TAX INFORMATION EXCHANGE AGREEMENTS …
A CANADIAN APPROACH

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As part of Canada's March 19, 2007 Federal Budget, Canada introduced certain international tax measures to address both international tax avoidance and international tax evasion issues. These measures were contained in the Federal Budget "International Tax Fairness Initiative"[1], however, as in the past the government again neatly sidestepped the issue of the distinction between "international tax avoidance" and "international tax evasion" and offered very little guidance in just how the proposed measures may, in fact, address one or both concerns. For years taxpayers have been forced to grapple with this distinction; the former presumably being legal and within the taxpayers' moral and legal rights, although unfortunately taxing authorities seem to use the terms interchangeably.

The Department of Finance did offer the following comment in its Backgrounder update with respect to the 2007 Budget:

> In a fair tax system, everyone must pay their fair share of tax. Low-tax offshore jurisdictions – the so-called "tax havens" – play a role in facilitating international tax avoidance. Some low-tax jurisdictions are also tax havens in a less neutral sense, in that they encourage illegal tax evasion. These are jurisdictions that not only have low or no income taxes for non-resident investors, but also have secrecy laws in place to prevent other countries, such as Canada, from verifying whether their residents have invested there. The increased mobility of global capital and the

[1] See Schedule "A" for the "International Tax Fairness Initiative" excerpt from the Canada 2007 Federal Budget.

> instantaneous distribution of information being great rewards to open economies like Canada's. They also present some challenges, including the challenge of ensuring that business income is appropriately taxed.[2]

Canada's Department of Finance recognized two important initiatives in addressing the concern of "international tax avoidance" and "international tax evasion":

1) A response to multinational groups' use of low-tax jurisdictions and other avoidance structures as a means of obtaining two deductions for the same financing expense.[3]

2) A response to deal with the secrecy laws in foreign jurisdictions that facilitate tax evasion in Canada.[4]

The paper considers the second initiative and then only from the perspective of the potential impact that such a proposal may have on Canada's long-standing international tax policies. In an effort to address the need for greater information exchange, we will see that what Canada is seemingly proposing is to abandon over three decades of international tax policy in favour of a "carrot and stick" approach designed to improve the exchange of information with the tax authorities in the jurisdictions where Canadian businesses are operating.

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[2] http://www.fin.gc.ca/news07/data/07-041_2e.html

[3] Much has been written over the last several months in Canada about these so called "double dip" structures that allow a tax deduction to be taken in Canada as well as abroad. In other words, when two deductions are claimed for a single investment and a payment of interest is made from a foreign affiliate in one country to another in a tax haven. The initiative to abolish the double dip scenario was put forward in a narrowly-focused restriction announced by the Department of Finance on May 14, 2007.

[4] To this extent Canada has indicated that it will conclude no new tax treaty, or update an existing tax treaty, unless the treaty partner country agrees to abide by the highest international standards of tax information exchange.

The "carrot" being to allow "exempt surplus"[5] to be returned to Canada from any jurisdiction regardless of whether it had a tax treaty with Canada and regardless of whether that jurisdiction in fact even had an income tax system in place. All that would be required for such a jurisdiction to receive this preferential treatment for its corporate residents would be for the jurisdiction, wherein the business operated, to have executed a Tax Information Exchange Agreement ("TIEA") with Canada. Today, there are about 32 TIEAs in the world, involving members of the Organization for Economic Cooperation and Development ("OECD") like the United States, the United Kingdom, Canada and Netherlands, on the one hand, and tax havens like the Bahamas, the Cayman Islands and the Netherlands Antilles, on the other (see Schedule "B" for a list of recent bilateral agreements). Most of these agreements follow a model convention promulgated by the OECD (see Schedule "C", "OECD Agreement on Exchange of Information on Tax Matters") which identifies the scope of the taxes in respect of which information is sought and lays down certain rules on how to obtain such information.[6]

The "stick" being to do away with the distinction between a foreign corporation's "active" and "passive" income by requiring that that any income earned by a foreign

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[5] Currently, Canada exempts from tax the foreign-source active business income ("exempt surplus") received by Canadian corporations from foreign affiliates, provided the income is earned in a treaty country in which the foreign affiliate is resident. "In particular, if a foreign affiliate earns business income in one of the 86 countries with which Canada has tax treaties, its business earnings can be classified as "exempt surplus" and be repatriated as tax-deductible dividends under paragraph 113(1)(a) of the Income Tax Act (Canada) (the "ITA") to its Canadian corporate shareholder. This benefit is justified on the basis that these "designated treaty countries" have tax systems that are roughly comparable to Canada's. Accordingly, under the economic principles of capital export neutrality and capital import neutrality, as well as our need to maintain international competitiveness, Canada has effectively said to its multi-nationals that they can choose where to expand their operations in Canada or in a country outside Canada. Make your decision based on proper business reasons, not tax benefits, because the tax result is neutral for earning profits (capital export neutrality) and for repatriating profits (capital import neutrality) in either case within the corporate sector." (Saltman, Lorne, "Canadian Federal Budget 2007 and Tax Information Agreements", 2007.

[6] The purpose of the model TIEA is to promote international co-operation in tax matters through exchange of information. It was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. The Agreement grew out of the work undertaken by the OECD to address harmful tax practices. The lack of effective exchange of information is one of the key criteria in determining harmful tax practices. The mandate of the Working Group was to develop a legal instrument that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. This Agreement, which was released in April 2002, is not a binding instrument but contains two models for bilateral agreements. A number of bilateral agreements have been based on this Agreement.

affiliate[7] in countries which have neither signed a Tax Treaty or a Tax Information Exchange Agreement with Canada, will be taxed currently in the hands of the Canadian shareholders of those affiliates. The effect being that all of the foreign corporation's income will be treated as "foreign accrual property income" (FAPI).[8]

The purpose of this paper is not to delve into the myriad of technical issues that will undoubtedly surface if, as and when, Canada attempts to codify this initiative, but to consider the purpose and effect that such policies may have on multinational corporations operating in the global economy. If these changes are enacted as proposed, it appears that these initiatives would represent an about-face in Canada's tax policy on foreign affiliate taxation, a longstanding policy that Finance officials have historically defended. The implementation of such changes also sends mixed messages to the so-called tax haven countries and the companies and individuals that operate within such countries.

