Chapter III – Forms of assistance

SECTION I – EXCHANGE OF INFORMATION

Article 4 – General provision

Paragraph 1

49. This article embodies the general obligation for the Parties to exchange any information that is foreseeably relevant for the administration or enforcement of domestic laws concerning the taxes covered by this Convention. The binding character of this obligation is set out in Article 1. Exchanges of information are the most immediate form of administrative assistance between tax authorities. Such assistance is desirable for ascertaining and discovering facts which may be of interest for the correct implementation of the domestic laws of the Parties. This may not only facilitate the enforcement of tax legislation, but also help the taxpayer to secure his entitlements to tax reliefs (for instance by making it easier for him to establish that he is not resident for tax purposes in a particular State, or that he has paid some foreign tax for which double taxation relief is due).

50. The scope of this article is wide. It should therefore assist Parties in combating international tax avoidance and evasion to the widest possible extent. The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the Parties are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons (see also paragraph 167).

51. The five main methods of exchanging information are the following:

i. exchange on request, that is to say the furnishing by the requested State of information relating to a particular case to an applicant State which has specifically requested it (see Article 5);

ii. automatic exchange, that is to say the systematic sending of information concerning specified items of income or capital from one Party to another (see Article 6);

iii. spontaneous exchange, that is to say the passing on of information obtained during examination of a taxpayer's affairs or otherwise, which might be of interest to the receiving State (see Article 7);

iv. simultaneous tax examination, that is to say the furnishing of information obtained in the course of the simultaneous examination in each Party concerned, on the basis of an arrangement between two or more competent authorities, of the tax affairs of a person, or persons in which these States have a common or related interest (see Article 8);

v. tax examination abroad, that is to say the obtaining of information through the presence of representatives of the tax administration of the applicant State at an examination of a tax matter in the requested State (see Article 9).

52. It should be stressed that Article 4 does not restrict the possibilities of exchanging information to the five methods mentioned above. In general, the manner in which exchange of information will in the event be effected can be decided upon by the Parties, acting through their competent authorities. It is not so much the character of the information which determines the classification under the articles in the Convention, but rather the mechanism through which the information is exchanged. In some situations, strict differentiation between the different types of exchange mentioned above may well become blurred, for example, when competent authorities agree to send all information of a particular kind which may be detected in tax audits, or when a competent authority sends bulk information without prior agreement. Arrangements for the automatic exchange of information may, in order to maximise effectiveness and minimise cost, limit the items, the length and the volume of information exchanged so that the difference between exchange on request and automatic exchange based on arrangements tends to be less clear-cut in practice.

53. Simultaneous tax examinations and tax examinations abroad are also mentioned in the commentary on Article 26 of the 2008 OECD Model Tax Convention. These techniques for exchanging information are, however, within the scope of Article 26. Similarly, Parties are not prevented from making use of any other advanced technique for this purpose, when

their domestic laws so permit, industry-wide exchange programmes or joint auditing. There is a growing interest in particular in multilateral simultaneous tax examinations given the increasingly multilateral dimension of tax evasion schemes and the need for international co-operation between tax administrations. However, some countries may for a number of reasons be unable, or be able only under certain conditions, to participate in the forms of co-operation described in Articles 8 and 9. States may, by virtue of paragraph 3 of Article 9, notify their intention not to accept, in general, the presence of a foreign representative at a tax examination on their territory.

54. Exchange of information may take place in a variety of ways acceptable to the competent authorities, for instance personal contact, telephone or secure email and exchange of CD Roms (encrypted where appropriate), but when exchange is oral, it is normal to confirm it in writing afterwards. With a view to speeding up the exchange, especially in a field where quick information is necessary, the competent authorities can agree to delegate powers for more direct contacts (for example, by telephone). Furthermore, it is worth mentioning that the Convention covers not only the exchange of taxpayer-specific information, but also allows the competent authorities to exchange other sensitive information related to tax administration and compliance improvement, for example, risk analysis techniques or tax avoidance or evasion schemes.

55. This Convention covers not only assessment but also collection and recovery. Without doubt, correct collection and recovery of tax are the desirable consequences of a correct assessment of the amount owed. If it proves to be very difficult to recover the tax due in the Party which made the assessment, it may be essential to know whether the taxpayer owns assets abroad on which, with the help of the other Party, the tax claim can be recovered.

Paragraph 3

56. Some systems of national legislation contain provisions requiring the State to inform the person concerned before information is communicated to another State. Paragraph 3 permits each Party to notify one of the depositaries that its authorities may inform the persons concerned before transmitting information to another Party. The person "concerned" is defined by the provisions of national law; it may be a national or resident of the requested State about whom information is to be supplied to another State in order to enable it to verify or establish its own tax claim on the said national or resident; it may also be a firm operated in the requested State by one of its nationals or residents, from which information is to be obtained for communication to another State in order to enable the latter to verify or

establish its tax claim on one of its own taxpayers who has a business relationship with the firm operated in the requested State (see also paragraph 180).

Article 5 – Exchange of information on request

Paragraph 1

57. As already mentioned in the commentary on Article 4, information exchanged on request will relate to a particular case indicated by the applicant State. Normally, the applicant State needs additional information to check the information supplied by the taxpayer in his return about income from, or assets in, the requested State. In many cases, the information will be requested because the applicant State suspects that the taxpayer did not give the complete or correct facts.

58. Requests are normally made in writing. However, requests can be expressed orally and confirmed in writing afterwards. In some situations where information is required without delay, for example, in cases involving itinerant activities, a request via ordinary mail is too cumbersome. In such situations the competent authorities may wish to use electronic or other communication and information technologies, including appropriate security systems, to improve the timeliness and quality of exchanges of information. Normally a request will be addressed to the competent authority of the requested State listed in Annex B but especially in the situation described above. In some instances, for example, in cases of exchange of information to combat tax avoidance or evasion in a special area, it has proven useful to authorise a special contact person to act on the competent authority's behalf in the matter (see Article 24). The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes may be helpful in this respect.

