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Mutual assistance in collection of tax debts and protocol for the mutual assistance procedure*

Summary

An integral part of the ability of transitional and developing countries to mobilize financial resources is strengthening their efforts to combat tax evasion and prevent tax avoidance, especially in an increasingly globalized economy. The present paper discusses the major efforts to increase tax information exchange agreements and develop mutual assistance in tax matters. The paper discusses the fact that developing countries may potentially request some type of economic incentives, such as sharing in the withholding revenue, as a quid pro quo for concluding a tax information exchange agreement and/or mutual assistance agreements and possibly for including such articles in income tax treaties. Annexed to the paper are draft articles on assistance in the collection of taxes, and service of documents.

* This paper was prepared by Mr. Bruce Zagaris. The views and opinions expressed are those of the author and do not necessarily represent those of the United Nations.

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Contents

Introduction

1. The Monterrey Consensus of the International Conference on Financing for Development,[1] held in Monterrey, Mexico, from 18 to 22 March 2002, emphasized "mobilizing and increasing the effective use of financial resources and achieving the national and international economic conditions needed to fulfil internationally agreed development goals" (para. 3). On 8 October 2000, the General Assembly adopted a resolution that, inter alia, expressed concern "about the obstacles developing countries face in mobilizing the resources needed to finance their sustained development".[2] The obstacles include erosion of the tax base and tax evasion and avoidance due to globalization. Similarly, the report of the Secretary-General on the outcome of the International Conference on Financing for Development called for the need to mobilize "domestic financial resources for development".[3]

2. The Secretary-General, in his report to the Preparatory Committee for the High-level International Intergovernmental Event on Financing for Development, at its second substantive session (12-22 February 2001), called on developing countries and countries with economies in transition to "undertake appropriate administrative and legislative measures to combat tax evasion and prevent tax avoidance".[4] In this regard, international institutions should assist, especially in facilitating South-South cooperation. The report called on countries to cooperate with each other to prevent capital flight and international tax avoidance and evasion (para. 31). The present paper proposes concrete ways to incorporate these goals into the work of the Ad Hoc Group of Experts on International Cooperation in Tax Matters and especially the United Nations Model Double Taxation Convention between Developed and Developing Countries.[5]

I. Existing agreements and mechanisms for mutual assistance in tax matters

3. Traditionally, mutual assistance in tax matters is provided for in the exchange-of-information article in income tax treaties.[6] This is reflected in the exchange-of-information articles in both the Organisation for Economic Cooperation and Development (OECD) Model Double Taxation Convention on Income and on Capital and the United Nations Model Double Taxation Convention between Developed and Developing Countries.

4. In recent years, the international community has started to broaden the exchange-of-information provisions in double taxation agreements. Simultaneously,

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[1] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex.

[2] See General Assembly resolution 55/2 containing the United Nations Millennium Declaration, para. 14.

[3] See document A/57/344 of 23 August 2002, para. 4.

[4] See document A/AC.257/12, boldface text between paras. 33 and 34.

[5] United Nations publication, Sales No. E.01.XVI.2.

[6] For a useful discussion of exchange of information and mutual assistance in tax matters, see Stef van Weeghel, "The system of exchange of information and its recent developments", *Tax Review*, No. 214 (12 May 2003).

multilateral conventions have provided for mutual assistance in tax matters rather than just exchange of tax information. In particular, the 1988 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 April 1995, covers, in addition to exchange of information, service of documents and collection of tax debts.

5. In 1998, as part of its harmful tax practices initiative, which aims at reducing harmful tax practices, especially with respect to geographically mobile activities, such as financial and other service activities,[7] OECD focused on lack of effective exchange of information as one of the causes of harmful tax practices. Similarly, lack of effective exchange of information due to secrecy laws is also noted as a principal element of harmful preferential tax regimes in OECD countries. OECD recommended that countries have reporting rules in place for resident taxpayers with respect to international transactions and foreign operations, and that countries exchange the information on these matters. The OECD report also recommended a greater and more efficient use of the exchange-of-information instruments contained in tax treaties and the above-mentioned multilateral Convention on Mutual Administrative Assistance in Tax Matters.[8] In implementing this recommendation, the OECD Committee on Fiscal Affairs has broadened the scope of article 26 of the OECD Model Convention to encompass taxes not otherwise covered by the Convention.[9] The Committee also recommended that countries exchange information on preferential tax regimes resulting from administrative decisions.[10]

6. To ascertain the state of the art in mutual assistance in tax matters requires a consideration of the following: (a) article 26 of the United Nations Model Double Taxation Convention between Developed and Developing Countries; (b) articles 26 and 27 of the OECD Model Double Taxation Convention; (c) the Convention on Mutual Administrative Assistance in Tax Matters; (d) the OECD Agreement on Exchange of Information on Tax Matters; (e) the EU Directive on Exchange of Information; (f) the EU Savings Tax Directive; (g) the EU Directive on Mutual Assistance for the Recovery of Claims; (h) the OECD Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims; and (i) the findings of the report on improving access to bank information for tax purposes.[11] But for the space limitations, this paper would have discussed the provisions of selected bilateral tax treaties and existing treaties on mutual legal assistance in criminal matters.

7. After reviewing these instruments, a discussion of potential incentives that developing countries may want to request for entering into tax information exchange agreements (TIEAs) and mutual assistance arrangements, and proposed provisions of two new articles of the United Nations Model Double Taxation Convention between Developed and Developing Countries will be considered.