This "carrot and stick" approach for obtaining information about Canadians operating businesses abroad *via* the use of TIEAs is highly controversial. There is no doubt that Canada's proposal will be heralded and criticized by international tax experts. Some will see the proposal as the new direction for international taxation and a significant advancement in the ability to enforce and collect tax by ensuring the free flow of tax information between countries, while simultaneously ensuring that the operation of a business in a non-complying jurisdiction (i.e. a jurisdiction that has not executed a TIEA with Canada), is not viable. Others will view this proposal as an ill-conceived attempt by Canada to entice tax havens to enter into such information sharing arrangements, thus

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[7] A foreign affiliate is defined in subsection 95(1) of the Act as a corporation (other than a corporation resident in Canada) in which a Canadian taxpayer's equity percentage is not less than 1%. This "equity percentage" may be either direct or indirect and is calculated on a class-by-class basis.

[8] Canada levies a tax on non-resident entities and/or Canadian residents with an interest in non-resident entities through special provisions, contained in the Act, known as the Foreign Accrual Property Income ("FAPI") rules. In general terms, the FAPI rules were implemented to deem a Canadian taxpayer, who has a controlling interest in a company resident outside Canada, to have earned the foreign accrual property income of that company, regardless of whether the funds are actually received by the Canadian taxpayer. The term FAPI is defined in paragraph 95(1)(b) of the Act. Although the definition is quite complex, in general, it includes income of an investment nature such as interest, dividends, capital gains, rents, royalties etc. One of the main exclusions from the formula utilized to calculate one's FAPI is any income pertaining or incidental to an active business. If the income earned by the foreign entity is classified, for Canadian tax purposes, as active business income, then such income will not form part of the Canadian individuals' taxable income for that particular tax year, but will only be included in income, at such time as monies are repatriated to Canada. In theory the exclusion would seem straightforward, however, in practicality there are a number of grey areas in determining whether the income, in question, pertains to or is incidental to an active business. In addition, there have been numerous changes to the Act, within the last few years, in an attempt to make it more difficult for a taxpayer to argue that the income earned by the foreign corporation is "active business income.

resulting in a continued serious erosion of Canada's corporate tax base with little or nothing to show for it in return.

Background

Before considering the effect and impact of the proposed policy, an understanding and appreciation for the basic framework for Canada's existing international taxation policies is necessary. Although Canada's international tax policies have been refined and amended over the years, the basic principles have existed since 1976. Canada's international tax policy distinguishes between business income and investment income, largely by implementing a "territoriality approach" approach for business income and a "residence approach" for investment income. Pursuant to subsection 91(1) of the Income Tax Act[9] (the "Act"), the "foreign accrual property income" (FAPI) of a foreign affiliate is attributed to the Canadian shareholder and taxed annually in the hands of the Canadian shareholder. The primary purpose of this attribution mechanism is to neutralize the tax consequences to Canadian-resident taxpayers of carrying on, through controlled foreign affiliates,[10] activities which the government believes should be carried on, and subjected to tax in the ordinary course, in Canada. It is important to note, that without this attribution mechanism, the income earned by a foreign corporation, given that it is recognized as a separate legal entity, would potentially result in a deferral or even elimination of tax in the hands of the Canadian taxpayer. In contrast to the FAPI regime, income from an active business earned by the same foreign affiliate is not subject to this same attribution. The active business earned income by the foreign affiliate will only be taxed in Canada when distributed to the Canadian resident taxpayer, in the form of dividends, however only to the extent that the dividend income has been paid out of the foreign affiliate's "taxable surplus"[11]. If, however, the income is deemed to have been

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[9] Income Tax Act, RSC 1985,c. 1 , as amended.

[10] A "controlled foreign affiliate" is defined in subsection 95(1) of the Act as a corporation that is a foreign affiliate of the taxpayer that was, at that time, controlled by

(a) the taxpayer,
(b) the taxpayer and not more than four other persons resident in Canada,
(c) not more than 4 persons resident in Canada, other than the taxpayer,
(d) a person or persons with whom the taxpayer does not deal at arm's length, or
(e) the taxpayer and a person or persons with whom the taxpayer does not deal at arm's length.

[11] Dividends received from a foreign affiliate by a Canadian corporate shareholder in excess of the available balance in the exempt surplus account are deemed to come next out of the taxable surplus

paid out of the foreign affiliate's "exempt surplus", the Canadian corporate recipient will not be required to pay Canadian tax provided the foreign affiliate is resident in a jurisdiction that has a Tax Treaty with Canada, and thus, it is possible to defer indefinitely, the Canadian tax.

Under the exempt surplus regime, any dividends paid by a foreign affiliate to its Canadian parent are exempt from tax[12] if the following conditions are met:

1) The foreign affiliate is resident in a country listed in the income tax regulations as a designate country with a tax treaty in force with Canada.
2) Dividends are paid out of the foreign affiliate's "exempt surplus"

The "exempt surplus" is defined as:

1) earnings from active business activities carried out from the affiliate's permanent establishment. (Thus interest earned from the deposit of funds in a bank account does not come within the definition of exempt surplus.)
2) certain capital gains;
3) dividends received by the foreign affiliate from the exempt surplus of other affiliates.

Thus dividends remitted to a Canadian parent by a Barbados resident affiliate, for example, which manufactures goods for export worldwide and enjoys a very low

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account. Taxable surplus includes active business income, net of underlying foreign tax, earned after 1975 by a foreign affiliate resident in a non-treaty country. It also includes foreign accrual property income (FAPI), and the taxable portion of capital gains derived from the disposition of certain property.

[12] A dividend from a foreign affiliate is included in income under section 90. A dividend out of exempt surplus or pre-acquisition surplus can then be deducted under paragraphs 113(1)(a) or (d), resulting in no corporate tax being paid in Canada. (Reason: the dividend is presumed to be from income which has already been subjected to foreign tax) A dividend from taxable surplus is included in income, but a deduction is allowed for underlying foreign tax paid by the foreign affiliate and for foreign withholding tax paid on the dividend (see paragraphs 113(1)(b) and (c) [Note: if the foreign tax paid is low, the benefit is marginal to the Canadian taxpayer as opposed to the result under the "exempt surplus" system. Dividends are normally deemed to come first from exempt surplus (net of any taxable deficit), then from taxable surplus (net of any exempt deficit), then pre-acquisition surplus (see Regulation 5901). Exempt surplus (Regulation 5907(1)) is, very generally, active business income earned by the foreign affiliate in treaty countries (see list of Canada's tax treaties at Schedule "E"), and certain capital gains. Taxable surplus (Regulation 5907(1)) is generally income earned in other countries, as well as passive income (earned anywhere) and certain capital gains.

corporate tax rate under Barbados law,[13] will not be taxed in the hands of the Canadian corporate entity.[14]

The fiscal advantages to a multinational corporation under Canada's "exempt surplus" system cannot be overstated. In fact, numerous studies have indicated that Canada's international tax policies are an essential part of Canada's international competitiveness.[15] One need only look briefly at the often referred to "Barbados 2.5% Solution" to fully appreciate the power of such planning.

