nominee shareholders, trustees, settlors, company directors, or accountants, or under a power of attorney to represent a company in its business affairs. More specifically, the communication must have been produced in good faith for the purpose of seeking or providing legal advice or for use in existing or contemplated legal proceedings.

19.3. In no event may a requested State decline to disclose communications between attorneys, solicitors or other admitted legal representatives and their clients if those persons have themselves participated with their clients in a plan to commit tax evasion or fraud.

19.4. A claim that information is protected as a confidential communication between an attorney, solicitor or other admitted legal representative and its client should be adjudicated exclusively in the Contracting State under the laws of which the claim arises. Thus, it is not intended that the courts of the requested State should adjudicate claims based on the laws of the requesting State.

20. Subparagraph 3(c) permits a requested State to decline to provide information if the disclosure of ~~certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense~~ that information would reveal any trade, business, industrial, commercial or professional secret or trade process. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. ~~Otherwise it is clear that too wide an~~Secrets mentioned in this subparagraph should not be taken in too wide a sense. A wide interpretation ~~would in many cases~~of the provision in many cases would be inconsistent with the purpose of Article 26 because it would render ineffective the exchange of information provided for in ~~the Convention. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the~~that Article.

20.1. A trade or business secret or trade process is generally understood to mean information which has considerable economic importance and which can be exploited practically and the unauthorised use of which may lead to serious damage (e.g., may lead to severe financial hardship). The purpose of the secrecy exception is to prevent an exchange of

information from imposing unfair hardship on taxpayers by revealing to their competitors or potential competitors valuable secret information and thereby significantly diminishing the commercial value of that information. Secret information that once had substantial commercial value may be disclosed if that information does not have substantial commercial value at the time the information is requested. Information is not secret within the meaning of subparagraph 3(c) simply because the disclosure of it would be embarrassing to the taxpayer or to a third party or may result in the taxpayer having to pay additional taxes. A Contracting State may decide to supply requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy. It is open to the Contracting States to add further dispensations from the obligation to supply information to the items listed in subparagraph (c), for example, information protected by provisions on banker's discretion. It has been felt necessary also to prescribe when it finds that there is no reasonable basis for assuming that the taxpayer involved may suffer adverse consequences incompatible with information exchange.

20.2. Secret information may be disclosed to the requesting State if the requested State determines that the risk of disclosure to the public or to competitors is highly unlikely due to the confidentiality requirements set forth in paragraph 2. A document that is protected from full disclosure because it contains protected secret information may be disclosed if the secret information is removed.

20.3. Financial information, including books and records, does not by its nature constitute a trade, business or other secret. In certain limited cases, however, the disclosure of financial information might reveal a trade, business or other secret. For instance, a request for information on certain purchase records may raise such an issue if the disclosure of such information would reveal the proprietary formula used in the manufacture of a product. The protection of such information may also extend to information in the possession of third persons. For instance, a bank might hold a pending patent application for safe keeping, or a secret trade process or formula might be described in a loan application or in a contract held by a bank. In such circumstances, details of the trade, business or other secret should be excised from the documents and the remaining financial information exchanged accordingly.

21. Paragraph 3(c) also includes a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated Under that limitation, Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*).” [para. 19]

). This limitation should only become relevant in extreme cases. For instance, such a case could arise if a tax investigation in the requesting State were motivated by political, racial, or religious persecution. The limitation may also be invoked when the information constitutes a state secret. For instance, there is no disclosure requirement when sensitive information is held by secret services, the disclosure of which would be contrary to the vital interests of the requested State. Thus, issues of public policy (*ordre public*) rarely arise in the context of information exchange between treaty partners.

22. As discussed above, paragraph 3 may give a requested State the right to refuse to supply information under some circumstances. It is not required, however, to invoke any of the limitations of that paragraph. If the requested State declines to exercise its right under paragraph 3 and supplies the requested information, the information exchanged remains within the framework of Article 26. Consequently, the information is subject to the confidentiality

rules of paragraph 2. In addition, the affected taxpayer or other a third party has no ground for contending that the tax authorities in the requested State have failed to observe the obligation to secrecy imposed on them by domestic law.

Paragraph 4 (Removal of domestic tax interest requirement)

23. Paragraph 4 was added to the United Nations Model Convention in 2007. It is taken directly from the comparable provision added to the OECD Model Convention in 2005. As a result, the OECD Commentary to paragraph 4 is fully applicable in interpreting paragraph 4 of Article 26. The position taken in the OECD Commentary is that the addition of this paragraph was intended to assist in the interpretation of Article 26 and does not result in a substance change in the obligations implicit in the prior version of Article 26.

