COMMENTARY ON ARTICLE 25
CONCERNING THE MUTUAL AGREEMENT PROCEDURE

I. Preliminary remarks

1. This Article institutes a mutual agreement procedure for resolving difficulties arising out of the application of the Convention in the broadest sense of the term.

(Replaced on 11 April 1977; see HISTORY)

2. It provides first, in paragraphs 1 and 2, that the competent authorities shall endeavour by mutual agreement to resolve the situation of taxpayers subjected to taxation not in accordance with the provisions of the Convention.

(Replaced on 11 April 1977; see HISTORY)

3. It also, in paragraph 3, invites and authorises the competent authorities of the two States to resolve by mutual agreement problems relating to the interpretation or application of the Convention and, furthermore, to consult together for the elimination of double taxation in cases not provided for in the Convention.

(Replaced on 11 April 1977; see HISTORY)

4. As regards the practical operation of the mutual agreement procedure, the Article, in paragraph 4, merely authorises the competent authorities to communicate with each other directly, without going through diplomatic channels, and, if it seems advisable to them, to have an oral exchange of opinions through a joint commission appointed especially for the purpose. Article 26 applies to the exchange of information for the purposes of the provisions of this Article. The confidentiality of information exchanged for the purposes of a mutual agreement procedure is thus ensured.

(Amended on 17 July 2008; see HISTORY)

5. Finally, paragraph 5 provides a mechanism that allows a taxpayer to request the arbitration of unresolved issues that have prevented competent authorities from reaching a mutual agreement within two years. Whilst the mutual agreement procedure provides a generally effective and efficient method of resolving disputes arising under the Convention, there may be cases where the competent authorities are unable to agree that the taxation by both States is in accordance with the Convention. The arbitration process provided for under paragraph 5 allows such cases to be resolved by allowing an independent decision of the unresolved issues, thereby allowing a mutual agreement to be reached. This process is an integral part of the mutual

agreement procedure and does not constitute an alternative route to solving disputes concerning the application of the Convention.

(Replaced on 17 July 2008; see HISTORY)

6. Since the Article merely lays down general rules concerning the mutual agreement procedure, the comments below are intended to clarify the purpose of such rules, and also to amplify them, if necessary, by referring, in particular, to the rules and practices followed at international level in the conduct of mutual agreement procedures or at the internal level in the conduct of the procedures which exist in most OECD member countries for dealing with disputed claims regarding taxes. In particular, since paragraph 5 expressly requires the competent authorities to agree on the mode of application of the arbitration process that it provides, the comments below discuss in detail various procedural aspects of that process. An Annex to this Commentary contains a sample form of agreement that the competent authorities may use as a basis for settling the mode of application of the arbitration process; that Annex addresses various structural and procedural issues, discusses the various provisions of the sample agreement and, in some cases, puts forward alternatives.

(Renumbered and amended on 17 July 2008; see HISTORY)

II. Commentary on the provisions of the Article

Paragraphs 1 and 2

7. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. When taxation not in accordance with the Convention arises from an incorrect application of the Convention in both States, taxpayers are then obliged to litigate in each State, with all the disadvantages and uncertainties that such a situation entails. So paragraph 1 makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure which is called the mutual agreement procedure because it is aimed, in its second stage, at resolving the dispute on an agreed basis, *i.e.* by agreement between competent authorities, the first stage being conducted exclusively in the State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) from the presentation of the objection up to the decision taken regarding it by the competent authority on the matter.

(Renumbered and amended on 17 July 2008; see HISTORY)

8. In any case, the mutual agreement procedure is clearly a special procedure outside the domestic law. It follows that it can be set in motion solely in cases coming within paragraph 1, *i.e.* cases where tax has been charged, or is going to be charged, in disregard of the provisions of the Convention. So where a charge of tax has been made contrary both to the Convention and the domestic law, this case is amenable to the mutual agreement procedure to the extent only that the Convention is affected, unless a connecting link exists between the rules of the Convention and the rules of the domestic law which have been misapplied.

(Renumbered on 17 July 2008; see HISTORY)

9. In practice, the procedure applies to cases — by far the most numerous — where the measure in question leads to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases, mention must be made of the following:

— questions relating to the attribution of profits to a permanent establishment under paragraph 2 of Article 7;

— the taxation in the State of the payer — in case of a special relationship between the payer and the beneficial owner — of the excess part of interest and royalties, under the provisions of Article 9, paragraph 6 of Article 11 or paragraph 4 of Article 12;

— cases of application of legislation to deal with thin capitalisation when the State of the debtor company has treated interest as dividends, insofar as such treatment is based on clauses of a convention corresponding for example to Article 9 or paragraph 6 of Article 11;

— cases where lack of information as to the taxpayer's actual situation has led to misapplication of the Convention, especially in regard to the determination of residence (paragraph 2 of Article 4), the existence of a permanent establishment (Article 5), or the temporary nature of the services performed by an employee (paragraph 2 of Article 15).

(Amended on 22 July 2010; see HISTORY)

10. Article 25 also provides machinery to enable competent authorities to consult with each other with a view to resolving, in the context of transfer pricing problems, not only problems of juridical double taxation but also those of economic double taxation, and especially those resulting from the inclusion of profits of associated enterprises under paragraph 1 of Article 9; the corresponding adjustments to be made in pursuance of paragraph 2 of the same Article thus fall within the scope of the mutual agreement procedure, both as concerns assessing whether they are well-founded and for determining their amount.

(Renumbered on 17 July 2008; see HISTORY)

11. This in fact is implicit in the wording of paragraph 2 of Article 9 when the bilateral convention in question contains a clause of this type. When the bilateral convention does not contain rules similar to those of paragraph 2 of Article 9 (as is usually the case for conventions signed before 1977) the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to the text of paragraph 1 — which usually only confirms broadly similar rules existing in domestic laws — indicates that the intention was to have economic double taxation covered by the Convention. As a result, most member countries consider that economic double taxation resulting from adjustments made to profits by reason of transfer pricing is not in accordance with — at least — the spirit of the convention and falls within the scope of the mutual agreement procedure set up under Article 25.

(Renumbered and amended on 17 July 2008; see HISTORY)

12. Whilst the mutual agreement procedure has a clear role in dealing with issues arising as to the sorts of adjustments referred to in paragraph 2 of Article 9, it follows that even in the absence of such a provision, States should be seeking to avoid double taxation, including by giving corresponding adjustments in cases of the type contemplated in paragraph 2. Whilst there may be some difference of view, States would therefore generally regard a taxpayer initiated mutual agreement procedure based upon economic double taxation contrary to the terms of Article 9 as encompassing issues of whether a corresponding adjustment should have been provided, even in the absence of a provision similar to paragraph 2 of Article 9. States which do not share this view do, however, in practice, find the means of remedying economic double taxation in most cases involving *bona fide* companies by making use of provisions in their domestic laws.

(Replaced on 17 July 2008; see HISTORY)

13. The mutual agreement procedure is also applicable in the absence of any double taxation contrary to the Convention, once the taxation in dispute is in direct contravention of a rule in the Convention. Such is the case when one State taxes a particular class of income in respect of which the Convention gives an exclusive right to tax to the other State even though the latter is unable to exercise it owing to a gap in its domestic laws. Another category of cases concerns persons who, being nationals of one Contracting State but residents of the other State, are subjected in that other State to taxation treatment which is discriminatory under the provisions of paragraph 1 of Article 24.

(Renumbered on 17 July 2008; see HISTORY)

14. It should be noted that the mutual agreement procedure, unlike the disputed claims procedure under domestic law, can be set in motion by a

taxpayer without waiting until the taxation considered by him to be "not in accordance with the Convention" has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the "actions of one or both of the Contracting States" will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention. Thus, for example, if a change to a Contracting State's tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income. Other examples include filing a return in a self assessment system or the active examination of a specific taxpayer reporting position in the course of an audit, to the extent that either event creates the probability of taxation not in accordance with the Convention (*e.g.* where the self assessment reporting position the taxpayer is required to take under a Contracting State's domestic law would, if proposed by that State as an assessment in a non-self assessment regime, give rise to the probability of taxation not in accordance with the Convention, or where circumstances such as a Contracting State's published positions or its audit practice create a significant likelihood that the active examination of a specific reporting position such as the taxpayer's will lead to proposed assessments that would give rise to the probability of taxation not in accordance with the Convention). Another example might be a case where a Contracting State's transfer pricing law requires a taxpayer to report taxable income in an amount greater than would result from the actual prices used by the taxpayer in its transactions with a related party, in order to comply with the arm's length principle, and where there is substantial doubt whether the taxpayer's related party will be able to obtain a corresponding adjustment in the other Contracting State in the absence of a mutual agreement procedure. As indicated by the opening words of paragraph 1, whether or not the actions of one or both of the Contracting States will result in taxation not in accordance with the Convention must be determined from the perspective of the taxpayer. Whilst the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established, the tax authorities should not refuse to consider a request under paragraph 1 merely because they consider that it has not been proven (for example to domestic law standards of proof on the "balance of probabilities") that such taxation will occur.

(Renumbered and amended on 17 July 2008; see HISTORY)

15. Since the first steps in a mutual agreement procedure may be set in motion at a very early stage based upon the mere probability of taxation not in accordance with the Convention, the initiation of the procedure in this manner would not be considered the presentation of the case to the competent authority for the purposes of determining the start of the two year period referred to in paragraph 5 of the Article. Paragraph 8 of the Annex to the Commentary on Article 25 describes the circumstances in which that two year period commences.

(Replaced on 17 July 2008; see HISTORY)

16. To be admissible objections presented under paragraph 1 must first meet a twofold requirement expressly formulated in that paragraph: in principle, they must be presented to the competent authority of the taxpayer's State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national), and they must be so presented within three years of the first notification of the action which gives rise to taxation which is not in accordance with the Convention. The Convention does not lay down any special rule as to the form of the objections. The competent authorities may prescribe special procedures which they feel to be appropriate. If no special procedure has been specified, the objections may be presented in the same way as objections regarding taxes are presented to the tax authorities of the State concerned.

(Renumbered on 17 July 2008; see HISTORY)

17. The requirement laid on the taxpayer to present his case to the competent authority of the State of which he is a resident (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) is of general application, regardless of whether the taxation objected to has been charged in that or the other State and regardless of whether it has given rise to double taxation or not. If the taxpayer should have transferred his residence to the other Contracting State subsequently to the measure or taxation objected to, he must nevertheless still present his objection to the competent authority of the State of which he was a resident during the year in respect of which such taxation has been or is going to be charged.

(Renumbered on 17 July 2008; see HISTORY)

C (25)

18. However, in the case already alluded to where a person who is a national of one State but a resident of the other complains of having been subjected in that other State to an action or taxation which is discriminatory under paragraph 1 of Article 24, it appears more appropriate for obvious reasons to allow him, by way of exception to the general rule set forth above, to present

his objection to the competent authority of the Contracting State of which he is a national. Finally, it is to the same competent authority that an objection has to be presented by a person who, while not being a resident of a Contracting State, is a national of a Contracting State, and whose case comes under paragraph 1 of Article 24.

(Renumbered on 17 July 2008; see HISTORY)

19. On the other hand, Contracting States may, if they consider it preferable, give taxpayers the option of presenting their cases to the competent authority of either State. In such a case, paragraph 1 would have to be modified as follows:

> 1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

(Renumbered on 17 July 2008; see HISTORY)

20. The time limit of three years set by the second sentence of paragraph 1 for presenting objections is intended to protect administrations against late objections. This time limit must be regarded as a minimum, so that Contracting States are left free to agree in their bilateral conventions upon a longer period in the interests of taxpayers, *e.g.* on the analogy in particular of the time limits laid down by their respective domestic regulations in regard to tax conventions. Contracting States may omit the second sentence of paragraph 1 if they concur that their respective domestic regulations apply automatically to such objections and are more favourable in their effects to the taxpayers affected, either because they allow a longer time for presenting objections or because they do not set any time limits for such purpose.

(Renumbered on 17 July 2008; see HISTORY)

21. The provision fixing the starting point of the three year time limit as the date of the "first notification of the action resulting in taxation not in accordance with the provisions of the Convention" should be interpreted in the way most favourable to the taxpayer. Thus, even if such taxation should be directly charged in pursuance of an administrative decision or action of general application, the time limit begins to run only from the date of the notification of the individual action giving rise to such taxation, that is to say, under the most favourable interpretation, from the act of taxation itself, as evidenced by a notice of assessment or an official demand or other instrument

for the collection or levy of tax. Since a taxpayer has the right to present a case as soon as the taxpayer considers that taxation will result in taxation not in accordance with the provisions of the Convention, whilst the three year limit only begins when that result has materialised, there will be cases where the taxpayer will have the right to initiate the mutual agreement procedure before the three year time limit begins (see the examples of such a situation given in paragraph 14 above).

(Renumbered and amended on 17 July 2008; see HISTORY)

22. In most cases it will be clear what constitutes the relevant notice of assessment, official demand or other instrument for the collection or levy of tax, and there will usually be domestic law rules governing when that notice is regarded as "given". Such domestic law will usually look to the time when the notice is sent (time of sending), a specific number of days after it is sent, the time when it would be expected to arrive at the address it is sent to (both of which are times of presumptive physical receipt), or the time when it is in fact physically received (time of actual physical receipt). Where there are no such rules, either the time of actual physical receipt or, where this is not sufficiently evidenced, the time when the notice would normally be expected to have arrived at the relevant address should usually be treated as the time of notification, bearing in mind that this provision should be interpreted in the way most favourable to the taxpayer.

(Replaced on 17 July 2008; see HISTORY)

23. In self assessment cases, there will usually be some notification effecting that assessment (such as a notice of a liability or of denial or adjustment of a claim for refund), and generally the time of notification, rather than the time when the taxpayer lodges the self-assessed return, would be a starting point for the three year period to run. There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of "notification" would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention. This could, for example, be when information recording the transfer of funds is first made available to a taxpayer, such as in a bank balance or statement. The time begins to run whether or not the taxpayer actually regards the taxation, at that stage, as contrary to the Convention, provided that a reasonably prudent person in the taxpayer's position would have been able to conclude at that stage that the taxation was not in accordance with the Convention. In such cases, notification of the fact of taxation to the taxpayer is enough. Where, however, it is only the combination of the self assessment with some other circumstance that would cause a reasonably prudent person in the taxpayer's position to conclude that the taxation was contrary to the Convention (such as

a judicial decision determining the imposition of tax in a case similar to the taxpayer's to be contrary to the provisions of the Convention), the time begins to run only when the latter circumstance materialises.

(Replaced on 17 July 2008; see HISTORY)

24. If the tax is levied by deduction at the source, the time limit begins to run from the moment when the income is paid; however, if the taxpayer proves that only at a later date did he know that the deduction had been made, the time limit will begin from that date. Where it is the combination of decisions or actions taken in both Contracting States that results in taxation not in accordance with the Convention, the time limit begins to run only from the first notification of the most recent decision or action. This means that where, for example, a Contracting State levies a tax that is not in accordance with the Convention but the other State provides relief for such tax pursuant to Article 23 A or Article 23 B so that there is no double taxation, a taxpayer will in practice often not initiate the mutual agreement procedure in relation to the action of the first State. If, however, the other State subsequently notifies the taxpayer that the relief is denied so that double taxation now arises, a new time limit begins from that notification, since the combined actions of both States then result in the taxpayer's being subjected to double taxation contrary to the provisions of the Convention. In some cases, especially of this type, the records held by taxing authorities may have been routinely destroyed before the period of the time limit ends, in accordance with the normal practice of one or both of the States. The Convention obligations do not prevent such destruction, or require a competent authority to accept the taxpayer's arguments without proof, but in such cases the taxpayer should be given the opportunity to supply the evidential deficiency, as the mutual agreement procedure continues, to the extent domestic law allows. In some cases, the other Contracting State may be able to provide sufficient evidence, in accordance with Article 26 of the Model Tax Convention. It is, of course, preferable that such records be retained by tax authorities for the full period during which a taxpayer is able to seek to initiate the mutual agreement procedure in relation to a particular matter.

(Renumbered on 17 July 2008; see HISTORY)

25. The three year period continues to run during any domestic law (including administrative) proceedings (*e.g.* a domestic appeal process). This could create difficulties by in effect requiring a taxpayer to choose between domestic law and mutual agreement procedure remedies. Some taxpayers may rely solely on the mutual agreement procedure, but many taxpayers will attempt to address these difficulties by initiating a mutual agreement procedure whilst simultaneously initiating domestic law action, even though the domestic law process is initially not actively pursued. This could result in

mutual agreement procedure resources being inefficiently applied. Where domestic law allows, some States may wish to specifically deal with this issue by allowing for the three year (or longer) period to be suspended during the course of domestic law proceedings. Two approaches, each of which is consistent with Article 25 are, on one hand, requiring the taxpayer to initiate the mutual agreement procedure, with no suspension during domestic proceedings, but with the competent authorities not entering into talks in earnest until the domestic law action is finally determined, or else, on the other hand, having the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions. This second possibility is discussed at paragraph 42 of this Commentary. In either of these cases, the taxpayer should be made aware that the relevant approach is being taken. Whether or not a taxpayer considers that there is a need to lodge a "protective" appeal under domestic law (because, for example, of domestic limitation requirements for instituting domestic law actions) the preferred approach for all parties is often that the mutual agreement procedure should be the initial focus for resolving the taxpayer's issues, and for doing so on a bilateral basis.

(Replaced on 17 July 2008; see HISTORY)

26. Some States may deny the taxpayer the ability to initiate the mutual agreement procedure under paragraph 1 of Article 25 in cases where the transactions to which the request relates are regarded as abusive. This issue is closely related to the issue of "improper use of the Convention" discussed in paragraph 9.1 and the following paragraphs of the Commentary on Article 1. In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure, however. The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention.