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[13] A properly structured Barbados "International Business Corporation" (IBC) is subject to a maximum Barbados tax on its income of 2.5%.

[14] There are jurisdictions in the world that have Tax treaties with Canada (for example, United Arab Emirates [UAE]), in which the corporate income in the foreign jurisdiction will not be taxed at all.

[15] The "exempt surplus" treatment is a significant competitive advantage for Canadian companies. Many countries, including the United States, the United Kingdom and Japan, do not provide a similar exemption. Instead, these countries tax their corporate residents' foreign affiliate dividends, providing only a credit for any foreign taxes paid on the underlying income. (see also Hejazi, Walid "Offshore Financial Centres and the Canadian Economy", 2007).

Barbados 2.5% Solution

Corporations carrying on an active business in Canada are subject to a combined[16] income tax of approximately 35%.[17] If, however this same active business is carried on in Barbados *via* an "international business corporation (IBC), the tax rate drops to a maximum of 2.5%.[18] As discussed above, the Canadian corporation with the Barbados foreign affiliate will be required to include the dividends received from the exempt surplus pool of the foreign affiliate in its income, however, the Canadian corporation will then be entitled to deduct those dividends from their taxable income, thus avoiding double taxation at the international level. As a result the foreign affiliate's income can be repatriated to its Canadian parent without any Canadian tax cost. If the foreign affiliate is resident in a country comprising the UAE (for example, Dubai where no corporate taxes are levied), the scenario is even better, since the gross income earned in the Dubai based foreign affiliate would not pay any tax in Dubai or Canada.

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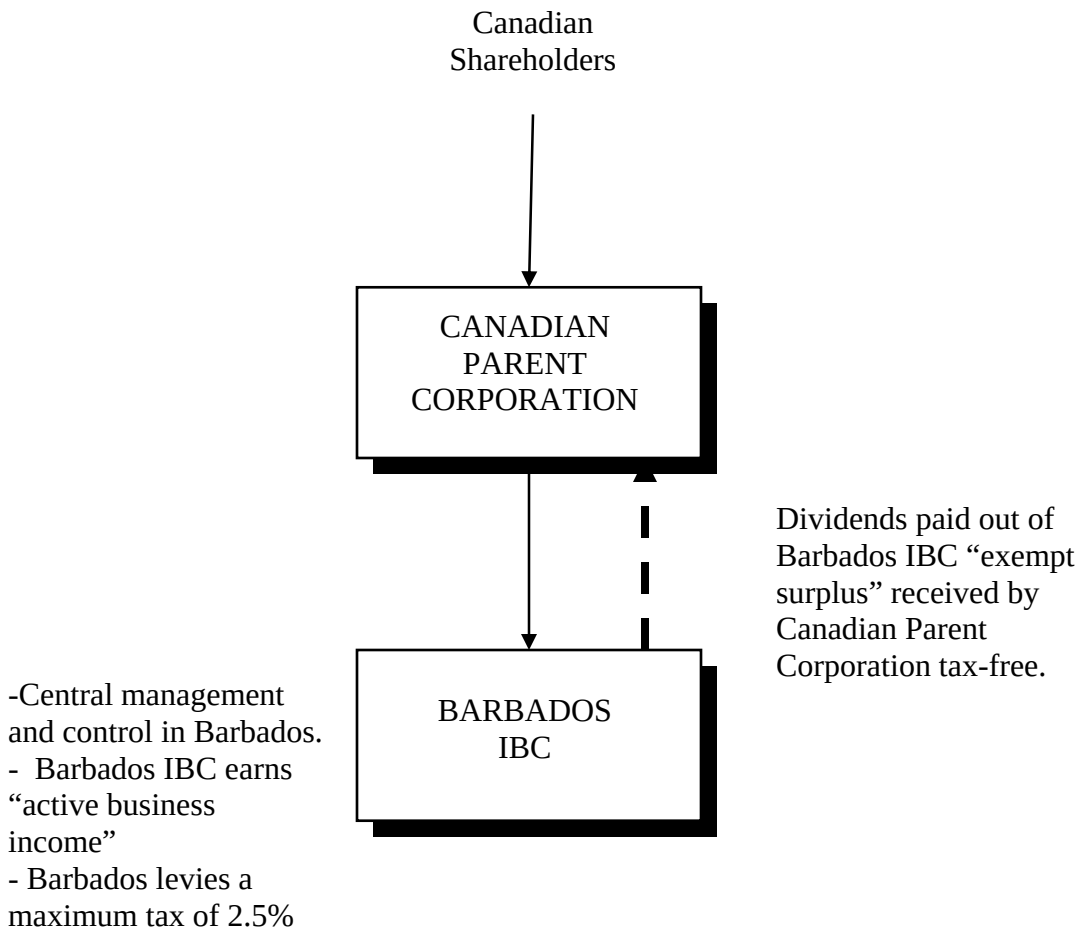
[16] Federal and Provincial.

[17] The combined corporate tax rate in Canada has been declining over the last several years and is proposed to hit a combined rate of 25% in 2012 for corporations resident in Alberta (Note: each Province in Ontario levies its own corporate tax rate on corporations resident in the Province).

[18] Pursuant to the *International Business Companies Act*, L.R.O. 2001, Ch. 77, ("IBCA"), an international business company ("IBC") is subject to tax in Barbados on its worldwide income at rates ranging from 1% to 2.5%, instead of the normal higher rate specified in the Barbados Income Tax Act ("BITA") of 40%. Furthermore, IBCs are not subject to withholding taxes in Barbados on dividends, interest, royalties or other income which is paid to non-residents or another IBC.



Recognizing a distinction between a treaty country and a non-treaty country has long existed in Canada's international tax policy initiatives – and generally with good reason. If a Canadian-based multi-national has earned business income through a foreign affiliate resident in a non-treaty country, the presumption, from a Canadian tax perspective, is that the corporate earnings have not been made subject to tax in a way roughly similar to that found in Canada and, as a result, Canada does not allow the tax to be deferred as "exempt surplus". Such income is classified as "taxable surplus" thereby attracting current tax when repatriated as a dividend to the Canadian corporate shareholder.[19] At first glance, this would seem to make good economic sense if global tax policy seemed to follow the general OECD consensus, being that income tax treaties are suitable in instances only when both countries impose a similar tax on the worldwide income of all their residents, corporate and individual. If this was not the case the potential for abuse (perceived or

[19] A tax credit is credit given for the underlying foreign tax paid under paragraph 113(1)(b) as proxy for a foreign tax credit.

actual) would be far too great. That said, in spite of their protestations to the contrary, OECD countries do enter into tax treaties with tax havens and other small developing countries, but they do so on a selective basis and generally for a variety of self motivated reasons. For example:

- Austria has a new income tax treaty with Belize that entered into force in 2004.
- Canada has a significant income tax treaty with Barbados that enables Canadian multinational companies to use low-tax Barbados IBCs to earn active foreign business income that can be brought back to its Canadian parent as tax-free *exempt surplus*.
- France tends to have tax treaties with French-speaking countries no matter how small they are or what, if any, taxes are levied in such countries.
- New Zealand and 14 other OECD countries (including Canada) have tax treaties with the United Arab Emirates (which includes Dubai); although the United Arab Emirates has no income tax.
- Norway and Sweden both entered into new tax treaties with Barbados after cancelling their old treaty extensions with many Caribbean countries.
- The UK tends to keep tax treaties with its current and former colonies; the UK recently announced that it is currently negotiating a tax treaty with the Cayman Islands which it plans to complete this year.