23.1. According to paragraph 4, a requested State must use its information gathering measures to obtain requested information even though those measures are invoked solely to provide information to the other Contracting State. The term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting State to obtain and provide the requested information. That is, a requested State does not need to have a domestic tax interest in obtaining the requested information for the obligation to supply information under paragraph 1 to apply.

23.2. As stated in the second sentence of paragraph 4, the obligation imposed by that paragraph generally is subject to the limitations contained in paragraph 3. An exception applies, however, that prevents a requested State from avoiding an obligation to supply information due to domestic laws or practices that include a domestic tax interest requirement. Thus, a requested State cannot avoid an obligation to supply information on the ground that its domestic laws or practices only permit it to supply information in which it has an interest for its own tax purposes.

23.3. For many countries, the combination of paragraph 4 and their domestic law provides a sufficient basis for using their information gathering measures to obtain the requested information even in the absence of a domestic tax interest in the information. Other countries, however, may wish to clarify expressly in the convention that Contracting States must ensure that their competent authorities have the necessary powers to do so. Contracting States wishing to clarify this point may replace paragraph 4 with the following text:

4. In order to effectuate the exchange of information as provided in paragraph 1, each Contracting State shall take the necessary measures, including legislation, rule-making, or administrative arrangements, to ensure that its competent authority has sufficient powers under its domestic law to obtain information for the exchange of information, regardless of whether that Contracting State may need such information for its own tax purposes.

Paragraph 5 (Secrecy Limitations)

24. Paragraph 4 was added to the United Nations Model Convention in 2007. It is taken directly from the comparable provision added to the OECD Model Convention in 2005. As a result, the OECD Commentary to paragraph 5 is fully applicable in interpreting paragraph 5 of Article 26. The discussion below of secrecy limitations draws heavily from the OECD Commentary. The position taken in the OECD Commentary is that the addition of this

paragraph was intended to assist in the interpretation of Article 26 and does not result in a substance change in the obligations implicit in the prior version of Article 26.

24.1. Paragraph 1 imposes a positive obligation on a Contracting State to exchange all types of information. Paragraph 5 is intended to ensure that the limitations of paragraph 3 cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees, agents and fiduciaries, as well as ownership information.

24.2. Paragraph 5 states that a requested State shall not decline to supply information to a requesting State solely because the information requested is held by a bank or other financial institution. Thus, paragraph 5 overrides paragraph 3 to the extent that paragraph 3 would otherwise permit a requested Contracting State to decline to supply information on grounds of domestic bank secrecy laws. Access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. The procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information.

24.3. Paragraph 5 also provides that a Contracting State shall not decline to supply information solely because the information is held by persons acting in an agency or fiduciary capacity. For instance, if a Contracting State has a law under which all information held by a fiduciary is treated as a “professional secret” merely because it was held by a fiduciary, such State could not use such law as a basis for declining to provide the information held by the fiduciary to the other Contracting State. A person acts in a “fiduciary capacity” when the business which the person transacts, or the money or property which the person handles, is not its own or for its own benefit but is held for the benefit of another person and when the fiduciary stands in a relationship to that other person implying and necessitating confidence and trust on the one part and good faith on the other part. A trustee is a common example of a person acting in a fiduciary capacity. The term “agency” is very broad and includes all forms of corporate service providers (e.g., company formation agents, trust companies, registered agents, lawyers).

24.4. Paragraph 5 states that a Contracting State shall not decline to supply information solely because the requested information relates to an ownership interest in a person, including companies and partnerships, foundations or similar organisational structures. Information requests cannot be declined merely because domestic laws or practices may treat ownership information as a trade or other secret.

24.5. Although paragraph 5 limits the ability of a requested State to rely on paragraph 3 to refuse to supply information held by a bank, financial institution, a person acting in an agency or fiduciary capacity or to refuse to supply information relating to ownership interests, that paragraph does not eliminate all protection under paragraph 3. The requested State may continue to refuse to supply such information if that refusal is based on substantial reasons unrelated to the status of the holder of the requested information as a bank, financial institution, agent, fiduciary or nominee, or to the fact that the information relates to ownership interests.