(Replaced on 17 July 2008; see HISTORY)

C (25)

27. Some States regard certain issues as not susceptible to resolution by the mutual agreement procedure generally, or at least by taxpayer initiated mutual agreement procedure, because of constitutional or other domestic law provisions or decisions. An example would be a case where granting the taxpayer relief would be contrary to a final court decision that the tax authority is required to adhere to under that State's constitution. The recognised general principle for tax and other treaties is that domestic law,

even domestic constitutional law, does not justify a failure to meet treaty obligations, however. Article 27 of the *Vienna Convention on the Law of Treaties* reflects this general principle of treaty law. It follows that any justification for what would otherwise be a breach of the Convention needs to be found in the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles. Such a justification would be rare, because it would not merely govern how a matter will be dealt with by the two States once the matter is within the mutual agreement procedure, but would instead prevent the matter from even reaching the stage when it is considered by both States. Since such a determination might in practice be reached by one of the States without consultation with the other, and since there might be a bilateral solution that therefore remains unconsidered, the view that a matter is not susceptible of taxpayer initiated mutual agreement procedure should not be lightly made, and needs to be supported by the terms of the Convention as negotiated. A competent authority relying upon a domestic law impediment as the reason for not allowing the mutual agreement procedure to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position. More usually, genuine domestic law impediments will not prevent a matter from entering into the mutual agreement procedure, but if they will clearly and unequivocally prevent a competent authority from resolving the issue in a way that avoids taxation of the taxpayer which is not in accordance with the Convention, and there is no realistic chance of the other State resolving the issue for the taxpayer, then that situation should be made public to taxpayers, so that taxpayers do not have false expectations as to the likely outcomes of the procedure.

(Replaced on 17 July 2008; see HISTORY)

28. In other cases, initiation of the mutual agreement procedure may have been allowed but domestic law issues that have arisen since the negotiation of the treaty may prevent a competent authority from resolving, even in part, the issue raised by the taxpayer. Where such developments have a legally constraining effect on the competent authority, so that bilateral discussions can clearly not resolve the matter, most States would accept that this change of circumstances is of such significance as to allow that competent authority to withdraw from the procedure. In some cases, the difficulty may be only temporary however; such as whilst rectifying legislation is enacted, and in that case, the procedure should be suspended rather than terminated. The two competent authorities will need to discuss the difficulty and its possible effect on the mutual agreement procedure. There will also be situations where a decision wholly or partially in the taxpayer's favour is binding and must be followed by one of the competent authorities but where there is still scope for

mutual agreement discussions, such as for example in one competent authority's demonstrating to the other that the latter should provide relief.

(Replaced on 17 July 2008; see HISTORY)

29. There is less justification for relying on domestic law for not implementing an agreement reached as part of the mutual agreement procedure. The obligation of implementing such agreements is unequivocally stated in the last sentence of paragraph 2, and impediments to implementation that were already existing should generally be built into the terms of the agreement itself. As tax conventions are negotiated against a background of a changing body of domestic law that is sometimes difficult to predict, and as both parties are aware of this in negotiating the original Convention and in reaching mutual agreements, subsequent unexpected changes that alter the fundamental basis of a mutual agreement would generally be considered as requiring revision of the agreement to the extent necessary. Obviously where there is a domestic law development of this type, something that should only rarely occur, good faith obligations require that it be notified as soon as possible, and there should be a good faith effort to seek a revised or new mutual agreement, to the extent the domestic law development allows. In these cases, the taxpayer's request should be regarded as still operative, rather than a new application's being required from that person.

(Replaced on 17 July 2008; see HISTORY)

30. As regards the procedure itself, it is necessary to consider briefly the two distinct stages into which it is divided (see paragraph 7 above).

(Renumbered and amended on 17 July 2008; see HISTORY)

31. In the first stage, which opens with the presentation of the taxpayer's objections, the procedure takes place exclusively at the level of dealings between him and the competent authorities of his State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national). The provisions of paragraph 1 give the taxpayer concerned the right to apply to the competent authority of the State of which he is a resident, whether or not he has exhausted all the remedies available to him under the domestic law of each of the two States. On the other hand, that competent authority is under an obligation to consider whether the objection is justified and, if it appears to be justified, take action on it in one of the two forms provided for in paragraph 2.

(Renumbered on 17 July 2008; see HISTORY)

32. If the competent authority duly approached recognises that the complaint is justified and considers that the taxation complained of is due wholly or in part to a measure taken in the taxpayer's State of residence, it must give the complainant satisfaction as speedily as possible by making such adjustments or allowing such reliefs as appear to be justified. In this situation, the issue can be resolved without resort to the mutual agreement procedure. On the other hand, it may be found useful to exchange views and information with the competent authority of the other Contracting State, in order, for example, to confirm a given interpretation of the Convention.

(Renumbered on 17 July 2008; see HISTORY)

33. If, however, it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other State, it will be incumbent on it, indeed it will be its duty — as clearly appears by the terms of paragraph 2 — to set in motion the mutual agreement procedure proper. It is important that the authority in question carry out this duty as quickly as possible, especially in cases where the profits of associated enterprises have been adjusted as a result of transfer pricing adjustments.

(Renumbered on 17 July 2008; see HISTORY)

34. A taxpayer is entitled to present his case under paragraph 1 to the competent authority of the State of which he is a resident whether or not he may also have made a claim or commenced litigation under the domestic law of that State. If litigation is pending, the competent authority of the State of residence should not wait for the final adjudication, but should say whether it considers the case to be eligible for the mutual agreement procedure. If it so decides, it has to determine whether it is itself able to arrive at a satisfactory solution or whether the case has to be submitted to the competent authority of the other Contracting State. An application by a taxpayer to set the mutual agreement procedure in motion should not be rejected without good reason.

(Renumbered on 17 July 2008; see HISTORY)

35. If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.

(Renumbered on 17 July 2008; see HISTORY)

36. In its second stage — which opens with the approach to the competent authority of the other State by the competent authority to which the taxpayer has applied — the procedure is henceforward at the level of dealings between States, as if, so to speak, the State to which the complaint was presented had given it its backing. But whilst this procedure is indisputably a procedure between States, it may, on the other hand, be asked:

— whether, as the title of the Article and the terms employed in the first sentence of paragraph 2 suggest, it is no more than a simple procedure of mutual agreement, or constitutes the implementation of a *pactum de contrahendo* laying on the parties a mere duty to negotiate but in no way laying on them a duty to reach agreement;

— or whether on the contrary, it is to be regarded (based on the existence of the arbitration process provided for in paragraph 5 to address unresolved issues or on the assumption that the procedure takes place within the framework of a joint commission) as a procedure of a jurisdictional nature laying on the parties a duty to resolve the dispute.

(Renumbered and amended on 17 July 2008; see HISTORY)

37. Paragraph 2 no doubt entails a duty to negotiate; but as far as reaching mutual agreement through the procedure is concerned, the competent authorities are under a duty merely to use their best endeavours and not to achieve a result. Paragraph 5, however, provides a mechanism that will allow an agreement to be reached even if there are issues on which the competent authorities have been unable to reach agreement through negotiations.

(Renumbered and amended on 17 July 2008; see HISTORY)

38. In seeking a mutual agreement, the competent authorities must first, of course, determine their position in the light of the rules of their respective taxation laws and of the provisions of the Convention, which are as binding on them as much as they are on the taxpayer. Should the strict application of such rules or provisions preclude any agreement, it may reasonably be held that the competent authorities, as in the case of international arbitration, can, subsidiarily, have regard to considerations of equity in order to give the taxpayer satisfaction.

(Renumbered on 17 July 2008; see HISTORY)

C (25)

39. The purpose of the last sentence of paragraph 2 is to enable countries with time limits relating to adjustments of assessments and tax refunds in their domestic law to give effect to an agreement despite such time limits. This provision does not prevent, however, such States as are not, on constitutional or other legal grounds, able to overrule the time limits in the domestic law from inserting in the mutual agreement itself such time limits as are adapted to their internal statute of limitation. In certain extreme cases, a

Contracting State may prefer not to enter into a mutual agreement, the implementation of which would require that the internal statute of limitation had to be disregarded. Apart from time limits there may exist other obstacles such as "final court decisions" to giving effect to an agreement. Contracting States are free to agree on firm provisions for the removal of such obstacles. As regards the practical implementation of the procedure, it is generally recommended that every effort should be made by tax administrations to ensure that as far as possible the mutual agreement procedure is not in any case frustrated by operational delays or, where time limits would be in point, by the combined effects of time limits and operational delays.

(Renumbered on 17 July 2008; see HISTORY)

40. The Committee on Fiscal Affairs made a number of recommendations on the problems raised by corresponding adjustments of profits following transfer pricing adjustments (implementation of paragraphs 1 and 2 of Article 9) and of the difficulties of applying the mutual agreement procedure to such situations:

a) Tax authorities should notify taxpayers as soon as possible of their intention to make a transfer pricing adjustment (and, where the date of any such notification may be important, to ensure that a clear formal notification is given as soon as possible), since it is particularly useful to ensure as early and as full contacts as possible on all relevant matters between tax authorities and taxpayers within the same jurisdiction and, across national frontiers, between the associated enterprises and tax authorities concerned.

b) Competent authorities should communicate with each other in these matters in as flexible a manner as possible, whether in writing, by telephone, or by face-to-face or round-the-table discussion, whichever is most suitable, and should seek to develop the most effective ways of solving relevant problems. Use of the provisions of Article 26 on the exchange of information should be encouraged in order to assist the competent authority in having well-developed factual information on which a decision can be made.

c) In the course of mutual agreement proceedings on transfer pricing matters, the taxpayers concerned should be given every reasonable opportunity to present the relevant facts and arguments to the competent authorities both in writing and orally.

(Renumbered on 17 July 2008; see HISTORY)

41. As regards the mutual agreement procedure in general, the Committee recommended that:

a) The formalities involved in instituting and operating the mutual agreement procedure should be kept to a minimum and any unnecessary formalities eliminated.

b) Mutual agreement cases should each be settled on their individual merits and not by reference to any balance of the results in other cases.

c) Competent authorities should, where appropriate, formulate and publicise domestic rules, guidelines and procedures concerning use of the mutual agreement procedure.

(Renumbered on 17 July 2008; see HISTORY)

42. The case may arise where a mutual agreement is concluded in relation to a taxpayer who has brought a suit for the same purpose in the competent court of either Contracting State and such suit is still pending. In such a case, there would be no grounds for rejecting a request by a taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of the mutual agreement procedure until the court had delivered its judgment in that suit. Also, a view that competent authorities might reasonably take is that where the taxpayer's suit is ongoing as to the particular issue upon which mutual agreement is sought by that same taxpayer, discussions of any depth at the competent authority level should await a court decision. If the taxpayer's request for a mutual agreement procedure applied to different tax years than the court action, but to essentially the same factual and legal issues, so that the court outcome would in practice be expected to affect the treatment of the taxpayer in years not specifically the subject of litigation, the position might be the same, in practice, as for the cases just mentioned. In either case, awaiting a court decision or otherwise holding a mutual agreement procedure in abeyance whilst formalised domestic recourse proceedings are underway will not infringe upon, or cause time to expire from, the two year period referred to in paragraph 5 of the Article. Of course, if competent authorities consider, in either case, that the matter might be resolved notwithstanding the domestic law proceedings (because, for example, the competent authority where the court action is taken will not be bound or constrained by the court decision) then the mutual agreement procedure may proceed as normal.

(Renumbered and amended on 17 July 2008; see HISTORY)

C (25)

43. The situation is also different if there is a suit ongoing on an issue, but the suit has been taken by another taxpayer than the one who is seeking to initiate the mutual agreement procedure. In principle, if the case of the taxpayer seeking the mutual agreement procedure supports action by one or both competent authorities to prevent taxation not in accordance with the Convention, that should not be unduly delayed pending a general clarification

of the law at the instance of another taxpayer, although the taxpayer seeking mutual agreement might agree to this if the clarification is likely to favour that taxpayer's case. In other cases, delaying competent authority discussions as part of a mutual agreement procedure may be justified in all the circumstances, but the competent authorities should as far as possible seek to prevent disadvantage to the taxpayer seeking mutual agreement in such a case. This could be done, where domestic law allows, by deferring payment of the amount outstanding during the course of the delay, or at least during that part of the delay which is beyond the taxpayer's control.

(Replaced on 17 July 2008; see HISTORY)

44. Depending upon domestic procedures, the choice of redress is normally that of the taxpayer and in most cases it is the domestic recourse provisions such as appeals or court proceedings that are held in abeyance in favour of the less formal and bilateral nature of mutual agreement procedure.

(Replaced on 17 July 2008; see HISTORY)

44.1 *(Renumbered on 17 July 2008; see HISTORY)*

44.2 *(Renumbered on 17 July 2008; see HISTORY)*

44.3 *(Renumbered on 17 July 2008; see HISTORY)*

44.4 *(Renumbered on 17 July 2008; see HISTORY)*

44.5 *(Renumbered on 17 July 2008; see HISTORY)*

44.6 *(Renumbered on 17 July 2008; see HISTORY)*

44.7 *(Renumbered on 17 July 2008; see HISTORY)*

45. As noted above, there may be a pending suit by the taxpayer on an issue, or else the taxpayer may have preserved the right to take such domestic law action, yet the competent authorities might still consider that an agreement can be reached. In such cases, it is, however, necessary to take into account the concern of a particular competent authority to avoid any divergences or contradictions between the decision of the court and the mutual agreement that is being sought, with the difficulties or risks of abuse that these could entail. In short, therefore, the implementation of such a mutual agreement should normally be made subject:

— to the acceptance of such mutual agreement by the taxpayer, and

— to the taxpayer's withdrawal of the suit at law concerning those points settled in the mutual agreement.

(Renumbered and amended on 17 July 2008; see HISTORY)

46. Some States take the view that a mutual agreement procedure may not be initiated by a taxpayer unless and until payment of all or a specified portion of the tax amount in dispute has been made. They consider that the requirement for payment of outstanding taxes, subject to repayment in whole or in part depending on the outcome of the procedure, is an essentially procedural matter not governed by Article 25, and is therefore consistent with it. A contrary view, held by many States, is that Article 25 indicates all that a taxpayer must do before the procedure is initiated, and that it imposes no such requirement. Those States find support for their view in the fact that the procedure may be implemented even before the taxpayer has been charged to tax or notified of a liability (as noted at paragraph 14 above) and in the acceptance that there is clearly no such requirement for a procedure initiated by a competent authority under paragraph 3.

(Replaced on 17 July 2008; see HISTORY)

47. Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. States therefore should as far as possible take into account the cash flow and possible double taxation issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. It also appears, as a minimum, that if the mutual agreement procedure is initiated prior to the taxpayer's being charged to tax (such as by an assessment), a payment should only be required once that charge to tax has occurred.

(Replaced on 17 July 2008; see HISTORY)

48. There are several reasons why suspension of the collection of tax pending resolution of a mutual agreement procedure can be a desirable policy, although many States may require legislative changes for the purpose of its implementation. Any requirement to pay a tax assessment specifically as a condition of obtaining access to the mutual agreement procedure in order to get relief from that very tax would generally be inconsistent with the policy of making the mutual agreement procedure broadly available to resolve such disputes. Even if a mutual agreement procedure ultimately eliminates any

double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. Finally, another unfortunate complication may be delays in the resolution of cases if a country is less willing to enter into good faith mutual agreement procedure discussions when a probable result could be the refunding of taxes already collected. Where States take the view that payment of outstanding tax is a precondition to the taxpayer initiated mutual agreement procedure, this should be notified to the treaty partner during negotiations on the terms of a Convention. Where both States party to a Convention take this view, there is a common understanding, but also the particular risk of the taxpayer's being required to pay an amount twice. Where domestic law allows it, one possibility which States might consider to deal with this would be for the higher of the two amounts to be held in trust, escrow or similar, pending the outcome of the mutual agreement procedure. Alternatively, a bank guarantee provided by the taxpayer's bank could be sufficient to meet the requirements of the competent authorities. As another approach, one State or the other (decided by time of assessment, for example, or by residence State status under the treaty) could agree to seek a payment of no more than the difference between the amount paid to the other State, and that which it claims, if any. Which of these possibilities is open will ultimately depend on the domestic law (including administrative requirements) of a particular State, but they are the sorts of options that should as far as possible be considered in seeking to have the mutual agreement procedure operate as effectively as possible. Where States require some payment of outstanding tax as a precondition to the taxpayer initiated mutual agreement procedure, or to the active consideration of an issue within that procedure, they should have a system in place for refunding an amount of interest on any underlying amount to be returned to the taxpayer as the result of a mutual agreement reached by the competent authorities. Any such interest payment should sufficiently reflect the value of

the underlying amount and the period of time during which that amount has been unavailable to the taxpayer.

(Replaced on 17 July 2008; see HISTORY)

49. States take differing views as to whether administrative interest and penalty charges are treated as taxes covered by Article 2 of the Convention. Some States treat them as taking the character of the underlying amount in dispute, but other States do not. It follows that there will be different views as to whether such interest and penalties are subject to a taxpayer initiated mutual agreement procedure. Where they are covered by the Convention as taxes to which it applies, the object of the Convention in avoiding double taxation, and the requirement for States to implement conventions in good faith, suggest that as far as possible interest and penalty payments should not be imposed in a way that effectively discourages taxpayers from initiating a mutual agreement procedure, because of the cost and the cash flow impact that this would involve. Even when administrative interest and penalties are not regarded as taxes covered by the Convention under Article 2, they should not be applied in a way that severely discourages or nullifies taxpayer reliance upon the benefits of the Convention, including the right to initiate the mutual agreement procedure as provided by Article 25. For example, a State's requirements as to payment of outstanding penalties and interest should not be more onerous to taxpayers in the context of the mutual agreement procedure than they would be in the context of taxpayer initiated domestic law review.

(Replaced on 17 July 2008; see HISTORY)

Paragraph 3

50. The first sentence of this paragraph invites and authorises the competent authorities to resolve, if possible, difficulties of interpretation or application by means of mutual agreement. These are essentially difficulties of a general nature which concern, or which may concern, a category of taxpayers, even if they have arisen in connection with an individual case normally coming under the procedure defined in paragraphs 1 and 2.

(Renumbered on 17 July 2008; see HISTORY)

51. This provision makes it possible to resolve difficulties arising from the application of the Convention. Such difficulties are not only those of a practical nature, which might arise in connection with the setting up and operation of procedures for the relief from tax deducted from dividends, interest and royalties in the Contracting State in which they arise, but also those which could impair or impede the normal operation of the clauses of the Convention as they were conceived by the negotiators, the solution of which

does not depend on a prior agreement as to the interpretation of the Convention.

(Renumbered on 17 July 2008; see HISTORY)

52. Under this provision the competent authorities can, in particular:

— where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;

— where the laws of a State have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes;

— determine whether, and if so under what conditions, interest may be treated as dividends under thin capitalisation rules in the country of the borrower and give rise to relief for double taxation in the country of residence of the lender in the same way as for dividends (for example relief under a parent/subsidiary regime when provision for such relief is made in the relevant bilateral convention).

