[JOINT COMMITTEE PRINT]

EXPLANATION OF PROPOSED CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS

SCHEDULED FOR A HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ON JUNE 14, 1990

PREPARED BY THE STAFF

OF THE

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INTRODUCTION

This pamphlet,[1] prepared by the staff of the Joint Committee on Taxation, provides an explanation of the proposed convention on Mutual Administrative Assistance in Tax Matters ("the convention"). This multilateral convention may be ratified, accepted, or approved by the member States of the Council of Europe and by the Member countries of the Organization for Economic Cooperation and Development (OECD).[2] The proposed convention was signed by the United States on June 28, 1989. The Senate Committee on Foreign Relations has scheduled a public hearing on the proposed convention on June 14, 1990.

There is no multilateral treaty relating to mutual administrative assistance in tax matters currently in force among the member States of the Council of Europe or Member countries of the OECD to which the United States is a party. There are currently in force, however, a number of bilateral income tax treaties between the United States and other countries, including individual member States of the Council of Europe and individual Member countries of the OECD, which contain provisions relating to mutual administrative assistance in tax matters.

The first part of the pamphlet provides an overview of information exchange and related topics under the proposed convention, U.S. income tax treaties, and the 1981 U.S. model income tax treaty ("U.S. model treaty"). The second part presents a discussion of issues raised by the convention. The third part provides a detailed, article-by-article explanation of the proposed convention.

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[1] This pamphlet may be cited as follows: Joint Committee on Taxation, *Explanation of Proposed Convention on Mutual Administrative Assistance in Tax Matters*, (JCS-14-90), June 13, 1990.

[2] A list of these countries is contained in the Explanation of the Preamble, below (Part III).

I. OVERVIEW

In general

The proposed multilateral Convention on Mutual Administrative Assistance in Tax Matters is designed to promote increased cooperation in tax administration and enforcement among the parties to the convention. The convention was drafted by the Council of Europe and the OECD, and its terms are more fully explained in an Explanatory Report approved by the Committee on Fiscal Affairs of the OECD (the "Explanatory Report"). Subject to certain clarifications and reservations indicated in the Treasury Department's Technical Explanation of the convention, the Explanatory Report is accepted by the Administration.

The convention is not currently in force. It has been signed by Finland, Norway, Sweden, and the United States, and of these countries it has been ratified by Norway. The convention will not enter into force until instruments of ratification, acceptance, or approval have been deposited by five signatories with the Secretary General of the Council of Europe or the Secretary General of the OECD.

Convention provisions

The convention contains three principal substantive divisions. The first provides for broad-based exchanges of tax-related information. The second provides for assistance in the recovery of taxes. The third provides for assistance in the service of documents. The other portions of the convention implement either the convention generally or these three principal substantive divisions.

The President seeks to ratify the convention subject to reservations that generally permit only the provisions relating to information exchanges and service of documents by mail to take effect for the United States.[3] Under these reservations, the United States will not provide or receive (1) assistance for taxes imposed by possessions, political subdivisions, or local authorities of other parties; (2) tax collection assistance; or (3) assistance in serving documents (except the service of documents by mail). The reservations are reciprocal; to the same extent that the United States will not provide assistance, other parties are free not to assist the United States.

Subject to whatever reservations a party may enter, the convention provides for the exchange of information foreseeably relevant to the assessment and collection of tax, the recovery and enforcement of tax claims, prosecution before an administrative authority, or initiation of judicial prosecution. The convention expressly

[3] Such reservations are expressly contemplated by the convention. They can be made upon signing, upon depositing instruments of ratification, or at any later time. Reservations previously made may be added to or withdrawn. The United States did not enter any reservations to the convention upon signing.

covers exchanges upon request of one of the parties, automatic exchanges under further mutual agreements, and spontaneous sharing of information with another party under specified circumstances. Parties may also mutually agree to conduct simultaneous tax examinations. The convention further specifies that permission may be given for the competent authority of one party to be present at a tax examination carried out by another country.

The convention permits a party not to comply with a request for assistance if the applicant has not pursued all means available in its own territory, unless recourse to those means would entail disproportionate difficulty. Under the convention, any information exchanged is to be treated as secret in the same manner as information obtained under the domestic laws of either the applicant or supplying country, whichever has more restrictive secrecy rules. The exchanged information may be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the convention applies. Those persons or authorities can use the information for such purposes or, subject to prior authorization by the competent authority of the supplying country, for any other purpose for which the information may be used under the laws of the supplying country. Exchanged information may be disclosed in public court proceedings or in judicial decisions, subject to prior authorization by the competent authority of the supplying country, unless this prior authorization condition is waived by mutual agreement.

The convention also contains limitations on the obligations of the countries to supply information. A country is not required to carry out measures at variance with its laws and administrative practices or those of the applicant country. Nor is a country obligated to supply information which is not obtainable under the laws, or under the administrative practice, of either country. A country is not required to supply information which 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. A country also is not required to provide administrative assistance if and insofar as it considers the taxation in the applicant country to be contrary to generally accepted taxation principles or to the provisions of a treaty, or to provide assistance if the application of the convention would lead to discrimination between a national of the requesting country and nationals of the applicant country in the same circumstances.

Upon an appropriate request for information specifying the form in which the applicant wishes the information to be supplied, the requested country will supply it in the form requested, if the requested country is in a position to do so. The convention provides that the requested country is to take all relevant measures to obtain the information requested, if the information is not available in its files.