24.6. A requested State is not necessarily prevented by paragraph 5 from declining under paragraph 3(b) to supply information constituting a confidential communication between an attorney, solicitor, or other admitted legal representative and his client even if that person is acting in an agency capacity. To qualify for protection under paragraph 3(b), however, a requested State must demonstrate that the communication between the attorney, solicitor, or other admitted legal representative and his client meets all the requirements of that paragraph,

including that the communication is protected from disclosure under domestic law, that the refusal is unrelated to the status of the legal representative as an agent, fiduciary, or nominee, that any documents at issue were not delivered to the legal representative to avoid disclosure, and that nondisclosure would not frustrate an effective exchange of information.

24.7. Contracting States wishing to refer expressly to the protection afforded to confidential communications between a client and an attorney, solicitor or other admitted legal representative may do so by adding the following text at the end of paragraph 5:

Nothing in the above sentence shall prevent a Contracting State from declining to obtain or provide information which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are protected from disclosure under paragraph 3(b) and when the claim for protection under that paragraph is unrelated to the status of the legal representative as an agent, fiduciary, or nominee.

25. The following examples illustrate the application of paragraph 5:

(a) Company X owns a majority of the stock in a subsidiary company Y, and both companies are incorporated under the laws of State A. State B is conducting a tax examination of business operations of company Y in State B. In the course of this examination the question of both direct and indirect ownership in company Y becomes relevant, and State B makes a request to State A for ownership information of any person in company Y's chain of ownership. In its reply, State A should provide to State B ownership information for both company X and company Y.

(b) An individual subject to tax in State A maintains a bank account with Bank B in State B. State A is examining the income tax return of the individual and makes a request to State B for all bank account income and asset information held by Bank B in order to determine whether there were deposits of untaxed earned income. State B should provide the requested bank information to State A.

(c) Bank A in State A is suspected of entering into secret letters of agreement with some of its depositors that direct the bank to pay interest earned by those depositors to an unrelated offshore bank. State B requests that State A provide it with copies of those secret letters of agreement. Bank A asserts that the letters of agreement are legal documents protected from disclosure under the lawyer-client privilege. State A should provide the requested documents.

Paragraph 6 (Dual criminality)

26. The United Nations Model Convention does not require the existence of criminal activity in either of the Contracting States for the obligation to exchange information to arise. Paragraph 6 is included in the text of Article 26 primarily to deal with those limited number of treaties where criminal activity in the requested State is required under the terms of the treaty or under the domestic law of a Contracting State. It is also included, as a cautionary measure, to ensure that a requested State cannot use the absence of criminal activity in one or the other State to avoid its obligation to exchange information under Article 26. Some countries may conclude that the inclusion of paragraph 6 is unnecessary and should be omitted.

Paragraph 7

27. The first sentence of paragraph 7 was taken, with minor changes, from the last sentence of paragraph 1 of the Model Convention before its amendment in 2007. The remaining two sentences were added in 2007. Paragraph 7 specifically grants to the competent authorities the authority to establish procedures for an effective exchange of information. The OECD Model Convention does not contain paragraph 7 or an equivalent. The position taken in the OECD Commentary is that this authority is implicit in Article 26.

27.1. The rule laid down in paragraph 7 allows information to be exchanged “on a routine basis or on request with reference to particular cases, or otherwise.” “Or otherwise” would include spontaneous exchanges of information coming into the possession of one Contracting State and provided to the other Contracting State without request and outside the established program for routine exchanges.

27.2. To achieve an effective exchange of information, the competent authorities of the Contracting States must work together to establish procedures for the exchange of information, including routine exchanges, typically in electronic form. Paragraph 7 not only authorizes the competent authorities to make such arrangements but also gives them a mandate to do so.

27.3. Some members of the Committee of Experts have expressed a concern that information requests from a developed country to a developing country could place excessive burdens on the tax department in the developing country. That concern might be alleviated by making the requesting state responsible for extraordinary costs associated with a request for information. In this context, the question of whether a cost of obtaining requested information is extraordinary would be determined not by reference to some absolute amount but by reference to the cost relative to the overall budget of the tax department being asked to provide information. For example, a relative small absolute cost might be extraordinary for a tax department with very limited resources, whereas even a large absolute cost might not be extraordinary for a well-funded department.

27.4. Countries concerned about imposing substantial costs on developing countries might include the following language at the end of paragraph 7.

Extraordinary costs incurred in providing information shall be borne by the Contracting Party which requests the information. The competent authorities of the Contracting Parties shall consult with each other in advance if the costs of providing information with respect to a specific request are expected to be extraordinary.