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[7] OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris, 1998), submitted to the OECD Ministers on 27 and 28 April 1998 (hereinafter referred to as the Harmful Tax Competition report).

[8] Ibid., recommendation 8.

[9] Ibid., para. 117.

[10] Ibid., para. 116.

[11] OECD Committee on Fiscal Affairs, *Improving Access to Bank Information for Tax Purposes* (Paris, 2000). The OECD Committee declassifed this report on 24 March 2000, in accordance with Council resolution C(97)64/FINAL, and approved its publication (hereinafter referred to as the Access to Bank Information for Tax Purposes report).

A. United Nations Model Double Taxation Convention between Developed and Developing Countries

8. Article 26 of the United Nations Model Double Taxation Convention is limited to exchange of information. It is very similar to the provisions of the OECD Model Convention, but with three substantive changes in paragraph 1. Article 26(1) of the United Nations Model Double Taxation Convention contains a phrase that states that exchange of information will be carried out in particular to prevent fraud or evasion of income taxes. In addition, a second phrase not found in the OECD Model is the following: "(h)owever, if the information is originally regarded as secret in the transmitting State". The sentence containing the phrase goes on to state that said information will 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 that are the subject of the Convention. Article 26(1) of the United Nations Model Double Taxation Convention has a final sentence also not found in the OECD Model Convention. The sentence reads as follows: "The competent authorities shall, through consultation, develop appropriate conditions, methods and techniques concerning the matters in respect of which such exchanges of information will be made, including, where appropriate, exchanges of information regarding tax avoidance."

1. Scope

9. Article 26(2) clarifies the fact that the exchange of information is not restricted by article 1, so that the information may include particulars about non-residents of the parties.

10. The taxes covered by article 26 of the United Nations Model Double Taxation Convention are limited to "the taxes covered by the Convention, in so far as the taxation thereunder is not contrary to the Convention". In contrast, the OECD Model covers "taxes of every kind and description imposed on behalf of the Contracting State, or of their political subdivisions or local authorities". Article 26(1) of the OECD Convention specifically states that the exchange of information is not restricted by articles 1 and 2.

2. Methods of exchange of information and/or assistance

11. The commentary to the United Nations Model Double Taxation Convention describes methods for exchanging tax information:

(a) Routine or automatic transmittal of information: one treaty country furnishes information to another on various aspects, such as regular sources of income and transactions involving taxpayer activity;[12]

(b) Transmittal on specific request: one treaty country makes a specific request to another country that may relate to a particular taxpayer and certain aspects of his situation or to particular types of transactions or activities or to information of a more general character;[13]

[12] United Nations Model Double Taxation Convention, article 26 commentary, pp. 354-357.
[13] Ibid., pp.358-361.

(c) Spontaneous exchange: the commentary advises that the competent authorities should determine whether they desire a transmittal of information on the discretionary initiative of the transmitting country and, if so, the standards governing such exchanges;[14]

(d) Tax examinations abroad: the commentary states that article 26 may provide for such arrangements and the process need not be reciprocal;[15]

(e) Simultaneous or joint examinations: the commentary states that some countries may decide to provide under the article for joint or "team" investigations of a particular taxpayer or activity;[16]

(f) Collection assistance: in December 1997, during the eighth meeting, several members of the Ad Hoc Group of Experts observed that some treaties had provisions for collection assistance under article 26, even though neither the United Nations nor the OECD Model Convention contained such a provision. In consideration of article 26, the Ad Hoc Group of Experts decided to examine whether the United Nations Model Double Taxation Convention or the commentaries should include provisions for collection assistance. The Group agreed with the suggestion of a member from a developed country to include the material dealing with "Assistance in recovery" in the commentaries that might be considered by contracting States during bilateral negotiations. Already the commentary says that, to protect against improper manipulation of treaty benefits, consideration should be given in bilateral negotiations to the inclusion of a separate article whereby the contracting States should try 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.[17] Other double taxation treaties have included provisions on collection assistance that are broader than the provisions in the United Nations Model Double Taxation Convention: they are not limited to ensuring that "any exemption or reduced rate of tax granted under the treaty ... should not be enjoyed by persons not entitled to such benefits".

3. Confidentiality

12. To assure reciprocal assistance between tax administrators, a requesting State must agree to treat with proper confidence the information that it will receive in the course of their cooperation. The receiving State agrees to treat such information communicated as secret in the receiving State in the same way as information obtained under the domestic laws of that State. Sanctions for violation of such secrecy in that State are governed by the administrative and penal laws of that State.[18] The secrecy provision of the Convention on Mutual Administrative Assistance in Tax Matters provides for the strictest regime of furnishing or receiving State to apply. The latter provision is analogous to the provision in the EU Directive on the Exchange of Information, perhaps because in bilateral situations the contracting States are to a greater extent informed about the secrecy regime of their

[14] Ibid., p. 361.
[15] Ibid., p. 364.
[16] Ibid., p. 365.
[17] Ibid., article 26 commentary, para. 29, (p. 374).
[18] Ibid., pp. 371-72.

treaty partner and hence may ascertain whether this is stringent enough. The Convention on Mutual Administrative Assistance in Tax Matters is a multilateral convention to which many countries potentially can become party. The secrecy regimes of these countries may vary considerably hence the reason behind the "dual secrecy provision" may be to provide States with the security that the confidentiality observed by the other State will always be at least equal to that observed under their own regime.