Exchange of information and administrative assistance under income tax treaties

There are currently bilateral income tax treaties in force between the United States and most members of the OECD and the Council of Europe.[4] While each of these treaties may differ from the others in certain respects, they generally contain articles governing the exchange of information or exchange of information and administrative assistance.[5] These may be similar to, or represent a variation on, article 26 of either the 1981 proposed U.S. model income tax treaty ("U.S. model treaty") or the model income tax treaty of the OECD. The convention does not limit the operation of these or any other provisions in existing or future bilateral income tax treaties of the United States.

U.S. model treaty

Article 26 of the U.S. model treaty provides for the exchange of information which is necessary to carry out the laws of the two countries concerning all taxes imposed by the two countries' national governments, including taxes imposed on residents of third countries.

Under the U.S. model treaty, any information exchanged is to be treated as secret in the same manner as information obtained under the domestic laws of the country receiving the information. The exchanged information may be disclosed only to persons or authorities (including courts and administrative bodies) involved in assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which the treaty applies. Persons or authorities receiving exchanged information can use the information only for such purposes. Persons involved in the administration of taxes include legislative bodies, such as, for example, the tax-writing committees of Congress and the U.S. General Accounting Office, for use in the performance of their role in overseeing the administration of U.S. tax laws. Exchanged information may be disclosed in public court proceedings or in judicial decisions.

The U.S. model treaty also contains limitations on the obligations of the countries to supply information. A country is not required to carry out administrative measures at variance with the law and administrative practice of either country (including the income tax treaty of which the article is a part), or to supply information which is not obtainable under the laws or in the normal course of the administration of either country, or to supply information which 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.

Upon an appropriate request for information, the U.S. model treaty provides that the requested country is to obtain the informa-

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[4] There is no U.S. income tax treaty in force with Liechtenstein, Portugal, Spain, or Turkey. The United States and Spain have signed an income tax treaty which is now before the Senate, and this Committee, for advice and consent.

[5] The United States also has entered into Tax Information Exchange Agreements with countries, not members of the OECD or the Council of Europe, with which the United States has not entered into comprehensive income tax treaties.

tion to which the request relates in the same manner and to the same extent as if its tax were at issue. A requested country is to use its subpoena or summons powers or any other powers that it has under its own laws to collect information requested by the other country. Where specifically requested by the competent authority of one country, the competent authority of the other country shall, if possible, provide the information in the form requested. Specifically, the competent authority of the second country will provide depositions of witnesses and copies of unedited documents (including books, papers, statements, accounts, and writings) to the extent that they can be obtained under the laws and practices of the second country in the enforcement of its own tax laws.

With respect to assistance in collection of tax, the U.S. model treaty provides that the countries are to endeavor to collect such tax on behalf of the other country as may be necessary to ensure that benefits of the treaty are not going to persons not entitled to those benefits. The collection provision does not impose on either treaty country the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes, or that would be contrary to its sovereignty, security, or public policy.

Not all the existing U.S. income tax treaties provide for as comprehensive information exchange or administrative assistance as the U.S. model treaty.

Comparison of the convention and Article 26 of the U.S. model treaty

The convention is in some ways similar to, and in some ways different from, the U.S. model treaty provisions described above. Some of the differences are as follows:

(1) The U.S. model applies only to national taxes. The convention also applies to taxes imposed by political subdivisions and local authorities. Under the reservation to be made by the United States, the convention would conform to the U.S. model in this respect.

(2) The reservations permitted under the convention can render the scope of the convention narrower than Article 26 of the U.S. model treaty as to the taxes covered.

(3) The convention provides for assistance only in the assessment of a tax covered by the convention, and the prosecution before an administrative authority, or the initiation of prosecution before a judicial body. The U.S. model provides for exchange of such information as is necessary for carrying out the domestic tax laws of the treaty countries. Thus, for example, there is no restriction in the U.S. model on exchanges of information after the initiation of prosecution before a judicial body, if such information is necessary for the prosecution.

(4) The secrecy provision of the convention provides for handling exchanged information in compliance with the secrecy laws of whichever party to the exchange imposes more restrictive rules; the U.S. model requires only that exchanged information be treated as secret in the same manner as information obtained under the domestic laws of the applicant country.

(5) Under the convention, authorization by the competent authority of the supplying country is necessary before disclosure of ex-

changed information in public court proceedings or judicial decisions. Under the U.S. model, such disclosure is authorized by the treaty without the requirement of additional authorization by the competent authority. The Administration intends to seek waivers of this additional authorization requirement of the convention.

(6) Under the convention, the authorities of the receiving country to whom exchanged information can be disclosed may, subject to prior authorization of the competent authority of the supplying party, use the information for any purpose for which it may be used under the laws of the supplying party, and, in addition, may use it in the assessment, collection or recovery of, enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of the country receiving the information. Under the U.S. model treaty, the authorities of the receiving country may use exchanged information only for these specified purposes. The Treasury Department has indicated that the U.S. competent authority intends never to authorize use of information the United States provides under the convention for any other purpose.

(7) The convention specifies circumstances under which a party must forward information to another party (for example, where the first party has grounds for supposing that there may be a loss of tax in the other party) without any request. The U.S. model treaty has no comparable language, although the language of the convention is said by the Treasury Department to be consistent with current U.S. practice under existing treaties.

(8) The convention provides that if the applicant country has information in conflict with information supplied by another country, the applicant country is to so advise the supplying country. There is no similar provision in the U.S. model treaty.

(9) The convention, unlike the U.S. model treaty, permits a party not to comply with a request for assistance if the applicant has not pursued all means available in its own territory, unless recourse to such means would give rise to disproportionate difficulty.

(10) Under the convention, a country is not required to provide administrative assistance if and insofar as it considers the taxation in the applicant country to be contrary to generally accepted taxation principles. This is not a criterion that permits a country to decline to provide assistance under the U.S. model treaty.