59. As set out in the commentary on Article 4, the exchange on request is, with respect to recovery, the most appropriate form of exchange of information. In order to be able to recover tax claims in another Party, it may be useful, especially if the taxpayer is resident in the requested State, to know whether he has assets in that State. A Party may request information irrespective of whether it is in a position to apply for assistance in recovery (for example, because the tax claim concerned is being or may be contested).

Paragraph 2

60. Except in the situations dealt with in Articles 19 and 21, the competent authorities of the requested State will try to find the information requested in domestic tax files, but if the information is not so available, they should utilise all relevant measures authorised for the purpose of that State's tax in order to obtain the information.

61. Information obtained from one Party may be transmitted by the competent authority of another Party to a third Party, subject to prior authorisation by the competent authority of the original supplying State (see Article 22 and paragraph 227 of the commentaries thereon).

Article 6 – Automatic exchange of information

62. Information which is exchanged automatically is typically bulk information comprising many individual cases of the same type, usually consisting of payments from and tax withheld in the supplying State, where such information is available periodically under that State's own system and can be transmitted automatically on a routine basis. By exchanging information in an automatic way, compliance is generally improved and fraud can be detected which otherwise would not have come to light. The aim of the Parties will be to exchange such information in the most efficient way possible having regard to its bulk character.

63. If such an arrangement, and thus the items exchanged, become known to the taxpayers, the standard of compliance may be improved and both the number of cases and the amount of income understated are likely to decrease after some years. However, there may be ways of maximising effectiveness and minimising costs, for instance by limiting automatic exchange to items where compliance is at its lowest by a rotation of items after some years of exchange and the use of standardised forms (see also paragraph 66 below).

64. This form of exchange of information requires a preliminary agreement between the competent authorities on the procedure to be adopted and on the items covered. There may in fact be situations where such exchanges may not be very fruitful between particular countries, for example, because little bulk information is available in one of them or economic relations between the countries are limited, or because it would involve too great a load on the tax administrations concerned.

65. Agreement on the items to be exchanged and the procedure to be adopted is a prerequisite, since, in the first place, it would not be very effective to exchange every item which is capable of being exchanged automatically and, in the second place, it is not always necessary for

partners to exchange information on the same items of income or with the same frequency under such an agreement. The amount and character of the items which are fit for automatic exchange will depend on each State's own domestic administrative systems. Such an agreement may be set up by two or more Parties, pursuant to the provisions of paragraph 1 of Article 24. The OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes is recommended for these types of agreements.

66. Automatic exchange of information is the most obvious field for the use of standardised forms, though they may also be appropriate for the transmission of requests or answers. In general, the main advantages of standardisation are the avoidance of the need for translation by the use of standard (number) codes by all the countries concerned for the same items of income or capital, the speeding up of the exchange and a reduction in the workload of the competent authorities, since it enables the inclusion of the information received in the recipient's country system and the matching of the information against the income reported by taxpayers. By definition, these advantages are achieved only if a large number of countries participate in a standardising exercise. The OECD Committee on Fiscal Affairs has therefore devised standardised formats for such automatic exchanges based on the latest available technology. The States concerned should as far as possible make use of the OECD Standard Transmission Format or a further updated standard when exchanging information automatically between themselves, as recommended by the OECD Committee on Fiscal Affairs.

Article 7 – Spontaneous exchange of information

Paragraph 1

67. Information is exchanged spontaneously when one of the Parties, having obtained information which it assumes will be of interest to another Party, passes on this information without the latter having asked for it. Information exchanged spontaneously will often be more effective than information exchanged automatically because it mostly concerns particulars detected and selected by a tax official of the sending State during an audit or investigation (see paragraph 70 below). This kind of exchange differs from the other two in that the information is sent without previous request from the other State and without a prior agreement between the competent authorities on items of income and procedures. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes may be useful in this respect.

68. Paragraph 1 sets out the various instances where a Party shall forward to another Party, without prior request, information of which it has knowledge. A spontaneous exchange of information is usually effective since it concerns particulars detected and selected by tax officials of the sending Party during or after an audit or other type of tax investigation.

69. Spontaneous exchange of information does not normally take place in the field of recovery of taxes. However, it might well be useful to supply information spontaneously as a supplement to information exchanged on request relating to a recovery case.

Paragraph 2

70. As the efficiency of spontaneous exchanges very much depends on the initiative of the supplying State, the competent authorities of the latter should take the necessary steps to ensure that information likely to be of interest to the other State is brought to its own attention. While it is the competent authority that is the responsible body in the exchange of information, full use should be made of the knowledge and resources of the whole tax administration when such assistance is rendered.

71. The work involved in this form of exchange of information and its ultimate utilisation usually requires a certain administrative effort on both sides, without an initial guarantee that the findings are actually going to be relevant for tax purposes. For this reason it is advisable to concentrate on the provision of information which seems promising, for example, because of its general importance or because of the amount of tax involved. Information sent spontaneously should be accompanied by any further documentary evidence which is available and which might assist the other State.

Article 8 – Simultaneous tax examination

72. In cases where international tax avoidance and evasion is suspected, simultaneous tax examinations can be very effective compliance and control tools for tax administrations. If the Parties concerned co-ordinate their tax examinations of the affairs of a person or persons in which they have a common or related interest, they will be able to obtain the greatest benefit from this exchange of information. The purpose of Article 8 is to enable them to do this. Competent Authorities may wish to consider negotiating bilateral or multilateral memoranda of understanding, working arrangements or any other similar instruments, in order to facilitate the efficient conduct of simultaneous tax examinations. The OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations could be used as a basis for developing such instruments.

73. This form of co-operation between tax administrations is likely to prove fruitful, in particular, when dealing with transactions between associated enterprises (and determining arm's-length prices). It can also help to eliminate economic double taxation and to discover aggressive tax planning arrangements. Simultaneous tax examinations may also reduce the compliance burden for taxpayers by co-ordinating enquiries from different States' tax authorities and avoiding duplication. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes may be useful in this respect.