(Renumbered on 17 July 2008; see HISTORY)

53. Paragraph 3 confers on the "competent authorities of the Contracting States", i.e. generally the Ministers of Finance or their authorised representatives normally responsible for the administration of the Convention, authority to resolve by mutual agreement any difficulties arising as to the interpretation of the Convention. However, it is important not to lose sight of the fact that, depending on the domestic law of Contracting States, other authorities (Ministry of Foreign Affairs, courts) have the right to interpret international treaties and agreements as well as the "competent authority" designated in the Convention, and that this is sometimes the exclusive right of such other authorities.

(Renumbered on 17 July 2008; see HISTORY)

54. Mutual agreements resolving general difficulties of interpretation or application are binding on administrations as long as the competent authorities do not agree to modify or rescind the mutual agreement.

(Renumbered on 17 July 2008; see HISTORY)

55. The second sentence of paragraph 3 enables the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. It is not merely desirable, but in most cases also will particularly reflect the role of Article 25 and the mutual

agreement procedure in providing that the competent authorities may consult together as a way of ensuring the Convention as a whole operates effectively, that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation. The opportunity for such matters to be dealt with under the mutual agreement procedure becomes increasingly important as Contracting States seek more coherent frameworks for issues of profit allocation involving branches, and this is an issue that could usefully be discussed at the time of negotiating conventions or protocols to them. There will be Contracting States whose domestic law prevents the Convention from being complemented on points which are not explicitly or at least implicitly dealt with in the Convention, however, and in these situations the Convention could be complemented by a protocol dealing with this issue. In most cases, however, the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles, will sufficiently support issues involving two branches of a third state entity being subject to the paragraph 3 procedures.

(Renumbered and amended on 17 July 2008; see HISTORY)

Paragraph 4

56. This paragraph determines how the competent authorities may consult together for the resolution by mutual agreement, either of an individual case coming under the procedure defined in paragraphs 1 and 2 or of general problems relating in particular to the interpretation or application of the Convention, and which are referred to in paragraph 3.

(Renumbered on 17 July 2008; see HISTORY)

57. It provides first that the competent authorities may communicate with each other directly. It would therefore not be necessary to go through diplomatic channels.

(Renumbered on 17 July 2008; see HISTORY)

58. The competent authorities may communicate with each other by letter, facsimile transmission, telephone, direct meetings, or any other convenient means. They may, if they wish, formally establish a joint commission for this purpose.

(Renumbered on 17 July 2008; see HISTORY)

C (25)

59. As to this joint commission, paragraph 4 leaves it to the competent authorities of the Contracting States to determine the number of members and the rules of procedure of this body.

(Renumbered on 17 July 2008; see HISTORY)

60. However, whilst the Contracting States may avoid any formalism in this field, it is nevertheless their duty to give taxpayers whose cases are brought before the joint commission under paragraph 2 certain essential guarantees, namely:

— the right to make representations in writing or orally, either in person or through a representative;

— the right to be assisted by counsel.

(Renumbered and amended on 17 July 2008; see HISTORY)

61. However, disclosure to the taxpayer or his representatives of the papers in the case does not seem to be warranted, in view of the special nature of the procedure.

(Renumbered on 17 July 2008; see HISTORY)

62. Without infringing upon the freedom of choice enjoyed in principle by the competent authorities in designating their representatives on the joint commission, it would be desirable for them to agree to entrust the chairmanship of each Delegation — which might include one or more representatives of the service responsible for the procedure — to a high official or judge chosen primarily on account of his special experience; it is reasonable to believe, in fact, that the participation of such persons would be likely to facilitate reaching an agreement.

(Renumbered on 17 July 2008; see HISTORY)

Paragraph 5

63. This paragraph provides that, in the cases where the competent authorities are unable to reach an agreement under paragraph 2 within two years, the unresolved issues will, at the request of the person who presented the case, be solved through an arbitration process. This process is not dependent on a prior authorization by the competent authorities: once the requisite procedural requirements have been met, the unresolved issues that prevent the conclusion of a mutual agreement must be submitted to arbitration.

(Added on 17 July 2008; see HISTORY)

64. The arbitration process provided for by the paragraph is not an alternative or additional recourse: where the competent authorities have reached an agreement that does not leave any unresolved issues as regards the application of the Convention, there are no unresolved issues that can be brought to arbitration even if the person who made the mutual agreement request does not consider that the agreement reached by the competent authorities provides a correct solution to the case. The paragraph is, therefore,

an extension of the mutual agreement procedure that serves to enhance the effectiveness of that procedure by ensuring that where the competent authorities cannot reach an agreement on one or more issues that prevent the resolution of a case, a resolution of the case will still be possible by submitting those issues to arbitration. Thus, under the paragraph, the resolution of the case continues to be reached through the mutual agreement procedure, whilst the resolution of a particular issue which is preventing agreement in the case is handled through an arbitration process. This distinguishes the process established in paragraph 5 from other forms of commercial or government-private party arbitration where the jurisdiction of the arbitral panel extends to resolving the whole case.

(Added on 17 July 2008; see HISTORY)

65. It is recognised, however, that in some States, national law, policy or administrative considerations may not allow or justify the type of arbitration process provided for in the paragraph. For example, there may be constitutional barriers preventing arbitrators from deciding tax issues. In addition, some countries may only be in a position to include this paragraph in treaties with particular States. For these reasons, the paragraph should only be included in the Convention where each State concludes that the process is capable of effective implementation.

(Added on 17 July 2008; see HISTORY)

66. In addition, some States may wish to include paragraph 5 but limit its application to a more restricted range of cases. For example, access to arbitration could be restricted to cases involving issues which are primarily factual in nature. It could also be possible to provide that arbitration would always be available for issues arising in certain classes of cases, for example, highly factual cases such as those related to transfer pricing or the question of the existence of a permanent establishment, whilst extending arbitration to other issues on a case-by-case basis.

(Added on 17 July 2008; see HISTORY)

67. States which are members of the European Union must co-ordinate the scope of paragraph 5 with their obligations under the European Arbitration Convention.

(Added on 17 July 2008; see HISTORY)

C (25)

68. The taxpayer should be able to request arbitration of unresolved issues in all cases dealt with under the mutual agreement procedure that have been presented under paragraph 1 on the basis that the actions of one or both of the Contracting States have resulted for a person in taxation not in accordance with the provisions of this Convention. Where the mutual agreement

procedure is not available, for example because of the existence of serious violations involving significant penalties (see paragraph 26), it is clear that paragraph 5 is not applicable.

(Added on 17 July 2008; see HISTORY)

69. Where two Contracting States that have not included the paragraph in their Convention wish to implement an arbitration process for general application or to deal with a specific case, it is still possible for them to do so by mutual agreement. In that case, the competent authorities can conclude a mutual agreement along the lines of the sample wording presented in the Annex, to which they would add the following first paragraph:

1. Where,

   a) under paragraph 1 of Article 25 of the Convention, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

   b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 of the Article within two years from the presentation of the case to the competent authority of the other Contracting State,

   any unresolved issues arising from the case shall be submitted to arbitration in accordance with the following paragraphs if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, the competent authorities hereby agree to consider themselves bound by the arbitration decision and to resolve the case pursuant to paragraph 2 of Article 25 on the basis of that decision.

This agreement would go on to address the various structural and procedural issues discussed in the Annex. Whilst the competent authorities would thus be bound by such process, such agreement would be given as part of the mutual agreement procedure and would therefore only be effective as long as the competent authorities continue to agree to follow that process to solve cases that they have been unable to resolve through the traditional mutual agreement procedure.

(Added on 17 July 2008; see HISTORY)

70. Paragraph 5 provides that a person who has presented a case to the competent authority of a Contracting State pursuant to paragraph 1 on the

basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention may request that any unresolved issues arising from the case be submitted to arbitration. This request may be made at any time after a period of two years that begins when the case is presented to the competent authority of the other Contracting State. Recourse to arbitration is therefore not automatic; the person who presented the case may prefer to wait beyond the end of the two year period (for example, to allow the competent authorities more time to resolve the case under paragraph 2) or simply not to pursue the case. States are free to provide that, in certain circumstances, a longer period of time will be required before the request can be made.

(Added on 17 July 2008; see HISTORY)

71. Under paragraph 2 of Article 25, the competent authorities must endeavour to resolve a case presented under paragraph 1 with a view to the avoidance of taxation not in accordance with the Convention. For the purposes of paragraph 5, a case should therefore not be considered to have been resolved as long as there is at least one issue on which the competent authorities disagree and which, according to one of the competent authorities, indicates that there has been taxation not in accordance with the Convention. One of the competent authorities could not, therefore, unilaterally decide that such a case is closed and that the person involved cannot request the arbitration of unresolved issues; similarly, the two competent authorities could not consider that the case has been resolved and deny the request for arbitration if there are still unresolved issues that prevent them from agreeing that there has not been taxation not in accordance with the Convention. Where, however, the two competent authorities agree that taxation by both States has been in accordance with the Convention, there are no unresolved issues and the case may be considered to have been resolved, even in the case where there might be double taxation that is not addressed by the provisions of the Convention.

(Added on 17 July 2008; see HISTORY)

72. The arbitration process is only available in cases where the person considers that taxation not in accordance with the provisions of the Convention has actually resulted from the actions of one or both of the Contracting States; it is not available, however, in cases where it is argued that such taxation will eventually result from such actions even if the latter cases may be presented to the competent authorities under paragraph 1 of the Article (see paragraph 70 above). For that purpose, taxation should be considered to have resulted from the actions of one or both of the Contracting States as soon as, for example, tax has been paid, assessed or otherwise

determined or even in cases where the taxpayer is officially notified by the tax authorities that they intend to tax him on a certain element of income.

(Added on 17 July 2008; see HISTORY)

73. As drafted, paragraph 5 only provides for arbitration of unresolved issues arising from a request made under paragraph 1 of the Article. States wishing to extend the scope of the paragraph to also cover mutual agreement cases arising under paragraph 3 of the Article are free to do so. In some cases, a mutual agreement case may arise from other specific treaty provisions, such as subparagraph 2 *d*) of Article 4. Under that subparagraph, the competent authorities are, in certain cases, required to settle by mutual agreement the question of the status of an individual who is a resident of both Contracting States. As indicated in paragraph 20 of the Commentary on Article 4, such cases must be resolved according to the procedure established in Article 25. If the competent authorities fail to reach an agreement on such a case and this results in taxation not in accordance with the Convention (according to which the individual should be a resident of only one State for purposes of the Convention), the taxpayer's case comes under paragraph 1 of Article 25 and, therefore, paragraph 5 is applicable.

(Added on 17 July 2008; see HISTORY)

74. In some States, it may be possible for the competent authorities to deviate from a court decision on a particular issue arising from the case presented to the competent authorities. Those States should therefore be able to omit the second sentence of the paragraph.

(Added on 17 July 2008; see HISTORY)

75. The presentation of the case to the competent authority of the other State, which is the beginning of the two year period referred to in the paragraph, may be made by the person who presented the case to the competent authority of the first State under paragraph 1 of Article 25 (*e.g.* by presenting the case to the competent authority of the other State at the same time or at a later time) or by the competent authority of the first State, who would contact the competent authority of the other State pursuant to paragraph 2 if it is not itself able to arrive at a satisfactory solution of the case. For the purpose of determining the start of the two year period, a case will only be considered to have been presented to the competent authority of the other State if sufficient information has been presented to that competent authority to allow it to decide whether the objection underlying the case appears to be justified. The mutual agreement providing for the mode of application of paragraph 5 (see the Annex) should specify which type of information will normally be sufficient for that purpose.

(Added on 17 July 2008; see HISTORY)

76. The paragraph also deals with the relationship between the arbitration process and rights to domestic remedies. For the arbitration process to be effective and to avoid the risk of conflicting decisions, a person should not be allowed to pursue the arbitration process if the issues submitted to arbitration have already been resolved through the domestic litigation process of either State (which means that any court or administrative tribunal of one of the Contracting States has already rendered a decision that deals with these issues and that applies to that person). This is consistent with the approach adopted by most countries as regards the mutual agreement procedure and according to which:

a) A person cannot pursue simultaneously the mutual agreement procedure and domestic legal remedies. Where domestic legal remedies are still available, the competent authorities will generally either require that the taxpayer agree to the suspension of these remedies or, if the taxpayer does not agree, will delay the mutual agreement procedure until these remedies are exhausted.

b) Where the mutual agreement procedure is first pursued and a mutual agreement has been reached, the taxpayer and other persons directly affected by the case are offered the possibility to reject the agreement and pursue the domestic remedies that had been suspended; conversely, if these persons prefer to have the agreement apply, they will have to renounce the exercise of domestic legal remedies as regards the issues covered by the agreement.

c) Where the domestic legal remedies are first pursued and are exhausted in a State, a person may only pursue the mutual agreement procedure in order to obtain relief of double taxation in the other State. Indeed, once a legal decision has been rendered in a particular case, most countries consider that it is impossible to override that decision through the mutual agreement procedure and would therefore restrict the subsequent application of the mutual agreement procedure to trying to obtain relief in the other State.

The same general principles should be applicable in the case of a mutual agreement procedure that would involve one or more issues submitted to arbitration. It would not be helpful to submit an issue to arbitration if it is known in advance that one of the countries is limited in the response that it could make to the arbitral decision. This, however, would not be the case if the country could, in a mutual agreement procedure, deviate from a court decision (see paragraph 74) and in that case paragraph 5 could be adjusted accordingly.

(Added on 17 July 2008; see HISTORY)

77. A second issue involves the relationship between existing domestic legal remedies and arbitration where the taxpayer has not undertaken (or has not

exhausted) these legal remedies. In that case, the approach that would be the most consistent with the basic structure of the mutual agreement procedure would be to apply the same general principles when arbitration is involved. Thus, the legal remedies would be suspended pending the outcome of the mutual agreement procedure involving the arbitration of the issues that the competent authorities are unable to resolve and a tentative mutual agreement would be reached on the basis of that decision. As in other mutual agreement procedure cases, that agreement would then be presented to the taxpayer who would have to choose to accept the agreement, which would require abandoning any remaining domestic legal remedies, or reject the agreement to pursue these remedies.

(Added on 17 July 2008; see HISTORY)

78. This approach is in line with the nature of the arbitration process set out in paragraph 5. The purpose of that process is to allow the competent authorities to reach a conclusion on the unresolved issues that prevent an agreement from being reached. When that agreement is achieved though the aid of arbitration, the essential character of the mutual agreement remains the same.

(Added on 17 July 2008; see HISTORY)

79. In some cases, this approach will mean that the parties will have to expend time and resources in an arbitration process that will lead to a mutual agreement that will not be accepted by the taxpayer. As a practical matter, however, experience shows that there are very few cases where the taxpayer rejects a mutual agreement to resort to domestic legal remedies. Also, in these rare cases, one would expect the domestic courts or administrative tribunals to take note of the fact that the taxpayer had been offered an administrative solution to his case that would have bound both States.

(Added on 17 July 2008; see HISTORY)

80. In some States, unresolved issues between competent authorities may only be submitted to arbitration if domestic legal remedies are no longer available. In order to implement an arbitration approach, these States could consider the alternative approach of requiring a person to waive the right to pursue domestic legal remedies before arbitration can take place. This could be done by replacing the second sentence of the paragraph by "these unresolved issues shall not, however, be submitted to arbitration if any person directly affected by the case is still entitled, under the domestic law of either State, to have courts or administrative tribunals of that State decide these issues or if a decision on these issues has already been rendered by such a court or administrative tribunal." To avoid a situation where a taxpayer would be required to waive domestic legal remedies without any assurance as to the

outcome of the case, it would then be important to also modify the paragraph to include a mechanism that would guarantee, for example, that double taxation would in fact be relieved. Also, since the taxpayer would then renounce the right to be heard by domestic courts, the paragraph should also be modified to ensure that sufficient legal safeguards are granted to the taxpayer as regards his participation in the arbitration process to meet the requirements that may exist under domestic law for such a renunciation to be acceptable under the applicable legal system (*e.g.* in some countries, such renunciation might not be effective if the person were not guaranteed the right to be heard orally during the arbitration).

(Added on 17 July 2008; see HISTORY)

81. Paragraph 5 provides that, unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both States. Thus, the taxation of any person directly affected by the case will have to conform with the decision reached on the issues submitted to arbitration and the decisions reached in the arbitral process will be reflected in the mutual agreement that will be presented to these persons.

(Added on 17 July 2008; see HISTORY)

82. As noted in subparagraph 76 *b*) above, where a mutual agreement is reached before domestic legal remedies have been exhausted, it is normal for the competent authorities to require, as a condition for the application of the agreement, that the persons affected renounce the exercise of domestic legal remedies that may still exist as regards the issues covered by the agreement. Without such renunciation, a subsequent court decision could indeed prevent the competent authorities from applying the agreement. Thus, for the purpose of paragraph 5, if a person to whom the mutual agreement that implements the arbitration decision has been presented does not agree to renounce the exercise of domestic legal remedies, that person must be considered not to have accepted that agreement.

(Added on 17 July 2008; see HISTORY)

83. The arbitration decision is only binding with respect to the specific issues submitted to arbitration. Whilst nothing would prevent the competent authorities from solving other similar cases (including cases involving the same persons but different taxable periods) on the basis of the decision, there is no obligation to do so and each State therefore has the right to adopt a different approach to deal with these other cases.

(Added on 17 July 2008; see HISTORY)

84. Some States may wish to allow the competent authorities to depart from the arbitration decision, provided that they can agree on a different solution (this, for example, is allowed under Article 12 of the EU Arbitration Convention). States wishing to do so are free to amend the third sentence of the paragraph as follows:

> ... Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision or the competent authorities and the persons directly affected by the case agree on a different solution within six months after the decision has been communicated to them, the arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States.

(Added on 17 July 2008; see HISTORY)

85. The last sentence of the paragraph leaves the mode of application of the arbitration process to be settled by mutual agreement. Some aspects could also be covered in the Article itself, a protocol or through an exchange of diplomatic notes. Whatever form the agreement takes, it should set out the structural and procedural rules to be followed in applying the paragraph, taking into account the paragraph's requirement that the arbitration decision be binding on both States. Ideally, that agreement should be drafted at the same time as the Convention so as to be signed, and to apply, immediately after the paragraph becomes effective. Also, since the agreement will provide the details of the process to be followed to bring unresolved issues to arbitration, it would be important that this agreement be made public. A sample form of such agreement is provided in the Annex together with comments on the procedural rules that it puts forward.