There are numerous other examples of such selected income tax treaties between OECD members and developing countries (see Schedule "D").

For many years, Canada's Department of Finance officials have defended the favourable tax status of certain countries like Barbados, Ireland, Cyprus and Malta on the basis that while they have lower tax rates on some business vehicles, their overall tax systems are roughly similar to that of Canada. Moreover, it is inappropriate for Canada to dictate to

such countries how they should construct their tax incentives, on the principle that Canada has its own biases and incentives and would resent being told by other countries how best to operate its tax system.

With the proposal to provide incentives for non-treaty countries to agree to a Canadian request for a TIEA, by expanding the scope of "exempt surplus", to deem a country with which Canada has entered into a TIEA to be a "designated treaty country", and conversely by expanding the scope of FAPI to include active business income earned in a non-TIEA country where that country fails to conclude a TIEA with Canada within five years of being invited to do so, it would seem that Canada has concluded that its existing international tax policy is no longer sacrosanct. With a new policy that grants equal Canadian tax benefits to a Turks and Caicos Islands based corporation, provided the TCI enters into a TIEA with Canada, that pays zero tax with one in Ireland that pays 12.5% tax, Canada has completely opened the flood gates to a new era in international planning. The years of defending the favourable tax status of certain Treaty partners and the further attempts to justify the overall similar nature of such countries' tax systems in comparison to Canada's is no longer relevant. The bottom line would now seem to be that the tax systems, tax rates, etc. are immaterial as long as there is a free flow of tax information.

If this policy were to be adopted as law, it would not be surprising to see a number of foreign subsidiary corporations migrate from traditionally accepted offshore jurisdictions (i.e. Barbados, Ireland, etc.) to new zero tax havens solely as a result of that specific country's execution of a TIEA with Canada. It is interesting to note that the vast majority (if not all) multi-national companies with foreign subsidiaries outside Canada, already provide full disclosure of their income (domestic and foreign) to Canadian tax authorities regardless of whether the country in which they are operating shares this same openness. Conversely, any country that, for whatever reason, be it political, economic, etc., that is not in a position to execute a TIEA with Canada would quickly see an emigration of all Canadian foreign subsidiaries, given the tax penalty applied to the active business income earned. In either situation, it is difficult to see how this could possibly be a viewed as a favourable result.

"These proposals corrode the principles underlying Canada's international tax system for the last 31 years. Canadian-based multi-nationals will be induced to set up foreign

affiliates in tax havens or move existing operations to tax havens from taxable jurisdictions which are roughly comparable to Canada's. In one fell swoop capital export neutrality is dismantled."[20]

And thus, the question remains, "what is the impetus for this new "tax fairness initiative"? Is such a drastic tax policy change truly necessary to entice countries to execute TIEAs with Canada? And if this is the sole motivation, one must question the value of information that will be shared between the signatories to such an agreement.

Interestingly, no other OECD member country has had to resort to tax incentives or the adoption of new tax policy in order to induce a tax haven counterparty to enter into a TIEA, which makes Canada's approach that much more bewildering. For example, the US was the first to secure TIEAs and it now has TIEAs with Barbados, Bermuda, Jamaica, Mexico, Trinidad and Tobago, Antigua and Barbuda, Aruba, the Bahamas, Costa Rica, Dominica, the Dominican Republic, Grenada, Guyana, Honduras, the Marshall Islands, Peru and St. Lucia.[21] Under pressure from the European Union, the UK compelled its dependent territories and crown dependencies to sign savings income TIEAs and the Netherlands also compelled Aruba and the Netherlands Antilles to sign TIEAs.[22]

Although the OECD has yet to comment on Canada's approach to securing TIEAs, it is interesting to note that the OECD has recently announced that significant progress has been made in securing TIEAs, and cited the following examples:

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[20] Saltman, Lorne, "Canadian Federal Budget 2007 and Tax Information Agreements", 2007.

[21] TIEAs signed by the US some years ago with the BVI, the Cayman Islands, Colombia, Guernsey, the Isle of Man, Jersey and the Netherlands Antilles have not (yet) entered into force. Moreover, the US has not yet signed TIEAs with several other Caribbean jurisdictions previously covered by the terminated US-UK income tax treaty, namely Anguilla, Belize, Montserrat, St. Kitts and Nevis, and St. Vincent and the Grenadines; nor has it signed a TIEA with the Turks and Caicos Islands.

[22] So as not to belittle the challenges involved in securing TIEAs, it is important to note that most former UK territories that are now independent countries have not signed such TIEAs and have little or no incentive to do so. Furthermore, a few decades ago, the British Virgin Islands (BVI) and many other British colonies that theoretically imposed "taxes substantially similar in character" to those imposed by the UK had income tax treaties in force with Canada, Denmark, Japan, New Zealand, Norway, Sweden, Switzerland, the UK and the US. Most British colonies that became independent remained parties to these tax treaties. Virtually all of these extensions were eventually terminated and most have not been replaced. The UK alone has kept some of its tax arrangements with its current and former dependent territories.