~~4. The Group emphasized that in negotiating treaties for the avoidance of double taxation and tax evasion the competent authorities might wish to provide for the exchange of such information as was necessary for carrying out the provisions of the treaty or of the domestic laws of the Contracting States concerning taxes covered by the treaty. In that regard, the Group suggested guidelines for arrangements regarding the implementation of appropriate exchanges of information. Those guidelines are in the form of an inventory of possible arrangements from which the competent authorities under a tax treaty may select the particular arrangements which they decide should be used. The inventory is not intended to be exhaustive nor is it to be~~

regarded as listing matters all of which are to be drawn on in every case. Instead, the inventory is a listing of suggestions to be examined by competent authorities in deciding on the matters they wish to cover.

5. The Group also emphasized that the term “exchange of information” included an exchange of documents and that, subject to the provisions of paragraph 2 of the article if specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State should provide information under that article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the extent that it could obtain such depositions and documents under the laws and administrative practices applying in respect to its own taxes.⁺

C. INVENTORY OF EXCHANGE MECHANISMS

Routine transmittal of information²

~~628.~~ - A method of exchange of information is that of the routine or automatic flow of information from one treaty country to another. The term "transmitting country" refers to the country transmitting information, and the term "receiving country" refers to the country receiving information. The following are various aspects that the competent authorities should focus on in developing a structure for such routine exchange. In considering routine exchanges of information, it should be recognized that some countries not desiring to receive such information in a routine fashion (or unable to receive it routinely because the transmitting countries do not routinely collect such information) may desire to obtain information of this type under a specific request. Hence, in these situations, items mentioned in the present section should be considered as available for coverage under the next section, “Transmittal on specific request”.

Items covered

~~729.~~ - Regular sources of income. The items covered under a routine transmittal or exchange of information may extend to regular sources of income flowing between countries, such as dividends, interest, compensation (including wages, salaries, fees and commissions), royalties, rents and other possible items whose regular flow between the two countries is significant. It should be recognized that at present a few countries are not in a position to supply routine information of this type because their tax collection procedures do not provide the needed data.

Transactions involving taxpayer activity. A routine exchange of information may cover certain significant transactions involving taxpayer activity.

(a) Transactions relevant to the treaty itself:

Claims

1. Claims for refund of transmitting country tax made by residents of receiving country;

Claims

2. Claims for exemption or particular relief from transmitting country tax made by residents of receiving country;

- ~~_____~~ (b)- ~~_____~~ Transactions relevant to special aspects of the legislation of the transmitting country:
—Items of income derived by residents of the receiving country that receive exemption or partial relief under special provisions of the national law of the transmitting country;
- ~~_____~~ (c) ~~_____~~ Transactions relating to activities in the transmitting country of residents of the receiving country:
- ~~_____~~ ~~Opening~~
3. ~~_____~~ ~~Opening~~ and closing by receiving country residents of a branch, office etc. in the transmitting country;
- ~~_____~~ ~~Creation~~
4. ~~_____~~ ~~Creation~~ or termination by receiving country residents of a corporation in the transmitting country;
- ~~_____~~ ~~Creation~~
5. ~~_____~~ ~~Creation~~ or termination by receiving country residents of a trust in the transmitting country;
- ~~_____~~ ~~Opening~~
6. ~~_____~~ ~~Opening~~ and closing by receiving country residents of bank accounts in the transmitting country;
- ~~_____~~ ~~Property~~
7. ~~_____~~ ~~Property~~ in the transmitting country acquired by residents of the receiving country by inheritance, bequest or gift;
- ~~_____~~ ~~Ancillary~~
8. ~~_____~~ ~~Ancillary~~ probate proceedings in the transmitting country concerning receiving country residents;
- ~~_____~~ (d)- ~~_____~~ General information:
- ~~_____~~ ~~Tax~~
9. ~~_____~~ ~~Tax~~ laws, administrative procedures, etc. of the transmitting country;
- ~~_____~~ ~~Changes~~
10. ~~_____~~ ~~Changes~~ in regular sources of income flowing between countries, especially as they affect the treaty, including administrative interpretations of and court decisions on treaty provisions and administrative practices or developments affecting application of the treaty;
- ~~_____~~ ~~Activities~~
11. ~~_____~~ ~~Activities~~ that affect or distort application of the treaty, including new patterns or techniques of evasion or avoidance used by residents of the transmitting or receiving country;
- ~~_____~~ ~~Activities~~
12. ~~_____~~ ~~Activities~~ that have repercussions regarding the tax system of the receiving country, including new patterns or techniques of evasion or avoidance used by residents of either country that significantly affect the receiving country's tax system.