(Added on 17 July 2008; see HISTORY)

Use of other supplementary dispute resolution mechanisms

86. Regardless of whether or not paragraph 5 is included in a Convention or an arbitration process is otherwise implemented using the procedure described in paragraph 69 above, it is clear that supplementary dispute resolution mechanisms other than arbitration can be implemented on an ad hoc basis as part of the mutual agreement procedure. Where there is disagreement about the relative merits of the positions of the two competent authorities, the case may be helped if the issues are clarified by a mediator. In such situations the mediator listens to the positions of each party and then communicates a view of the strengths and weaknesses of each side. This helps each party to better understand its own position and that of the other party. Some tax administrations are now successfully using mediation to

resolve internal disputes and the extension of such techniques to mutual agreement procedures could be useful.

(Added on 17 July 2008; see HISTORY)

87. If the issue is a purely factual one, the case could be referred to an expert whose mandate would simply be to make the required factual determinations. This is often done in judicial procedures where factual matters are referred to an independent party who makes factual findings which are then submitted to the court. Unlike the dispute resolution mechanism which is established in paragraph 5, these procedures are not binding on the parties but nonetheless can be helpful in allowing them to reach a decision before an issue would have to be submitted to arbitration under that paragraph.

(Added on 17 July 2008; see HISTORY)

III. Interaction of the mutual agreement procedure with the dispute resolution mechanism provided by the General Agreement on Trade in Services

88. The application of the General Agreement on Trade in Services (GATS), which entered into force on 1 January 1995 and which all member countries have signed, raises particular concerns in relation to the mutual agreement procedure.

(Renumbered on 17 July 2008; see HISTORY)

89. Paragraph 3 of Article XXII of the GATS provides that a dispute as to the application of Article XVII of the Agreement, a national treatment rule, may not be dealt with under the dispute resolution mechanisms provided by Articles XXII and XXIII of the Agreement if the disputed measure "falls within the scope of an international agreement between them relating to the avoidance of double taxation" (*e.g.* a tax convention). If there is disagreement over whether a measure "falls within the scope" of such an international agreement, paragraph 3 goes on to provide that either State involved in the dispute may bring the matter to the Council on Trade in Services, which shall refer the dispute for binding arbitration. A footnote to paragraph 3, however, contains the important exception that if the dispute relates to an international agreement "which exist[s] at the time of the entry into force" of the Agreement, the matter may not be brought to the Council on Trade in Services unless both States agree.

(Renumbered on 17 July 2008; see HISTORY)

90. That paragraph raises two particular problems with respect to tax treaties.

(Renumbered on 17 July 2008; see HISTORY)

91. First, the footnote thereto provides for the different treatment of tax conventions concluded before and after the entry into force of the GATS, something that may be considered inappropriate, in particular where a convention in existence at the time of the entry into force of the GATS is subsequently renegotiated or where a protocol is concluded after that time in relation to a convention existing at that time.

(Renumbered on 17 July 2008; see HISTORY)

92. Second, the phrase "falls within the scope" is inherently ambiguous, as indicated by the inclusion in paragraph 3 of Article XXII of the GATS of both an arbitration procedure and a clause exempting pre-existing conventions from its application in order to deal with disagreements related to its meaning. Whilst it seems clear that a country could not argue in good faith[1] that a measure relating to a tax to which no provision of a tax convention applied fell within the scope of that convention, it is unclear whether the phrase covers all measures that relate to taxes that are covered by all or only some provisions of the tax convention.

(Renumbered and amended on 17 July 2008; see HISTORY)

93. Contracting States may wish to avoid these difficulties by extending bilaterally the application of the footnote to paragraph 3 of Article XXII of the GATS to conventions concluded after the entry into force of the GATS. Such a bilateral extension, which would supplement — but not violate in any way — the Contracting States' obligations under the GATS, could be incorporated in the convention by the addition of the following provision:

> For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of Article 25 or, failing

1 The obligation of applying and interpreting treaties in good faith is expressly recognised in Articles 26 and 31 of the *Vienna Convention on the Law of Treaties*; thus, the exception in paragraph 3 of Article XXII of the GATS applies only to good faith disputes.

agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.

(Renumbered on 17 July 2008; see HISTORY)

94. Problems similar to those discussed above may arise in relation with other bilateral or multilateral agreements related to trade or investment. Contracting States are free, in the course of their bilateral negotiations, to amend the provision suggested above so as to ensure that issues relating to the taxes covered by their tax convention are dealt with through the mutual agreement procedure rather than through the dispute settlement mechanism of such agreements.

(Renumbered on 17 July 2008; see HISTORY)

Observation on the Commentary

95. *Hungary* does not fully share the interpretation in paragraph 27 of the Commentary on Article 25 and is not in a position to pursue a mutual agreement procedure where a Hungarian court has already rendered a decision on the merits of the case.

(Added on 17 July 2008; see HISTORY)

Reservations on the Article

96. With respect to paragraph 1 of the Article, *Turkey* reserves the right to provide that the case must be presented to its competent authority within a period of five years following the related taxation year. However, if the notification is made in the last year of that period, such application should be made within one year from the notification.

(Renumbered on 17 July 2008; see HISTORY)

97. The *United Kingdom* reserves its position on the last sentence of paragraph 1 on the grounds that it conflicts with the six year time limit under its domestic legislation.

(Renumbered on 17 July 2008; see HISTORY)

98. *Chile*, *Greece*, *Italy*, *Mexico*, *Poland*, *Portugal* and *Switzerland* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time limits prescribed by their domestic laws.

C (25)

(Amended on 15 July 2014; see HISTORY)

99. *Turkey* reserves its position on the second sentence of paragraph 2. Turkey's tax law provides that refunds of tax, like the assessment itself, must be made within a specific period. According to these provisions, if the

administration finds an application for repayment acceptable, it must notify the fact to the taxpayer so that he can present his claim within a period of one year of such notification. If the taxpayer exceeds this time limit, his right to claim repayment lapses. The same procedure applies to the enforcement of judgements of courts under which repayments are required to be made. That is why Turkey is obliged to fix a time limit for the implementation of agreed mutual agreement procedures as is done for all repayments. For this reason Turkey wishes to reserve the right to mention in the text of bilateral conventions a definite time limit as regards their implementation.

(Renumbered on 17 July 2008; see HISTORY)

100. *Canada* reserves the right to include a provision similar to a provision referred to in paragraph 10 of the Commentary on Article 9, which effectively sets a time limit within which a Contracting State can make an adjustment to the profits of an enterprise.

(Amended on 15 July 2014; see HISTORY)

101. *Hungary* reserves its position on the last sentence of paragraph 1 as it could not agree to pursue a mutual agreement procedure in the case of a request that would be presented to its competent authority outside the prescription period provided for under its domestic legislation.

(Added on 17 July 2008; see HISTORY)

ANNEX

SAMPLE MUTUAL AGREEMENT ON ARBITRATION

1. The following is a sample form of agreement that the competent authorities may use as a basis for a mutual agreement to implement the arbitration process provided for in paragraph 5 of the Article (see paragraph 85 above). Paragraphs 2 to 43 below discuss the various provisions of the agreement and, in some cases, put forward alternatives. Competent authorities are of course free to modify, add or delete any provisions of this sample agreement when concluding their bilateral agreement.

Mutual agreement on the implementation of paragraph 5 of Article 25

The competent authorities of [State A] and [State B] have entered into the following mutual agreement to establish the mode of application of the arbitration process provided for in paragraph 5 of Article 25 of the [title of the Convention], which entered into force on [date of entry into force]. The competent authorities may modify or supplement this agreement by an exchange of letters between them.

1. *Request for submission of case to arbitration*

   A request that unresolved issues arising from a mutual agreement case be submitted to arbitration pursuant to paragraph 5 of Article 25 of the Convention (the "request for arbitration") shall be made in writing and sent to one of the competent authorities. The request shall contain sufficient information to identify the case. The request shall also be accompanied by a written statement by each of the persons who either made the request or is directly affected by the case that no decision on the same issues has already been rendered by a court or administrative tribunal of the States. Within 10 days of the receipt of the request, the competent authority who received it shall send a copy of the request and the accompanying statements to the other competent authority.

2. *Time for submission of the case to arbitration*

   A request for arbitration may only be made after two years from the date on which a case presented to the competent authority of one Contracting State under paragraph 1 of Article 25 has also been presented to the competent authority of the other State. For this purpose, a case shall be considered to have been presented to the competent authority of the other State only if the following information has been presented: [the necessary information and documents will be specified in the agreement].

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3. *Terms of Reference*

Within three months after the request for arbitration has been received by both competent authorities, the competent authorities shall agree on the questions to be resolved by the arbitration panel and communicate them in writing to the person who made the request for arbitration. This will constitute the "Terms of Reference" for the case. Notwithstanding the following paragraphs of this agreement, the competent authorities may also, in the Terms of Reference, provide procedural rules that are additional to, or different from, those included in these paragraphs and deal with such other matters as are deemed appropriate.

4. *Failure to communicate the Terms of Reference*

If the Terms of Reference have not been communicated to the person who made the request for arbitration within the period referred to in paragraph 3 above, that person and each competent authority may, within one month after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period shall constitute the tentative Terms of Reference. Within one month after all the arbitrators have been appointed as provided in paragraph 5 below, the arbitrators shall communicate to the competent authorities and the person who made the request for arbitration a revised version of the tentative Terms of Reference based on the lists so communicated. Within one month after the revised version has been received by both of them, the competent authorities will have the possibility to agree on different Terms of Reference and to communicate them in writing to the arbitrators and the person who made the request for arbitration. If they do so within that period, these different Terms of Reference shall constitute the Terms of Reference for the case. If no different Terms of Reference have been agreed to between the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators shall constitute the Terms of Reference for the case.

5. *Selection of arbitrators*

Within three months after the Terms of Reference have been received by the person who made the request for arbitration or, where paragraph 4 applies, within four months after the request for arbitration has been received by both competent authorities, the competent authorities shall each appoint one arbitrator. Within two months of the latter appointment, the arbitrators so appointed will appoint a third arbitrator who will function as Chair. If any appointment is not made within the required

time period, the arbitrator(s) not yet appointed shall be appointed by the Director of the OECD Centre for Tax Policy and Administration within 10 days of receiving a request to that effect from the person who made the request for arbitration. The same procedure shall apply with the necessary adaptations if for any reason it is necessary to replace an arbitrator after the arbitral process has begun. Unless the Terms of Reference provide otherwise, the remuneration of all arbitrators …. [the mode of remuneration should be described here; one possibility would be to refer to the method used in the Code of Conduct on the EC Arbitration Convention].

6. *Streamlined arbitration process*

If the competent authorities so indicate in the Terms of Reference (provided that these have not been agreed to after the selection of arbitrators pursuant to paragraph 4 above), the following rules shall apply to a particular case notwithstanding paragraphs 5, 11, 15, 16 and 17 of this agreement:

a) Within one month after the Terms of Reference have been received by the person who made the request for arbitration, the two competent authorities shall, by common consent, appoint one arbitrator. If, at the end of that period, the arbitrator has not yet been appointed, the arbitrator will be appointed by the Director of the OECD Centre for Tax Policy and Administration within 10 days of receiving a request to that effect from the person who made the request referred to in paragraph 1. The remuneration of the arbitrator shall be determined as follows … [the mode of remuneration should be described here; one possibility would be to refer to the method used in the Code of Conduct on the EC Arbitration Convention].

b) Within two months from the appointment of the arbitrator, each competent authority will present in writing to the arbitrator its own reply to the questions contained in the Terms of Reference.

c) Within one month from having received the last of the replies from the competent authorities, the arbitrator will decide each question included in the Terms of Reference in accordance with one of the two replies received from the competent authorities as regards that question and will notify the competent authorities of the choice, together with short reasons explaining that choice. Such decision will be implemented as provided in paragraph 19.

7. *Eligibility and appointment of arbitrators*

Any person, including a government official of a Contracting State, may be appointed as an arbitrator, unless that person has been involved in prior stages of the case that results in the arbitration process. An arbitrator will be considered to have been appointed when a letter confirming that appointment has been signed both by the person or persons who have the power to appoint that arbitrator and by the arbitrator himself.

8. *Communication of information and confidentiality*

For the sole purposes of the application of the provisions of Articles 25 and 26, and of the domestic laws of the Contracting States, concerning the communication and the confidentiality of the information related to the case that results in the arbitration process, each arbitrator shall be designated as authorised representative of the competent authority that has appointed that arbitrator or, if that arbitrator has not been appointed exclusively by one competent authority, of the competent authority of the Contracting State to which the case giving rise to the arbitration was initially presented. For the purposes of this agreement, where a case giving rise to arbitration was initially presented simultaneously to both competent authorities, "the competent authority of the Contracting State to which the case giving rise to the arbitration was initially presented" means the competent authority referred to in paragraph 1 of Article 25.

9. *Failure to provide information in a timely manner*

Notwithstanding paragraphs 5 and 6, where both competent authorities agree that the failure to resolve an issue within the two year period provided in paragraph 5 of Article 25 is mainly attributable to the failure of a person directly affected by the case to provide relevant information in a timely manner, the competent authorities may postpone the nomination of the arbitrator for a period of time corresponding to the delay in providing that information.

10. *Procedural and evidentiary rules*

Subject to this agreement and the Terms of Reference, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to answer the questions set out in the Terms of Reference. They will have access to all information necessary to decide the issues submitted to arbitration, including confidential information. Unless the competent authorities agree otherwise, any information that was not available to both competent authorities before the request for arbitration was received

by both of them shall not be taken into account for purposes of the decision.

11. *Participation of the person who requested the arbitration*

The person who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the same extent that he can do so during the mutual agreement procedure. In addition, with the permission of the arbitrators, the person may present his position orally during the arbitration proceedings.

12. *Logistical arrangements*

Unless agreed otherwise by the competent authorities, the competent authority to which the case giving rise to the arbitration was initially presented will be responsible for the logistical arrangements for the meetings of the arbitral panel and will provide the administrative personnel necessary for the conduct of the arbitration process. The administrative personnel so provided will report only to the Chair of the arbitration panel concerning any matter related to that process.

13. *Costs*

Unless agreed otherwise by the competent authorities:

a) each competent authority and the person who requested the arbitration will bear the costs related to his own participation in the arbitration proceedings (including travel costs and costs related to the preparation and presentation of his views);

b) each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority, or appointed by the Director of the OECD Centre for Tax Policy and Administration because of the failure of that competent authority to appoint that arbitrator, together with that arbitrator's travel, telecommunication and secretariat costs;

c) the remuneration of the other arbitrators and their travel, telecommunication and secretariat costs will be borne equally by the two Contracting States;

d) costs related to the meetings of the arbitral panel and to the administrative personnel necessary for the conduct of the arbitration process will be borne by the competent authority to which the case giving rise to the arbitration was initially presented, or if presented in both States, will be shared equally; and

e) all other costs (including costs of translation and of recording the proceedings) related to expenses that both competent authorities have agreed to incur, will be borne equally by the two Contracting States.

14. *Applicable Legal Principles*

The arbitrators shall decide the issues submitted to arbitration in accordance with the applicable provisions of the treaty and, subject to these provisions, of those of the domestic laws of the Contracting States. Issues of treaty interpretation will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties*, having regard to the Commentaries of the OECD Model Tax Convention as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction to the OECD Model Tax Convention. Issues related to the application of the arm's length principle should similarly be decided having regard to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

15. *Arbitration decision*

Where more than one arbitrator has been appointed, the arbitration decision will be determined by a simple majority of the arbitrators. Unless otherwise provided in the Terms of Reference, the decision of the arbitral panel will be presented in writing and shall indicate the sources of law relied upon and the reasoning which led to its result. With the permission of the person who made the request for arbitration and both competent authorities, the decision of the arbitral panel will be made public in redacted form without mentioning the names of the parties involved or any details that might disclose their identity and with the understanding that the decision has no formal precedential value.

16. *Time allowed for communicating the arbitration decision*

The arbitration decision must be communicated to the competent authorities and the person who made the request for arbitration within six months from the date on which the Chair notifies in writing the competent authorities and the person who made the request for arbitration that he has received all the information necessary to begin consideration of the case. Notwithstanding the first part of this paragraph, if at any time within two months from the date on which the last arbitrator was appointed, the Chair, with the consent of one of the competent authorities, notifies in writing the other competent authority

and the person who made the request for arbitration that he has not received all the information necessary to begin consideration of the case, then

a) if the Chair receives the necessary information within two months after the date on which that notice was sent, the arbitration decision must be communicated to the competent authorities and the person who made the request for arbitration within six months from the date on which the information was received by the Chair, and

b) if the Chair has not received the necessary information within two months after the date on which that notice was sent, the arbitration decision must, unless the competent authorities agree otherwise, be reached without taking into account that information even if the Chair receives it later and the decision must be communicated to the competent authorities and the person who made the request for arbitration within eight months from the date on which the notice was sent.

17. *Failure to communicate the decision within the required period*

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraphs 6 *c)* or 16, the competent authorities may agree to extend that period for a period not exceeding six months or, if they fail to do so within one month from the end of the period provided for in paragraph 6 *c)* or 16, they shall appoint a new arbitrator or arbitrators in accordance with paragraph 5 or 6 *a)*, as the case may be.

18. *Final decision*

The arbitration decision shall be final, unless that decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 25 or of any procedural rule included in the Terms of Reference or in this agreement that may reasonably have affected the decision. If a decision is found to be unenforceable for one of these reasons, the request for arbitration shall be considered not to have been made and the arbitration process shall be considered not to have taken place (except for the purposes of paragraphs 8 “Communication of information and confidentiality” and 13 “Costs”).

19. *Implementing the arbitration decision*

The competent authorities will implement the arbitration decision within six months from the communication of the decision to them by reaching a mutual agreement on the case that led to the arbitration.

20. Where no arbitration decision will be provided

Notwithstanding paragraphs 6, 15, 16 and 17, where, at any time after a request for arbitration has been made and before the arbitrators have delivered a decision to the competent authorities and the person who made the request for arbitration, the competent authorities notify in writing the arbitrators and that person that they have solved all the unresolved issues described in the Terms of Reference, the case shall be considered as solved under the mutual agreement procedure and no arbitration decision shall be provided.

This agreement applies to any request for arbitration made pursuant to paragraph 5 of Article 25 of the Convention after that provision has become effective.

[Date of signature of the agreement]

[Signature of the competent authority of each Contracting State]

General approach of the sample agreement

2. A number of approaches can be taken to structuring the arbitral process which is used to supplement the mutual agreement procedure. Under one approach, which might be referred to as the "independent opinion" approach, the arbitrators would be presented with the facts and arguments by the parties based on the applicable law, and would then reach their own independent decision which would be based on a written, reasoned analysis of the facts involved and applicable legal sources.