(11) The convention provides that upon a request for information specifying the form in which the applicant wishes the information to be supplied, the requested country will supply it in the form requested, if the requested country is in a position to do so. The convention also provides that the requested country is to take all relevant measures to obtain the information requested. The U.S. model treaty provides a specific list of forms in which information must be provided if requested, and specifies that information in that form must be provided to the same extent information in that form can be obtained under the laws and administrative practices of the supplying country with respect to its own taxes.

(12) Although a few U.S. income tax treaties require the United States to assist more generally in the collection of tax owed to the other treaty country, the U.S. model treaty requires a country to assist in tax collection only to the extent necessary to ensure that relief from internal income tax laws of the other country, which

relief is granted by the other terms of the income tax treaty, does not inure to the benefit of persons not entitled thereto. The convention provides for much broader collection assistance. On the other hand, claims against nonresidents of the applicant country qualify for collection assistance under the convention only if the claim may no longer be contested, while the U.S. model treaty has no similar limitation. Under the reservation to be made by the United States, the convention will provide less collection assistance for U.S. purposes than does the U.S. model income tax treaty.

(13) The convention, unlike the U.S. model treaty, contains provisions regarding assistance in the service of process. Under the reservation to be made by the United States, the convention will provide no difference in this regard.

(14) Parties to the convention are expressly authorized in the convention to unilaterally broaden or narrow their obligations under the convention, by means of adding or withdrawing reservations after they become parties to the convention. (Of course, any such unilateral act may reciprocally affect the obligations of the other parties with respect to the party making the change.) U.S. bilateral tax treaties generally do not expressly provide that individual parties thereto may similarly broaden or narrow their treaty obligations.

(15) Interpretation of the convention is guided by mutual agreements reached between parties, the Explanatory Report, and opinions requested by parties that may be issued by the coordinating body created under the convention. It may be that these interpretations will serve as guides to the interpretation of similar provisions of the U.S. model and U.S. income tax treaties. On the other hand, either the United States or another party to the convention may choose to diverge from the Explanatory Report or the coordinating body in interpreting provisions outside the convention.

II. ISSUES

The proposed convention presents the following specific issues:

(1) Reservations

The convention permits a party to make one or more of five enumerated reservations, described in detail in the explanation of Article 30 (Reservations) (below). Two issues arise with respect to the reservations.

Assistance in recovery of tax claims

Parties are permitted to enter a reservation with respect to assistance in recovery of tax claims (which generally relates to assistance in the collection process). A party may reserve the right not to provide assistance in the recovery of any tax claim generally, or a tax claim with respect to one or more types of taxes to which the convention applies. The Administration has indicated that the United States intends to enter a reservation with respect to assistance in recovery of all tax claims generally.

Some may argue that the United States may forego significant benefits under the convention by entering this reservation. This reservation could, for example, prevent the United States from collecting the maximum amount of taxes due it by causing it not to be able to avail itself of the collection procedures of other parties to the convention. Others believe that a reservation with respect to this issue is appropriate, in that the United States should not be obligated to help all the potential signatory governments of the convention collect their uncontested tax claims against U.S. residents or to collect their claims against their own residents.[6] In addition, the Administration has stated that the United States has not had extensive experience using the broad collection assistance provisions that are contained in four existing U.S. tax treaties. Some may argue that further experience is warranted before extending the network of U.S. collection assistance obligations.

Service of documents

Parties are permitted to enter two reservations with respect to the service of documents. A party may reserve the right not to provide assistance in the service of documents relating to all taxes covered by the convention generally, or only with respect to one or more types of taxes to which the convention applies. A party may also reserve the right not to permit the service of documents by

[6] For example, in 1951, the Senate considered income tax treaties for Greece, Norway, and South Africa which, as originally submitted to the Senate, would have obligated the treaty countries to provide broad tax collection assistance to each other. The Senate gave its advice and consent to those treaties subject to an understanding that the countries would only provide such collection assistance as would be necessary to ensure that the exemption or reduced rate of tax granted by the treaties would not be enjoyed by persons not entitled to those benefits.

mail. The Administration has indicated that the United States will enter a reservation with respect to the service of documents generally, but not to enter a reservation with respect to the service of documents by mail. Thus, the United States intends to provide assistance under the convention for the service of documents by mail.

Some may argue that the United States might be foregoing significant benefits under the convention by entering this reservation. Others believe that the United States does not benefit from additional options relating to the service of documents, in that the Internal Revenue Code (the Code) generally permits the service of documents by mail.

Procedural issues

Although the President has expressed his intention to ratify the treaty with the reservations indicated, no reservations were made at the time of signature. Also, at any time in the future, additional reservations can be made under the terms of the convention, and reservations previously made can be withdrawn. The Committee should assure itself that, if the Senate consents to ratification of the convention, the manner by which the Senate consents is consistent with an intent that changes in the reservations can only be made with the advice and consent of the Senate.

(2) Taxpayer safeguards

The convention provides that any information obtained by a party pursuant to the convention must be treated as secret or confidential in the same manner as information obtained under the domestic laws of that party. If, however, the party supplying the information has more restrictive conditions of secrecy, the more restrictive provisions apply. This approach generally ensures that information supplied by the United States to another party is accorded at least the same confidentiality protections accorded to the information in the United States.

The convention contains no explicit reference to any penalties that might apply for failure to observe the confidentiality protections. The taxpayer protections afforded under the convention are, however, potentially greater than those available under the U.S. model treaty, in that information exchanged under the convention is subject to the receiving country's or supplying country's secrecy laws, whichever are more restrictive, while information provided by the United States under a bilateral treaty that follows the U.S. model is subject only to the confidentiality rules of the receiving country. If currently there are no significant problems relating to the unauthorized disclosure of otherwise confidential information under treaties, it may be argued that no similar problems should be expected to arise under the convention.

