COMMENTARY ON ARTICLE 28 CONCERNING MEMBERS OF DIPLOMATIC MISSIONS AND CONSULAR POSTS

1. The aim of the provision is to secure that members of diplomatic missions and consular posts shall, under the provisions of a double taxation convention, receive no less favourable treatment than that to which they are entitled under international law or under special international agreements.

(Renumbered on 28 January 2003; see HISTORY)

2. The simultaneous application of the provisions of a double taxation convention and of diplomatic and consular privileges conferred by virtue of the general rules of international law, or under a special international agreement may, under certain circumstances, have the result of discharging, in both Contracting States, tax that would otherwise have been due. As an illustration, it may be mentioned that *e.g.* a diplomatic agent who is accredited by State A to State B and derives royalties, or dividends from sources in State A will not, owing to international law, be subject to tax in State B in respect of this income and may also, depending upon the provisions of the bilateral convention between the two States, be entitled as a resident of State B to an exemption from, or a reduction of, the tax imposed on the income in State A. In order to avoid tax reliefs that are not intended, the Contracting States are free to adopt bilaterally an additional provision which may be drafted on the following lines:

> Insofar as, due to fiscal privileges granted to members of diplomatic missions and consular posts under the general rules of international law or under the provisions of special international agreements, income or capital are not subject to tax in the receiving State, the right to tax shall be reserved to the sending State.

(Renumbered on 28 January 2003; see HISTORY)

3. In many OECD member countries, the domestic laws contain provisions to the effect that members of diplomatic missions and consular posts whilst abroad shall for tax purposes be deemed to be residents of the sending State. In the bilateral relations between member countries in which provisions of this kind are operative internally, a further step may be taken by including in the Convention specific rules that establish, for purposes of the Convention, the sending State as the State of residence of the members of the diplomatic missions and consular posts of the Contracting States. The special provision suggested here could be drafted as follows:

> Notwithstanding the provisions of Article 4, an individual who is a member of a diplomatic mission or a consular post of a Contracting State which is

situated in the other Contracting State or in a third State shall be deemed for the purposes of the Convention to be a resident of the sending State if:

a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State or on capital situated outside that State, and

b) he is liable in the sending State to the same obligations in relation to tax on his total income or on capital as are residents of that State.

(Renumbered on 28 January 2003; see HISTORY)

4. By virtue of paragraph 1 of Article 4 the members of diplomatic missions and consular posts of a third State accredited to a Contracting State, are not deemed to be residents of the receiving State if they are only subject to a limited taxation in that State (see paragraph 8 of the Commentary on Article 4). This consideration also holds true of the international organisations established in a Contracting State and their officials as they usually benefit from certain fiscal privileges either under the convention or treaty establishing the organisation or under a treaty between the organisation and the State in which it is established. Contracting States wishing to settle expressly this question, or to prevent undesirable tax reliefs, may add the following provision to this Article:

The Convention shall not apply to international organisations, to organs or officials thereof and to persons who are members of a diplomatic mission or a consular post of a third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income or on capital.

This means that international organisations, organs or officials who are liable in a Contracting State in respect only of income from sources therein should not have the benefit of the Convention.

(Renumbered on 28 January 2003; see HISTORY)

5. Although honorary consular officers cannot derive from the provisions of the Article any privileges to which they are not entitled under the general rules of international law (there commonly exists only tax exemption for payments received as consideration for expenses honorary consuls have on behalf of the sending State), the Contracting States are free to exclude, by bilateral agreement, expressly honorary consular officers from the application of the Article.

6. *(Deleted on 28 January 2003; see HISTORY)*

HISTORY

Article 28 replaced a previous Article 28 on 28 January 2003 and corresponds to Article 27 as it read before that date. The previous Article 28 (Territorial Extension) was renumbered as Article 29 (see history of the Commentary on Article 29) and Article 27 was renumbered as Article 28 as a consequence of the addition of a new Article 27 (Assistance in the Collection of Taxes) by the report entitled "The 2002 Update to the Model Tax Convention", adopted by the OECD Council on 28 January 2003. The addition of the new Article 27 also required the renumbering of Articles 28, 29 and 30 as Articles 29, 30 and 31 (see history of the Commentary on these Articles).

Title: Amended 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, the title read as follows:

> "COMMENTARY ON ARTICLE 27 CONCERNING DIPLOMATIC AND CONSULAR PRIVILEGES"

Paragraph 1: Corresponds to paragraph 1 of the Commentary on Article 27 as it read before 28 January 2003. On that date paragraph 1 of the Commentary on Article 28 was renumbered as paragraph 1 of the Commentary on Article 29 (see history of paragraph 1 of the Commentary on Article 29) and paragraph 1 of the Commentary on Article 27 was renumbered as paragraph 1 of the Commentary on Article 28 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003.

Paragraph 1 was amended on 31 March 1994 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 1 read as follows:

> "1. The aim of the provision is to secure that diplomatic agents or consular officers shall, under the provisions of a double taxation convention, receive no less favourable treatment than that to which they are entitled under international law or under special international agreements."