3. Alternatively, under the so-called "last best offer" or "final offer" approach, each competent authority would be required to give to the arbitral panel a proposed resolution of the issue involved and the arbitral panel would choose between the two proposals which were presented to it. There are obviously a number of variations between these two positions. For example, the arbitrators could reach an independent decision but would not be required to submit a written decision but simply their conclusions. To some extent, the appropriate method depends on the type of issue to be decided.

4. The above sample agreement takes as its starting point the "independent opinion" approach which is thus the generally applicable process but, in recognition of the fact that many cases, especially those which involve primarily factual questions, may be best handled differently, it also provides for an alternative "streamlined" process, based on the "last best offer" or "final offer" approach. Competent authorities can therefore agree to use that streamlined process on a case-by-case basis. Competent authorities may of course adopt this combined approach, adopt the streamlined process

as the generally applicable process with the independent opinion as an option in some circumstances or limit themselves to only one of the two approaches.

The request for arbitration

5. Paragraph 1 of the sample agreement provides the manner in which a request for arbitration should be made. Such request should be presented in writing to one of the competent authorities involved in the case. That competent authority should then inform the other competent authority within 10 days of the receipt of the request.

6. In order to determine that the conditions of paragraph 5 of Article 25 have been met (see paragraph 76 of the Commentary on this Article) the request should be accompanied by statements indicating that no decision on these issues has already been rendered by domestic courts or administrative tribunals in either Contracting State.

7. Since the arbitration process is an extension of the mutual agreement procedure that is intended to deal with cases that cannot be solved under that procedure, it would seem inappropriate to ask the person who makes the request to pay in order to make such request or to reimburse the expenses incurred by the competent authorities in the course of the arbitration proceedings. Unlike taxpayers' requests for rulings or other types of advance agreements, where a charge is sometimes made, providing a solution to disputes between the Contracting States is the responsibility of these States for which they in general should bear the costs.

8. A request for arbitration may not be made before two years from the date when a mutual agreement case presented to the competent authority of a Contracting State has also been presented to the competent authority of the other Contracting State. Paragraph 2 of the sample agreement provides that for this purpose, a case shall only be considered to have been presented to the competent authority of that other State if the information specified in that paragraph has been so provided. The paragraph should therefore include a list of the information required; in general, that information will correspond to the information and documents that were required to initiate the mutual agreement procedure.

Terms of Reference

9. Paragraph 3 of the sample agreement refers to the "Terms of Reference", which is the document that sets forth the questions to be resolved by the arbitrators. It establishes the jurisdictional basis for the issues which are to be decided by the arbitral panel. It is to be established by the competent authorities who may wish in that connection to consult with the person who made the request for arbitration. If the competent authorities cannot agree on

the Terms of Reference within the period provided for in paragraph 3, some mechanism is necessary to ensure that the procedure goes forward. Paragraph 4 provides for that eventuality.

10. Whilst the Terms of Reference will generally be limited to a particular issue or set of issues, it would be possible for the competent authorities, given the nature of the case and the interrelated nature of the issues, to draft the Terms of Reference so that the whole case (and not only certain specific issues) be submitted to arbitration.

11. The procedural rules provided for in the sample agreement shall apply unless the competent authorities provide otherwise in the Terms of Reference. It is therefore possible for the competent authorities, through the Terms of Reference, to depart from any of these rules or to provide for additional rules in a particular case.

Streamlined process

12. The normal process provided for by the sample agreement allows the consideration of questions of either law or fact, as well as of mixed questions of law and fact. Generally, it is important that the arbitrators support their decision with the reasoning leading to it. Showing the method through which the decision was reached may be important in assuring acceptance of the decision.

13. In some cases, however, the unresolved issues will be primarily factual and the decision may be simply a statement of the final disposition, for example a determination of the amount of adjustments to the income and deductions of the respective related parties. Such circumstances will often arise in transfer pricing cases, where the unresolved issue may be simply the determination of an arm's length transfer price or range of prices (although there are other transfer pricing cases that involve complex factual issues); there are also cases in which an analogous principle may apply, for example, the determination of the existence of a permanent establishment. In some cases, the decision may be a statement of the factual premises on which the appropriate legal principles should then be applied by the competent authorities. Paragraph 6 of the sample agreement provides a streamlined process which the competent authorities may wish to apply in these types of cases. That process, which will then override other procedural rules of the sample agreement, takes the form of the so-called "last best offer" or "final offer" arbitration, under which each competent authority is required to give to an arbitrator appointed by common consent that competent authority's own reply to the questions included in the Terms of Reference and the arbitrator simply chooses one of the submitted replies. The competent authorities may,

as for most procedural rules, amend or supplement the streamlined process through the Terms of Reference applicable to a particular case.

Selection of arbitrators

14. Paragraph 5 of the sample agreement describes how arbitrators will be selected unless the Terms of Reference drafted for a particular case provide otherwise (for instance, by opting for the streamlined process described in the preceding paragraph or by providing for more than one arbitrator to be appointed by each competent authority). Normally, the two competent authorities will each appoint one arbitrator. These appointments must be made within three months after the Terms of Reference have been received by the person who made the request for arbitration (a different deadline is provided for cases where the competent authorities do not agree on the Terms of Reference within the required period). The arbitrators thus appointed will select a Chair who must be appointed within two months of the time at which the last of the initial appointments was made. If the competent authorities do not appoint an arbitrator during the required period, or if the arbitrators so appointed do not appoint the third arbitrator within the required period, the paragraph provides that the appointment will be made by the Director of the OECD Centre for Tax Policy and Administration. The competent authorities may, of course, provide for other ways to address these rare situations but it seems important to provide for an independent appointing authority to solve any deadlock in the selection of the arbitrators.

15. There is no need for the agreement to stipulate any particular qualifications for an arbitrator as it will be in the interests of the competent authorities to have qualified and suitable persons act as arbitrators and in the interests of the arbitrators to have a qualified Chair. However, it might be possible to develop a list of qualified persons to facilitate the appointment process and this function could be developed by the Committee on Fiscal Affairs. It is important that the Chair of the panel have experience with the types of procedural, evidentiary and logistical issues which are likely to arise in the course of the arbitral proceedings as well as having familiarity with tax issues. There may be advantages in having representatives of each Contracting State appointed as arbitrators as they would be familiar with this type of issue. Thus it should be possible to appoint to the panel governmental officials who have not been directly involved in the case. Once an arbitrator has been appointed, it should be clear that his role is to decide the case on a neutral and objective basis; he is no longer functioning as an advocate for the country that appointed him.

16. Paragraph 9 of the sample agreement provides that the appointment of the arbitrators may be postponed where both competent authorities agree

that the failure to reach a mutual agreement within the two year period is mainly attributable to the lack of cooperation by a person directly affected by the case. In that case, the approach taken by the sample agreement is to allow the competent authorities to postpone the appointment of the arbitrators by a period of time corresponding to the undue delay in providing them with the relevant information. If that information has not yet been provided when the request for arbitration is submitted, the period of time corresponding to the delay in providing the information continues to run until such information is finally provided. Where, however, the competent authorities are not provided with the information necessary to solve a particular case, there is nothing that prevents them from resolving the case on the basis of the limited information that is at their disposal, thereby preventing any access to arbitration. Also, it would be possible to provide in the agreement that if within an additional period (*e.g.* one year), the taxpayer still had not provided the necessary information for the competent authorities to properly evaluate the issue, the issue would no longer be required to be submitted to arbitration.

Communication of information and confidentiality

17. It is important that arbitrators be allowed full access to the information needed to resolve the issues submitted to arbitration but, at the same time, be subjected to the same strict confidentiality requirements as regards that information as apply to the competent authorities themselves. The proposed approach to ensure that result, which is incorporated in paragraph 8 of the sample agreement, is to make the arbitrators authorised representatives of the competent authorities. This, however, will only be for the purposes of the application of the relevant provisions of the Convention (*i.e.* Articles 25 and 26) and of the provisions of the domestic laws of the Contracting States, which would normally include the sanctions applicable in case of a breach of confidentiality. The designation of the arbitrator as authorised representative of a competent authority would typically be confirmed in the letter of appointment but may need to be done differently if domestic law requires otherwise or if the arbitrator is not appointed by a competent authority.

Procedural and evidentiary rules

18. The simplest way to establish the evidentiary and other procedural rules that will govern the arbitration process and that have not already been provided in the agreement or the Terms of Reference is to leave it to the arbitrators to develop these rules on an ad hoc basis. In doing so, the arbitrators are free to refer to existing arbitration procedures, such as the International Chamber of Commerce Rules which deal with many of these questions. It should be made clear in the procedural rules that as general

matter, the factual material on which the arbitral panel will base its decision will be that developed in the mutual agreement procedure. Only in special situations would the panel be allowed to investigate factual issues which had not been developed in the earlier stages of the case.

19. Paragraph 10 of the sample agreement follows that approach. Thus, decisions as regards the dates and format of arbitration meetings will be made by the arbitrators unless the agreement or Terms of Reference provide otherwise. Also, whilst the arbitrators will have access to all information necessary to decide the issues submitted to arbitration, including confidential information, any information that was not available to both competent authorities shall not be taken into account by the arbitrators unless the competent authorities agree otherwise.

Taxpayer participation in the supplementary dispute resolution process

20. Paragraph 11 of the sample agreement provides that the person requesting arbitration, either directly or through his representatives, is entitled to present a written submission to the arbitrators and, if the arbitrators agree, to make an oral presentation during a meeting of the arbitrators.

Practical arrangements

21. A number of practical arrangements will need to be made in connection with the actual functioning of the arbitral process. They include the location of the meetings, the language of the proceedings and possible translation facilities, the keeping of a record, dealing with practical details such as filing etc.

22. As regards the location and the logistical arrangements for the arbitral meetings, the easiest solution is to leave the matter to be dealt with by the competent authority to which the case giving rise to the arbitration was initially presented. That competent authority should also provide the administrative personnel necessary for the conduct of the arbitration process. This is the approach put forward in paragraph 12 of the sample agreement. It is expected that, for these purposes, the competent authority will use meeting facilities and personnel that it already has at its disposal. The two competent authorities are, however, entitled to agree otherwise (*e.g.* to take advantage of another meeting in a different location that would be attended by both competent authorities and the arbitrators).

23. It is provided that the administrative personnel provided for the conduct of the arbitration process will report only to the Chair of the arbitration panel concerning any matter related to that procedure.

24. The language of the proceedings and whether, and which, translation facilities should be provided is a matter that should normally be dealt with in the Terms of Reference. It may be, however, that a need for translation or recording will only arise after the beginning of the proceedings. In that case, the competent authorities are entitled to reach agreement for that purpose. In the absence of such agreement, the arbitrators could, at the request of one competent authority and pursuant to paragraph 10 of the sample agreement, decide to provide such translation or recording; in that case, however, the costs thereof would have to be borne by the requesting party (see under "Costs" below).

25. Other practical details (*e.g.* notice and filing of documents) should be similarly dealt with. Thus, any such matter should be decided by agreement between the competent authorities (ideally, included in the Terms of Reference) and, failing such agreement, by decision of the arbitrators.

Costs

26. Different costs may arise in relation to the arbitration process and it should be clear who should bear these costs. Paragraph 13 of the sample agreement, which deals with this issue, is based on the principle that where a competent authority or a person involved in the case can control the amount of a particular cost, this cost should be borne by that party and that other costs should be borne equally by the two competent authorities.

27. Thus, it seems logical to provide that each competent authority, as well as the person who requested the arbitration, should pay for its own participation in the arbitration proceedings. This would include costs of being represented at the meetings and of preparing and presenting a position and arguments, whether in writing or orally.

28. The fees to be paid to the arbitrators are likely to be one of the major costs of the arbitration process. Each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority (or appointed by the Director of the OECD Centre for Tax Policy and Administration because of the failure of that competent authority to appoint that arbitrator), together with that arbitrator's travel, telecommunication and secretariat costs.

29. The fees and the travel, telecommunication and secretariat costs of the other arbitrators will, however, be shared equally by the competent authorities. The competent authorities will normally agree to incur these costs at the time that the arbitrators are appointed and this would typically be confirmed in the letter of appointment. The fees should be large enough to ensure that appropriately qualified experts could be recruited. One possibility

would be to use a fee structure similar to that established under the EU Arbitration Convention Code of Conduct.

30. The costs related to the meetings of the arbitral panel, including those of the administrative personnel necessary for the conduct of the arbitration process, should be borne by the competent authority to which the case giving rise to the arbitration was initially presented, as long as that competent authority is required to arrange such meetings and provide the administrative personnel (see paragraph 12 of the sample agreement). In most cases, that competent authority will use meeting facilities and personnel that it already has at its disposal and it would seem inappropriate to try to allocate part of the costs thereof to the other competent authority. Clearly, the reference to "costs related to the meetings" does not include the travel and accommodation costs incurred by the participants; these are dealt with above.

31. The other costs (not including any costs resulting from the taxpayers' participation in the process) should be borne equally by the two competent authorities as long as they have agreed to incur the relevant expenses. This would include costs related to translation and recording that both competent authorities have agreed to provide. In the absence of such agreement, the party that has requested that particular costs be incurred should pay for these.

32. As indicated in paragraph 13 of the sample agreement, the competent authorities may, however, agree to a different allocation of costs. Such agreement can be included in the Terms of Reference or be made afterwards (*e.g.* when unforeseen expenses arise).

Applicable legal principles

33. An examination of the issues on which competent authorities have had difficulties reaching an agreement shows that these are typically matters of treaty interpretation or of applying the arm's length principle underlying Article 9 and paragraph 2 of Article 7. As provided in paragraph 14 of the sample agreement, matters of treaty interpretation should be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties*, having regard to these Commentaries as periodically amended, as explained in paragraphs 28 to 36.1 of the Introduction. Issues related to the application of the arm's length principle should similarly be decided in the light of the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Since Article 32 of the *Vienna Convention on the Law of Treaties* permits a wide access to supplementary means of interpretation, arbitrators will, in practice, have considerable latitude in determining relevant sources for the interpretation of treaty provisions.

34. In many cases, the application of the provisions of a tax convention depends on issues of domestic law (for example, the definition of immovable property in paragraph 2 of Article 6 depends primarily on the domestic law meaning of that term). As a general rule, it would seem inappropriate to ask arbitrators to make an independent determination of purely domestic legal issues and the description of the issues to be resolved, which will be included in the Terms of Reference, should take this into account. There may be cases, however, where there would be legitimate differences of views on a matter of domestic law and in such cases, the competent authorities may wish to leave that matter to be decided by an arbitrator who is an expert in the relevant area.

35. Also, there may be cases where the competent authorities agree that the interpretation or application of a provision of a tax treaty depends on a particular document (*e.g.* a memorandum of understanding or mutual agreement concluded after the entry into force of a treaty) but may disagree about the interpretation of that document. In such a case, the competent authorities may wish to make express reference to that document in the Terms of Reference.

Arbitration decision

36. Paragraph 15 of the sample agreement provides that where more than one arbitrator has been appointed, the arbitration decision will be determined by a simple majority of the arbitrators. Unless otherwise provided in the Terms of Reference, the decision is presented in writing and indicates the sources of law relied upon and the reasoning which led to its result. It is important that the arbitrators support their decision with the reasoning leading to it. Showing the method through which the decision was reached is important in assuring acceptance of the decision by all relevant participants.

37. Pursuant to paragraph 16, the arbitration decision must be communicated to the competent authorities and the person who made the request for arbitration within six months from the date on which the Chair notifies in writing the competent authorities and the person who made the request for arbitration that he has received all of the information necessary to begin consideration of the case. However, at any time within two months from the date on which the last arbitrator was appointed, the Chair, with the consent of one of the competent authorities, may notify in writing the other competent authority and the person who made the request for arbitration that he has not received all the information necessary to begin consideration of the case. In that case, a further two months will be given for the necessary information to be sent to the Chair. If the information is not received by the Chair within that period, it is provided that the decision will be rendered

within the next six months without taking that information into account (unless both competent authorities agree otherwise). If, on the other hand, the information is received by the Chair within the two month period, that information will be taken into account and the decision will be communicated within six months from the reception of that information.

38. In order to deal with the unusual circumstances in which the arbitrators may be unable or unwilling to present an arbitration decision, paragraph 17 provides that if the decision is not communicated within the relevant period, the competent authorities may agree to extend the period for presenting the arbitration decision or, if they fail to reach such agreement within one month, appoint new arbitrators to deal with the case. In the case of the appointment of new arbitrators, the arbitration process would go back to the point where the original arbitrators were appointed and will continue with the new arbitrators.

Publication of the decision

39. Decisions on individual cases reached under the mutual agreement procedure are generally not made public. In the case of reasoned arbitral decisions, however, publishing the decisions would lend additional transparency to the process. Also, whilst the decision would not be in any sense a formal precedent, having the material in the public domain could influence the course of other cases so as to avoid subsequent disputes and lead to a more uniform approach to the same issue.

40. Paragraph 15 of the sample agreement therefore provides for the possibility to publish the decision. Such publication, however, should only be made if both competent authorities and the person who made the arbitration request so agree. Also, in order to maintain the confidentiality of information communicated to the competent authorities, the publication should be made in a form that would not disclose the names of the parties nor any element that would help to identify them.

Implementing the decision

41. Once the arbitration process has provided a binding solution to the issues that the competent authorities have been unable to resolve, the competent authorities will proceed to conclude a mutual agreement that reflects that decision and that will be presented to the persons directly affected by the case. In order to avoid further delays, it is suggested that the mutual agreement that incorporates the solution arrived at should be completed and presented to the taxpayer within six months from the date of the communication of the decision. This is provided in paragraph 19 of the sample agreement.

42. Paragraph 2 of Article 25 provides that the competent authorities have the obligation to implement the agreement reached notwithstanding any time limit in their domestic law. Paragraph 5 of the Article also provides that the arbitration decision is binding on both Contracting States. Failure to assess taxpayers in accordance with the agreement or to implement the arbitration decision through the conclusion of a mutual agreement would therefore result in taxation not in accordance with the Convention and, as such, would allow the person whose taxation is affected to seek relief through domestic legal remedies or by making a new request pursuant to paragraph 1 of the Article.