Paragraph 1

74. This paragraph requires the Parties to consult together at the request of one of them to determine cases and procedures for simultaneous tax examinations. This consultation involves their respective competent authorities.

75. The applicant competent authority will inform the others of its choice of potential cases. The other competent authorities will decide whether to enter into simultaneous tax examination of those cases and may also nominate other cases for consideration.

76. A simultaneous tax examination will be possible only between competent authorities of Parties which share an interest, or related interests, in the affairs of the relevant person or persons. Even if this condition is fulfilled, one of the competent authorities concerned may consider that the operations involved are not substantial enough to justify the procedure.

77. However, it is to be hoped that the requested competent authority will be ready to take part in an examination if the applicant competent authority can demonstrate that it is a matter of some importance to it and that, as the case may be, the simultaneous examination may produce information useful to the requested competent authority's own investigations (see also paragraph 53).

Paragraph 2

78. This paragraph defines what is meant by a simultaneous tax examination. The subject of the examination is described as "the tax affairs of a person or persons in which they [the Parties] have a common or related interest". These words may be construed widely. They comprise the single person resident in one of the Parties who performs activities in another Party or other Parties as well as related persons resident in two or more Parties; and they may also in suitable cases comprise unrelated persons, resident in

different Parties who, although not under common control and/or ownership, nevertheless share close trading or other links.

79. The first case includes individuals resident in the first Party who carry out professional or other activities in the other Parties as well as enterprises resident in one Party which operate through a permanent establishment in the other.

80. The second and third cases apply principally to companies. The second case covers multinational enterprises which carry out intra-group transactions. The third case will comprise enterprises which, although not related, trade together so closely that information about the affairs of one (for example, the prices of goods sold and purchased) would be of use to the authority responsible for the tax affairs of the other.

81. Once agreement has been reached on implementation of a simultaneous tax examination, the tax administration personnel in charge of the case selected will consider with their counterparts from the other Party or Parties involved their examination plans, the periods (for example, tax years) to be covered, possible issues to be developed and target dates. Once agreement has been reached on the general lines to be followed, officials of each State will separately carry out their examination within their own jurisdiction.

82. In the case of related enterprises, the responsibility for co-ordinating the examination and exchanges of information will most usefully rest with the competent authority of the Party in which the parent or base company is located. If a parent company which is involved is resident outside all the participating Parties, the competent authorities of all the Parties involved will together decide which country should act as co-ordinator.

Article 9 – Tax examinations abroad

I. Preliminary remarks

83. Traditionally, exchange of information under double taxation conventions and mutual assistance conventions has been carried out in writing. A written procedure is necessarily time-consuming and may for that reason be less effective than other, less formal procedures. In certain situations, rapid action on the part of the tax administration is required, for example, to combat tax evasion in relation to international hiring out of labour or to itinerant activities. Further, in order to be able to ascertain a clear and complete picture of business and other relations between a resident of a Party who is the subject of a tax examination and his foreign associates, it is often of great value to be able to follow at close proximity an

examination initiated in the foreign country. In fact, experience has shown the need to open up the possibility of representatives of the tax authorities being physically present at such tax examinations in another country as are of interest for tax examination in their country. This article provides; for such a possibility.

84. The decision as to whether the foreign representative may be allowed to be present lies exclusively within the hands of the competent authority of the State where the examination is to take place.

85. In some States, the foreign representative's presence would be regarded as an infringement of that country's sovereignty or contrary to its policy or procedure. In other States, such presence is admitted only if the taxpayer does not object to it.

86. On the other hand, other countries consider the presence on their territory of a representative of a foreign authority to be acceptable on the condition that the tax examination is carried out strictly in conformity with their law and practice. Article 9 is drafted with such considerations in mind and is intended to cover the need for such express provisions in international agreements which most states seem to require in order to be able to allow foreign representatives to be present at their tax examinations. Those States which are able to accept that foreign representatives can exercise more extensive authority within their territory than is envisaged by this article are free to do so, possibly subject to agreement under paragraph 1 of Article 24. The OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes may be useful in this respect.

II. Commentary on the provisions of Article 9

Paragraph 1

87. Paragraph 1 sets out the formal rules for initiating a request for attendance at a tax audit. Like the ordinary exchange of information procedure which is carried out by correspondence, it stipulates that the request has to be made at the level of the competent authorities. As far as procedures are concerned, the sequence of events is likely to be the following. The applicant State will first ask for the information under Article 5. When it is determined that the information is not already available in the requested State, the latter will inform the applicant State that a special examination is necessary and is being considered. The applicant State will then request, under Article 9, that its representatives be present at the special tax examination.

88. It may be that a request for attendance will be made at the time the request for information is made, in case the information can only be

obtained by means of a special investigation. In other cases, information received spontaneously could lead a Party to ask permission to be represented at an investigation under way in another Party.

89. It is understood that this kind of rather far-reaching assistance by a foreign tax authority should not be asked for unless the competent authority of the applicant State is convinced that the examination in the foreign country will contribute to a considerable extent to the solution of a domestic tax case. Furthermore a State should not make a request for attendance in minor cases. This does not, however, necessarily imply that large amounts of tax have to be involved in the individual case. Another justification for a request would be the fact that the matter is of prime importance for the solution of other domestic tax cases or that the foreign examination is to be regarded as part of an examination on a large scale embracing domestic enterprises and residents.

90. It is in the interests of the applicant State to specify, as thoroughly as possible, the motives for the request. The request should include a clear description of the domestic tax case which is the basis for it. This may have been provided already at the time of the initial request for information under Article 5. It should also indicate the special reasons why the physical presence of a representative of the competent authority is important. If the competent authority of the applicant State wishes the examination to be conducted in a specific manner or at a specified time, such wishes should be stated in the request.

91. The representative(s) of the competent authority of the applicant State may be present only for the appropriate part of the tax examination. The authorities of the requested State will ensure that this requirement is fulfilled by virtue of the exclusive authority they exercise in respect of the conduct of the tax examination (see paragraph 2 of this article and the related commentary).