Paragraph 1 was previously amended 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 1 read as follows:

> "1. The aim of the provision is to secure that members of diplomatic or consular representations shall, under the provisions of a double taxation Convention, receive no less favourable treatment than that to which they are entitled under international law or under special international treaties."

Paragraph 2: Corresponds to paragraph 2 of the Commentary on Article 27 as it read before 28 January 2003. On that date paragraph 2 of the Commentary on Article 28 was renumbered as paragraph 2 of the Commentary on Article 29 (see history of paragraph 2 of the Commentary on Article 29) and paragraph 2 of the Commentary on Article 27 was renumbered as paragraph 2 of the Commentary on Article 28 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003.

Paragraph 2 was amended on 31 March 1994 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 2 read as follows:

> "2. The simultaneous application of the provisions of a double taxation convention and of diplomatic and consular privileges conferred by virtue of the general rules of international law, or under a special international agreement may

under certain circumstances, have the result of discharging, in both Contracting States, tax that would otherwise have been due. As an illustration, it may be mentioned that *e.g.* a diplomatic agent who is accredited by State A to State B and derives royalties, or dividends from sources in State A will not, owing to international law, be subject to tax in State B in respect of this income and may also, depending upon the provisions of the bilateral convention between the two States, be entitled as a resident of State B to an exemption from, or a reduction of, the tax imposed on the income in State A. In order to avoid tax reliefs that are not intended, the Contracting States are free to adopt bilaterally an additional provision which may be drafted on the following lines:

"Insofar as, due to fiscal privileges granted to diplomatic agents or consular officers under the general rules of international law or under the provisions of special international agreements, income or capital are not subject to tax in the receiving State, the right to tax shall be reserved to the sending State.""

Paragraph 2 was previously amended 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 2 read as follows:

"2. The simultaneous application of the provisions of a double taxation Convention and of diplomatic and consular privileges conferred by virtue of the general rules of international law, or under a special international treaty may under certain circumstances, have the result of discharging, in both Contracting States, tax that would otherwise have been due. As an illustration, it may be mentioned that *e.g.* a diplomatic agent who is accredited by State A to State B and derives royalties or dividends from sources in State A will not, owing to international law, be subject to tax in State B in respect of this income and may also, depending upon the provisions of the bilateral Convention between the two States, be entitled as a resident of State B to an exemption from, or a reduction of, the tax imposed on the income in State A. In order to avoid tax reliefs that are not intended, the Contracting States should be free to adopt bilaterally an additional provision which may be drafted on the following lines:

"Insofar as, due to fiscal privileges granted to diplomatic or consular officials under the general rules of international law or under the provisions of special international treaties, income or capital are not subject to tax in the receiving State, the right to tax shall be reserved to the sending State."

It should be remarked, however, that also without the inclusion of the additional clause the sending State, by the rules laid down in Article 19 on taxation of remuneration of governmental functions, always retains the right to tax the salaries and other emoluments paid to the diplomatic and consular officials in their capacity as such."

Paragraph 3: Corresponds to paragraph 3 of the Commentary on Article 27 as it read before 28 January 2003. On that date paragraph 3 of the Commentary on Article 27 was renumbered as paragraph 3 of the Commentary on Article 28 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003.

Paragraph 3 was amended on 31 March 1994 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 3 read as follows:

"3. In many OECD member countries, the domestic laws contain provisions to the effect that diplomatic agents and consular officers while abroad shall for tax purposes be deemed to be residents of the sending State. In the bilateral relations between member countries in which provisions of this kind are operative

internally, a further step may be taken by including in the Convention specific rules that establish, for purposes of the Convention, the sending State as the State of residence of the members of the diplomatic missions and consular posts of the Contracting States. The special provision suggested here could be drafted as follows:

"Notwithstanding the provisions of Article 4, an individual who is a member of a diplomatic mission, consular post or permanent mission of a Contracting State which is situated in the other Contracting State or in a third State shall be deemed for the purposes of the Convention to be a resident of the sending State if:

a) in accordance with international law he is not liable to tax in the receiving State in respect of income from sources outside that State or on capital situated outside that State, and

b) he is liable in the sending State to the same obligations in relation to tax on his total income or on capital as are residents of that State.""

Paragraph 3 was previously amended 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 3 read as follows:

"3. In many Member countries, the internal legislation contains provisions to the effect that diplomatic and consular agents while abroad shall for tax purposes be deemed to be residents of the sending State. In the bilateral relations between Member countries in which provisions of this kind are operative internally, a further step may be taken by including in the Convention specific rules that establish, for purposes of the Convention, the sending State as the State of residence of the members of the diplomatic and consular missions of the Contracting States. The special provision suggested here could be drafted as follows:

"For the purposes of this Convention, persons who are members of a diplomatic or consular mission of a Contracting State in the other Contracting State or in a third State and who are nationals of the sending State, shall be deemed to be residents of the sending State if they are submitted therein to the same obligations in respect of taxes on income and capital as are residents of that State.""