13. The information obtained may be disclosed only to persons and 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 that are the subject of the Convention. As exchange of information is broadened to cover taxes of every kind, as has occurred in the OECD Model Convention since 2000, it may be appropriate to reconsider the limitation of the exchange to the taxes that are the subject of the Convention. The persons already eligible to receive the information include courts and administrative bodies, the taxpayer, his proxy (that is to say, his counsel) or witnesses. The Convention on Mutual Administrative Assistance in Tax Matters requires prior authorization from the providing State before the receiving State can disclose the information transmitted in court sessions held in public or in decisions that reveal the name of the taxpayer.

14. The information received by a contracting State may be used only for the purposes of tax assessment and collection. If the information is 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 must resort to means specially designed for those purposes (such as judicial assistance or mutual assistance in criminal matters for non-fiscal crime or mini-administrative penal conventions for securities or commodities futures regulatory matters). Article 26 does not provide for a special authorization procedure as does the Convention on Mutual Administrative Assistance in Tax Matters, under which the providing State may authorize the use of the information provided for tax purposes for other purposes or the transmission of such information to a third party.[19]

15. The commentary to the United Nations Model Double Taxation Convention does not allow the disclosure of information to authorities that supervise the general administration of the Government of a contracting State, but are not involved specifically in tax matters. However, contracting States may agree to provide for disclosure to such supervisory bodies.[20]

4. Exemptions to the requirement to exchange information

16. Paragraph 2 contains the limitations to the requirements to provide assistance for the benefit of the requested State. Three main exemptions apply. The requested State need not carry out administrative measures at variance with the domestic laws and administrative practice of that or of the other contracting State. Another ground for a refusal to furnish information is that such information is not obtainable under the laws or in the normal course of the administration of that or of the other contracting State. This provision prevents a contracting State from taking advantage

[19] Council of Europe-OECD Treaty on Mutual Administrative Assistance in Tax Matters, article 22.

[20] United Nations Model Double Taxation Convention ..., p. 372.

of the information system of the other contracting State if it is wider than its own system. Some mutual assistance agreements and jurisprudence overcome this limitation.[21] In addition, the requested State may also refuse to furnish information that is unobtainable under its own laws or in the normal course of its own administration. If applied broadly, the application of both these grounds of refusal may result in the exchange of little information. A third argument for exempting a requested State from the obligation to furnish information is that the request would disclose some trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy.

B. Organisation for Economic Cooperation and Development (OECD) Model Double Taxation Convention on Income and on Capital

17. The most important difference in the types of exchange of information or assistance required in the OECD and United Nations Model Conventions lies in the existence of article 27 (Assistance in the collection of taxes) in the latter. Article 27(1) requires the contracting States to provide assistance to each other in the collection of revenue claims and not to restrict such assistance by articles 1 (Persons covered) and 2 (Taxes covered).

18. Article 27(2) provides that the term “revenue claim” means “an amount owed in respect of taxes of every kind and description imposed on behalf of the contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount”. Hence, the scope of revenue covered is quite broad, including all kinds of taxes, for example, of political subdivisions or local authorities.

19. Article 27(3) provides that when a revenue claim of one contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim must, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other contracting State. The requested State shall collect the claim in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

20. Article 27(4) provides that, when a revenue claim of a contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensuring its collection, that revenue claim must, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other contracting State.

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[21] In *re Commissioner’s Subpoenas. United States,* U.S. Ct. of App. for the 11th Cir., No. 02-10418, Mar. 31, 2003 (in a smuggling revenue case under a United States-Canada Mutual Legal Assistance Treaty (MLAT), the appellate court upheld the issuance of a subpoena by the United States in a pre-charge investigatory stage even though Canadian law did not allow the issuance of subpoenas by the Canadian Government). For a discussion of the case, see Bruce Zagaris, “U.S. Appellate Court applies MLAT to pre-charge investigations”, *19 Int’l Enforcement L. Rep.* 262-64 (July 2003).

The requested State must take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owned by a person who has a right to prevent its collection.

21. Article 27(5) precludes the application of time limits or any priority applicable to a revenue claim accepted by a contracting State under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by the requested State must not, in that State, have any priority applicable to that revenue claim under the laws of the other (that is to say, the requesting State).

22. Article 27(6) precludes the bringing of proceedings with respect to the existence, the validity or the amount of a revenue claim in the requested State.

23. Article 27(7) requires the requesting State to promptly notify the requested State if the relevant revenue claim ceases to be a revenue claim that is enforceable or one for which measures of conservancy apply. The requesting State must either suspend or withdraw its request.

24. Article 27(8) provides that a requested State need not (a) carry out administrative measures at variance with the laws and administrative practice of that or of the other (that is to say, the requesting) State; (b) carry out measures that would be contrary to public policy; (c) provide assistance if the other (that is to say, the requesting) State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice; and (d) provide assistance in those cases where the administrative burden for that (that is to say, the requested) State is clearly disproportionate to the benefit to be derived by the other (that is to say, the requesting) State.

C. Council of Europe-OECD Convention on Mutual Administrative Assistance in Tax Matters

1. Scope

25. The Convention provides, on a multilateral basis, for administrative assistance in respect to income, capital (wealth), social security and other taxes, including the exchange of information, simultaneous tax examinations, assistance in collection, and service of documents.