(3) Criminal proceedings

The mutual assistance provisions of the convention are not to apply once criminal judicial proceedings have begun.[7] Article 4 of

[7] Although this rule is not explicitly articulated in the convention itself, it appears in paragraph 56 of the Explanatory Report and in the Treasury Department's Technical Explanation.

the convention also provides that information obtained under the convention may be used as evidence before a criminal court only if prior authorization is received from the party supplying the information. Two or more parties are permitted to agree mutually to waive this condition. The Administration has indicated that it intends to seek these waivers on a bilateral basis.

One issue relates to the point at which criminal judicial proceedings are considered to commence for purposes of the convention. The Administration has indicated that it will consider a criminal indictment to be the point at which criminal judicial proceedings are considered to begin. Consequently, information would still be permitted to be exchanged during a grand jury investigation. Some might view criminal indictment as being too early in the process, and would argue that a more appropriate cut-off point for exchanging information would be the actual commencement of the criminal trial. Others might view the criminal indictment as being too late in the process, in that grand jury investigations may be viewed as so integral a part of the criminal process as to be indistinguishable from it. One advantage to using criminal indictment as the cut-off point is that it represents a definitive action, so that it is clear when information may no longer be exchanged.

Another issue is whether it is appropriate to permit the use of information obtained pursuant to the convention in any criminal proceedings. Some might observe that the severity of criminal sanctions, in comparison with civil sanctions, implies that more restrictive rules should be operative in determining the availability of documents in criminal cases. Others would respond by noting that the U.S. model treaty provides for the exchange of such information as is necessary for carrying out the domestic tax laws of the treaty countries. Thus, there is no restriction in the U.S. model on exchanges of information after the initiation of prosecution before a judicial body, if such information is necessary for such prosecution. Accordingly, they would argue that no further restrictions are appropriate on the use of documents in criminal cases. In addition, they would observe that nothing in the convention affects domestic U.S. rules regarding the admissibility or inadmissibility of evidence. Thus, information received pursuant to this convention that is to be introduced into a criminal trial would need to meet the same admissibility standards as any other material offered as evidence.

III. EXPLANATION OF THE PROPOSED CONVENTION

PREAMBLE

The preamble states in general terms the rationale leading the signatories to agree to a convention on mutual administrative assistance in tax matters. The preamble notes that the development of the international economy across national borders has increased the possibilities for tax avoidance and evasion, thus necessitating increased cooperation and coordination among the tax authorities of signatory countries. The preamble also acknowledges the importance of protecting the rights of taxpayers.

Potential parties to the convention are member States of the Council of Europe and the Member countries of the Organization for Economic Cooperation and Development (OECD). The Council of Europe and OECD have the following members in common: Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. In addition, Cyprus, Liechtenstein, Malta, and San Marino are members of the Council of Europe. Additional members of the OECD are Australia, Canada, Japan, New Zealand, and the United States.

I. SCOPE OF THE CONVENTION

Article 1. Object of the Convention and persons covered

The convention requires the parties to provide administrative assistance to each other in tax matters. The convention explicitly states that administrative assistance may involve, where appropriate, measures taken by judicial bodies. Administrative assistance must terminate once criminal proceedings before a judicial body have been initiated. Information previously obtained may be used as evidence in a criminal proceeding only if prior authorization has been given by the party that supplied this information (see Article 4, described in detail below).

The convention enumerates three general categories of administrative assistance: the exchange of information, assistance in the recovery of amounts owed, and the service of documents. Article 30 (Reservations) of the convention (described in detail below) provides that a party may enter a reservation with respect to assistance in the recovery of amounts owed or the service of documents (in addition to other aspects of the convention). The Administration has stated that the United States intends to enter a reservation with respect to both of these areas of assistance.

The convention provides that a party must provide administrative assistance whether the person with respect to whom assistance is sought is a resident or national of a party to the convention or of another country.

Article 2. Taxes covered

The convention applies to many types of taxes. All parties to the convention must apply the convention to the following types of taxes: taxes on income or profits, taxes on capital gains that are imposed separately from the tax on income or profits, and taxes on wealth. These types of taxes must be imposed by the country itself, and not by a political subdivision or local authority, in order for the mandatory application to be effective.

The convention also applies to additional types of taxes. Under Article 30 of the convention, however, a party may enter a reservation withholding the application of the convention to any or all of these additional types of taxes. These additional types of taxes are: taxes on income, profits, capital gains, or net wealth that are imposed by a political subdivision or local authority; national social security taxes; estate, inheritance, or gift taxes; general consumption taxes (such as value added taxes or sales taxes); taxes on goods and services (such as excise taxes); taxes on the use or ownership of motor vehicles or other moveable property; or any other taxes (except customs duties). These taxes (except social security taxes) may be imposed by either the country itself or a political subdivision or local authority thereof. The Administration has stated that the United States intends to enter a reservation with respect to all State and local taxes, as well as all taxes imposed by U.S. possessions.

The convention provides that the existing taxes to which the convention applies are to be listed in an appendix to the convention to be supplied by each party. If any change is made to this list (by, for example, altering a reservation), the convention provides that a party must notify either of the Depositaries (the Secretary General of the Council of Europe or the Secretary General of the OECD). Any modification is effective on the first day of the month that begins three months after the receipt of the notice by the Depositary.

The convention also applies automatically to any identical or substantially similar tax that is imposed by a party after the convention becomes effective with respect to that party. The party must also notify the Depositary of the adoption of the tax.