General operational aspects to be considered

830.- The competent authorities should consider various factors that may have a bearing on the operational character of the routine exchange, including its effectiveness. For example:

- (a)-** Countries that are more interested in receiving information on a specific request basis than on a routine basis, in their consideration of the specific request area, should keep in mind items mentioned in this inventory under the heading of routine information.
- (b)** A minimum floor amount may be fixed to limit minor data.
- (c)-** The routine source of income items may be rotated from year to year, for example, dividends only in one year, interest in another etc.
- (d)-** The information to be exchanged routinely need not be ~~strictly~~ reciprocal in all items. Country A may be interested in receiving information on some items but not others; the preferences of country B may extend to different items; it is not necessary for either country to receive items in which it is not interested, nor should either country refuse to transmit information on certain items simply because it is not interested in receiving information on those items.
- (e)-** While the information to be exchanged on income items may not always be significant in itself as regards the income flows escaping tax, the routine exchange may provide indications respecting the degree to which the capital or other assets producing the income flows are escaping tax.
- (f)-** Whether the information on items of income should cover the payee only or also the payer is a further point to be taken into account.
- (g)** Another factor to be considered is whether the information should cover only residents of the receiving country or also those domiciled therein or citizens thereof, or be limited to any of these categories.
- (h)-** The degree of detail involved in the reporting, e.g., name of taxpayer or recipient, profession, address, etc., may need to be taken into account.
- (i)-** The form and the language in which the information should be provided is a further point to be considered.

Factors to be considered by the transmitting country

931.- The transmitting country may wish to give consideration to factors affecting its ability to fulfil the requirements of a routine exchange of information. Such a consideration would presumably lead to a more careful selection of the information to be routinely exchanged rather than to a decision not to exchange information that could be of practical use.

4032.- Among the factors to be considered are the administrative ability of the transmitting country to obtain the information involved. This, in turn, is governed by the general effectiveness of its administrative procedures, its use of withholding taxes, its use of information returns from payers or others, and the overall costs of obtaining the information involved.

Factors to be considered by receiving country

~~14~~33.- The receiving country may wish to give consideration to factors affecting its ability to use the information that could be received under a routine exchange of information, such as the administrative ability of the receiving country to use the information on a reasonably current basis and effectively to associate such information with its own taxpayers, either routinely or on a sufficient scale to justify the routine receipt of the information.

Transmittal on specific request

~~12~~34.- A method of exchange of information that is in current use is that of a request for specific information made by one treaty country to another. The specific information may relate to a particular taxpayer and certain facets of his situation, or to particular types of transactions or activities, or to information of a more general character. The following are various aspects of the question that the competent authorities should focus on in developing a structure for such exchange of information pursuant to specific requests.

Items covered

~~13~~35.- *Particular taxpayers.* The information that may be desired from a transmitting country with respect to a receiving country taxpayer is essentially open-ended and depends on the factors involved in the situation of the taxpayer under the tax system of the receiving country and the relationship of the taxpayer and his activities to the transmitting country. A specific enumeration in advance of the type of information that may be within the scope of an exchange pursuant to specific request does not seem to be a fruitful or necessary task. The agreement to provide information pursuant to specific request may, thus, be open-ended as to the range, scope and type of information, subject to the overall constraints to be discussed herein.

~~14~~36.- The request for specific information may arise in a variety of ways. For example:

- (a)- Information needed to complete the determination of a taxpayer's liability in the receiving country when that liability depends on the taxpayer's worldwide income or assets; the nature of the stock ownership in the transmitting country of the receiving country corporation; the amount or type of expense incurred in the transmitting country; and the fiscal domicile of an individual or corporation;
- (b)- Information needed to determine the accuracy of a taxpayer's tax return to the tax administration of the receiving country or the accuracy of the claims or proof asserted by the taxpayer in defence of the tax return when the return is regarded as suspect or is under actual investigation;
- (c)- Information needed to determine the true liability of a taxpayer in the receiving country when it is suspected that his reported liability is wrong.

Particular types of transactions or activities. The exchange on specific request need not be confined to requests regarding particular taxpayers but may extend to requests for information on particular types of transactions or activities. For example:

- ~~_____~~ (a)- Information on price, cost, commission or other such patterns in the transmitting country necessary to enable the tax administration of the receiving country either to determine tax liability in a particular situation or to develop standards for investigation of its taxpayers in situations involving possible under- or over- invoicing of exported or imported goods, the payment of commissions on international transactions and the like;
- ~~_____~~ (b)- Information on the typical methods by which particular transactions or activities are customarily conducted in the transmitting country;
- ~~_____~~ (c)- Information on whether a particular type of activity is being carried on in the transmitting country that may have effects on taxpayers or tax liabilities in the receiving country.