Paragraph 2

92. Paragraph 2 makes it clear that the decision as to whether representatives of the foreign competent authorities should be allowed to be present or not is taken by the competent authority of the requested State. The fact that the requested State has the decisive power in this respect does not, however, in any way restrict the obligation on that state to furnish information which may be asked for under Article 5. It is therefore normal that a State declining a request should indicate the reasons by invoking, for instance, Article 19 or 21, or giving other reasons on which its decision is based.

93. If the request is approved, the competent authority of the requested State is called upon to indicate the time and place of the examination and other particulars considered necessary, such as the authority or official responsible for the examination and any specific conditions stipulated for the conduct of the examination.

94. All decisions on how the examination is to be carried out have to be taken by the authority or the official of the requested State in charge of the examination. There should not be any question of exercise of authority in its strict sense by the foreign official. The examination takes place under the control of the responsible official, who may decide what influence the foreign official may have on the actual conduct of the examination. The foreign official may be able to co-operate actively (for example, suggest questions) or be restricted to a passive role (being present at the examination). The foreign official is in any case bound by secrecy under the provisions of Article 22.

Paragraph 3

95. This paragraph provides that States may make known their intention not to accept, as a general rule, requests made by other States to participate in their tax examinations. The reason for such a rule is twofold: on the one hand, it obviates the need for States not in favour of such participation to refuse systematically requests made by other States in this connection; on the other hand, it makes it possible to avoid the entering of reservations and the rigidity resulting from them. This provision consequently establishes a system whereby a State may notify all Parties that it is in principle not in favour of arrangements for foreign participation in tax examinations, but does not reject all possibility of co-operation in this area. The declaration referred to in paragraph 3 may be made or withdrawn at any time, in a similar manner to reservations.

Article 10 – Conflicting information

96. This article is meant as a kind of feedback provision for the exchange of information articles of Section 1.

97. The situation contemplated here is the following: a Contracting State has received information about a person's tax affairs from another Party under one of the types of exchange mentioned in the section and compares this information with information in its possession. If it appears that the information received is to a large extent in conflict with the information in its possession, this article obliges the receiving State to inform the providing State of its findings, in order to enable the latter State

to clear this up with its taxpayer. The two States would normally consult with respect to the outcome of this further contact with the taxpayer concerned.

SECTION II – ASSISTANCE IN RECOVERY

General remarks on the scope of Section II

98. Globalisation not only makes it harder for tax authorities to accurately determine the correct tax liabilities of their taxpayers: it also makes the collection of tax more difficult. Taxpayers may have assets throughout the world but tax authorities generally cannot go beyond their borders to take action to collect taxes. By acceding to the Convention, a State takes upon itself the obligation, within certain limits (see Article 21), to use the powers it has under its domestic law to recover taxes owed to another Party. As indicated in paragraph 1 of Article 11, the requested State will proceed as if the tax claims concerned were its own tax claims, except in relation to time-limits (hereinafter TLs) which are governed solely by the laws of the applicant State (Article 14), and in relation to priority (Article 15).

99. Assistance in recovery may include measures not only against the taxpayer but also against any person who, according to the laws of the applicant State, may be liable for payment of the tax (see also the commentaries on paragraph 3 of Article 1). It is the law of the applicant State which determines who falls within the scope of this provision, and not the law of the requested State. This follows also from paragraph 2 of Article 23, which provides that disputes concerning the existence of the claim shall be brought only before the competent body of the applicant State. The OECD Manual on the Implementation of Assistance in Tax Collection may be useful in this respect.

100. The cases in which persons other than the taxpayer himself may be liable for payment of tax vary greatly. It is therefore useful to give examples of the more frequent cases.

101. The most common situation is that where persons making payments, which have in the hands of the recipient the character of income, must withhold tax from such payments. Thus, in most countries, employers are obliged to withhold tax from the wages they pay and to hand over the amounts thus withheld to the tax collector as tax due from their employees. Withholding taxes on payments such as dividends, interest and royalties often have the same character.

102. Secondly, the law may hold both parties to certain contracts or transactions liable to payment of a tax which is primarily due from one of them in connection with such contracts or transactions. These cases often occur in the field of indirect taxes, of import and export duties and of gift taxes.

103. Then there are cases in which the liability of one person for payment of taxes owed by other persons is a consequence of a special relationship between these persons. Thus, members of a partnership, for example, are often jointly and severally liable for all debts of the partnership, and so any individual partner may have to pay, *inter alia*, the sales tax owed by the partnership.

104. In addition, there are cases in which persons are held liable for payment of taxes owed by their predecessors. There are states that hold the owner of immovable property liable for taxes related to such property which were owed by his legal predecessor in the years before the transfer.

105. A distinction can be made between the cases referred to in paragraphs 100 to 104 above and cases where the assets are in the possession of a third party. In the former cases, the person who is liable for the payment of tax is personally liable. In the latter cases, however, there may be inconvenience for the third party, but his assets are not affected; it is only the assets of the debtor that are seized. Examples are money or securities deposited with banks.

106. The present Convention covers assistance in recovery in both categories of case, in order to provide for maximum efficiency in the assistance lent by the requested State.

107. The cases in which a person is made liable for the payment of another person's tax may vary considerably from one State to another. In view of paragraph 2.a of Article 21, it might be thought that assistance under the present article may be refused when a person is made liable for the payment of another person's tax under the law of the applicant State but would not be so liable under the law of the requested State. However, it is not intended that limitations provided for by paragraph 2.a of Article 21 shall apply in this case, since this provision is concerned with recovery measures and not with the basis of liability itself.

108. Parties which are not able to provide assistance in recovery may enter a reservation under paragraph 1.b of Article 30.

Article 11 – Recovery of tax claims

Paragraph 1

109. This paragraph is designed to make it clear that, upon a request by a Party, the requested State has to take action to recover taxes owed to the applicant State, provided the tax claim meets the conditions laid down in this section of the Convention. The paragraph also regulates the way in which the tax claim of the applicant State is to be recovered by the requested State. The recovery has to take place as if the requested State were recovering a tax claim of its own, except in relation to TLs (Article 14) and priority (Article 15). In particular where the laws of the requested State in respect of the recovery of tax claims provide for measures taken by judicial bodies, such action is covered by the Convention (see paragraphs 9 and 10 above).