CHAPTER II. GENERAL DEFINITIONS

Article 3. Definitions

This article contains the definitions of certain terms utilized in the convention. The term "applicant State" refers to any party applying for assistance in tax matters. The term "requested State" refers to any party that is requested to provide assistance in tax matters. The term "tax" means any tax to which the convention applies pursuant to Article 2. The term "tax claim" means any amount of tax, interest thereon, tax penalties, and related collection charges, that are owed and not yet paid. The term "competent authority" refers to the persons and authorities listed in an Annex to the convention. The Administration has stated that, for the United States, the competent authority will be the Secretary of the Treasury or his delegate. The Administration has indicated that, as in the case of existing bilateral treaties, the Secretary intends to

delegate the authority to act to the Commissioner of Internal Revenue, who in turn intends to delegate authority to act to the Assistant Commissioner (International) of the Internal Revenue Service, who may act only with the concurrence of the Associate Chief Counsel (International) of the Internal Revenue Service with respect to interpretative issues.

A party may define more explicitly the defined terms contained in this Article by means of an Annex to the convention. Any modifications to these Annexes must be provided to a Depositary, and they become effective on the first day of the month that is three months after receipt of the notification by the Depositary. In general, any term not otherwise defined is to have the meaning that it has under the domestic law of the party.

CHAPTER III. FORMS OF ASSISTANCE

Section I. Exchange of Information

Article 4. General provision

The convention requires parties to exchange any information that is "foreseeably relevant" to the assessment and collection of tax or the recovery and enforcement of tax claims. The convention also requires parties to exchange any information that is foreseeably relevant to prosecution before an administrative authority or initiation of prosecution before a judicial body. Information that is "unlikely to be relevant" to these purposes shall not be exchanged under the convention.

The convention provides that a party may utilize information obtained under the convention as evidence in a criminal court only if prior authorization has been given by the party that supplied the information. The convention also provides that any two or more parties may agree to waive this condition. The Administration has indicated that the United States will seek waivers of this condition on a bilateral basis.

An exchange of information is not permitted after criminal proceedings before a judicial body have begun. For United States purposes, a criminal indictment will be the point at which criminal proceedings are considered to begin before a judicial body. Consequently, information would still be permitted to be exchanged during a grand jury investigation.

Any party may indicate that its own laws require it to inform its resident or national before transmitting information concerning him or her. This is done by making a declaration addressed to one of the Depositaries. In general, United States law requires that notice be provided to taxpayers of any summons served on a third-party recordkeeper. The Administration intends to adopt an administrative procedure under which it will generally notify an affected taxpayer of specific requests and spontaneous exchanges.

The convention enumerates six different forms in which exchanges of information may occur: on request (Article 5), automatically (Article 6), spontaneously (Article 7), in a simultaneous tax examination (Article 8), in a tax examination abroad (Article 9), and through notification regarding conflicting information (Article 10). Parties are not restricted to exchanging information in one of

these specified forms, but may exchange information in other forms. It is likely, however, that the vast majority of information will be exchanged in one of the six forms enumerated in the convention.

Article 5. Exchange of information on request

Upon the request of an applicant State, the requested State must provide the applicant State with any information subject to the convention that concerns particular persons or transactions. The convention explicitly states that if the requested information is not available in the tax files of the requested State, the requested State shall take all relevant measures to provide the applicant State with the information requested. This type of exchange occurs under certain bilateral treaties to which the United States is a party.

Article 6. Automatic exchange of information

Two or more parties may agree to exchange information automatically with respect to mutually agreed upon categories of cases and in accordance with mutually agreed upon procedures. This type of exchange occurs under certain bilateral treaties to which the United States is a party.

Article 7. Spontaneous exchange of information

The convention enumerates several circumstances in which a party is to forward to another party, without prior request, information of which it has knowledge. These circumstances are: (1) where a party has grounds for supposing that there may be a loss of tax in the other party; (2) where a person obtains a reduction in or exemption from tax that would give rise to a liability for or an increase in tax in another party; (3) where business dealings between a person liable for tax in a party and another person liable for tax in another party are conducted through other countries (whether or not they are parties) in such a way that tax savings may result in either party; (4) where a party has grounds for supposing that tax savings may result from artificial transfers of profits within groups of enterprises; and (5) where information that has been received by a party from another party has enabled the receiving party to obtain additional information that may be relevant in assessing liability by the party that provided the original information. This type of exchange occurs under certain bilateral treaties to which the United States is a party.

The convention requires parties to take all necessary measures to ensure that information is transmitted pursuant to this provision.

Article 8. Simultaneous tax examinations

A party may request that two or more parties consult together to determine cases and procedures for simultaneous tax examinations. A party may decide whether or not to participate in any specific simultaneous tax examination. A simultaneous tax examination is a concurrent examination of a taxpayer, conducted by each party in its own territory, with a view to exchanging any relevant information that is obtained through the examination. Any examination

must be of a person in whom the parties have a common or related interest. This type of examination and exchange of information occurs under certain bilateral treaties to which the United States is a party.

Article 9. Tax examinations abroad

The competent authority of an applicant State may request that the competent authority of the requested State permit representatives of the applicant State to be present for an appropriate part of a specific tax examination conducted by a requested State. If the request is approved, the requested State is to notify the applicant State of the time and place of the examination, the authority or official designated to carry out the examination, and the procedures and conditions utilized by the requested State in conducting the examination. All decisions regarding the conduct of the examination are to be made by the requested State.