1) Nearly 100 more exchange of information arrangements are now in place, compared with one year ago, including tax information exchange agreements between the United States and Guernsey, the Isle of Man and Jersey which entered into force in 2006;
2) The scope of some existing arrangements has been extended. For example, Switzerland has signed a number of protocols to its bilateral tax conventions to allow it to exchange information, including bank information, in cases of tax fraud and the like. Some of these protocols also allow for exchange of information in both civil and criminal tax matters in the case of holding companies;
3) Access to bank information for tax purposes has been greatly improved in economies such as Belgium, which in November signed its first tax treaty providing for exchange of bank information for all tax purposes;
4) Increasingly, legislation requires financial and other service providers to have available details of the beneficial as well as the legal owners of corporate vehicles. For example, in Macao, China; new anti-money laundering legislation requires financial institutions to verify the identity of customers and their beneficial owners. In San Marino, new legislation requires that from 2008 meetings of joint stock corporations must be held in the presence of a notary public who is required to identify holders of bearer shares.
5) Some jurisdictions, such as Guernsey and Jersey, have brought into force legislation empowering them to fully implement the provisions of their bilateral exchange of information arrangements.[23]

Conclusion

With the constant growth and expansion that corporations are experiencing, cross border transactions are continuing to grow in scope and frequency and not just with the United States as was the case in past years. Corporate growth and expansion has now truly gone global and there is no visible signs of this move abating … international borders are fading. As a result, it should come as no surprise to tax practitioners that corporate clients are constantly evaluating different options and strategies to minimize their global

[23] OECD Press Release "OECD reports progress in fighting offshore tax evasion, but says more efforts are needed", 12/10/2007.

tax bill. Establishing and administering an effective international tax policy that on one hand ensures the domestic tax system is fair by requiring all tax residents to pay their fair share while on the other hand providing economic stimulus to allow global competitiveness is a fine balancing act; a balance that I believe was adequately maintained for a number of years in Canada. Canada's international tax policies may not be perfect, but at least the policies were thoroughly canvassed and debated over many years. Canada's knee-jerk reaction to adopt an entirely new international tax policy with the sole goal being to secure a greater flow of arguably needless tax information is, to be kind, troubling.

Having practiced in the field of international tax for 15 years and professing a fairly proficient working knowledge of Canada's foreign tax policies, my educated presumption is that the "Tax Fairness Initiative" will never be implemented in Canada. I do not believe that the execution of TIEAs is a sufficient enough objective to justify such a change in policy. The policy change would leave Canada susceptible to a far greater drain on government coffers and would result in a significant back-lash from Canada's existing Treaty partners, who will undoubtedly view such a policy change as a slap in the face. The costs of implementing such a radical change will far outweigh the small benefits that may be garnered. Interestingly, the international proposals include plans for an advisory panel of experts to undertake further study and consultations, with a view to building on the measures in the March 2007 Federal Budget.[24] Personally, for the good of Canada's tax system, I would hope that the panel of experts reaches the same conclusions as I have.

No doubt, Canada's ability to secure TIEAs without the "carrot and stick" approach will prove more difficult. That said, in today's international competitive market for attracting capital, where certain tax havens actively seek to be removed from lists of Harmful Tax Regimes (the OECD), and from lists of uncooperative regimes published by the Financial Action Task Force, and where tax havens enact their own anti-money laundering legislation, OECD countries should be finding it easier and easier to persuade tax havens to enter into TIEAs. Lastly, the days of clients (corporate or individual, Canadian or

[24] Personally, I would prefer to see Canada consider a reduction in withholding tax rates for payments made to residents of countries that have executed TIEAs with Canada as opposed to making changes to Canada's corporate international tax policies.

otherwise) relying on “secrecy” to defer, avoid or even evade taxes are a thing of the past. In today’s digital age and flattening world, nothing is secret for very long and any client that hopes to shield itself with this defence will soon falter. The changing times, have and will continue to ensure an open and instantaneous distribution of information … Canada need only be patient.

SCHEDULE "A"

(Excerpt from Canada's 2007 Federal Budget)

International Tax Fairness Initiative

Budget 2007's International Tax Fairness Initiative builds on the Tax Fairness Plan and proposes a significant and long-overdue improvement to how Canada taxes foreign-source business income. It also enhances the ability of the Canada Revenue Agency, working with its partners in other countries, to track down and deal with those who try to use aggressive international tax planning to shirk their tax obligations and increase the burden on other Canadian taxpayers. This will make Canada's tax system much fairer.

Budget 2007 proposes to:

- Eliminate the deductibility of interest incurred to invest in business operations abroad.
- Improve our information exchange agreements with other countries.
- Provide more resources to the Canada Revenue Agency to strengthen their audit and enforcement activities.

Interest Deductibility and Foreign Affiliates

When a company (or other taxpayer) borrows money for an income-earning purpose, the interest it pays on the borrowed money is generally tax-deductible. This ensures that the income is correctly measured: the interest is a cost of earning it, and like other costs it should be deductible. Owning shares in a company is usually considered an income-earning purpose, since most dividends are taxable. If the shares are bought using borrowed money, the tax system ordinarily allows the interest expense to be deducted. There is, though, one important kind of dividend income that does not get taxed in Canada. This is dividend income that a foreign subsidiary corporation, known as a foreign affiliate, pays to its Canadian parent company out of the foreign affiliate's "exempt surplus"—its foreign business income. Despite the fact that these exempt

surplus dividends are not taxed in Canada (and neither is the underlying foreign income), the parent company in Canada can deduct the interest it pays on borrowed money used to acquire the shares of the foreign affiliate. In other words, the Canadian tax system recognizes the expense but not the corresponding revenue. Canada's existing tax rules permit this mismatch, and multinational corporations have used it to their advantage. The corporations borrow in Canada to fund business operations abroad, and then use the resulting interest deductions to offset Canadian-source income. By giving this tax saving to the corporations, Canadian taxpayers are indirectly subsidizing their international operations. That subsidy makes it more attractive for even a Canadian-owned company to locate new income-earning operations in a foreign country rather than in Canada, other things being equal. These problems are not new. For example, the 1997 *Report of the Technical Committee on Business Taxation* recommended disallowing the deduction of interest expense on borrowed money used to invest in foreign affiliates. The Auditor General of Canada also highlighted this issue as a concern in both 1992 and 2002. Canada's New Government has chosen to act, to ensure that everyone pays their fair share of tax. Budget 2007 proposes that interest expense on indebtedness incurred to acquire the shares of a foreign affiliate no longer be deductible, unless and until the shares generate income that Canada actually taxes. The restriction on interest deductibility will apply to interest payable after 2007 on new debt incurred on or after March 19, 2007. The restriction will apply to existing non-arm's length debt for interest payable after 2008 and, to moderate the immediate impact of these changes on firms in relation to their arrangements with arm's length lenders, will apply to arm's length debt for interest payable after 2009. This measure is expected to generate $10 million in federal revenue in 2007–08 and $40 million in 2009–10.

Improving the Exchange of Tax Information

In order for all Canadians to enjoy lower taxes, those who owe tax have to pay it. Budget 2007 proposes concrete steps to reinforce the ability of the Canada Revenue Agency (CRA) to collect tax by building on our existing tax treaty network to update our exchange of information standards. No new or revised tax treaties will be signed that do not include comprehensive exchange of information provisions. In addition, because the greatest challenges the CRA faces in enforcing Canada's tax laws are in respect of income earned in countries with which Canada does not have a tax treaty, Budget 2007 will provide incentives for non-treaty countries to enter into comprehensive tax information exchange agreements (TIEAs) with Canada. Non-treaty countries will be asked to agree to a TIEA within five years of being approached by Canada to do so. If a jurisdiction does agree to a TIEA, business income earned in that jurisdiction by foreign

affiliates of Canadian firms will (as described below) be exempt from Canadian tax; otherwise, that income will be taxable in Canada as earned.