110. The question may arise as to which procedure the requested State is to follow. As the Convention covers several kinds of taxes in addition to taxes on income and capital, it is possible that the request concerns a tax which does not exist in the requested State. However, since the applicant State has to indicate the character of the tax in the recovery of which assistance is requested (see paragraph 1.d of Article 18), this should not give rise to serious problems. The requested State will then follow the procedure applicable to a claim for a tax of its own which is similar to that of the applicant State or any other appropriate procedure if no similar tax exists.

111. The reference to the procedures of the requested State covers not only its statutory provisions but also the relevant administrative practices. As the collecting authorities are familiar with these procedures, the extra burden of assistance should not weigh too heavily on the administrative machinery of the requested State. Particular problems may arise for implementing the provisions of the article, for example, when the cost of recovery exceeds the amount of tax due. Whilst the applicant State should avoid pursuing small amounts under the Convention, both Contracting States may consult, under the provisions of Article 24, to overcome any difficulty. They may also agree on minimum amounts to be recovered.

Paragraph 2

112. This paragraph stipulates the conditions under which a request for assistance in recovery can be made and contains in this respect a double guarantee. In the first place, the tax claim has to be the subject of an instrument permitting its enforcement in the applicant State. This provision is aimed at preventing recovery from taking place in the requested State at

too early a stage, that is to say before the tax has been assessed. Recovery of taxes, the amount of which has not yet been determined, can be damaging to the taxpayer and may cause the requested State to run the risk of being held responsible for the consequences of the premature recovery. Of course, the requested State also has to be able to recover the claim under its domestic law when the request is made.

113. In the second place, this article requires that the amount of tax due is not contested. If the tax claim has been contested, assistance can normally be requested only if the contestation has been the subject of a final decision. Nevertheless, the article provides for the possibility of the Parties agreeing otherwise, in other words seeking recovery without waiting for the appeal proceedings to be concluded. Such a possibility should make co-operation easier with certain States in which the taxpayers have extensive rights of appeal and ensure that such appeals, which tend to lengthen the procedure, do not prevent recovery of claims. The applicant State would none the less be required under its own law to refund to the taxpayer any amount of tax wrongly collected, together with interest and related charges where appropriate, in cases where the taxpayer's appeal is subsequently upheld.

114. Where a tax claim is made against a person who is not resident in the applicant State and might consequently be less well informed, this article introduces an additional requirement intended to increase the safeguard for the taxpayer. It will no longer be sufficient, in order to apply for assistance in recovery, for the claim not to have been contested; it will also be necessary – unless there is a specific agreement between the Parties on this point – for no further contestation to be possible. Thus, in the absence of a particular agreement between the Parties concerned, the remedies available to the taxpayer and to the applicant State respectively for contesting or substantiating the validity of the tax claim must have been exhausted before a request for assistance in recovery is made. But only effective remedies within the framework of the domestic legal system need to be exhausted, that is to say only ordinary means such as appeals and pleas of nullity and not extraordinary means such as the reopening of the case or the setting aside of a judgment that has been obtained. A claim cannot be regarded as one which may be contested within the meaning of this provision solely because such possibilities exist. The agreement of principle between Parties to derogate from the requirements on contesting tax claims is by way of an international arrangement concluded between authorities empowered to commit the State under the internal constitutional order.

115. Special problems might arise in relation to provisional assessments since they can seldom be contested. These problems do not directly affect paragraph 2, but it might be doubted whether a provisional assessment for the full amount could be regarded as tax actually owed and

therefore be considered to be a tax claim as defined in Article 3, since only in the final assessment are all the relevant circumstances taken into account. The result could, at least in theory, very well be restitution to the taxpayer. It is clear therefore that States should exercise care in asking for assistance in the recovery of tax charged under provisional assessments. In such circumstances, it might be more appropriate to ask for measures of conservancy.

116. The guarantee referred to in paragraph 113 above is based to a certain extent on an administrative practice of States according to which recovery of the contested part of a tax claim is often deferred (although sometimes only after security has been provided by the taxpayer), whereas the uncontested portion has to be paid within the normal time- limit. But in this case, contesting a claim, even in part, may prevent the whole claim from being recovered in the requested State, which provides a further guarantee for the position of the taxpayer.

117. The Convention tries to provide a reasonable balance between the need for the tax authorities to obtain the amount owed and the desire of the taxpayer to pay no more than he actually owes. In order to achieve this, Article 12 stipulates that the requested State can take, on request, measures of conservancy for the benefit of the requesting State, even if the tax claim does not comply with the conditions of paragraph 2 of this article. More details are given in the commentary on Article 12.

Paragraph 3

118. The aim of the provisions of paragraph 3 is to limit assistance in recovery from the estate of a deceased person to the value of that estate, so that it will not extend to the personal assets of those entitled to the estate.

119. For various reasons it is considered reasonable to restrict, to some extent, recovery from an estate or from heirs. In the first place, the heirs may very well be ignorant of the fact that the deceased person left tax debts in another country. In itself this is no reason to protect them at the expense of the tax authorities of the applicant State; but it is considered reasonable not to take their personal assets to meet the claim of that State, a risk which becomes greater the more the field of application of the Convention is extended. Further, the laws of the various States may have different consequences in relation to the responsibility of the heir for the debts of the deceased in the case of unconditional acceptance of an inheritance. Finally, it may be very difficult for the successors of a deceased person, who had connections with various countries, to estimate whether the estate will be solvent or insolvent. Therefore it would appear appropriate to limit the extent of the assistance provided in that context. At the time of the request,

the applicant State should inform the requested State about the limit of the recoverable amount and provide details of the value of the estate or the property acquired by each beneficiary of the estate.