Paragraph 4: Corresponds to paragraph 4 of the Commentary on Article 27 as it read before 28 January 2003. On that date paragraph 4 of the Commentary on Article 27 was renumbered as paragraph 4 of the Commentary on Article 28 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003.

Paragraph 4 was amended on 31 March 1994 by the report entitled "1994 Update to the Model Tax Convention", adopted by the OECD Council on 31 March 1994. In the 1977 Model Convention and until 31 March 1994, paragraph 4 read as follows:

"4. By virtue of paragraph 1 of Article 4 the diplomatic agents and consular officers of a third State accredited to a Contracting State, are not deemed to be residents of the receiving State if they are only subject to a limited taxation in that State (see paragraph 8 of the Commentary on Article 4). This consideration also holds true of the international organisations established in a Contracting State and their officials as they usually benefit from certain fiscal privileges either under the convention or treaty establishing the organisation or under a treaty between the organisation and the State in which it is established. Contracting States wishing to

settle expressly this question, or to prevent undesirable tax reliefs, may add the following provision to this Article:

> "The Convention shall not apply to international organisations, to organs or officials thereof and to persons who are members of a diplomatic mission, consular post or permanent mission of a third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income or on capital."

This means that international organisations, organs or officials who are liable in a Contracting State in respect only of income from sources therein should not have the benefit of the Convention."

Paragraph 4 was previously amended 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 4 read as follows:

"4. Regarding the diplomatic and consular agents of a third State accredited to a Contracting State, it results from the rule suggested in the foregoing paragraph that they should be excluded from the benefits available under the double taxation Conventions concluded by the receiving State. Such a solution also finds strong support from the consideration that, where this category is concerned, there is normally no question of double taxation involved, since in the receiving State these officials are entitled to the fiscal privileges granted under the general rules of international law. This latter consideration also holds true of the officials of intergovernmental organisations established in a Member State, as these officials usually benefit from certain fiscal privileges either under the Convention or Treaty establishing the organisation or under a special international Treaty between the organisation and the country in which it is established.

As a safeguard against undesirable tax reliefs the following provision could be added to this Article by bilateral agreement:

> "This Convention shall not apply to International Organisations, to organs or officials thereof and to persons who are members of a diplomatic or consular mission of a third State, being present in a Contracting State and not treated in either Contracting State as residents in respect of taxes on income and capital.""

Paragraph 5: Corresponds to paragraph 5 of the Commentary on Article 27 of the 1977 Model as it read before 28 January 2003. On that date paragraph 5 of the Commentary on Article 27 was renumbered as paragraph 5 of the Commentary on Article 28 by the report entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003.

Paragraph 5 was amended 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 5 read as follows:

"5. Although honorary consular officers cannot derive from the provisions of the Article any privileges to which they are not entitled under the general rules of international law — there commonly exists only tax exemption for payments received as consideration for expenses honorary consuls have on behalf of the sending State — the Contracting States should be free to exclude, by bilateral agreement, expressly honorary consular officers from the application of the Article."

Paragraph 6: Corresponds to paragraph 6 of the Commentary on Article 27 as it read before 28 January 2003. On that date paragraph 6 of the Commentary on Article 27 was renumbered as paragraph 6 of the Commentary on Article 28 and deleted the Report

entitled "The 2002 Update to the Model Tax Convention" adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 6 of the Commentary on Article 27 read as follows:

> "6. *Belgium* and *France* are of the opinion that persons, who are not liable to comprehensive taxation (full liability to tax) or who do not bear on the taxable part of their income a tax which corresponds in percentage terms to the tax to which they would have been liable on their total income if it had not been partly exempt, should not be deemed to be residents. *France* would, after the words "sources therein" in the last sentence of paragraph 4 above, insert the phrase: ", or are not subject in a Contracting State to the same obligations with respect to taxes on income and on capital as the residents of that State,"."

Paragraph 6 was amended on 21 September 1995, by adding the last sentence and by deleting the Netherlands from the list of countries making the reservation, by the report entitled "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 6 read as follows:

> "6. *Belgium*, *France* and the *Netherlands* are of the opinion that persons, who are not liable to comprehensive taxation (full liability to tax) or who do not bear on the taxable part of their income a tax which corresponds in percentage terms to the tax to which they would have been liable on their total income if it had not been partly exempt, should not be deemed to be residents."

Paragraph 6 was previously amended on 23 July 1992 by deleting Switzerland from the list of countries making the observation, 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 6 read as follows:

> "6. *Belgium*, *France*, the *Netherlands* and *Switzerland* are of the opinion that persons, who are not liable to comprehensive taxation (full liability to tax) or who do not bear on the taxable part of their income a tax which corresponds in percentage terms to the tax to which they would have been liable on their total income if it had not been partly exempt, should not be deemed to be residents."

Paragraph 6 and the heading preceding it were added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.