43. Paragraph 20 of the sample agreement deals with the case where the competent authorities are able to solve the unresolved issues that led to arbitration before the decision is rendered. Since the arbitration process is an exceptional mechanism to deal with issues that cannot be solved under the usual mutual agreement procedure, it is appropriate to put an end to that exceptional mechanism if the competent authorities are able to resolve these issues by themselves. The competent authorities may agree on a resolution of these issues as long as the arbitration decision has not been rendered.

HISTORY

Paragraph 1: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 1 of the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) was deleted and a new paragraph 1 and the heading preceding it were added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until it was deleted when the 1977 Model Convention was adopted, paragraph 1 read as follows:

> "1. In the Article are set out the rules governing the mutual agreement procedure to be followed where differences of opinion or other difficulties arise as to the application of the Convention. The Article also embodies some general rules regarding the exchange of views between the competent authorities concerned on the interpretation or the application of the Convention."

Paragraph 2: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 2 of the 1963 Draft Convention was amended and renumbered as paragraph 6 (see history of paragraph 7), the preceding heading was moved with it and a new paragraph 2 was added.

Paragraph 3: Replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 3 of the 1963 Draft Convention was deleted and a new paragraph 3 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 3 read as follows:

> "3. The competent authority of the Contracting State of which the taxpayer is a resident will, of course, subject his application to a careful examination and ask for all evidence available. As a result of such an examination the authority may find that the matter can be solved without recourse to the mutual agreement procedure. On the other hand, although adjustments might be required in the State of residence only, an exchange of views as well as of information with the competent authority of the other Contracting State may be useful, *e.g.* to obtain support for a certain interpretation of the Convention."

Paragraph 4: Amended on 17 July 2008, by deleting "Finally," at the beginning of the first sentence, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 15 July 2005 and until 17 July 2008, paragraph 4 read as follows:

> "4. Finally, as regards the practical operation of the mutual agreement procedure, the Article, in paragraph 4, merely authorises the competent authorities to communicate with each other directly, without going through diplomatic channels, and, if it seems advisable to them, to have an oral exchange of opinions through a joint commission appointed especially for the purpose. Article 26 applies to the exchange of information for the purposes of the provisions of this Article. The confidentiality of information exchanged for the purposes of a mutual agreement procedure is thus ensured."

Paragraph 4 was previously amended on 15 July 2005 by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005, on the basis of another report entitled "Changes to Articles 25 and 26 of the Model Tax Convention" (adopted by the OECD Committee on Fiscal Affairs on 1 June 2004). In the 1977 Model Convention and until 15 July 2005, paragraph 4 read as follows:

> "4. Finally, as regards the practical operation of the mutual agreement procedure, the Article, in paragraph 4, merely authorises the competent authorities to communicate with each other directly, without going through diplomatic channels, and, if it seems advisable to them, to have an oral exchange of opinions through a joint commission appointed especially for the purpose."

Paragraph 4 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 4 of the 1963 Draft Convention was deleted and a new paragraph 4 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 4 read as follows:

> "4. In paragraph 2 it is laid down that in case the State of residence is not itself able to arrive at an appropriate solution, the competent authority of that State shall communicate with the competent authority of the other State with a view to reaching an agreement regarding the taxation in dispute. Among the cases in which this procedure could be applied might be mentioned the case where one Contracting State which, in the particular case, is considered by the other State to have no right to tax under the Convention, taxes income not being subject to tax under the laws of that other Contracting State. Other examples are the case of the application of non-discrimination clauses and the case of difficulties arising in the allocation of profits among associated enterprises."

Paragraph 5: Replaced on 17 July 2008 when paragraph 5 was renumbered as paragraph 6 (see history of paragraph 6) and a new paragraph 5 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 6: Corresponds to paragraph 5 of the 1977 Model Convention as it read before 17 July 2008. On that date paragraph 6 was renumbered as paragraph 7 (see history of paragraph 7), the headings preceding paragraph 6 were moved with it and paragraph 5 was amended and renumbered as paragraph 6 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax

Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). In the 1977 Model Convention and until 17 July 2008, paragraph 5 read as follows:

> "5. Since the Article merely lays down general rules concerning the mutual agreement procedure, the comments now following are intended to clarify the purpose of such rules, and also to amplify them, if necessary, by referring, in particular, to the rules followed at international level in the conduct of mutual agreement procedures or at the internal level in the conduct of the procedures which exist in most OECD member countries for dealing with disputed claims regarding taxes."

Paragraph 5 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 5 of the 1963 Draft Convention was deleted and a new paragraph 5 was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 5 read as follows:

> "5. No time-limit is specified in the Article for presenting claims under paragraph 1. Any time-limit that may be fixed upon bilaterally should be reasonably generous."

Paragraph 7: Corresponds to paragraph 6 of the 1977 Model Convention as it read before 17 July 2008. On that date paragraph 7 was renumbered as paragraph 8 (see history of paragraph 8), paragraph 6 was amended, by replacing the word "amicable" with "agreed", and renumbered as paragraph 7 and the headings preceding paragraph 6 were moved with it by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). In the 1977 Model Convention and until 17 July 2008, paragraph 6 read as follows:

> "6. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. When taxation not in accordance with the Convention arises from an incorrect application of the Convention in both States, taxpayers are then obliged to litigate in each State, with all the disadvantages and uncertainties that such a situation entails. So paragraph 1 makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure which is called the mutual agreement procedure because it is aimed, in its second stage, at resolving the dispute on an amicable basis, *i.e.* by agreement between competent authorities, the first stage being conducted exclusively in the State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) from the presentation of the objection up to the decision taken regarding it by the competent authority on the matter."

Paragraph 6 of the 1977 Model Convention corresponded to paragraph 2 of the 1963 Draft Convention. On 23 July 1992 paragraph 6 of the 1963 Draft Convention was amended and renumbered as paragraph 29 (see history of paragraph 50) and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At the same time, paragraph 2 of the 1963 Draft Convention was amended and renumbered as paragraph 6 of the 1977 Model Convention, the heading preceding paragraph 2 was moved with it and a new section heading was added. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 2 read as follows:

"2. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. The provisions of paragraph 1 establish a right for the taxpayer concerned to address himself to the competent authority of the Contracting State of which he is a resident. The taxpayer may use this right whether or not he has exhausted all the legal remedies open to him according to the national tax laws of both States. Neither is it a prerequisite for the use of this right that the actions concerned have already resulted in incorrect taxation; the evident risk of such taxation as a consequence of the measures already taken would be sufficient."

Paragraph 8: Corresponds to paragraph 7 as it read before 17 July 2008. On that date paragraph 8 of the 1977 Model Convention was renumbered as paragraph 9 (see history of paragraph 9) and paragraph 7 was renumbered as paragraph 8 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 7 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 7 of the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963), was amended and renumbered as paragraph 34 (see history of paragraph 55) and a new paragraph 7 was added.

Paragraph 9: Amended on 22 July 2010, by replacing the first bullet point, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 17 July 2008 and until 22 July 2010, paragraph 9 read as follows:

"9. In practice, the procedure applies to cases — by far the most numerous — where the measure in question leads to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases, mention must be made of the following:

— the questions relating to attribution to a permanent establishment of a proportion of the executive and general administrative expenses incurred by the enterprise, under paragraph 3 of Article 7;

— the taxation in the State of the payer — in case of a special relationship between the payer and the beneficial owner — of the excess part of interest and royalties, under the provisions of Article 9, paragraph 6 of Article 11 or paragraph 4 of Article 12;

— cases of application of legislation to deal with thin capitalisation when the State of the debtor company has treated interest as dividends, insofar as such treatment is based on clauses of a convention corresponding for example to Article 9 or paragraph 6 of Article 11;

— cases where lack of information as to the taxpayer's actual situation has led to misapplication of the Convention, especially in regard to the determination of residence (paragraph 2 of Article 4), the existence of a permanent establishment (Article 5), or the temporary nature of the services performed by an employee (paragraph 2 of Article 15).

Paragraph 9 as it read after 17 July 2008 corresponded to paragraph 8. On 17 July 2008 paragraph 9 was renumbered as paragraph 10 (see history of paragraph 10) and paragraph 8 was renumbered as paragraph 9 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 8 of the 1977 Model Convention was amended on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraph 88 *a)* of a previous report entitled "Thin Capitalisation" (adopted by the OECD Council on 26 November 1986). In the 1977 Model Convention and until 23 July 1992, paragraph 8 read as follows:

> "8. In practice, the procedure applies to cases — by far the most numerous — where the measure in question leads to double taxation which it is the specific purpose of the Convention to avoid. Among the most common cases, mention must be made of the following:
>
> — the questions relating to attribution to a permanent establishment of a proportion of the executive and general administrative expenses incurred by the enterprise, under paragraph 3 of Article 7;
>
> — the taxation in the State of the payer — n case of a special relationship between the payer and the beneficial owner — of the excess part of interest and royalties, under the provisions of Article 9, paragraph 6 of Article 11 or paragraph 4 of Article 12;
>
> — cases where lack of information as to the taxpayer's actual situation has led to misapplication of the Convention, especially in regard to the determination of residence (paragraph 2 of Article 4), the existence of a permanent establishment (Article 5), or the temporary nature of the services performed by an employee (paragraph 2 of Article 15)."

Paragraph 8 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. Paragraph 8 of the 1963 Draft Convention was amended and renumbered as paragraph 35 (see history of paragraph 56) and a new paragraph 8 was added when the 1977 Model Convention was adopted.

Paragraph 10: Corresponds to paragraph 9 as it read before 17 July 2008. On that date paragraph 10 was split into two paragraphs. All but the last sentence of paragraph 10 was renumbered as paragraph 11 (see history of paragraph 11), the last sentence of paragraph 10 was incorporated into paragraph 12, and paragraph 9 was renumbered as paragraph 10, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 9 of the 1977 Model Convention was replaced on 23 July 1992 when it was deleted and a new paragraph 9 was added by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of paragraph 79 and subdivision 115 *b)(ii)* of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982). In the 1977 Model Convention and until 23 July 1992, paragraph 9 read as follows:

> "9. As regards adjustments to be made correlatively with the reinstatement of profits in the trading results of associated enterprises under the provisions of paragraphs 1 and 2 of Article 9, there is ground for considering that they may properly be dealt with through the mutual agreement procedure when determining their amount gives rise to difficulty."

Paragraph 9 of the 1963 Draft Convention was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 9 of the 1963 Draft Convention was amended and renumbered as paragraph 44 (see history of paragraph 47) and a new paragraph 9 was added.

Paragraph 11: Corresponds to paragraph 10 as it read before 17 July 2008. On that date paragraph 11 was renumbered as paragraph 13 (see history of paragraph 13) and paragraph 10 was amended, by removing the final sentence (which was incorporated into paragraph 12 (see history of paragraph 12)), and renumbered as paragraph 11 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 10 read as follows:

> "10. This in fact is implicit in the wording of paragraph 2 of Article 9 when the bilateral convention in question contains a clause of this type. When the bilateral convention does not contain rules similar to those of paragraph 2 of Article 9 (as is usually the case for conventions signed before 1977) the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to the text of paragraph 1 — which usually only confirms broadly similar rules existing in domestic laws — indicates that the intention was to have economic double taxation covered by the Convention. As a result, most member countries consider that economic double taxation resulting from adjustments made to profits by reason of transfer pricing is not in accordance with — at least — the spirit of the convention and falls within the scope of the mutual agreement procedure set up under Article 25. States which do not share this view do, however, in practice, find the means of remedying economic double taxation in most cases involving *bona fide* companies by making use of provisions in their domestic laws."

Paragraph 10 of the 1977 Model Convention was replaced on 23 July 1992 when it was renumbered as paragraph 11 (see history of paragraph 13) and a new paragraph 10 was added by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of paragraph 79 of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982).

Paragraph 12: Replaced on 17 July 2008 when paragraph 12 was amended and renumbered as paragraph 14 (see history of paragraph 14) and a new paragraph 12, which incorporated the final sentence of paragraph 10, was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 13: Corresponds to paragraph 11 as it read before 17 July 2008. On that date paragraph 13 was renumbered as paragraph 16 (see history of paragraph 16) and paragraph 11 was renumbered as paragraph 13 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 11 as it read after 23 July 1992 corresponded to paragraph 10 of the 1977 Model Convention. On 23 July 1992 paragraph 11 of the 1977 Model Convention was renumbered as paragraph 12 (see history of paragraph 14) and paragraph 10 was renumbered as paragraph 11 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 10 of the 1963 Draft Convention was replaced when it was deleted and a new paragraph 10 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 10 read as follows:

"10. In future, when a multilateral Convention may have been agreed upon, it might be useful to consider more precise rules on such an international consultative procedure."

Paragraph 14: Corresponds to paragraph 12 as it read before 17 July 2008. On that date paragraph 14 was renumbered as paragraph 17 (see history of paragraph 17) and paragraph 12 was amended, by adding examples to the paragraph, and renumbered as paragraph 14 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 12 read as follows:

"12. It should be noted that the mutual agreement procedure, unlike the disputed claims procedure under domestic law, can be set in motion by a taxpayer without waiting until the taxation considered by him to be "not in accordance with the Convention" has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the "actions of one or both of the Contracting States" will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention."

Paragraph 12 as it read after 23 July 1992 corresponded to paragraph 11 of the 1977 Model Convention. On 23 July 1992 paragraph 12 of the 1977 Model Convention was renumbered as paragraph 13 (see history of paragraph 16) and paragraph 11 was renumbered as paragraph 12 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 11 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 15: Replaced on 17 July 2008 when paragraph 15 was renumbered as paragraph 18 (see history of paragraph 18) and a new paragraph 15 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 16: Corresponds to paragraph 13 as it read before 17 July 2008. On that date paragraph 16 was renumbered as paragraph 19 (see history of paragraph 19) and paragraph 13 was renumbered as paragraph 16 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 13 as it read after 23 July 1992 corresponded to paragraph 12 of the 1977 Model Convention. On 23 July 1992 paragraph 13 of the 1977 Model Convention was renumbered as paragraph 14 (see history of paragraph 17) and paragraph 12 was renumbered as paragraph 13 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 12 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 17: Corresponds to paragraph 14 as it read before 17 July 2008. On that date paragraph 17 was renumbered as paragraph 20 (see history of paragraph 20) and paragraph 14 was renumbered as paragraph 17 by the report entitled "The 2008

Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 14 as it read after 23 July 1992 corresponded to paragraph 13 of the 1977 Model Convention. On 23 July 1992 paragraph 14 of the 1977 Model Convention was renumbered as paragraph 15 (see history of paragraph 18) and paragraph 13 was renumbered as paragraph 14 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 13 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 18: Corresponds to paragraph 15 as it read before 17 July 2008. On that date paragraph 18 was amended and renumbered as paragraph 21 (see history of paragraph 21) and paragraph 15 was renumbered as paragraph 18 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 15 as it read after 23 July 1992 corresponded to paragraph 14 of the 1977 Model Convention. On 23 July 1992 paragraph 15 of the 1977 Model Convention was renumbered as paragraph 16 (see history of paragraph 19) and paragraph 14 was renumbered as paragraph 15 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 14 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 19: Corresponds to paragraph 16 as it read before 17 July 2008. On that date paragraph 19 was amended and renumbered as paragraph 30 (see history of paragraph 30) and paragraph 16 was renumbered as paragraph 19 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 16 as it read after 23 July 1992 corresponded to paragraph 15 of the 1977 Model Convention. On 23 July 1992 paragraph 16 of the 1977 Model Convention was renumbered as paragraph 17 (see history of paragraph 20) and paragraph 15 was renumbered as paragraph 16 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 15 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 20: Corresponds to paragraph 17 as it read before 17 July 2008. On that date paragraph 20 was renumbered as paragraph 31 (see history of paragraph 31) and paragraph 17 was renumbered as paragraph 20 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 17 as it read after 23 July 1992 corresponded to paragraph 16 of the 1977 Model Convention. On 23 July 1992 paragraph 17 of the 1977 Model Convention was renumbered as paragraph 18 (see history of paragraph 21) and paragraph 16 was renumbered as paragraph 17 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 16 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 21: Corresponds to paragraph 18 as it read before 17 July 2008. On that date paragraph 21 was renumbered as paragraph 32 (see history of paragraph 32) and paragraph 18 was amended by replacing the 3rd and last sentences (which were incorporated into paragraph 24), and renumbered as paragraph 21 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 18 read as follows:

> "18. The provision fixing the starting point of the three-year time limit as the date of the "first notification of the action resulting in taxation not in accordance with the provisions of the Convention" should be interpreted in the way most favourable to the taxpayer. Thus, even if such taxation should be directly charged in pursuance of an administrative decision or action of general application, the time limit begins to run only from the date of the notification of the individual action giving rise to such taxation, that is to say, under the most favourable interpretation, from the act of taxation itself, as evidenced by a notice of assessment or an official demand or other instrument for the collection or levy of tax. If the tax is levied by deduction at the source, the time limit begins to run from the moment when the income is paid; however, if the taxpayer proves that only at a later date did he know that the deduction had been made, the time limit will begin from that date. Furthermore, where it is the combination of decisions or actions taken in both Contracting States resulting in taxation not in accordance with the Convention, it begins to run only from the first notification of the most recent decision or action."

Paragraph 18 as it read after 23 July 1992 corresponded to paragraph 17 of the 1977 Model Convention. On 23 July 1992 paragraph 18 of the 1977 Model Convention was renumbered as paragraph 19 (see history of paragraph 30) and paragraph 17 was renumbered as paragraph 18 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 17 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 22: Replaced on 17 July 2008 when paragraph 22 was renumbered as paragraph 33 (see history of paragraph 33) and a new paragraph 22 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 23: Replaced on 17 July 2008 when paragraph 23 was renumbered as paragraph 34 (see history of paragraph 34) and a new paragraph 23 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 24: Corresponds in part to the 3rd and final sentences of paragraph 18 as they read before 17 July 2008. On 17 July 2008 paragraph 24 was renumbered as paragraph 35 (see history of paragraph 35) and a new paragraph 24, incorporating the 3rd and final sentences of paragraph 18, was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 25: Replaced on 17 July 2008 when paragraph 25 was amended and renumbered as paragraph 36 (see history of paragraph 36) and a new paragraph 25

was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 26: Replaced on 17 July 2008 when paragraph 26 was amended and renumbered as paragraph 37 (see history of paragraph 37) and a new paragraph 26 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 27: Replaced on 17 July 2008 when paragraph 27 was renumbered as paragraph 38 (see history of paragraph 38) and a new paragraph 27 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 28: Replaced on 17 July 2008 when paragraph 28 was renumbered as paragraph 39 (see history of paragraph 39) and a new paragraph 28 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 29: Replaced on 17 July 2008 when paragraph 29 was renumbered as paragraph 40 (see history of paragraph 40) and a new paragraph 29 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 30: Corresponds to paragraph 19 as it read before 17 July 2008. On that date paragraph 30 was renumbered as paragraph 41 (see history of paragraph 41) and paragraph 19 was amended by replacing the cross-reference to "paragraph 6" with "paragraph 7", and renumbered as paragraph 30 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 19 read as follows:

> "19. As regards the procedure itself, it is necessary to consider briefly the two distinct stages into which it is divided (see paragraph 6 above)."