Foreign-Source Business Income: Exempt Surplus

Although its mismatch with interest deductibility has been a long-standing problem, the "exempt surplus" rule in itself is a key competitive advantage of the Canadian tax system. The rule allows a Canadian company to earn business income through a foreign affiliate in any tax-treaty country, and bring that income back to Canada, with no Canadian tax. Since the only tax on this business income will be that paid to the foreign country in which it is earned, the system ensures that Canadian firms are able to operate on a level playing field with their foreign competitors. With the proposal above to resolve the interest deductibility problem, it is no longer necessary to link the exemption to the presence of a tax treaty. In the current environment, it is more appropriate to link the exemption to the presence of a comprehensive exchange of information agreement. Budget 2007 therefore proposes to extend the exemption to active business income from non-treaty jurisdictions as well as treaty countries, provided those jurisdictions agree to exchange tax information with Canada. This will give Canadian firms more scope to expand internationally, especially into new and emerging markets, without our tax system imposing additional costs that could reduce their competitiveness, while also maintaining tax fairness. It will also encourage non-treaty jurisdictions to join in the efforts of Canada and our treaty partners to control international tax evasion.

Improved Auditing and Enforcement

The CRA will be provided with additional resources to strengthen the enforcement of Canada's tax system in relation to foreign income and cross-border transactions. Particular emphasis will be placed on transfer pricing transactions and complex international tax avoidance cases. Further resources will also be provided for the CRA to verify and collect taxes owing on income and sales generated in Canada. These resources will be used to find and challenge taxpayers participating in aggressive tax shelters, who fail to report all of their income, or who have made unsubstantiated GST/HST refund claims.

SCHEDULE “B”

Recent bilateral agreements (by date of signature)

Jersey - Netherlands	(20 June 2007)
Netherlands Antilles - New Zealand	(01 March 2007)
Australia - Netherlands Antilles	(01 March 2007)
Antigua & Barbuda - Australia	(30 January 2007)
Australia - Bermuda	(15 November 2005)
Isle of Man - Kingdom of The Netherlands	(12 October 2005)
Aruba - United States	(21 November 2003)
Jersey - United States	(04 November 2002)
Isle Of Man - United States	(02 October 2002)
Guernsey - United States	(19 September 2002)
Netherlands Antilles - United States	(17 April 2002)
British Virgin Islands - United States	(03 April 2002)
Bahamas - United States	(25 January 2002)
Cayman Islands - United States	(27 November 2001)
Antigua And Barbuda - United States	(06 December 2000)

SCHEDULE "C"

OECD OCDE

AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS

AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS

I. INTRODUCTION

1. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.

2. The Agreement was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.

3. The Agreement grew out of the work undertaken by the OECD to address harmful tax practices. See the 1998 OECD Report "*Harmful Tax Competition: An Emerging Global Issue*" (the "1998 Report"). The 1998 Report identified "the lack of effective exchange of information" as one of the key criteria in determining harmful tax practices. The mandate of the Working Group was to develop a legal instrument that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices.

4. This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the commitments undertaken by the OECD and the committed jurisdictions. In this context, it is important that financial centres throughout the world meet the standards of tax information exchange set out in this document. As many economies as possible should be encouraged to co-operate in this important endeavour. It is not in the interest of participating economies that the implementation of the standard contained in the Agreement should lead to the migration of business to economies that do not co-operate in the exchange of information. To avoid this result requires measures to defend the integrity of tax systems against the impact of a lack of co-operation in tax information exchange matters. The OECD members and committed jurisdictions have to engage in an ongoing dialogue to work towards implementation of the standard. An adequate framework will be jointly established by the OECD and the committed jurisdictions for this purpose particularly since such a framework would help to achieve a level playing field where no party is unfairly disadvantaged.

5. The Agreement is presented as both a multilateral instrument and a model for bilateral treaties or agreements. The multilateral instrument is not a "multilateral" agreement in the traditional sense. Instead, it provides the basis for an integrated bundle of bilateral treaties. A Party to the multilateral Agreement would only be bound by the Agreement vis- à-vis the specific parties with which it agrees to be bound. Thus, a party wishing to be bound by the multilateral Agreement must specify in its instrument of ratification, approval or acceptance the party or parties vis-à-vis which it wishes to be so bound. The Agreement then enters into force, and creates rights and obligations, only as between those parties that have <u>mutually</u> identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement. The bilateral version is intended to serve as a model for bilateral exchange of information agreements. As such, modifications to the text may be agreed in bilateral agreements to implement the standard set in the model.

6. As mentioned above, the Agreement is intended to establish the standard of what constitutes effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. However, the purpose of the Agreement is not to prescribe a specific format for how this standard should be achieved. Thus, the Agreement in either of its forms is only one of several ways in which the standard can be implemented. Other instruments, including double taxation agreements, may also be used provided both parties agree to do so, given that other instruments are usually wider in scope.

7. For each Article in the Agreement there is a detailed commentary intended to illustrate or interpret its provisions. The relevance of the Commentary for the interpretation of the Agreement is determined by principles of international law. In the bilateral context, parties wishing to ensure that the Commentary is an authoritative interpretation might insert a specific reference to the Commentary in the text of the exchange instrument, for instance in the provision equivalent to Article 4, paragraph 2.

II. TEXT OF THE AGREEMENT

MULTILATERAL VERSION

The Parties to this Agreement, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

BILATERAL VERSION

The government of _____ and the government of _____, desiring to facilitate the exchange of information with respect to taxes have agreed as follows:

Article 1

Object and Scope of the Agreement

The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.

Article 2

Jurisdiction

A Requested Party is not obligated to provide information which is neither held by its authorities nor in the possession or control of persons who are within its territorial jurisdiction.

Article 3

Taxes Covered

MULTILATERAL VERSION

1. This Agreement shall apply:

a) to the following taxes imposed by or on behalf of a Contracting Party:

i) taxes on income or profits;

BILATERAL VERSION

1. The taxes which are the subject of this Agreement are:

a) in country A, _____;

ii) taxes on capital;

iii) taxes on net wealth;

iv) estate, inheritance or gift taxes;

b) to the taxes in categories referred to in subparagraph a) above, which are imposed by or on behalf of political sub-divisions or local authorities of the Contracting Parties if listed in the instrument of ratification, acceptance or approval.

2. The Contracting Parties, in their instruments of ratification, acceptance or approval, may agree that the Agreement shall also apply to indirect taxes.

3. This Agreement shall also apply to any identical taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of entry into force of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

b) in country B, _____.