26. A signatory must provide administrative assistance whether the person affected is a resident or national of a signatory or of any other State.[22]

27. Under international criminal law, the Convention has limited application. The Convention is meant to cover the preparation of criminal proceedings in the tax area to be initiated before the judicial bodies. However, after criminal proceedings have started before a judicial body, the Convention does not apply, in order to avoid any conflict with the Convention on Mutual Assistance in Criminal Matters.[23] Another part of the Convention that will have potentially significant impact on international

[22] Article 1(3).

[23] *See* Committee on Fiscal Affairs, OECD, *Explanatory Report and Commentary on the Provisions of the Convention, Commentary on para. 1* (27 May 1986).

criminal law is the provision authorizing the use of information exchanged under the Convention in criminal proceedings in the requesting State. In this regard, article 4, paragraph 2, of the Convention provides that:

> "A Party may use information obtained under this Convention as evidence before a criminal court only if prior authorization has been given by the Party that has supplied the information. However, any two or more Parties may mutually agree to waive the condition of prior authorization."

2. Methods of exchange of information and/or assistance

28. The Convention provides for five main methods of exchanging information: on request; automatic exchange; spontaneous exchange; simultaneous tax examination; and tax examination abroad. The enumeration of the five methods of exchanging information does not limit the possibilities of exchanging information.[24] Exchange of information may occur in a variety of ways acceptable to the competent authorities, such as personal contact, telex, or telephone and exchange of magnetic tapes, but when exchange is oral, it is normal to confirm the exchange in writing afterwards. To accelerate formalities, especially since time is often critical in tax examinations, the competent authorities can agree to delegate powers for more direct contact, such as by telephone.[25]

29. The Convention provides that, with respect to categories of cases and in accordance with procedures that they must determine by mutual agreement, two or more signatories must automatically exchange the information in article 4.[26] This is typically bulk information consisting of payments from and tax withheld in the furnishing State, namely, dividends, interest, and royalties, that is transmitted automatically on a routine basis.[27] The aim of the signatories in exchanging such information is to improve compliance and detect fraud that otherwise would not have come to light. The signatories are to try to exchange such information in the most efficient way possible, having regard to its bulk character.[28] The OECD Committee on Fiscal Affairs has devised a standard form for automatic exchanges which signatories should, as far as possible, make use of when exchanging information, since standardization of the forms would facilitate the processing of bulk information by diverse countries and dispense with the need for translation by the use of standard (number) codes by all the countries concerned for the same items of income or capital, and the acceleration of the exchange, lead to a reduction in the workload of the competent authorities, and enable the information received to be used directly by case officers.[29]

30. The Convention provides for spontaneous exchange of information. A signatory must, with prior request, transmit to another signatory information of which it has knowledge in the following circumstances: (a) it has grounds to suppose that a loss of tax may be occurring in the other signatory; (b) a person liable

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[24] OECD Committee on Fiscal Affairs, *Explanatory Report on the Convention on Mutual Administrative Assistance in Tax Matters*, paras. 51-52.

[25] Ibid., para. 54.

[26] Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, article 6.

[27] *Explanatory Report on the Convention ...*, para. 63.

[28] Ibid.

[29] Ibid., para. 67.

to tax obtains a reduction in or an exemption from tax in the first-mentioned signatory that would give rise to an increase in tax or to liability to tax in the other signatory; (c) business dealings between a person liable to tax in another signatory country are conducted through one or more countries in such a way that a savings in tax may result in one or the other signatory or in both; (d) a signatory has grounds to suppose that a saving of tax may result from artificial transfers of profits within groups of enterprises; and information transmitted to the first-mentioned signatory by the other signatory has enabled information to be obtained that may be relevant in assessing liability to tax in the latter signatory.[30]

31. The Convention provides for simultaneous tax examinations. At the request of one signatory, two or more signatories must consult to determine cases and procedures for simultaneous tax examinations. Each signatory involved must decide whether or not it wants to participate in a particular simultaneous tax examination.[31] A simultaneous tax examination is defined as an arrangement between two or more signatories to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information that they so obtain.[32] Such examinations may be conducted with respect to a single person resident in one of the signatories who performs activities in another signatory or other signatories (for example, individuals resident in the first signatory who carry out professional or other activities in the other signatories as well as enterprises resident in one signatory that operate through a permanent establishment in the other), as well as related persons resident in two or more signatories. They may also in suitable cases involve unrelated persons, resident in different signatories who, although not under common control and/or ownership, still share close trading or other links. The second and third cases apply mainly to companies. The second case covers multinational enterprises that carry out intra-group transactions that may involve offshore financial centres. The third case will comprise enterprises that, although not related, trade together so closely that information about the affairs of one (that is to say, the prices of goods sold and purchased) would be of use to the authority responsible for the tax affairs of the other.[33]

32. The Convention provides for tax examinations abroad. Traditionally, exchange of information under income tax conventions has been carried out in writing, entailing a time-consuming and sometimes ineffective process. Rapid action may be required to combat tax evasion in relation to international hiring out of labour or to itinerant activities. Hence, tax authorities often find it invaluable to conduct tax examinations abroad. The Convention provides for this possibility. The decision whether the foreign tax representative may be permitted to be present lies exclusively with the competent authority of the State where the examination is to occur. In some States, the foreign representative's presence would be regarded as an infringement of that country's sovereignty or contrary to its policy or procedure. In other States, such presence is admitted only if the taxpayer does not object to it. Other countries consider the presence on their territory of a representative of a foreign authority to be acceptable on the condition that the tax examination is carried out strictly in conformity with their law and practice. The provisions of

[30] Convention on Mutual Administrative Assistance ..., article 7(1).
[31] Ibid., article 8(1).
[32] Ibid., article 8(2).
[33] *Explanatory Report on the Convention ...*, paras. 82-83.

article 9 of the Convention on tax examinations abroad accommodate such considerations.[34]

33. Articles 11 through 16 of the Convention concern recovery of tax claims, whereby one signatory must help another to recover tax claims as if they were its own, including taking measures to conserve the tax claims.