~~1537~~.- *Economic relationships between the countries.* The specific request may extend to requests for information regarding certain economic relationships between the countries which may be useful to a country as a check on the effectiveness of its tax administration activities, for example:

- ~~_____~~ (a)- The volume of exports from the transmitting country to the receiving country;
- ~~_____~~ (b)- The volume of imports into the transmitting country from the receiving country;
- ~~_____~~ (c)- Names of banks dealing in the transmitting country with branches, subsidiaries, etc. of residents of the receiving country.

It should be noted that since items in this category, such as the volume of exports between the countries, are presumably not regarded as secret to the tax authorities in the transmitting country, they may be disclosed generally in the receiving country, as provided in ~~a~~Article 26.

Rules applicable to the specific request

~~1638~~.- The competent authorities should develop rules applicable to the transmission of specific requests by the receiving country and to the response by the transmitting country. These rules should be designed to facilitate a systematic operational procedure regarding such exchange that is both efficient and orderly. While the rules may be general in character in the sense that they set standards or guidelines governing the specific request procedures, the rules should also permit discussion between the competent authorities of special situations that either country believes require special handling.

~~_____~~ The rules should pertain to:

- ~~_____~~ (a)- The specificity of detail required in the request by the receiving country, the form of such request and the language of the request and reply;
- ~~_____~~ (b)- The extent to which the receiving country must pursue or exhaust its own administrative processes and possibilities before making a specific request;

presumably the receiving country should make a bona fide effort to obtain the information for itself before resorting to the specific request procedure;

- (c)- The conditions affecting the nature and extent of the response by the transmitting country. This aspect should cover the ability of the transmitting country to provide documentary material when the receiving country needs material in that form for use in judicial or other proceedings, including the appropriate authentication of the documents.

Transmittal of information on discretionary initiative of transmitting country (spontaneous exchange)

~~1739~~.- The competent authorities should determine whether, in addition to the routine and specific request methods of exchange of information under which a transmitting country is automatically transmitting information or systematically responding to specific requests by the receiving country, they desire a transmittal of information on the discretionary initiative of the transmitting country itself. Such a transmittal could occur when, in the course of its own activities, the tax administration of the transmitting country obtains information that it considers would be of importance to the receiving country. The information may relate to facets of a particular taxpayer's situation and the relationship of that situation to his liability in the receiving country or to the liability of other taxpayers in the receiving country. Or the information may relate to a pattern of transactions or conduct by various taxpayers or groups of taxpayers occurring in either country that is likely to affect the tax liabilities or tax administration of the receiving country in relation either to its national laws or to the treaty provisions.

~~1840~~.- The competent authorities will have to determine, under the standards governing the exchange of information developed pursuant to the treaty, whether it is the duty of a transmitting country affirmatively to develop a procedure and guidelines governing when such information is to be transmitted, whether such transmittal is to be considered by the transmitting country but is fully discretionary, or whether such transmittal need not even be considered by the transmitting country. Even if it is agreed that it is the duty of the transmitting country to develop a system for such transmittal, presumably the decision on when the conditions under that system have been met will rest on the discretionary judgement of the latter country.

Use of information received

~~1941~~.- The competent authorities will have to decide on the permissible use of the information received. The decisions on this matter basically depend on the legal requirements set forth in ~~a~~Article 26 itself. ~~Under the guideline,~~³ ~~+~~The extent of the use of information depends primarily on the requirements of national law regarding the disclosure of tax information or on other "security requirements" regarding tax information. This being so, it is possible that the extent of the disclosure or the restrictions on disclosure may vary between the two countries. However, such possible variance need not be regarded as inappropriate or as negating exchanges of information that would otherwise occur if the countries involved are satisfied with such a consequence under ~~a~~Article 26 as adopted in their convention.

Recipients of information received through exchange

~~2042~~.- The competent authorities will have to specify, either in detail or by reference to existing comparable rules in the receiving country, who the qualifying recipients of information in that country are. Under ~~a~~Article 26 the information can be disclosed, for example:

- ~~_____~~ (a)- To administrators of the taxes covered in the convention;
- ~~_____~~ (b)- To enforcement officials and prosecutors for such taxes;
- ~~_____~~ (c)- To administrative tribunals for such taxes;
- ~~_____~~ (d)- To judicial tribunals for such taxes;
- ~~_____~~ (e)- In public court proceedings or in judicial decisions where it may become available to the public if considered appropriate;
- ~~_____~~ (f)- To the competent authority of another country (see the section below entitled "Consultation among several competent authorities").