A party may inform one of the Depositaries that it generally intends not to approve requests for these examinations. This declaration may be made (or withdrawn) at any time. The Administration has indicated that it does not intend to make this declaration. The Administration has also indicated that it currently intends to use the authority granted by this Article on a limited basis, determined by the facts of each case. The Administration has indicated its intent to notify a taxpayer of the request of another party to be present at the tax examination and to permit the other party to be present only if the taxpayer does not object.

Article 10. Conflicting information

If a party receives information from another party that is in conflict with information in its possession, it shall advise the party that provided the information of the conflict.

Section II. Assistance in Recovery

Article 11. Recovery of tax claims

If an applicant State so requests, the convention provides that a requested State must take the necessary steps to recover tax claims of the applicant State as if they were tax claims of the requested State. This is subject to the time limits enumerated in Article 14 (described below) and the priority provisions of Article 15 (described below).

This provision is to apply only to tax claims that may be enforced in the applicant State. In addition, unless the applicant State and the requested State otherwise agree, this provision may only apply to tax claims that are not contested. Also, if a tax claim is against a person who is not a resident of the applicant State, this provision may only apply (unless the applicant State and the requested State otherwise agree) to tax claims that may no longer be contested. Thus, this special non-resident rule means that all opportunity to contest a tax claim, such as through normal administrative or judicial appeals processes, must be exhausted or must no longer be available (due to the expiration of all applicable time periods for appeal) before a requested State may assist an applicant

State in the recovery of a tax claim against a non-resident of th applicant State.

A special rule applies to the recovery of tax claims against a d cedent or his or her estate. The obligation to provide assistance limited to the value of the estate (with respect to tax clain against an estate) or the value of the property acquired by eac beneficiary of the estate (with respect to tax claims against th beneficiaries).

Article 30 (described below) permits a party to make a reserv tion with respect to all or a portion of Section II of the conventio The Administration has indicated that the United States intends t enter a reservation with respect to the entirety of this Section the convention.

Article 12. Measures of conservancy

If an applicant State so requests, a requested State shall tak measures of conservancy, even if the tax claim is contested or not yet enforceable by the applicant State. Such measures are t prevent dissipation of the assets example, seizing or freezing th assets.

Article 13. Documents accompanying the request

Any request for administrative assistance in recovery of ta claims must be accompanied by the following documentation: a de laration that the tax claim concerns a tax covered by the conver tion and that the tax claim is not or may not be contested (as r quired); an official copy of the document permitting enforcement the tax claim in the applicant State; and any other document ne essary for recovery or measures of conservancy.

The official document permitting enforcement of the tax claim i the applicant State shall (as appropriate and in accordance wit the laws of the requested State) be accepted, recognized, suppl mented, or replaced as soon as possible after receipt by an offici document permitting enforcement in the requested State.

Article 14. Time limits

The law of the applicant State determines the time limits beyon which a tax claim cannot be enforced. The applicant State mus provide information on the applicable time limit to the requeste State as part of the request for assistance.

If the requested State takes action to recover a tax claim tha under the laws of the requested State, suspends or interrupts thi time limit, then the time limit is suspended or interrupted with re spect to the tax claim of the applicant State. The requested Stat must inform the applicant State of any such actions.

In no event, however, is the requested State required to compl with a request for assistance that is submitted to it more than 1 years after the date of the original official document permitting en forcement.

Article 15. Priority

The tax claim of the applicant State does not have any priorit that may be accorded to taxes in the requested State, even if th

ollection procedures utilized by the requested State are procedures ıpplicable to its own taxes.

ırticle 16. Deferral of payment

The requested State may permit deferral of payment or payment ›y installments if its laws or administrative practices permit it to lo so in similar circumstances. The requested State must inform he applicant State of this before permitting deferral or installnent payments.

Section III. Service of Documents

ırticle 17. Service of documents

If the applicant State so requests, the requested State shall serve locuments (including documents related to judicial decisions) of the ıpplicant State that relate to a tax covered by the convention.

The requested State is to serve the documents by a method precribed by its own laws for the service of substantially similar docıments, or, to the extent possible, by the method requested by the ıpplicant State (or the closest method available under the laws of he requested State).

A party may serve documents through the mails on a person vithin the territory of another party. The convention explicitly tates that nothing in it shall be construed to invalidate the service ›f documents by a party in accordance with its own laws.

A document served pursuant to this article of the convention ıeed not be accompanied by a translation of that document. If the equested State determines that the person on whom the document ɜ served cannot understand the language of the document, the reıuested State is to have it translated into (or a summary prepared n) one of its official languages. As an alternative, the requested ›tate may ask the applicant State to have the document translated nto (or a summary prepared in) one of the official languages of the equested State, the Council of Europe, or the OECD.

Article 30 (described below) permits a party to make a reservaion with respect to the service of documents for all or specified ypes of taxes. That Article also permits a party to enter a reservaion not to permit the service of documents by mail. The Administration has indicated that the United States will enter a reservaion with respect to this entire Article, except as to the provision ›ermitting service of documents by mail.

Chapter IV. Provisions Relating to All Forms of Assistance

ırticle 18. Information to be provided by the applicant State

A request for assistance is required to indicate (as appropriate): he identity of the entity initiating the request for assistance; the ıame, address, and other information useful in identifying the ›erson with respect to whom the request for assistance is made; vith respect to a request for information, the format in which the ıpplicant State wishes to receive the information; with respect to a equest for assistance in recovery or measures of conservancy, the ıature and components of the tax claim and the identity of the ıssets from which the tax claim may be recovered; with respect to

a request for service of documents, the nature and subject of tho documents; whether, in general, the request is in conformity wit the law and administrative practice of the applicant State; ar whether the applicant State has pursued all available means in i own territory before making the request for assistance, as require by Article 19 (described below).