34. The Convention provides that, at the request of the applicant State, the requested State must serve upon the addressee documents, including those relating to judicial decisions, that emanate from the applicant State and that relate to a tax covered by the Convention.[35] A signatory may effect service of documents directly through the mail on a person within the territory of another signatory.[36] Difficulties in serving documents abroad may apply in the case of a tax claim against a non-resident.

35. The Convention also requires the requested State to serve documents (a) by a method prescribed by its domestic laws for the service of documents of a substantially similar nature; and (b) to the extent possible, by a particular method requested by the applicant State or the closest to such method available under its own laws.[37] The United States has reserved on service, except by mail. One way whereby a signatory can avoid the obvious increase in workload in providing assistance in serving documents is to limit service to mailing notices of assessment, tax demands or other documents. Difficulties may arise in cases where a State regards the sending by post of official documents of another State to its residents as an infringement of its sovereignty.[38]

3. Confidentiality

36. The Convention has an article on secrecy. A signatory obtaining any information under the Convention must treat it as secret in the same manner as information obtained under the domestic laws of the signatory, or under the conditions of secrecy applying in the supply country if such conditions are more restrictive.[39] A signatory must disclose any information obtained only to persons or authorities (including courts and administrative or supervisory bodies) involved in the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that signatory. Only the persons or authorities specified (tax-competent authorities or prosecutors and their assistants in the event of a criminal prosecution and other officials and persons involved in the adjudication in question) may use the information and then only for such purposes. They may disclose it in public court proceedings or in judicial decisions relating to such taxes, subject to prior authorization by the competent authority of the supplying country. However, any two or more signatories may mutually agree to waive the condition of prior authorization.[40]

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[34] Ibid., paras. 85-88.
[35] Convention on Mutual Administrative Assistance ..., article 7(1).
[36] Ibid., article 17(3).
[37] Ibid., article 17(2).
[38] *Explanatory Report on the Convention ...*, paras. 165-166.
[39] Convention on Mutual Administrative Assistance ..., article 22(1).
[40] Ibid., article 21(2).

4. Exemptions to the requirement to exchange information

37. The Convention provides for the protection of persons and sets forth limits to the obligation to provide assistance. The Convention does not affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.[41] With the exception of the case of time limits for collection of tax measures, the Convention must not be construed so as to impose on the requested State the obligation: (a) to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant State; (b) to carry out measures that it considers contrary to public policy or to its essential interests; (c) to furnish information that is not obtainable under its own laws or its administrative practice; (d) to supply information that would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy or to its essential interests; (e) to provide administrative assistance if and insofar as it considers the taxation in the applicant State to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention that the requested State has concluded with the applicant State; or (f) to provide assistance if the application of this Convention would lead to discrimination between a national of the requested State and nationals of the applicant State in the same circumstances.[42]

38. What may jeopardize public policy or endanger any of the "essential interests" of a requested State is for the two States to interpret in each particular case. This concept includes interests of persons when the latter have a "national" dimension. Hence, public security and economic interests may be included in this concept.[43]

39. With respect to which practices in the applicant State may be considered "contrary to generally accepted taxation principles", the requested State may consider that taxation in the applicant State is confiscatory, or that the taxpayer's punishment for the tax offence is excessive.[44] The requested State may also decline to provide assistance under subparagraph (e) as "contrary to generally accepted taxation principles" or to the provisions of an income tax convention where it considers taxation contrary to such convention rules as encompass rates of withholding, the definition of permanent establishment and the determination of taxable profits.[45]

D. OECD Agreement on Exchange of Information on Tax Matters

40. The OECD Agreement on the Exchange of Information on Tax Matters (OECD TIEA) contains two models for bilateral agreements prepared in the light of the commitments undertaken by OECD and the committed jurisdiction in the OECD initiative on harmful tax practices. It is presented as both a multilateral instrument and a model for bilateral treaties or agreements. A party to the multilateral Agreement would be bound by the Agreement only vis-à-vis the specific parties with which it agrees to be bound. Hence, a party wanting to be bound by the

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[41] Ibid., article 22(1).
[42] Ibid., article 21(2).
[43] *Explanatory Report on the Convention ...*, para. 191.
[44] Ibid., para. 200.
[45] Ibid., para. 201.

multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties in respect of which it wishes to be so bound. The Agreement enters into force and creates rights and obligations, only as between those parties that have mutually identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement. The bilateral version is meant to serve as a model for bilateral exchange-of-information agreements.

1. Scope

41. The multilateral version applies to a variety of taxes as follows: (a) taxes on income or profits; (b) taxes on capital; (c) taxes on net wealth; and (d) estate, inheritance or gift taxes. It also applies to taxes imposed by or on behalf of political subdivisions or local authorities of contracting parties.