2. This Agreement shall also apply to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall also apply to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes if the competent authorities of the Contracting Parties so agree. Furthermore, the taxes covered may be expanded or modified by mutual agreement of the Contracting Parties in the form of an exchange of letters. The competent authorities of the Contracting Parties shall notify each other of any substantial changes to the taxation and related information gathering measures covered by the Agreement.

Article 4

Definitions

MULTILATERAL VERSION

1. For the purposes of this Agreement, unless otherwise defined:

a) the term “Contracting Party” means any party that has deposited an instrument of ratification, acceptance or approval with the depositary;

BILATERAL VERSION

a) the term “Contracting Party” means country A or country B as the context requires;

b) the term “competent authority” means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval;	b) the term “competent authority” means i) in the case of Country A, _____; ii) in the case of Country B, _____;

c) the term “person” includes an individual, a company and any other body of persons;

d) the term “company” means any body corporate or any entity that is treated as a body corporate for tax purposes;

e) the term “publicly traded company” means any company whose principal class of shares is listed on a recognised stock exchange provided its listed shares can be readily purchased or sold by the public. Shares can be purchased or sold “by the public” if the purchase or sale of shares is not implicitly or explicitly restricted to a limited group of investors;

f) the term “principal class of shares” means the class or classes of shares representing a majority of the voting power and value of the company;

g) the term “recognised stock exchange” means any stock exchange agreed upon by the competent authorities of the Contracting Parties;

h) the term “collective investment fund or scheme” means any pooled investment vehicle, irrespective of legal form. The term “public collective investment fund or scheme” means any collective investment fund or scheme provided the units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed by the public. Units, shares or other interests in the fund or scheme can be readily purchased, sold or redeemed “by the public” if the purchase, sale or redemption is not implicitly or explicitly restricted to a limited group of investors;

i) the term “tax” means any tax to which the Agreement applies;

j) the term “applicant Party” means the Contracting Party requesting information;

k) the term “requested Party” means the Contracting Party requested to provide information;

l) the term “information gathering measures” means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information;

m) the term “information” means any fact, statement or record in any form whatever;

n) the term “depositary” means the Secretary-General of the Organisation for Economic Co-operation and Development;	*This paragraph would not be necessary*

o) the term “criminal tax matters” means tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party;

p) the term “ criminal laws” means all criminal laws designated as such under domestic law irrespective of whether contained in the tax laws, the criminal code or other statutes.

2. As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 5

Exchange of Information Upon Request

1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party.

2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes.

3. If specifically requested by the competent authority of an applicant Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Contracting Party shall ensure that its competent authorities for the purposes specified in Article 1 of the Agreement, have the authority to obtain and provide upon request:

a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

b) information regarding the ownership of companies, partnerships, trusts, foundations, “Anstalten” and other persons, including, within the constraints of Article 2, ownership information on all such persons in an ownership chain; in the case of trusts, information on settlors, trustees and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries. Further, this Agreement does not create an obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties.

5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:

(a) the identity of the person under examination or investigation;

(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;

(c) the tax purpose for which the information is sought;

(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;

(e) to the extent known, the name and address of any person believed to be in possession of the requested information;

(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties.

6. The competent authority of the requested Party shall forward the requested information as promptly as possible to the applicant Party. To ensure a prompt response, the competent authority of the requested Party shall:

a) Confirm receipt of a request in writing to the competent authority of the applicant Party and shall notify the competent authority of the applicant Party of deficiencies in the request, if any, within 60 days of the receipt of the request.

b) If the competent authority of the requested Party has been unable to obtain and provide the information within 90 days of receipt of the request, including if it encounters obstacles in furnishing the information or it refuses to furnish the information, it shall immediately inform the applicant Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal.

Article 6

Tax Examinations Abroad

MULTILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of another Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of a Contracting Party, the competent authority of another Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax examination in the

BILATERAL VERSION

1. A Contracting Party may allow representatives of the competent authority of the other Contracting Party to enter the territory of the first-mentioned Party to interview individuals and examine records with the written consent of the persons concerned. The competent authority of the second-mentioned Party shall notify the competent authority of the first-mentioned Party of the time and place of the meeting with the individuals concerned.

2. At the request of the competent authority of one Contracting Party, the competent authority of the other Contracting Party may allow representatives of the competent authority of the first-mentioned Party to be present at the appropriate part of a tax

second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

examination in the second-mentioned Party.

3. If the request referred to in paragraph 2 is acceded to, the competent authority of the Contracting Party conducting the examination shall, as soon as possible, notify the competent authority of the other Party about the time and place of the examination, the authority or official designated to carry out the examination and the procedures and conditions required by the first-mentioned Party for the conduct of the examination. All decisions with respect to the conduct of the tax examination shall be made by the Party conducting the examination.

Article 7

Possibility of Declining a Request

1. The requested Party shall not be required to obtain or provide information that the applicant Party would not be able to obtain under its own laws for purposes of the administration or enforcement of its own tax laws. The competent authority of the requested Party may decline to assist where the request is not made in conformity with this Agreement.

2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph.

3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:

(a) produced for the purposes of seeking or providing legal advice or

(b) produced for the purposes of use in existing or contemplated legal proceedings.

4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public).

5. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed.

6. The requested Party may decline a request for information if the information is requested by the applicant Party to administer or enforce a provision of the tax law of the applicant Party, or any requirement connected therewith, which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances.

Article 8

Confidentiality

Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the requested Party.

Article 9

Costs

Incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties.

Article 10

Implementation Legislation

The Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the Agreement.

Article 11

Language

This article may not be required.

Requests for assistance and answers thereto shall be drawn up in English, French or any other language agreed bilaterally between the competent authorities of the Contracting Parties under Article 13.

Article 12

Other international agreements or arrangements

This article may not be required

The possibilities of assistance provided by this Agreement do not limit, nor are they limited by, those contained in existing international agreements or other arrangements between the Contracting Parties which relate to co-operation in tax matters.

Article 13

Mutual Agreement Procedure

1. Where difficulties or doubts arise between two or more Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities of those Contracting Parties shall endeavour to resolve the matter by mutual agreement.

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavour to resolve the matter by mutual agreement.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of two or more Contracting Parties may mutually agree:

a) on the procedures to be used under Articles 5 and 6;

b) on the language to be used in making and responding to requests in accordance with Article 11.

2. In addition to the agreements referred to in paragraph 1, the competent authorities of the Contracting Parties may mutually agree on the procedures to be used under Articles 5 and 6.

3. The competent authorities of the Contracting Parties may communicate with each other directly for purposes of reaching agreement under this Article.

4. Any agreement between the competent authorities of two or more Contracting Parties shall be effective only between those Contracting Parties.