As soon as the applicant State has or receives additional info mation relevant to the request for assistance, it is to forward it the requested State.

Article 19. Possibility of declining a request

The requested State is not required to respond to a request f assistance if the applicant State has not pursued all the mear available in its own territory, except where doing so would giv rise to disproportionate difficulty.

Article 20. Response to the request for assistance

If the requested State complies with the request for assistance, is to inform the applicant State as soon as possible of the actior taken and the results obtained. If the requested State declines t comply with the request for assistance, it is to inform the applicar State as soon as possible of its decision and the reasons for it. If a applicant State has requested that information be supplied in specific format, the requested State must supply the information i that format if it is in a position to do so.

Article 21. Protection of persons and limits to the obligation t provide assistance

Nothing in the convention is to affect the rights and safeguard afforded to persons by either the laws or administrative practice of the requested State.

Except as provided in Article 14 (relating to time limits), nothin in the convention is to be construed to impose on the requeste State any obligation: to carry out measures that are at varianc with its own laws or administrative practices (as well as the law and administrative practices of the applicant State); to carry ou measures that the requested State considers contrary to eithe public policy or its essential interests; to supply information not ob tainable under its own laws or administrative practices (or those c the applicant State); to provide administrative assistance to th extent that the requested State considers the taxation of the appli cant State to be contrary to generally accepted taxation principle or to a treaty that the requested State has entered into with th applicant State; or to provide assistance in any instance wher doing so would lead to discrimination between a national of the re quested State and a national of the applicant State in the same cir cumstances.

Article 22. Secrecy

Any information obtained by a party pursuant to the conventio must be treated as secret in the same manner as information ob tained under the domestic laws of that party. If, however, the party supplying the information has more restrictive conditions of secre cy, the more restrictive provisions apply. This rule provides greate

protection for the confidentiality of the information that is exchanged than is provided under the model treaty. Under the model treaty, information is treated as secret in the same manner as information obtained under the domestic laws of the applicant State.

Regardless of the laws and administrative practices of any party, information obtained pursuant to the convention can only be disclosed to persons and authorities involved in the assessment, collection, recovery, or enforcement of taxes of that party, including persons (such as the General Accounting Office and the Congressional tax-writing committees) responsible for the supervision of the administration of the tax laws and having the power to look into individual tax cases. Persons authorized to receive information are permitted to use this information only for authorized purposes. They may, however, disclose it in judicial proceedings relating to the taxes, if the party that supplied the information agrees.

If a party has made a reservation with respect to the types of taxes to which the convention applies pursuant to Article 30 (described below), then any other party obtaining information from that party may not use the information with respect to a tax subject to the reservation. Similarly, the party that made the reservation must not use any information obtained under the convention with respect to a tax subject to the reservation.

Notwithstanding these provisions, information received by a party may be used for other purposes to the extent that the law of the party supplying the information permits such use and that party has specifically authorized such use. The Administration has indicated that the United States intends never to authorize such use by another party. If another party provides information to the United States, that information may be disclosed for the non-tax purposes authorized by section 6103 of the Code only if the law of the party supplying the information permits that use and that party has specifically authorized that use. If a party receives information from another party, it may (subject to the approval of the party supplying the information) transmit the information to a third party.

Article 23. Proceedings

Proceedings related to measures taken by the requested State under the convention may only be brought before the appropriate body of the requested State.

Proceedings related to measures taken by the applicant State under the convention (such as suits regarding the existence or amount of the tax claim) may only be brought before the appropriate body of the applicant State. If such proceedings are brought, the applicant State must so notify the requested State. Upon being so notified, the requested State must suspend any actions relating to the subject of the proceedings pending the decision of the body in the applicant State. In this instance, upon request of the applicant State, the requested State must take measures of conservancy to safeguard recovery. If such proceedings are brought in the applicant State, any interested person may so inform the requested State. If the requested State is so notified, it may, if necessary, consult with the applicant State.

As soon as a final decision has been rendered in the proceedings, the requested State or the applicant State (as appropriate) must notify the other State of the decision and the implications it has for the request for assistance.

CHAPTER V. SPECIAL PROVISIONS

Article 24. Implementation of the Convention

Parties are to communicate with each other regarding the implementation of the convention through their respective competent authorities. The competent authorities may communicate directly and may authorize subordinate authorities to act on their behalf. The competent authorities of two or more parties may agree among themselves as to the implementation of the convention among themselves.

If the requested State believes that application of the convention in a particular case would have serious and undesirable consequences, the requested State and the applicant State are to consult and attempt to resolve the situation.

The convention establishes a coordinating body, consisting of representatives of the competent authorities of each party. This body is established under the aegis of the OECD. The coordinating body is to monitor the implementation and development of this convention. It is to recommend any action that is likely to further the general aims of the convention, act as a forum for the study of new ways to increase international cooperation in tax matters, and, where appropriate, recommend revisions or amendments to the convention. States that have signed, but not yet ratified, accepted, or approved the convention, are entitled to representation at the meetings of the coordinating body as observers.

A party may ask the coordinating body to furnish opinions on the interpretation of the provisions of the convention.

In instances where questions regarding the implementation or interpretation of the convention have arisen between two or more parties, those parties shall attempt to resolve the matter. They must communicate any resolution to the coordinating body.

The Secretary General of the OECD must inform not only parties but also signatories that have not yet ratified, accepted, or approved the convention of all opinions issued by the coordinating body on the interpretation of the convention and of all resolutions of questions regarding the implementation or interpretation of the convention that have been reached by two or more parties.