42. The scope of the OECD TIEA is more robust than that of article 26 of the OECD Model Convention and the EU Directive on the Exchange of Information in that it covers the recovery and enforcement of tax claims and the investigation and prosecution of tax matters. Unlike the aforementioned two instruments, it also embraces the assistance to the exchange of information in criminal tax matters. Hence, it combines the cooperation as provided for in the exchange of information under the 1988 Convention on Mutual Administrative Assistance in Tax Matters and the EU Convention on Mutual Assistance in Criminal Matters.

2. Methods of exchange of information and/or assistance

43. The OECD TIEA provides for exchange on request. Automatic or spontaneous exchanges and simultaneous tax examinations are not covered unless the contracting parties expressly agree. the commentary stipulates that information in connection with criminal tax matters must be exchanged irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested party.[46]

3. Confidentiality

44. Under article 8, any information received under the Agreement must be treated as confidential. The information can 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, taxes covered by the Agreement, including the taxpayer. The persons authorized to receive the information can use it only for specific purposes, including any disclosure in “public court proceedings”, “judicial decisions”, and similar proceedings, albeit not formally “judicial”.

4. Exemptions to the requirement to exchange information

45. Article 7 gives the requested party discretion to refuse to provide the information. The requested party need not supply the requested information if the requesting party would not be able to obtain such information under its own laws for purposes of the administration or enforcement of its own tax laws (article 7(1)), such as under the privilege against self-incrimination in the case of a person at risk

[46] Agreement on Exchange of Information on Tax Matters, commentary, para. 40.

of criminal prosecution.[47] A contracting party may also refuse to provide information where it would lead to the disclosure of any trade, business, industrial, commercial or professional secret or trade process (article 7(2)). A request may also be refused if the information requested would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are: (a) produced for the purposes of seeking or providing legal advice, or (b) produced for the purposes of use in existing or contemplated legal proceedings (article 7(3)). A requested State can decline to disclose information that would be contrary to public policy (article 7(4)). A request can be declined if the information is requested by the applicant party to administer or enforce a provision of the tax law of the applicant party, or any requirement connected therewith, that discriminates against a national of the requested party as compared with a national of the applicant party in the same circumstances (article 7(6)).

E. European Union (EU) Directive on Exchange of Information

46. Under the EU Directive, EU members must exchange any information that appears relevant for the correct assessment in one of the EU members of taxes on income and capital and any information relating to the assessment of value-added tax and certain other indirect taxes.[48]

1. Methods of exchange of information

47. The Directive provides in articles 2-4 for: (a) exchanges on request about a specific case; (b) automatic exchange of information for categories of tax, as determined under the consultation procedure of article 9; and (c) the spontaneous exchange of information. By mutual agreement the EU members can extend the obligations to the exchange of information to cases other than the ones mentioned explicitly in the Directive.[49]

2. Exemptions to the obligation to exchange information

48. Article 8 enables a requested State to raise exemptions. A requested State need not "carry out enquiries or provide information where the laws or administrative practice prevent its tax administration from carrying out these enquiries or from collecting or using this information for its own purposes".[50] Further, the requested State can refuse to provide the information where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or if the disclosure of the information would be contrary to public policy. The principle of reciprocity governs exchanges, so that a requested State may refuse to provide

[47] Ibid., paras. 73-74.

[48] Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation, *1977 Official Journal (L 336)* 15, as amended by Council Directive 79/1070/EEC of 6 December 1979, *1979 Official Journal (L 331)* 8, and Council Directive 92/12/EEC of 25 February 1992, *1992 Official Journal (L 76)* 1, and as amended by the Acts of Accession of new member States (hereinafter referred to as the EU Directive on the Exchange of information).

[49] Council Directive 77/799/EEC of 19 December 1977.

[50] Ibid., article 8(1).

information if the requesting State is unable, for practical or legal reasons, to provide information similar to the requested information.

3. Confidentiality

49. Under article 7, all information provided to an EU member must be kept secret in that State in the same manner as information received under its domestic legislation. The information received can be provided only to the persons directly involved in the tax assessment or the administrative control thereof, or to persons directly involved in judicial proceedings or administrative proceedings involving sanctions in relation to the tax assessment and only in connection with such proceedings. Provided the EU member furnishing information does not object, the information provided can be disclosed during public hearings or in judgements. The information provided can be used only for tax purposes or in connection with judicial proceedings or administrative proceedings involving sanctions concerning the tax assessment.

50. The EU member furnishing the information can permit the receiving State to use the information for other purposes, if the legislation of the furnishing State permits the use of the information for similar purposes in comparable domestic circumstances. If the receiving State cannot or will not respect the narrower secrecy requirements of the supplying State, when such requirements exist, the latter must not provide information. An EU member may send information received from another EU member that it considers likely to be useful to a third EU member, to the latter, provided the EU member that furnished the information agrees to the transfer.

4. Supremacy

51. Article 11 provides that foregoing provisions of the Directive will not serve as a constraint on any more extensive obligations to exchange information, contained in any other present of future domestic or international arrangement. These provisions clearly show that the Directive contains measures of minimum harmonization.