120. It may be noted that this paragraph in the first place covers tax claims in the name of the deceased, that is to say, not only taxes established during his lifetime and not paid at the date of death, but also taxes assessed in the name of the estate after that date but in respect of activities exercised (income taxes), capital assets (taxes on net wealth) or for business transactions carried out (turnover tax) before that date as well as estate taxes themselves.

121. But the provision is also applicable to taxes recoverable from the heirs in cases in which the estate has already been distributed at the time that the recovery takes place. Paragraph 3 stipulates that the amount of tax recovered from each of the persons benefiting from the estate against whom a claim can still be made shall not exceed the value of his portion of the estate.

122. At first sight, it might appear that if assistance in recovery of a tax claim in respect of a deceased person, for example, income tax and turnover tax which are due abroad, coincides with the levying of an estate or inheritance tax, then this could lead in the end to recovery of more than the total value of the estate. This, however, could only be the case if, in the valuation of the estate or of the acquisitions from it, all the tax debts of the deceased were not taken into account. If a request for assistance clearly indicates that a foreign tax debt of the deceased has not been taken into account, this would normally justify a reopening of the assessment and so lead to a proportionate reduction in estate taxes.

Article 12 – Measures of conservancy

123. In most States, the law permits the recovery of tax notwithstanding that the claim is contested or may be contested. However, the possibility of recovery in the requested State may disappear in the period between the date on which the applicant State can itself collect and that on which assistance in recovery can be requested. In order to safeguard the rights of the applicant State, this paragraph enables it to request the other State to take measures of conservancy, even if it is not yet possible to ask for assistance in recovery. Such measures could include the seizure or the freezing of assets of the taxpayer before final judgment to guarantee that they will still be there when the enforcement takes place.

124. This article does not define all the conditions required for the taking of measures of conservancy, as these conditions may vary from one

State to another. The Convention recognises this situation, but lays down one condition which must be complied with in every case, namely the requirement that the amount of the tax be determined beforehand, if only provisionally or partially (see also paragraph 115 above).

125. As is the case with assistance in recovery, it is clear that in any event a request for measures of conservancy cannot be made before the applicant State itself can take such measures.

126. The applicant State needs to indicate in each case what stage in the process of assessment or recovery has been reached. The requested State will then have to consider whether in such a case its laws and administrative practice permit it to take measures of conservancy.

127. It may be noticed especially that, insofar as these measures are taken before the start of the recovery procedure proper, they are often taken at a time when the existence or amount of the tax claim may still be contested in the applicant State. It will be clear that such a challenge does not result in a stay of these measures, the essence of which is precisely that they can be taken pending the result of court or other proceedings in respect of the tax claim.

Article 13 – Documents accompanying the request

Paragraph 1

128. Under this section a tax claim in respect of which assistance is requested must meet certain conditions which are directed only at the applicant and the requested State. Article 13 deals with the way in which it is to be ascertained that these conditions are met.

129. First of all, the applicant State has to declare that the claim relates to a tax to which the Convention applies. No formal requirements are prescribed for this declaration. In the case of assistance in recovery, the applicant State must also declare that the claim is not contested or, where it is directed against a person who is not a resident of that State, that it may not be contested (sub-paragraph a), unless the exception provided for in paragraph 2 of Article 11 applies (see paragraphs 113 to 115 above).

130. The applicant State is also required to submit with the request for assistance an official copy of the instrument permitting its enforcement in that State as proof of the enforceability of the claim (sub-paragraph b). The purpose of sub-paragraph b is to furnish the requested State with a document which can serve as an authorisation for the actions of enforcement it is requested to perform. The text only refers to the instrument permitting

enforcement of the tax claim without further specifying what kind of document is meant. In fact, it is impossible to be more specific about this instrument in the Convention as this depends on the domestic laws of the applicant State. This matter is further discussed in the commentary on paragraph 2 of this article.

131. If other documents are required for the actual recovery or measures of conservancy according to the laws of the applicant State, an official copy of these documents must also be submitted (sub-paragraph c).

132. The exact nature of the documents referred to in sub-paragraphs b and c will have to be determined by the competent authorities, for instance under the regulations for the mode of application of the Convention (paragraph 1 of Article 24). If the tax claim has been contested, sub-paragraph c requires that a copy of the decision taken must be submitted with the request for assistance. The applicant State must then also indicate whether further remedies were open after this decision. If so, it can be said that the claim may not be contested only if the TLs for these legal remedies have elapsed.

Paragraph 2

133. Where a request for assistance meeting the conditions of the Convention has been received, the requested State will have to take steps to recover the tax claim of the applicant State. To this end the authorities of the requested State will need an authorisation or an instrument entitling them to undertake measures of enforcement. It is with this instrument that paragraph 2 is concerned. The text is designed to make it clear that the aim must be to enable the enforcement in the requested State through administrative channels. It enumerates ways of doing so. The Contracting States will have to decide in what way the requested State shall operate its powers of enforcement, as provided for under the last sentence of paragraph 1 of Article 24.

134. Some States may be able to accept a foreign instrument as permitting enforcement in their own territory. Other States, however, will not be able to recover the tax claim of the applicant State within their territory without further measures. These can be of various kinds: the instrument permitting enforcement in the applicant State may have to be recognised in the requested State, or it may have to be supplemented or even replaced by an instrument permitting enforcement in the territory of the requested State.

Article 14 – Time-limits

135. This provision is worded to avoid using terms such as "prescription" or "limitation", which not all legal systems construe identically. What is envisaged hereunder is the rule of law according to which the debtor can be relieved from enforcement by lapse of time.

Paragraph 1

136. When a State recovers, under its domestic procedures, taxes owed to another State, the question inevitably arises as to which State's laws are to govern the period beyond which a tax claim cannot be enforced. On the one hand, the requested State might be reluctant to lend assistance if its relevant period is shorter than that of the applicant State and has expired. On the other hand, when that period in the applicant State is shorter than in the requested State and has expired, the first State obviously may no longer ask for the assistance of the other; a problem remains, however, when the period expires after the request has been made, since it may be argued that assistance can no longer be lent because the applicant State itself is no longer able to recover its tax.