Article 25. Language

Requests for assistance and responses must be prepared in one of the official languages of the OECD or of the Council of Europe. Alternatively, these documents may be prepared in any other language that the two parties may agree to. English is one of the official languages of the OECD.

Article 26. Costs

Unless parties bilaterally agree otherwise, ordinary costs incurred in providing assistance are to be borne by the requested

State, but extraordinary costs incurred in providing assistance are to be borne by the applicant State.

CHAPTER VI. FINAL PROVISIONS

Article 27. Other international agreements or arrangements

The possibilities of assistance provided by the convention do not limit, nor are they limited by, those contained in existing or future international agreements or other arrangements between parties or other instruments that relate to cooperation in tax matters. Thus, parties may utilize the agreement, arrangement, or instrument that is most useful to the applicant State in a particular situation.

Notwithstanding this provision, however, all parties that are members of the European Economic Community must apply the rules of that Community to their relations.

Article 28. Signature and entry into force of the Convention

The convention is open to signature by the member States of the Council of Europe and the Member countries of the OECD, subject to ratification, acceptance, or approval. Instruments of ratification, acceptance, or approval must be deposited with one of the Depositaries.

The convention is to enter into force on the first day of the month following three months after five States have ratified, accepted, or approved the convention. If, after this date, another member State of the Council of Europe or Member country of the OECD ratifies, accepts, or approves the convention, it becomes effective with respect to that party on the first day of the month following three months after the date of deposit of the instrument of ratification, acceptance, or approval.

Article 29. Territorial application of the Convention

Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, or approval, specify the territory or territories to which the convention applies. At any later date, a State may extend the application of the convention to other territories. The State must specify the additional territories in a declaration to be deposited with one of the Depositories. The extension becomes effective on the first day of the month following three months after the receipt of this declaration by the Depositary.

The Administration has stated that the United States intends to specify that the United States, for purposes of this convention, is the United States of America, including Puerto Rico, the Virgin Islands, Guam, and any other territory or possession.

A State may withdraw application of the convention to any territory by specifying the territory in a declaration made to one of the Depositaries. A declaration of withdrawal becomes effective within the same time period as a declaration of extension.

Article 30. Reservations

The convention provides that a State may make reservations with respect to one or more of five specified aspects of the convention. No other reservation (beyond those specified) may be made.

The first reservation is not to provide any form of assistance wi respect to specified taxes imposed by other parties (the types taxes to which this reservation applies are listed in Article 2 of t convention, discussed above). A party may not decline to provi assistance with respect to any tax with respect to which it also s licits assistance under the convention.

The second reservation relates to assistance in the recovery tax claims. A party may decline to provide any assistance in th area, or may decline to provide assistance with respect to specifi types of taxes.

Under the third reservation, a party may decline to provide a sistance with respect to any claim in existence on the date the co vention becomes effective with respect to that party. A party ma also decline to provide assistance where the party had previous made the first or the second reservation (or both), and subsequent withdraws the reservation. In these circumstances, a party may d cline to provide assistance with respect to a claim in existence c the effective date of the withdrawal that relates to a type of ta subject to the withdrawal.

Under the fourth reservation, a party may decline to provide a sistance with respect to the service of documents. This may be do either for all purposes or only for one or more of the types of tax covered by the convention.

Under the fifth reservation, a party may decline to permit t service of documents by mail, as otherwise permitted by Article (described above).

These reservations may be made at the time of signature, at t time of depositing the instrument of ratification, acceptance, or a proval, or at any other time. Once the convention has become effe tive with respect to a party, the party may also make one or mo of these reservations. These additional reservations become effe tive on the first day of the month following three months after r ceipt of the new reservation by one of the Depositaries.

In addition, a party that has made a reservation (either initial or subsequently) may wholly or partially withdraw it. It may do by notifying one of the Depositaries. The withdrawal is effective c the date of receipt of the notification by the Depositary.

A party that has made a reservation is not permitted to requi another party to observe that reserved provision of the conventio If the reservation is partial, this rule applies only to the portion the provision with respect to which the reservation applies.

Article 31. Denunciation

A party may denounce the convention at any time by notifyin one of the Depositaries. The denunciation is effective on the fir day of the month following three months after receipt of the noti cation by a Depositary. Any party that denounces the conventic remains bound by the secrecy provisions of Article 22 (Secrecy) f as long as it retains any documents or information obtained und the convention.

Article 32. Depositaries and their functions

Each Depositary must notify the member States of the Council Europe, the Member countries of the OECD, and the other Depos

ary, of the following: any signature of the convention; the deposit f any instrument of ratification, acceptance, or approval of the onvention; the entry into force of the convention with respect to a tate or a modification of the territorial application of the convenion, as provided in Articles 28 (Signature and entry into force of he convention) and 29 (Territorial application of the convention); ny declaration by a party that, under its laws, it may inform its esidents or nationals prior to transmitting information concerning hem, pursuant to Article 4 (General provision), or the withdrawal f this declaration; any declaration by a party that it intends not to ccept, as a general rule, requests by another State to be present at he party's tax examination, pursuant to Article 9 (Tax examinaion abroad), or the withdrawal of this declaration; any reservation or withdrawal thereof) made under Article 30 (Reservations); any otification of the taxes to which the Convention applies (or modifiations thereto), as provided in Article 2 (Taxes covered); any notifiation relating to the identity of competent authorities or the defiition of particular terms (or modifications thereto), as provided in rticle 3 (Definitions); any notification regarding the territorial aplicability of the convention (or modifications thereto), as provided n Article 29 (Territorial application of the convention); any denuniation of the convention, as provided in Article 31 (Denunciation); r any other act, notification, or communication relating to this onvention.

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