F. EU Directive on the Taxation of Savings (EU Savings Tax Directive)

52. The EU Savings Tax Directive is one of several measures to combat harmful tax competition which include a code of conduct to eliminate harmful tax practices and a proposal for a directive concerning withholding taxes on interest and royalty payments between associated companies.[51] This paper discusses only the Savings Directive, since it is the only measure concerning exchange of information.

1. Withholding tax

53. The current Directive provides that all EU members must participate in a system of exchange of information. There is a transitional period of seven years, in which Belgium, Luxembourg and Austria will be able to levy withholding tax

[51] Proposal for a Council Directive on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Associated Companies of Different Member States, of 6 May 1998, Com(1998)67 final.

instead of exchanging information so as to allow these countries to revise their legal systems, especially bank secrecy rules, so that they can comply. These countries would impose a withholding tax of 15 per cent during the first three years and 20 per cent for the remaining four years. The country imposing the withholding tax would retain 25 per cent of the withholding tax revenue and transmit the other 75 per cent to the country of residence of the beneficial owner. At the end of the transitional period, the three EU members mentioned should have implemented the prescribed system of exchange of information. The remaining member States must introduce an exchange-of-information system from the date of entry into force of the Directive.

2. Scope and type of exchange of information

54. The system involves the place of establishment of the paying agent and the residence of the beneficial owner/individual. Hence, the paying agent must automatically supply certain information to the EU member in which the beneficial owner resides. The latter State can then effectively apply its domestic tax laws to its resident receiving the payments. The system is limited only to certain types of interest income initially.

55. To implement the system requires EU members to ensure that their legal system allows the obtaining of the information required and to implement a system that requires the paying agents in that jurisdiction to obtain the required information, and provide information concerning the identity, residency and the account number of the beneficial owner and regarding the amount of the interest payment, to the competent authority in the paying State. During the transitional period, the paying agent in the three aforementioned States will withhold tax and transfer it to the EU member of the residency of the beneficial owner, thereby fulfilling the paying State's obligation to pass 75 per cent of the tax withheld to the EU member of the residency of the beneficial owner.[52]

3. Exemptions and confidentiality

56. A paying State has no ability to avoid fulfilling the information exchange requirements, except for those in the transition period. The supranational legal element of the EU Directive enables EU to override the normal exemptions found in agreements. The Directive applies the confidentiality regime of the EU Directive on the Exchange of Information to the information exchange system.

4. Dependencies and third countries

57. Two measures safeguard the competitiveness of the EU financial markets and minimize the likelihood that EU members will suffer from the migration of business to other jurisdictions. First, once the proposed Directive is agreed and before its implementation, EU must initiate discussions with key third countries (for example, the United States of America, Switzerland, Liechtenstein, Monaco, Andorra and San Marino) to convince these countries to adopt equivalent measures with respect to the exchange of information at the same time as the EU members adopt the proposed measures. Secondly, EU members must ensure adoption of comparable measures in the dependent or associated territories, such as the Channel Islands and territories in

[52] Savings Tax Directive, Explanatory memorandum, commentary to article 11.

the Caribbean. At least one territory has brought litigation challenging this measure within EU.[53]

G. Directive on Mutual Assistance for the Recovery of Claims

58. The revised directive includes a wide variety of direct and indirect taxes, interest, administrative penalties and fines, and costs incidental to these claims. It obligates EU members to assist in providing information and assistance in the form of recovery in and by another EU member.[54]

H. OECD Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims

59. In 1981, OECD prepared a Convention for Mutual Administrative Assistance in the Recovery of Tax Claims. The Convention has articles titled as follows: Object of the Convention and persons covered; Taxes covered; Definitions; Service of documents; Exchange of information; Assistance in recovery; Documents accompanying the request for assistance in recovery; Period of limitation; Priority; Disputes; Deferral of payment; Measures of conservancy; Information to be provided by the applicant State; Response to the request for assistance; Obligation of secrecy; Limits to the obligation to lend assistance; Implementation of the Convention; Entry into force; and Termination. A commentary accompanies the Convention.

I. OECD Report on Improving Access to Bank Information for Tax Purposes

60. While most OECD members permit tax authorities to have access to bank information for tax purposes, some countries limit access to cases of criminal proceedings or tax fraud or only permit judicial authorities access in cases of suspected tax fraud.[55] Tax authorities obtain and transmit bank information internationally primarily through automatic exchanges of interest withheld and information furnished on request. At the time of the OECD report, 19 OECD members had required banks to automatically provide information on the opening

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[53] EU, Commission communication to the Council entitled “Report concerning negotiations with third countries on taxation of savings income”, *Bulletin EU* 11-20002.

[54] Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on Mutual Assistance for the Recovery of Claims Resulting from Operations Forming Part of the System of Financing the European Agricultural Guidance and Guarantee Fund, and of Agricultural Levies and Customs Duties and In Respect of Value Added Tax and Certain Excise Duties, *Official Journal L 175*, 28 June 2001, pp. 0017-0020.