The form in which information is provided

~~2143~~.- The permissible extent of the disclosure may affect the form in which the information is to be provided if it is to be useful to the receiving country. Thus, if the information may be used in judicial tribunals, and if, to be so used, it must be of a particular character or form, then the competent authorities will have to consider how to provide for a transmittal that meets this need. (See also the comment on documents in the section above dealing with rules applicable to the specific request.)

Consultation among several competent authorities

~~2244~~.- Countries may wish to give consideration to procedures developed by the competent authorities for consultations covering more than the two competent authorities under a particular treaty. Thus, if countries A, B and C are joined in a network of treaties, the competent authorities of A, B and C might desire to hold a joint consultation. ~~This~~A joint meeting could be desired whether ~~or not~~ all three countries are directly intertwined, ~~by their treaty network~~. For example, ~~the joint meeting might be desirable~~ where there are A-B, A-C and B-C treaties, ~~or where one country is a link in a chain but not fully joined, for example, B-C treaties or~~ where there are A-B and B-C treaties but not an A-C treaty. Countries desiring to have their competent authorities engage in such consultations should provide the legal basis for the consultations by adding the necessary authority in their treaties. Some countries may feel that ~~a~~Article 26 permits joint consultation where all three countries are directly linked by bilateral treaties. However, the guideline does not cover joint consultation where a link in the chain is not fully joined, as in the second situation described above. In such a case, it would be necessary to add a treaty provision allowing the competent authority of country B to provide information received from country A to the competent authority of country C. Such a treaty provision could include a safeguard that the competent authority of country A must consent to the action of the competent authority of country B. Presumably, it would so consent only where it was satisfied as to the provisions regarding protection of secrecy in the B-C treaty.

Overall factors

2345.- There are a variety of overall factors affecting the exchanges of information that the competent authorities will have to consider and decide upon, either as to their specific operational handling in the implementation of the exchange of information or as to their effect on the entire exchange process itself. Among such overall factors are:

Factors affecting implementation of exchange of information

- (a)- The competent authorities should decide on the channels of communication for the different types of exchanges of information. One method of communication that may be provided for is to permit an official of one country to go in person to the other country to receive the information from the competent authority and discuss it so as to expedite the process of exchange of information.
- (b)- Some countries may have decided that it is useful and appropriate for a country to have representatives of its own tax administration stationed in the other treaty country. Such an arrangement would presumably rest on authority, treaty or agreements other than that in the article on exchange of information of the envisaged double taxation treaty (though, if national laws of both countries permit, this article would be treated as covering this topic), and the arrangement would determine the conditions governing the presence of such representatives and their duties. In this regard, it should be noted that it would not seem necessary that the process be reciprocal, so that it would be appropriate for country A to have its representatives in country B but not vice versa if country A considered the process to be useful and country B did not. If arrangements do exist for such representatives, then the competent authorities may want to coordinate with those representatives where such coordination would make the exchange of information process more effective and where such coordination is otherwise appropriate.
- (c)- Some countries may decide it is appropriate to have a tax official of one country participate directly with tax officials of the other country in a joint or "team" investigation of a particular taxpayer or activity. The existence of the arrangement for most countries would presumably rest on authority, treaty or agreements other than that in the envisaged treaty article on exchange of information, although, if national laws of both countries permit, this article could be treated by the countries as authorizing the competent authorities to sanction this arrangement. In either event, if the arrangement is made, it would be appropriate to extend to such an investigation the safeguards and procedures developed under the envisaged treaty article on exchange of information.
- (d)- The process of exchange of information should be developed so that it has the needed relevance to the effective implementation of the substantive treaty provisions. Thus, treaty provisions regarding intercompany pricing and the allocation of income and expenses produce their own informational requirements for effective implementation. The exchange of information process should be responsive to those requirements.
- (e)- The substantive provisions of the treaty should take account of and be responsive to the exchange of information process. Thus, if there is an adequate informational base for the exchange of information process to support allowing one country to deduct

expenses incurred in another country, then the treaty should be developed on the basis of the substantive appropriateness of such deduction.

- (f)- The competent authorities will have to determine to what extent there should be cost sharing or cost reimbursement with respect to the process of exchange of information.

