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posed 2007) of the United Nations
eveloped and Developing Countries,
nge mechanisms are set out below. The
al of various limitations on an exchange of
the elimination of the rule allowing a
on to provide information based on the fact that
matter. Paragraph 5 requires a Contracting State to
notwithstanding domestic secrecy laws, including
eld by banks and fiduciaries. Paragraph 6 clarifies that
itled to requested information whether or not criminal
aragraph 7 authorizes the competent authorities to act in
bligations assumed by a Contracting State under paragraph 1.

considerations and proposed commentary on article 28 (proposed
hs 1 to 3, is contained in document E/C.18/2007/10.

* The present note has not yet been acted upon by the full Subcommittee. All comments received from members of the Subcommittee are reflected in the document. The views and opinions expressed are those of the authors and do not necessarily represent those of the United Nations.

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Contents

* See E/C.18/2007/10.

Commentary on paragraphs 4-7 of article 26 (proposed 2007)

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 f th
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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 non-disclosure 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

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 programme 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 on International Cooperation in Tax Matters 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

(iii) Creation or termination by receiving country residents of a trust in the transmitting country;

(iv) Opening and closing by receiving country residents of bank accounts in the transmitting country;

(v) Property in the transmitting country acquired by residents of the receiving country by inheritance, bequest or gift;

(vi) Ancillary probate proceedings in the transmitting country concerning receiving country residents;

(d) General information:

(i) Tax laws, administrative procedures etc. of the transmitting country;

(ii) 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;

(iii) 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;

(iv) 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

31. The competent authorities should consider various factors that may have a

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 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.

6. Overall factors

47. 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. Such overall factors include those set out below.

Factors affecting implementation of exchange of information

48. These include the following:

(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

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 the structure of the exchange of information process

49. These include the following:

(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 multi-country 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 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. 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.

Periodic consultation and review

50. 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.