137. Where these periods differ in the two States, there are various possible solutions. One would be to apply the TL of the applicant State, another to apply the TL of the requested State and a third would be to apply the shorter of these TLs.

138. Conflicting opinions can be held about the solution to be adopted in a convention in this field. One view is that the TL of the requested State should apply, mainly because of the risk that, if the requested State operates on the basis of different TLs from those which apply in the recovery of its own taxes, the consistency and certainty under its own laws could be undermined. However, another view is that the TL of the applicant State should apply. The main argument for this solution is that the requested State is providing assistance in the recovery of a claim which has arisen under a different system of law, which undoubtedly governs the creation and the extinction of that claim. Therefore, as long as the right to recover the claim has not been lost by the expiry of the TL under the laws of the applicant State, the claim remains in being and can be recovered.

139. In this Convention, paragraph 1 provides that questions concerning any period beyond which a claim cannot be enforced shall be governed solely by the laws of the applicant State. Since these laws, and these laws only, are to be applied, it follows that as long as the validity of the claim has not expired under these laws, this validity may not be affected by the fact that the TL of the requested State has expired.

140. Quite a different approach would have been to have had no specific rule on this subject in the Convention but to have allowed the requested State to invoke Article 21 and refuse to lend assistance in cases where the TLs in the applicant State are longer than its own. However, it has been felt preferable that conflicts between the TLs of two States be solved by specific provisions. Accordingly, paragraph 1 offers a precise solution to the problem.

141. The second sentence of paragraph 1 obliges the applicant State to give particulars about its TL when making the request; the most important information will normally be the date of expiry of the claim but in some circumstances further details may be useful.

Paragraph 2

142. A request for assistance in recovery does not affect the possibilities which the applicant State has of suspending or interrupting under its laws the TL specified in paragraph 1. This does not require provisions in the Convention, since paragraph 1 stipulates that the laws of the applicant State govern any question relating to TLs.

143. However, the requested State, when recovering the foreign claim according to its own laws and administrative practice, may have to take steps in order to suspend or interrupt that TL and it is not obvious that the steps provided for by its domestic laws would have the effect of suspending or interrupting the TL under the laws of the applicant State. In order to make the position clear, paragraph 2 stipulates that measures by the requested State to suspend or interrupt the TL shall have the same effect under the laws of the applicant State.

144. It follows that, when measures to this effect are taken by the requested State, the effect thereof for the applicant State will be the same as if it had taken such measures itself. For instance, if the requested State has taken a measure on a certain date which would, as a consequence thereof, become the starting-point for a new TL if it were taken in the recovery of its own taxes, the result of paragraph 2 is to provide the applicant State, from that same date, with a new TL of the same length as under its own laws.

145. Since both the applicant and the requested States may suspend or interrupt that period, it is evident that they have to keep each other informed about measures taken to this effect. In its own interest and as required by paragraph 1, the applicant State will inform the requested State about its own measures; paragraph 2 obliges the requested State to inform the applicant State about its measures, since the laws of that State govern the TL

and it is essential for the applicant State to keep the position under review in order that its tax claim can still be enforced.

Paragraph 3

146. Legal systems differ considerably with regard to the length of the period beyond which a claim cannot be enforced. On account of many States' reluctance to assist in the recovery of longstanding claims, this paragraph provides that there is no obligation to comply with a request for assistance "submitted over fifteen years from the date of the original instrument permitting enforcement".

147. The fifteen-year period is such as to avoid an obligation to assist recovery of longstanding claims; yet it is sufficient time for disputes over the existence or the validity of a claim to be settled domestically before assistance is requested under the Convention. The period runs from the date of the original instrument permitting enforcement. By "original instrument permitting enforcement" is meant the instrument originally issued, permitting enforcement in the applicant State within the meaning of paragraph 1.b of Article 13 of the Convention. Legislation in some States requires renewal of the enforcement instrument, in which case the first instrument is the one that counts. The date of the original instrument is easily ascertainable, which makes it possible to avoid enquiries and conflicts relating to interruptions of the period.

Article 15 – Priority

148. In order to ensure that they can recover taxes to the fullest possible extent, States generally include in their laws provisions giving their tax claim priority over the claims of other creditors. This priority becomes apparent if the property of the taxpayer is seized, for instance in the case of bankruptcy. Sometimes special categories of taxes are a prior charge on certain goods, or the laws may provide for a prior charge on immovable property for tax debts in general.

149. The article provides that the tax claim in the recovery of which assistance is provided shall not have in the requested State any priority specially accorded to the tax claims of that State. This means that the priorities enjoyed by the requested State for the recovery of its own tax claims are not automatically extended to the tax claims of the applicant State. There are various reasons for this provision. First, the residents of a State are by and large well acquainted with the taxes which their State levies and with the priority that such tax claims enjoy. It cannot however be expected of residents of a State that they should also be acquainted with any

priorities that tax claims of another State might have. It would be very unsatisfactory for creditors in a State if the courses open to them for recovery, already restricted by the priority given to that State's tax claims, were also to be restricted by the priority being given to tax claims of another State. Other reasons for denying priority to claims of the applicant State in the requested State are to avoid competition between the priorities of the taxes of the two States or the complication of devising special rules for such occasions.

150. The rule that the applicant State's tax claim must not be given any special priority attaching to the requested State's claims is absolute, applying "even if the recovery procedure used is the one applicable to its own (that is to say the requested State's) tax claims". This provides a precaution against giving unjustified priority to the applicant State's tax claims by applying to them rules of procedure normally applicable in the requested State to the latter's own tax claims.

151. Nevertheless, the article does not limit in any way the possibility for the requested State, as in the case of any other creditor, to obtain security in general law in order to guarantee the tax claim of the applicant State, for example, by the registration of a charge on immovable property.

Article 16 – Deferral of payment

152. The domestic laws of States contain provisions which empower the State under certain circumstances to soften the full force of the law concerning recovery of tax claims in particular cases. Most States will also have developed administrative practices on this point.