[55] OECD Committee on Fiscal Affairs, *Improving Access to Bank Information for Tax Purposes* (Paris, 2000), para. 71. The OECD Committee declassified the report on 24 March 2000, in accordance with Council resolution C(97)64/FINAL, and approved its publication.

and closing of accounts, interest payments, and the closing of accounts.[56] Some countries that require reporting have bank account information in centralized databases. When requests are made for tax information from another country, all OECD members permit domestic tax and judicial authorities or public prosecutors access to bank information in the event of certain criminal tax matters. Differences exist in respect of the ways whereby tax authorities access bank information for tax administration purposes. Several countries (Australia, the Czech Republic, Denmark, Finland, France, Italy, Norway, New Zealand, Spain and Turkey) can obtain bank information for tax administration purposes without limitation. Other countries normally must use a special procedure to obtain bank information such as a requirement (Canada), an administrative summons (United States) or the consent of an independent commissioner (United Kingdom of Great Britain and Northern Ireland). Others limit the circumstances under which they can obtain information, such as a criminal proceeding (Austria, Belgium, Luxembourg, Portugal and Switzerland) or an enforcement order issued by a court at the request of the tax administration and also in cases where fiscal benefits are provided through bank accounts. Most OECD members can request information from banks in a tax audit.[57] Some countries permit their tax authorities, under certain circumstances, to seize documents, to enter the bank premises or to examine the bank records directly.[58]

61. Most OECD members permit access to bank information about a third person not suspected of tax fraud but who has had economic transactions with a specified person suspected of tax fraud. Over half the OECD members can obtain information about the account holder's economic situation, business activities etc., that the bank has obtained for credit purposes.[59]

62. Most OECD members permit the collection of bank information to provide assistance pursuant to a bilateral tax convention, in the same way as for domestic purposes, without the requirement that there be a domestic tax interest or that the information relate to a resident.

II. Economic incentives for tax information exchange agreements (TIEAs)

63. The precedents of the EU Savings Directive and the United States Caribbean Basin Initiative enable developing countries so inclined to request incentives for concluding a broad TIEA that is separate from the income tax agreement. Although developing countries can ask for incentives to include additional articles on mutual assistance and collection of debts in an income tax treaty, a prospective treaty partner may respond that the treaty itself is an incentive.

64. Whether it is useful and/or desirable for developed countries to provide incentives, such as sharing withholding revenue (see, for example, the EU Savings Directive), or other incentives with developing countries that agree to conclude TIEAs or expanded information exchange, mutual assistance, and collection of tax debts in an income tax treaty, depends on whether the international community or

[56] Ibid., para 78.
[57] Ibid., paras. 80, 81 and 83.
[58] Ibid., para. 82.
[59] Ibid., para. 83.

individual countries believe that it is useful macroeconomic policy and equity to provide incentives. Indeed, a prior United Nations report on the problem of offshore financial centres recognized the utility of quid pro quo incentives for cooperating offshore financial centres, but did not specify any precise positive response, such as incentives.[60] Arguments can be made for both, depending on the perspective of the policy maker. A discussion of whether incentives are wise and, if they are, of what type they should be is beyond the limits of this paper. The Ad Hoc Group of Experts may wish to discuss the potential for economic incentives in the Manual for the Negotiation of Tax Treaties between Developed and Developing Countries.

III. Summary and conclusion

65. **The most acceptable provision for the United Nations Model Double Taxation Convention would be something similar to the provisions of article 27 of the OECD Model Convention (see annex I).**

66. **Another seemingly neutral form of mutual assistance would be provided in an article on service of documents, emulating article 17 of the Council of Europe/OECD Convention (see annex II). The provisions of this article facilitate the service of documents by one country on taxpayers or persons residing in another country, so that revenue authorities may serve documents on tax proceedings or related matters abroad.**

[60] Jack A. Blum and others, *Financial havens, banking secrecy and money-laundering* (Vienna, Office for Drug Control and Crime Prevention, December 1998).

Annex I

Article __

Assistance in the collection of taxes[a]

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

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

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

4. The obligation to provide assistance in the recovery of tax claims concerning a deceased person or his/her estate is limited to the value of the estate or of the property acquired by each beneficiary of the estate, according to whether the claim is to be recovered from the estate or from the beneficiaries thereof.

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

6. The requested State may allow deferral of payment or payment by instalment if its laws or administrative practice permit it to do so in similar circumstances, but shall first inform and receive the approval of the applicant State of any such deferral or proposed instalment payment.

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[a] In some countries, national law, policy or administrative considerations may not allow or justify the type of assistance envisaged under this article or may require that this type of assistance be restricted, for example, to countries that have similar tax systems or tax administrations, or as to the taxes covered. In some countries, legal or policy considerations may restrict such assistance to those countries that agree to share revenue or other mutually acceptable cooperation. For that reason, the article should be included in the Convention only where each State concludes that, based on the factors described in paragraph 1 of the commentary on the article, they can agree to provide assistance in the collection of taxes imposed by the other State.

Annex II

Article __

Service of documents

1. At the request of the applicant State, the requested State shall serve upon the addressee documents, including those relating to judicial decisions, that emanate from the applicant State and that relate to a tax covered by this Convention.

2. The requested State shall effect service of documents:

(a) By a method prescribed by its domestic laws for the service of documents of a substantially similar nature;

(b) To the extent possible, by a particular method requested by the applicant State or the closest to such method available under its own laws.

3. A Contracting State may effect service of documents directly through the post on a person within the territory of another Contracting State.

4. Nothing in the Convention shall be construed as invalidating any service of documents by a party in accordance with its laws.

5. When a document is served in accordance with this Article, it need not be accompanied by a translation. However, where it is satisfied that the addressee cannot understand the language of the document, the requested State shall arrange to have it translated into or a summary drafted in its or one of its official languages. Alternatively, it may ask the applicant State to have the document translated into or accompanied by a summary in one of the official languages of the requested State.