Paragraph 19 as it read after 23 July 1992 corresponded to paragraph 18 of the 1977 Model Convention. On 23 July 1992 paragraph 19 of the 1977 Model Convention was renumbered as paragraph 20 (see history of paragraph 31) and paragraph 18 was renumbered as paragraph 19 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 18 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 31: Corresponds to paragraph 20 as it read before 17 July 2008. On that date paragraph 31 was divided and incorporated into paragraphs 42 and 45 with amendment (see history of paragraph 42) and paragraph 20 was renumbered as paragraph 31 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled

"Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 20 as it read after 23 July 1992 corresponded to paragraph 19 of the 1977 Model Convention. On 23 July 1992 paragraph 20 of the 1977 Model Convention was renumbered as paragraph 21 (see history of paragraph 32) and paragraph 19 was renumbered as paragraph 20 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 19 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 32: Corresponds to paragraph 21 as it read before 17 July 2008. On that date paragraph 32 was renumbered as paragraph 50, the heading preceding paragraph 32 was moved with it (see history of paragraph 50) and paragraph 21 was renumbered as paragraph 32 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 21 as it read after 23 July 1992 corresponded to paragraph 20 of the 1977 Model Convention. On 23 July 1992 paragraph 21 of the 1977 Model Convention was amended and renumbered as paragraph 22 (see history of paragraph 33) and paragraph 20 was renumbered as paragraph 21 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 20 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 33: Corresponds to paragraph 22 as it read before 17 July 2008. On that date paragraph 33 was renumbered as paragraph 51 (see history of paragraph 51) and paragraph 22 was renumbered as paragraph 33 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 22 as it read after 23 July 1992 corresponded to paragraph 21 of the 1977 Model Convention. On 23 July 1992 paragraph 22 of the 1977 Model Convention was amended and renumbered as paragraph 23 (see history of paragraph 34) and paragraph 21 was amended and renumbered as paragraph 22 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraph 116 i) of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982). In the 1977 Model Convention and until 23 July 1992, paragraph 21 read as follows:

> "21. If, however, it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other State. it will be incumbent on it, indeed it will be its duty — as clearly appears by the terms of paragraph 2 — to set in motion the mutual agreement procedure proper."

Paragraph 21 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 34: Corresponds to paragraph 23 as it read before 17 July 2008. On that date paragraph 34 was renumbered as paragraph 52 (see history of paragraph 52) and paragraph 23 was renumbered as paragraph 34 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 23 as it read after 23 July 1992 corresponded to paragraph 22 of the 1977 Model Convention. On 23 July 1992 paragraph 23 of the 1977 Model Convention was renumbered as paragraph 24 (see history of paragraph 35) and paragraph 22 was amended and renumbered as paragraph 23 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraph 116 *i*) of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982). In the 1977 Model Convention and until 23 July 1992, paragraph 22 read as follows:

> "22. A taxpayer is entitled to present his case under paragraph 1 to the competent authority of the State of which he is a resident whether or not he may also have made a claim or commenced litigation under the domestic law of that State. If litigation is pending, the competent authority of the State of residence should not wait for the final adjudication, but should say whether it considers the case to be eligible for the mutual agreement procedure. If it so decides, it has to determine whether it is itself able to arrive at a satisfactory solution or whether the case has to be submitted to the competent authority of the other Contracting State."

Paragraph 22 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 35: Corresponds to paragraph 24 as it read before 17 July 2008. On that date paragraph 35 was renumbered as paragraph 53 (see history of paragraph 53) and paragraph 24 was renumbered as paragraph 35 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 24 as it read after 23 July 1992 corresponded to paragraph 23 of the 1977 Model Convention. On 23 July 1992 paragraph 24 of the 1977 Model Convention was renumbered as paragraph 25 (see history of paragraph 36) and paragraph 23 was renumbered as paragraph 24 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 23 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 36: Corresponds to paragraph 25 as it read before 17 July 2008. On that date paragraph 36 was renumbered as paragraph 54 (see history of paragraph 54) and paragraph 25 was amended and renumbered as paragraph 36 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 25 read as follows:

> "25. In its second stage — which opens with the approach to the competent authority of the other State by the competent authority to which the taxpayer has applied — the procedure is henceforward at the level of dealings between States, as if, so to speak, the State to which the complaint was presented had given it its backing. But while this procedure is indisputably a procedure between States, it may, on the other hand, be asked:
>
> — whether, as the title of the Article and the terms employed in the first sentence of paragraph 2 suggest, it is no more than a simple procedure of mutual agreement, or constitutes the implementation of a *pactum de contrahendo* laying on the parties a mere duty to negotiate but in no way laying on them a duty to reach agreement;

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— or whether on the contrary, it is to be regarded (on the assumption of course that it takes place within the framework of a joint commission) as a procedure of a jurisdictional nature laying on the parties a duty to resolve the dispute."

Paragraph 25 as it read after 23 July 1992 corresponded to paragraph 24 of the 1977 Model Convention. On 23 July 1992 paragraph 25 of the 1977 Model Convention was renumbered as paragraph 26 (see history of paragraph 37) and paragraph 24 was renumbered as paragraph 25 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 24 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 37: Corresponds to paragraph 26 as it read before 17 July 2008. On that date paragraph 37 was amended and renumbered as paragraph 55 (see history of paragraph 55) and paragraph 26 was amended and renumbered as paragraph 37 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 26 read as follows:

"26. Paragraph 2 no doubt entails a duty to negotiate; but as far as reaching mutual agreement through the procedure is concerned, the competent authorities are under a duty merely to use their best endeavours and not to achieve a result. However, Contracting States could agree on a more far-reaching commitment whereby the mutual agreement procedure, and above all the discussions in the joint commission, would produce a solution to the dispute. Such a rule could be established either by an amendment to paragraph 2 or by an interpretation specified in a protocol or an exchange of letters annexed to the Convention."

Paragraph 26 as it read after 23 July 1992 corresponded to paragraph 25 of the 1977 Model Convention. On 23 July 1992 paragraph 26 of the 1977 Model Convention was renumbered as paragraph 27 (see history of paragraph 38) and paragraph 25 was renumbered as paragraph 26 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 25 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 38: Corresponds to paragraph 27 as it read before 17 July 2008. On that date paragraph 38 was renumbered as paragraph 56 (see history of paragraph 56), the heading preceding paragraph 38 was moved with it and paragraph 27 was renumbered as paragraph 38 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 27 as it read after 23 July 1992 corresponded to paragraph 26 of the 1977 Model Convention. On 23 July 1992 paragraph 27 of the 1977 Model Convention was amended and renumbered as paragraph 28 (see history of paragraph 39) and paragraph 26 was renumbered as paragraph 27 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 26 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 39: Corresponds to paragraph 28 as it read before 17 July 2008. On that date paragraph 39 was renumbered as paragraph 57 (see history of paragraph 57) and paragraph 28 was renumbered as paragraph 39 by the report entitled "The 2008

Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 28 as it read after 23 July 1992 corresponded to paragraph 27 of the 1977 Model Convention. On 23 July 1992 paragraph 28 of the 1977 Model Convention was renumbered as paragraph 31 (see history of paragraph 42) and paragraph 27 was amended and renumbered as paragraph 28 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraph 116 *i*) of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982). In the 1977 Model Convention and until 23 July 1992, paragraph 27 read as follows:

> "27. The purpose of the last sentence of paragraph 2 is to enable countries with time limits relating to adjustments of assessments and tax refunds in their domestic law to give effect to an agreement despite such time limits. This provision does not prevent, however, such States as are not, on constitutional or other legal grounds, able to overrule the time limits in the domestic law from inserting in the mutual agreement itself such time limits as are adapted to their internal statute of limitation. In certain extreme cases, a Contracting State may prefer not to enter into a mutual agreement, the implementation of which would require that the internal statute of limitation had to be disregarded. Apart from time limits there may exist other obstacles such as "final court decisions" to giving effect to an agreement. Contracting States are free to agree on firm provisions for the removal of such obstacles."

Paragraph 27 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 40: Corresponds to paragraph 29 as it read before 17 July 2008. On that date paragraph 40 was renumbered as paragraph 58 (see history of paragraph 58) and paragraph 29 was renumbered as paragraph 40 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 29 of the 1977 Model Convention was replaced on 23 July 1992 when it was renumbered as paragraph 32 (see history of paragraph 50) and new paragraph 29 was added by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraphs 116 (iii), (iv) and (v) of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982).

Paragraph 41: Corresponds to paragraph 30 as it read before 17 July 2008. On that date paragraph 41 was renumbered as paragraph 59 (see history of paragraph 59) and paragraph 30 was renumbered as paragraph 41 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 30 of the 1977 Model Convention as replaced on 23 July 1992 when it was renumbered as paragraph 33 (see history of paragraph 51) and new paragraph 30 was added by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraphs 116 (vi), (vii) and (viii) of a previous report entitled "Transfer Pricing, Corresponding Adjustments and the Mutual Agreement Procedure" (adopted by the OECD Council on 24 November 1982).

Paragraph 42: Corresponds to paragraph 31 as it read before 17 July 2008. On that date paragraph 42 was amended and renumbered as paragraph 60 (see history of

paragraph 60), paragraph 31 was amended, with minor amendments and by replacing the third and subsequent sentences, which were incorporated into paragraph 45 with other amendments, and paragraph 31 was renumbered as paragraph 42 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 31 read as follows:

> "31. Finally, the case may arise where a mutual agreement is concluded in relation to a taxpayer who has brought a suit for the same purpose in the competent court of either Contracting State and such suit is still pending. In such a case, there would be no grounds for rejecting a request by a taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of the mutual agreement procedure until the court had delivered its judgment in the suit still pending. On the other hand, it is necessary to take into account the concern of the competent authority to avoid any divergence or contradiction between the decision of the court and the mutual agreement, with the difficulties or risks of abuse that they could entail. In short, therefore, it seems normal that the implementation of a mutual agreement should be made subject:
>
> — to the acceptance of such mutual agreement by the taxpayer, and
>
> — to the taxpayer's withdrawal of his suit at law concerning the points settled in the mutual agreement."

Paragraph 31 as it read after 23 July 1992 corresponded to paragraph 28 of the 1977 Model Convention. On 23 July 1992 paragraph 31 of the 1977 Model Convention was amended and renumbered as paragraph 34 (see history of paragraph 52) and paragraph 28 was renumbered as paragraph 31 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 28 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 43: Replaced on 17 July 2008 when paragraph 43 was renumbered as paragraph 61 (see history of paragraph 61) and a new paragraph 43 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44: Replaced on 17 July 2008 when paragraph 44 was renumbered as paragraph 62 (see history of paragraph 62) and a new paragraph 44 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.1: Renumbered as paragraph 88 (see history of paragraph 88) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.2: Renumbered as paragraph 89 (see history of paragraph 89) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.3: Renumbered as paragraph 90 (see history of paragraph 90) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.4: Renumbered as paragraph 91 (see history of paragraph 91) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.5: Renumbered as paragraph 92 (see history of paragraph 92) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.6: Renumbered as paragraph 93 (see history of paragraph 93) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 44.7: Renumbered as paragraph 94 (see history of paragraph 94) by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 45: Corresponds to the third sentence and subsequent sentences of paragraph 31 as they read before 17 July 2008. On 17 July 2008 the third and subsequent sentences of paragraph 31 were incorporated in part into a new paragraph 45 (see history of paragraph 31) and paragraph 45 and the heading preceding it were deleted by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 21 September 1995 and until 17 July 2008, paragraph 45 and the heading preceding it read as follows:

> *"IV. Final observations*
>
> 45. On the whole, the mutual agreement procedure has proved satisfactory. Treaty practice shows that Article 25 has generally represented the maximum that Contracting States were prepared to accept. It must, however, be admitted that this provision is not yet entirely satisfactory from the taxpayer's viewpoint. This is because the competent authorities are required only to seek a solution and are not obliged to find one (see paragraph 26 above). The conclusion of a mutual agreement depends to a large extent on the powers of compromise which the domestic law allows the competent authorities. Thus, if a convention is interpreted or applied differently in two Contracting States, and if the competent authorities are unable to agree on a joint solution within the framework of a mutual agreement procedure, double taxation is still possible although contrary to the sense and purpose of a convention aimed at avoiding double taxation."

The heading preceding paragraph 45, "III. Final observations", as it read after 23 July 1992 and until 21 September 1995, was renumbered as "IV. Final observations" by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 45 as it read after 23 July 1992 corresponded to paragraph 42 of the 1977 Model Convention. On 23 July 1992 paragraph 45 of the 1977 Model Convention was amended and renumbered as paragraph 48 (see history of paragraph 48), paragraph 42 was amended and renumbered as paragraph 45 and the heading preceding paragraph 42 was moved with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 42 and the heading preceding it read as follows:

> *"III. Final observations*
>
> 42. On the whole, the mutual agreement procedure has proved satisfactory. The most recent treaty practice shows that Article 25 represents the maximum that Contracting States are prepared to accept. It must, however, be admitted that this

provision is not yet entirely satisfactory from the taxpayer's viewpoint. This is because the competent authorities are required only to seek a solution and are not obliged to find one (see paragraph 25 above). The conclusion of a mutual agreement depends to a large extent on the powers of compromise which the domestic law allows the competent authorities. Thus, if a convention is interpreted or applied differently in two Contracting States, and if the competent authorities are unable to agree on a joint solution within the framework of a mutual agreement procedure, double taxation is still possible although contrary to the sense and purpose of a convention aimed at avoiding double taxation."

Paragraph 42 and the heading preceding it were added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 46: Replaced on 17 July 2008 when paragraph 46 was deleted and a new paragraph 46 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 46 read as follows:

"46. It is difficult to avoid this situation without going outside the framework of the mutual agreement procedure. The first approach to a solution might consist of seeking an advisory opinion: the two Contracting States would agree to ask the opinion of an impartial third party, although the final decision would still rest with the States."

Paragraph 46 as it read after 23 July 1992 corresponded to paragraph 43 of the 1977 Model Convention. On 23 July 1992 paragraph 46 of the 1977 Model Convention was renumbered as paragraph 50 (see history of paragraph 50) and paragraph 43 was renumbered as paragraph 46 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 43 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 47: Replaced on 17 July 2008 when paragraph 47 was deleted and a new paragraph 47 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 47 read as follows:

"47. The provisions embodied in this Convention, as well as the Commentary related thereto, are the result of close international joint work within the Committee on Fiscal Affairs. A possibility near at hand would be to call upon the Committee on Fiscal Affairs to give an opinion on the correct understanding of the provisions where special difficulties of interpretation arise as to particular points. Such a practice, which would be in line with the mandate and aims of the Committee on Fiscal Affairs, might well make a valuable contribution to arriving at a desirable uniformity in the application of the provisions."

Paragraph 47 as it read after 23 July 1992 corresponded to paragraph 44 of the 1977 Model Convention. On 23 July 1992 paragraph 47 of the 1977 Model Convention was amended and renumbered as paragraph 53 (see history of paragraph 98) and paragraph 44 was renumbered as paragraph 47 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 44 of the 1977 Model Convention corresponded to paragraph 9 of the 1963 Draft Convention. Paragraph 9 of the 1963 Draft Convention was amended and renumbered when the 1977 Model Convention was adopted by the OECD Council on

11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until it was deleted when the 1977 Model Convention was adopted, paragraph 9 read as follows:

> "9. As the provisions embodied in this Convention as well as the Commentaries annexed thereto are the result of a close international joint work within the Fiscal Committee, a possibility near at hand would be to call upon the Fiscal Committee to, give an opinion on the correct understanding of the provisions where special difficulties of interpretation arise as to particular points. Such a practice, which would be in line with the mandate and aims of the Fiscal Committee with regard to the progressive elaboration of uniform law for the avoidance of double taxation, might well make a valuable contribution to arriving at a desirable uniformity in the application of the provisions."

Paragraph 48: Replaced on 17 July 2008 when paragraph 48 was deleted and a new paragraph 48 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 48 read as follows:

> "48. Another solution is that of arbitration. This is the solution adopted by the member States of the European Communities through their multilateral Arbitration Convention, which was signed on 23 July 1990 and which provides that certain cases of double taxation that have not been solved through the mutual agreement procedure must be submitted to an arbitration procedure. Also, some recent bilateral conventions provide that the Contracting States may agree to submit unresolved disagreements to arbitration."

Paragraph 48 as it read after 23 July 1992 corresponded to paragraph 45 of the 1977 Model Convention. On 23 July 1992 paragraph 48 of the 1977 Model Convention was renumbered as paragraph 54 (see history of paragraph 99) and paragraph 45 was amended and renumbered as paragraph 48 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 45 read as follows:

> "45. It might also be feasible to ask the opinion of certain persons acting as independent arbitrators. In the case of OECD member countries, the Committee on Fiscal Affairs could, for example, periodically draw up a list of persons from among whom the competent authorities of the two States concerned could choose the third party to be asked to give an advisory opinion."

Paragraph 45 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 49: Replaced on 17 July 2008 when paragraph 46 was deleted and a new paragraph 46 was added by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). At the same time, the heading preceding paragraph 49 was moved immediately before paragraph 95. After 28 January 2003 and until 17 July 2008, paragraph 49 read as follows:

C (25)

> "49. *Belgium* believes that, in the context of a bilateral or multilateral APAs, the first sentence of paragraph 3 allows the competent authorities to solve difficulties related to the application of the arms' length principle provided for in paragraph 1 of Article 9 even where the convention does not include paragraph 2 of that Article."