Factors affecting structure of exchange of information process

- 2446.- (a)- It should be recognized that the arrangements regarding exchange of information worked out by country A with country B need not parallel those worked out between country A and country C or between country B and country C. The arrangements should in the first instance be responsive to the needs of the two countries directly involved and need not be fully parallel in every case just for the sake of formal uniformity. However, it should be observed that prevention of international tax evasion and avoidance will often require international cooperation of tax authorities in a number of countries. As a consequence, some countries may consider it appropriate to devise procedures and treaty provisions that are sufficiently flexible to enable them to extend their cooperation to multicountry consultation and exchange arrangements.
- (b)- The competent authorities will have to weigh the effect of a domestic legal restriction on obtaining information in a country that requests information from another country not under a similar domestic legal restriction. Thus, suppose country A requests information from country B, and the tax authorities in country B are able to go to their financial institutions to obtain such information, whereas the tax authorities in country A are generally not able to go to their own financial institutions to obtain information for tax purposes. How should the matter be regarded in country B? It should be noted that ~~Article~~ Article 26 here permits country B to obtain the information from its financial institutions and transmit it to country A. Thus, country B is not barred by its domestic laws regarding tax secrecy if it decides to obtain and transmit the information. ~~It is~~ Thus, it becomes a matter of discretion in country B as to whether it should respond, and may perhaps become a matter for negotiation between the competent authorities. It should be noted that many countries in practice do respond in this situation and that such a course is indeed useful in achieving effective exchange of information to prevent tax avoidance. However, it should also be noted that country A, being anxious to obtain information in such cases from other countries, should also recognize its responsibility to try to change its domestic laws to strengthen the domestic authority of its own tax administration and to enable it to respond to requests from other countries. It should be noted that countries that have entered into a tax convention that includes paragraph 5 of Article 26 of the United Nations Model Convention are required to provide information to its treaty partner notwithstanding its domestic bank secrecy laws.
- (c)- In addition to situations involving the legal imbalance discussed above, the competent authorities will have to weigh the effects of a possible imbalance growing out of a divergence in other aspects of tax administration. Thus, if country A cannot respond as fully to a request as country B can because of practical problems of tax administration in country A, then might the level of the process of exchange of information be geared to the position of country A? Or, ~~on the other hand,~~ in general

or in particular aspects, should country B be willing to respond to requests of country A even when country A would not be able to respond to requests of country B? This matter is similar to that discussed in the preceding paragraph, and a similar response should be noted.

(d)- It should be noted that Article 26 authorizes a transmitting country to use its administrative procedures solely to provide information to the requesting country, even when the person about whom information is sought is not involved in a tax proceeding in the transmitting country. Moreover, the transmitting country should, for the purpose of exchange of information, use its own administrative authority in the same way as if its own taxation were involved.

(e)- The competent authorities will have to weigh the effect on the process of exchange of information of one country's belief that the tax system or tax administration of the other country, either in general or in particular situations, is discriminatory or confiscatory. It may be that further exploration of such a belief could lead to substantive provisions in the treaty or in national law that would eliminate the problems perceived by the first country and thereby facilitate a process of exchange of information. One possible example of this is the treatment of non-permanent residents.

(f)- The competent authorities will have to weigh the effects that the process of exchange of information may have on the competitive position of taxpayers of the countries involved. Thus, if country A has a treaty with country B providing for exchange of information, country A will have to weigh the effect on the structure or process of that exchange of the fact that country C does not have a treaty with country B, so that firms of country C doing business in country B may be subject to a different tax posture in country B than firms of country A. Similarly, even if a treaty with an exchange of information article exists between countries C and B, if the tax administration of country A has more authority to obtain information (to be exchanged with country B) than does the tax administration of country C, or is otherwise more effective in its administration and, therefore, has more information, then a similar difference in tax posture may result. As a corollary, it seems clear that the adequate implementation of exchange of information provisions requires a universal effort of tax administrations to obtain and develop under national laws a capacity for securing information and a competence in utilizing information that is appropriate to a high level of efficient and equitable tax administration.

Periodic consultation and review

2547.- Since differences in interpretation and application, specific difficulties, and unforeseen problems and situations are bound to arise, provision must be made for efficient and expeditious consultation between the competent authorities. Such consultation should extend both to particular situations and problems and to periodic review of the operations under the exchange of information provision. The periodic review should ensure that the process of exchange of information is working with the requisite promptness and efficiency, that it is meeting the basic requirements of treaty implementation, and that it is promoting adequate compliance with treaty provisions and the national laws of the two countries.

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