153. This article makes clear what is already implied in paragraph 1 of Article 11, namely that deferral of payment or payment by instalments is permitted where the law or administrative practice of the requested State provides for this. This provision is not intended to cover cases where a short period of delay is allowed to enable the taxpayer to realise assets to meet the tax claim. It recognises the essential element of flexibility which most recovery procedures contain in order to deal with cases of genuine financial hardship or of practical difficulties in realising certain assets in the short term; it will normally be in the interest of both the applicant and the requested State to solve this special problem in a fair and practical way.

154. The requirement that the requested State is to inform the applicant State before deferral of payment or payment by instalments is allowed elaborates on the basic provisions of Article 20 (response to the request for assistance) and is meant not only to give the applicant State notice of the proposal but also an opportunity to provide, then or later, information which

will show that this concession to the taxpayer is not, in the particular circumstances, justified. In general, however, once an arrangement is made by the requested State, it should not be disturbed unless there are new and special circumstances, for example, the taxpayer has received substantial further assets or has been found to have concealed assets.

155. Where there is disagreement between the States on questions of deferral of payment, it has to be remembered that the applicant State has found itself unable to collect its tax anyway and that it is the law and administrative practice of the requested State which predominates in the recovery procedure. It is of course possible for the applicant State or the requested State (under Article 12) to take measures of conservancy in any suitable case as additional protection when deferral arrangements are made with the taxpayer.

156. However, when the applicant State is prepared to grant to its taxpayers longer deferral of payment than is provided for under the laws of the requested State, there is no reason for that State to be less lenient than the applicant State vis-à-vis the latter's own taxpayer. The applicant State should indicate at the time of its request whether this is the case. It should similarly inform the requested State if it decides to suspend the action for a period of time (see commentaries on Article 18).

SECTION III – SERVICE OF DOCUMENTS

Article 17 – Service of documents

Paragraph 1

157. There are often difficulties for States in serving documents abroad (for example, in the case of a tax claim against a non-resident). The Convention therefore provides for administrative assistance between Contracting States in this area. Although such assistance may, in principle, be requested at all phases of tax proceedings, assistance in the service of documents as referred to in this article will in practice relate mainly to the assessment phase. The aim here is to ensure as far as possible that documents such as notices of assessment or reminders actually reach the taxpayer, in order to avoid enforcement steps being taken against a taxpayer who is genuinely ignorant of the tax claim or is merely neglectful. Documents shall be served if required for the activities of the tax authorities or for the protection of taxpayers. The provision shall be inapplicable to any other circumstances, in particular to audits for non- tax purposes. As they may mutually agree on the mode of application of this provision, in

accordance with Article 24, paragraph 1, of the Convention, the Contracting States may indicate whether they want to be informed of the content of the documents to be served. Relying upon paragraph 2.b of Article 21, the requested State may object to the service of a document which, in itself or because of its implications, it considers contrary to public policy.

158. In the great majority of countries, the possibility of recovery does not depend on whether the documents have actually reached the taxpayer. Most States have regulations concerning the way in which documents must be brought to the attention of the taxpayer in normal cases. Often there are also regulations to cover cases in which the taxpayer lives abroad or his address is not known (for example, documents are sent via consular missions or posted in public buildings). Generally, recovery can take place even when it is not certain that the notice to pay or final demand has reached the taxpayer.

159. For the reasons given in the foregoing paragraph, uncertainty that service of documents has been achieved should not in most cases be a legal obstacle to granting assistance in recovery. Also, assistance in the service of documents is an additional administrative burden on the requested State. Therefore, the omission of a provision on this subject would not have seriously weakened the Convention. Even so, such a provision gives additional protection for the taxpayer, may strengthen the recovery procedure and may itself lead to payment without the need for further assistance. However, Contracting States which are not able to provide assistance of this kind may enter a reservation under paragraph 1.d of Article 30.

Paragraph 2

160. This paragraph deals with the procedure to be followed by the requested State in serving the applicant State's documents. The service of documents will be effected by the requested State as if they were its own documents, that is to say by a method prescribed by its domestic laws for documents of a substantially similar nature (sub-paragraph a).

161. There are cases, however, where the applicant State has a preference for a certain method of service. Such a preference may be expressed when sending the request for assistance. The requested State shall then effect service of documents accordingly, insofar as the method requested by the applicant State is available under its own laws. If not, it will make use of the closest method available under its domestic laws (sub-paragraph b).

Paragraph 3

162. While States may agree to assist each other in this matter, it is clear that this will lead to an increase in the workload as two tax administrations will be involved. An obvious way of avoiding this extra work is to send directly by post notices of assessment, tax demands or other documents to the taxpayer abroad, it being understood that such sending by post cannot always be regarded as equivalent to an official notification under the laws of the taxing State. Paragraph 3 provides for such a possibility.

163. In the majority of countries, the use of their postal service does not seem to present any problems. However, difficulties arise where a State regards the sending by post of official documents of another State to its residents as an infringement of its sovereignty. It may also be inferred from the Hague Conventions on Civil Procedure that the use of foreign postal services for official notifications cannot be taken for granted. Hence this specific provision in the Convention. Contracting States which could not adhere to such a provision may enter a reservation under paragraph 1.e of Article 30 on the use of their postal services.

Paragraph 4

164. The Convention provides additional means whereby the applicant State may serve its documents. Neither this article nor anything else in the Convention is intended to prevent a Contracting State from using its own procedures for the service of documents in its own territory or in another State, if that is possible under the laws of that other State – or to invalidate the use of such procedures. This is of special interest to applicant States which may serve documents in other ways (for example, service on a representative of the taxpayer in the territory of that State or service by public notice). Although such methods of service do not necessarily guarantee that the taxpayer actually receives a notification, their usual effect is that he is deemed to have received it.

Paragraph 5

165. In some cases, the person on whom the document is served may not understand the language in which it is written. Paragraph 5 recognises this. Where the taxpayer has genuine problems in comprehending the language concerned and the competent authority is satisfied that it is so, the paragraph provides a solution which broadly parallels that adopted in Article 7 of the European Convention on the Service Abroad of Documents relating to Administrative Matters (ETS No. 94).