Paragraph 49 was replaced on 28 January 2003 when it was deleted and a new paragraph 49 was added by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003. After 23 July 1992 and until 28 January 2003, paragraph 49 read as follows:

> "49. *Belgium* expresses doubts about the interpretation given in paragraphs 9 and 10 above. In particular, where a convention does not include provisions corresponding to paragraph 2 of Article 9, Belgium believes that there is no provision in the Convention that appears to allow the enterprise the profits of which have been diverted, or the enterprise that has benefitted from this diversion, the right to make a request for adjustment under the mutual agreement procedure because the profits that have been abusively transferred may have been subject to economic double taxation. However, where the adjusted profits are also subject to juridical double taxation, *e.g.* where the profits transferred to the associated enterprise are subjected to a tax on dividends as a hidden distribution after having been included in the taxable profits of the other enterprise, nothing would prevent the application of Article 25."

Paragraph 49 was added on 23 July 1992 together with the heading preceding it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 50: Corresponds to paragraph 32 as it read before 17 July 2008. On that date paragraph 32 was renumbered as paragraph 50, the heading preceding paragraph 32 was moved with it, paragraph 50 was deleted and the heading preceding paragraph 50 was moved immediately before paragraph 96 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 32 as it read after 23 July 1992 corresponded to paragraph 29 of the 1977 Model Convention. On 23 July 1992 paragraph 32 of the 1977 Model Convention was renumbered as paragraph 35 (see history of paragraph 53), paragraph 29 was renumbered as paragraph 32 and the heading preceding paragraph 29 was moved with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 29 of the 1977 Model Convention corresponded to paragraph 6 of the 1963 Draft Convention. Paragraph 6 of the 1963 Draft Convention was amended and renumbered as paragraph 29 and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the 1977 Model Convention was adopted, paragraph 6 read as follows:

> "6. The provisions of paragraph 3 invite the competent authorities to resolve general difficulties of interpretation or application by means of mutual agreement and enable the authorities to enter into such agreement, if possible."

Paragraph 50 as it read before 17 July 2008 was deleted by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 50 read as follows:

> "50. *Canada* and *Portugal* reserve their positions on the last sentence of paragraph 1 as they could not accept such a long time-limit."

Paragraph 50 as it read after 23 July 1992 corresponded to paragraph 46 of the 1977 Model Convention. On 23 July 1992 paragraph 46 of the 1977 Model Convention was renumbered as paragraph 50 and the heading preceding paragraph 46 was moved

with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 46 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 51: Corresponds to paragraph 33 as it read before 17 July 2008. On that date paragraph 51 was renumbered as paragraph 96 (see history of paragraph 96) and paragraph 33 was renumbered as paragraph 51 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 33 as it read after 23 July 1992 corresponded to paragraph 30 of the 1977 Model Convention. On 23 July 1992 paragraph 33 of the 1977 Model Convention was renumbered as paragraph 36 (see history of paragraph 54) and paragraph 30 was renumbered as paragraph 33 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 30 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 52: Corresponds to paragraph 34 as it read before 17 July 2008. On that date paragraph 52 was renumbered as paragraph 97 (see history of paragraph 97) and paragraph 34 was renumbered as paragraph 52 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 34 as it read after 23 July 1992 corresponded to paragraph 31 of the 1977 Model Convention. On 23 July 1992 paragraph 34 of the 1977 Model Convention was renumbered as paragraph 37 (see history of paragraph 55) and paragraph 31 was amended and renumbered as paragraph 34 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992, on the basis of subparagraph 88 *b)* of a previous report entitled "Thin Capitalisation" (adopted by the OECD Council on 26 November 1986). In the 1977 Model Convention and until 23 July 1992, paragraph 31 read as follows:

> "31. Under this provision the competent authorities can, in particular:
>
> — where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;
>
> — where the laws of a State have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes."

Paragraph 31 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 53: Corresponds to paragraph 35 as it read before 17 July 2008. On that date paragraph 53 was amended and renumbered as paragraph 98 (see history of paragraph 98) and paragraph 35 was renumbered as paragraph 53 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 35 as it read after 23 July 1992 corresponded to paragraph 32 of the 1977 Model Convention. On 23 July 1992 paragraph 35 of the 1977 Model Convention was renumbered as paragraph 38 (see history of paragraph 56) and paragraph 32 was

renumbered as paragraph 35 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 32 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 54: Corresponds to paragraph 36 as it read before 17 July 2008. On that date paragraph 54 was renumbered as paragraph 99 (see history of paragraph 99) and paragraph 36 was renumbered as paragraph 54 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 36 as it read after 23 July 1992 corresponded to paragraph 33 of the 1977 Model Convention. On 23 July 1992 paragraph 36 of the 1977 Model Convention was renumbered as paragraph 39 (see history of paragraph 57) and paragraph 33 was renumbered as paragraph 36 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 33 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 55: Corresponds to paragraph 37 as it read before 17 July 2008. On that date paragraph 37 was amended and renumbered as paragraph 55 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 37 read as follows:

> "37. The second sentence of paragraph 3 enables the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. It is of course desirable that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation. An exception must, however, be made for the case of Contracting States whose domestic law prevents the Convention from being complemented on points which are not explicitly or at least implicitly dealt with; in such a case, the Convention could be complemented only by a protocol subject, like the Convention itself, to ratification or approval."

Paragraph 37 as it read after 23 July 1992 corresponded to paragraph 34 of the 1977 Model Convention. On 23 July 1992 paragraph 37 of the 1977 Model Convention was renumbered as paragraph 40 (see history of paragraph 58) and paragraph 34 was renumbered as paragraph 37 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 34 of the 1977 Model Convention corresponded to paragraph 7 of the 1963 Draft Convention. Paragraph 7 of the 1963 Draft Convention was amended and renumbered as paragraph 34 when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 7 read as follows:

> "7. In the second sentence of paragraph 3, a possibility is indicated for the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. It is, of course, desirable that the

consultations concerned should result in the effective elimination of the double taxation in question."

Paragraph 55 as it read before 15 July 2005 was deleted by the report entitled "The 2005 Update to the Model Tax Convention", adopted by the OECD Council on 15 July 2005. After 21 September 1995 and until 15 July 2005, paragraph 55 read as follows:

"55. *Mexico* reserves its position on the second sentence of paragraph 3 on the grounds that it has no authority under its law to eliminate double taxation in cases not provided for in the Convention."

Paragraph 55 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 56: Corresponds to paragraph 38 as it read before 17 July 2008. On that date paragraph 38 was renumbered as paragraph 56 and the heading preceding paragraph 38 was moved with it, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 38 as it read after 23 July 1992 corresponded to paragraph 35 of the 1977 Model Convention. On 23 July 1992 paragraph 38 of the 1977 Model Convention was renumbered as paragraph 41 (see history of paragraph 59), paragraph 35 was renumbered as paragraph 38 and the heading preceding paragraph 35 was moved with it by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 35 of the 1977 Model Convention corresponded to paragraph 8 of the 1963 Draft Convention. Paragraph 8 of the 1963 Draft Convention was amended and renumbered and the preceding heading was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 8 read as follows:

"8. This paragraph provides that the competent authorities of the Contracting States may communicate with each other directly. It would thus not be necessary to go through diplomatic channels. As suggested by the second sentence of paragraph 4, the setting up of a Commission may in certain cases be advisable. When dealing with a particular case, it might be found of value to allow the taxpayer to make representations in writing or orally. If agreed upon unanimously, this procedure should be open to the Commission."

Paragraph 57: Corresponds to paragraph 39 as it read before 17 July 2008. On that date paragraph 39 was renumbered as paragraph 57 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 39 as it read after 23 July 1992 corresponded to paragraph 36 of the 1977 Model Convention. On 23 July 1992 paragraph 39 of the 1977 Model Convention was renumbered as paragraph 42 (see history of paragraph 60) and paragraph 36 was renumbered as paragraph 39 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 36 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 58: Corresponds to paragraph 40 as it read before 17 July 2008. On that date paragraph 40 was renumbered as paragraph 58 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008,

on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 40 was amended on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995. After 23 July 1992 and until 21 September 1995, paragraph 40 read as follows:

> "40. Such exchange of opinions will normally take place by letter. However, if the competent authorities deem it useful, in order to reach an agreement more easily, they may also — as provided in the second sentence of paragraph 4 — exchange views orally. They may, moreover, agree that such exchanges should take place in a commission consisting of representatives of the said authorities."

Paragraph 40 as it read after 23 July 1992 corresponded to paragraph 37 of the 1977 Model Convention. On 23 July 1992 paragraph 40 of the 1977 Model Convention was renumbered as paragraph 43 (see history of paragraph 61) and paragraph 37 was renumbered as paragraph 40 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 37 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 59: Corresponds to paragraph 41 as it read before 17 July 2008. On that date paragraph 41 was renumbered as paragraph 59 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 41 as it read after 23 July 1992 corresponded to paragraph 38 of the 1977 Model Convention. On 23 July 1992 paragraph 41 of the 1977 Model Convention was renumbered as paragraph 44 (see history of paragraph 62) and paragraph 38 was renumbered as paragraph 41 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 38 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 60: Corresponds to paragraph 42 as it read before 17 July 2008. On that date paragraph 42 was amended, by replacing the word "while" in the first sentence with "whilst", and renumbered as paragraph 60 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 23 July 1992 and until 17 July 2008, paragraph 42 read as follows:

> "42. However, while the Contracting States may avoid any formalism in this field, it is nevertheless their duty to give taxpayers whose cases are brought before the joint commission under paragraph 2 certain essential guarantees, namely:
>
> — the right to make representations in writing or orally, either in person or through a representative;
>
> — the right to be assisted by counsel."

Paragraph 42 as it read after 23 July 1992 corresponded to paragraph 39 of the 1977 Model Convention. On 23 July 1992 paragraph 42 of the 1977 Model Convention was amended and renumbered as paragraph 45 (see history of paragraph 45) and paragraph 39 was renumbered as paragraph 42 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 39 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 61: Corresponds to paragraph 43 as it read before 17 July 2008. On that date paragraph 43 was renumbered as paragraph 61 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 43 as it read after 23 July 1992 corresponded to paragraph 40 of the 1977 Model Convention. On 23 July 1992 paragraph 43 of the 1977 Model Convention was renumbered as paragraph 46 (see history of paragraph 46) and paragraph 40 was renumbered as paragraph 43 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 40 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 62: Corresponds to paragraph 44 as it read before 17 July 2008. On that date paragraph 44 was renumbered as paragraph 62 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44 as it read after 23 July 1992 corresponded to paragraph 41 of the 1977 Model Convention. On 23 July 1992 paragraph 44 of the 1977 Model Convention was renumbered as paragraph 47 (see history of paragraph 47) and paragraph 41 was renumbered as paragraph 44 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 41 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 63: Added on 17 July 2008, together with the heading preceding it, by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 64: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 65: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 66: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 67: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 68: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 69: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 70: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 71: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 72: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 73: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 74: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 75: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 76: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 77: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 78: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 79: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 80: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 81: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of

another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 82: Added on 17 July 2008 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 83: Added on 17 July 2008 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 84: Added on 17 July 2008 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 85: Added on 17 July 2008 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 86: Added on 17 July 2008, together with the heading preceding it by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 87: Added on 17 July 2008 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 88: Corresponds to paragraph 44.1 as it read before 17 July 2008. On that date paragraph 44.1 was renumbered as paragraph 88 and the heading preceding paragraph 44.1 was moved with it by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.1 was added on 21 September 1995, together with the heading preceding it by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995.

Paragraph 89: Corresponds to paragraph 44.2 as it read before 17 July 2008. On that date paragraph 44.2 was renumbered as paragraph 89 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.2 was added on 21 September 1995 by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995.

Paragraph 90: Corresponds to paragraph 44.3 as it read before 17 July 2008. On that date paragraph 44.3 was renumbered as paragraph 91 by the report entitled “The 2008 Update to the Model Tax Convention”, adopted by the OECD Council on 17 July 2008, on the basis of another report entitled “Improving the Resolution of Tax Disputes” (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.3 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 91: Corresponds to paragraph 44.4 as it read before 17 July 2008. On that date paragraph 44.4 was renumbered as paragraph 91 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.4 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 92: Corresponds to paragraph 44.5 as it read before 17 July 2008. On that date paragraph 44.5 was amended, by replacing the word "While" with "Whilst" at the beginning of the second sentence, and renumbered as paragraph 92 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007). After 21 September 1995 and until 17 July 2008, paragraph 44.5 read as follows:

> "44.5 Second, the phrase "falls within the scope" is inherently ambiguous, as indicated by the inclusion in paragraph 3 of Article XXII of the GATS of both an arbitration procedure and a clause exempting pre-existing conventions from its application in order to deal with disagreements related to its meaning. While it seems clear that a country could not argue in good faith[1] that a measure relating to a tax to which no provision of a tax convention applied fell within the scope of that convention, it is unclear whether the phrase covers all measures that relate to taxes that are covered by all or only some provisions of the tax convention.
>
> 1 The obligation of applying and interpreting treaties in good faith is expressly recognized in Articles 26 and 31 of the *Vienna Convention on the Law of Treaties*; thus, the exception in paragraph 3 of Article XXII of the GATS applies only to good faith disputes."

Paragraph 44.5 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 93: Corresponds to paragraph 44.6 as it read before 17 July 2008. On that date paragraph 44.6 was renumbered as paragraph 93 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.6 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 94: Corresponds to paragraph 44.7 as it read before 17 July 2008. On that date paragraph 44.7 was renumbered as paragraph 94 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008, on the basis of another report entitled "Improving the Resolution of Tax Disputes" (adopted by the OECD Committee on Fiscal Affairs on 30 January 2007).

Paragraph 44.7 was added on 21 September 1995 by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995.

Paragraph 95: Added on 17 July 2008 and the heading preceding paragraph 49 was moved immediately before paragraph 95 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 96: Corresponds to paragraph 51 as it read before 17 July 2008. On that date paragraph 51 was renumbered as paragraph 96 and the heading preceding paragraph 50 was moved immediately before paragraph 96 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 51 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 97: Corresponds to paragraph 52 as it read before 17 July 2008. On that date paragraph 52 was renumbered as paragraph 97 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 52 was added on 23 July 1992 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 98: Amended on 15 July 2014, by deleting the Slovak Republic from the list of countries making the reservation, by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 22 July 2010 and until 15 July 2014, paragraph 98 read as follows:

> "98. *Chile*, *Greece*, *Italy*, *Mexico*, *Poland*, *Portugal*, the *Slovak Republic* and *Switzerland* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time limits prescribed by their domestic laws."

Paragraph 98 was previously amended on 22 July 2010, by changing the list of countries making the reservation by adding Chile and deleting Spain, by the report entitled "The 2010 Update to the Model Tax Convention", adopted by the OECD Council on 22 July 2010. After 17 July 2008 and until 22 July 2010, paragraph 98 read as follows:

> "98. *Greece*, *Italy*, *Mexico*, *Poland*, *Portugal*, the *Slovak Republic*, *Spain* and *Switzerland* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 98 as it read after 17 July 2008 corresponded to paragraph 53. On 17 July 2008 paragraph 53 was amended, by adding Poland and deleting Canada, Ireland and the United Kingdom from the list of countries making the reservation, and renumbered as paragraph 98 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008. After 28 January 2003 and until 17 July 2008, paragraph 53 read as follows:

> "53. *Canada*, *Greece*, *Ireland*, *Italy*, *Mexico*, *Portugal*, the *Slovak Republic*, *Spain*, *Switzerland* and the *United Kingdom* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 53 was

amended on 28 January 2003, by adding the Slovak Republic to the list of countries making the reservation by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003. After 23 October 1997 and until 28 January 2003, paragraph 53 read as follows:

"53. *Canada*, *Greece*, *Ireland*, *Italy*, *Mexico*, *Portugal*, *Spain*, *Switzerland* and the *United Kingdom* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 53 was previously amended on 23 October 1997, by deleting Belgium from the list of countries making the reservation, by the report entitled "The 1997 Update to the Model Tax Convention", adopted by the OECD Council on 23 October 1997. After 21 September 1995 and until 23 October 1997, paragraph 53 read as follows:

"53. *Canada*, *Belgium*, *Greece*, *Ireland*, *Italy*, *Mexico*, *Portugal*, *Spain*, *Switzerland* and the *United Kingdom* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 53 was previously amended on 21 September 1995, by adding Mexico to the list of countries making the Reservation, by the report entitled "The 1995 Update to the Model Tax Convention", adopted by the OECD Council on 21 September 1995. After 23 July 1992 and until 21 September 1995, paragraph 53 read as follows:

"53. *Canada*, *Belgium*, *Greece*, *Ireland*, *Italy*, *Portugal*, *Spain*, *Switzerland* and the *United Kingdom* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 53 as it read after 23 July 1992 corresponded to paragraph 47 of the 1977 Model Convention. On 23 July 1992 paragraph 47 of the 1977 Model Convention was renumbered as paragraph 53 and amended, by adding Belgium and Switzerland to the list of countries making the reservation, by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992. In the 1977 Model Convention and until 23 July 1992, paragraph 47 read as follows:

"47. *Canada*, *Greece*, *Ireland*, *Italy*, *Portugal*, *Spain* and *the United Kingdom* reserve their positions on the second sentence of paragraph 2. These countries consider that the implementation of reliefs and refunds following a mutual agreement ought to remain linked to time-limits prescribed by their domestic laws."

Paragraph 47 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 99: Corresponds to paragraph 54 as it read before 17 July 2008. On that date paragraph 54 was renumbered as paragraph 99 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 54 as it read after 23 July 1992 corresponded to paragraph 48 of the 1977 Model Convention. On 23 July 1992 paragraph 48 of the 1977 Model Convention was renumbered as paragraph 54 by the report entitled "The Revision of the Model Convention", adopted by the OECD Council on 23 July 1992.

Paragraph 48 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 100: Amended on 15 July 2014 by the Report entitled "The 2014 Update to the Model Tax Convention", adopted by the Council of the OECD on 15 July 2014. After 17 July 2008 and until 15 July 2014, paragraph 100 read as follows:

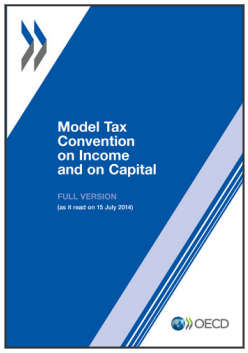
"100. *Canada* reserves the right to include a provision, as referred to in paragraph 10 of the Commentary on Article 9, which effectively sets a time limit within which a Contracting State is under an obligation to make an appropriate

adjustment following an upward adjustment of the profits of an enterprise in the other Contracting State."

Paragraph 100 was added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

Paragraph 101: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.

ANNEX - Sample Mutual Agreement on Arbitration: Added on 17 July 2008 by the report entitled "The 2008 Update to the Model Tax Convention", adopted by the OECD Council on 17 July 2008.



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