4. The paragraph would not be necessary.

5. The Contracting Parties may also agree on other forms of dispute resolution.

Article 14

Depositary's functions

1. The depositary shall notify all Contracting Parties of:

a. the deposit of any instrument of ratification, acceptance or approval of this Agreement;

b. any date of entry into force of this Agreement in accordance with the provisions of Article 15;

The article would be unnecessary

c. any notification of termination of this Agreement;

d. any other act or notification relating to this Agreement.

2. At the request of one or more of the competent authorities of the Contracting Parties, the depositary may convene a meeting of the competent authorities or their representatives, to discuss significant matters related to interpretation or implementation of the Agreement.

Article 15

Entry into Force

1. This Agreement is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be submitted to the depositary of this Agreement.

2. Each Contracting Party shall specify in its instrument of ratification, acceptance or approval vis-à-vis which other party it wishes to be bound by this Agreement. The Agreement shall enter into force only between Contracting Parties that specify each other in their respective instruments of ratification, acceptance or approval.

3. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

For each party depositing an instrument after such entry into force, the Agreement shall enter into force on the 30th day following the deposit of both instruments.

1. This Agreement is subject to ratification, acceptance or approval by the Contracting Parties, in accordance with their respective laws. Instruments of ratification, acceptance or approval shall be exchanged as soon as possible.

2. This Agreement shall enter into force on 1 January 2004 with respect to exchange of information for criminal tax matters. The Agreement shall enter into force on 1 January 2006 with respect to all other matters covered in Article 1.

4. Unless an earlier date is agreed by the Contracting Parties, the provisions of this Agreement shall have effect

- with respect to criminal tax matters for tax able periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;
- with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

In cases addressed in the third sentence of paragraph 3, the Agreement shall take effect for all taxable periods beginning on or after the sixtieth day following entry into force, or where there is no taxable period for all charges to tax arising on or after the sixtieth day following entry into force.

3. The provisions of this Agreement shall have effect:

- with respect to criminal tax matters for taxable periods beginning on or after 1 January 2004 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2004;
-with respect to all other matters described in Article 1 for all taxable periods beginning on or after January 1 2006 or, where there is no taxable period, for all charges to tax arising on or after 1 January 2006.

Article 16

Termination

1. Any Contracting Party may terminate this Agreement vis-à-vis any other Contracting Party by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party. A copy shall be provided to the depositary of the Agreement.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the depositary.

3. Any Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

Termination

1. Either Contracting Party may terminate the Agreement by serving a notice of termination either through diplomatic channels or by letter to the competent authority of the other Contracting Party.

2. Such termination shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of notice of termination by the other Contracting Party.

3. A Contracting Party that terminates the Agreement shall remain bound by the provisions of Article 8 with respect to any information obtained under the Agreement.

In witness whereof, the undersigned, being duly authorised thereto, have signed the Agreement.

III. COMMENTARY

Title and Preamble

1. The preamble sets out the general objective of the Agreement. The objective of the Agreement is to facilitate exchange of information between the parties to the Agreement. The multilateral and the bilateral versions of the preamble are identical except that the multilateral version refers to the signatories of the Agreement as "Parties" and the bilateral version refers to the signatories as the "Government of _____." The formulation "Government of _____" in the bilateral context is used for illustrative purposes only and countries are free to use other wording in accordance with their domestic requirements or practice.

Article 1 (Object and Scope of Agreement)

2. Article 1 defines the scope of the Agreement, which is the provision of assistance in tax matters through exchange of information that will assist the Contracting Parties to administer and enforce their tax laws.

3. The Agreement is limited to exchange of information that is foreseeably relevant to the administration and enforcement of the laws of the applicant Party concerning the taxes covered by the Agreement. 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 Contracting 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 taxpayer. Parties that choose to enter into bilateral agreements based on the Agreement may agree to an alternative formulation of this standard, provided that such alternative formulation is consistent with the scope of the Agreement.

4. The Agreement uses the standard of foreseeable relevance in order to ensure that information requests may not be declined in cases where a definite assessment of the pertinence of the information to an on-going investigation can only be made following the receipt of the information. The standard of foreseeable relevance is also used in the Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters.

5. The last sentence of Article 1 ensures that procedural rights existing in the requested Party will continue to apply to the extent they do not unduly prevent or delay effective exchange of information. Such rights may include, depending on the circumstances, a right of notification, a right to challenge the exchange of information following notification or rights to challenge information gathering measures taken by the requested Party. Such procedural rights and safeguards also include any rights secured to persons that may flow from relevant international agreements on human rights and the expression "unduly prevent or delay" indicates that such rights may take precedence over the Agreement.

6. Article 1 strikes a balance between rights granted to persons in the requested Party and the need for effective exchange of information. Article 1 provides that rights and safeguards are not overridden simply because they could, in certain circumstances, operate to prevent or delay effective exchange of information. However, Article 1 obliges the requested Party to ensure that any such rights and safeguards are not applied in a manner that unduly prevents or delays effective exchange of information. For instance,

a bona fide procedural safeguard in the requested Party may delay a response to an information request. However, such a delay should not be considered as "unduly preventing or delaying " effective exchange of information unless the delay is such that it calls into question the usefulness of the information exchange agreement for the applicant Party. Another example may concern notification requirements. A requested Party whose laws require prior notification is obliged to ensure that its notification requirements are not applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the party seeking the information. For instance, notification rules should permit exceptions from prior notification (*e.g*., in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation conducted by the applicant Party). To avoid future difficulties or misunderstandings in the implementation of an agreement, the Contracting Parties should consider discussing these issues in detail during negotiations and in the course of implementing the agreement in order to ensure that information requested under the agreement can be obtained as expeditiously as possible while ensuring adequate protection of taxpayers' rights.

Article 2 (Jurisdiction)

7. Article 2 addresses the jurisdictional scope of the Agreement. It clarifies that a requested Party is not obligated to provide information which is neither held by its authorities nor is in the possession or control of persons within its territorial jurisdiction. The requested Party's obligation to provide information is not, however, restricted by the residence or the nationality of the person to whom the information relates or by the residence or the nationality of the person in control or possession of the information requested. The term "possession or control" should be construed broadly and the term "authorities" should be interpreted to include all government agencies. Of course, a requested Party would nevertheless be under no obligation to provide information held by an "authority" if the circumstances described in Article 7 (Possibility of Declining a Request) were met.

Article 3 (Taxes Covered)

Paragraph 1

8. Article 3 is intended to identify the taxes with respect to which the Contracting Parties agree to exchange information in accordance with the provisions of the Agreement. Article 3 appears in two versions: a multilateral version and a bilateral version. The multilateral Agreement applies to taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes. "Taxes on income or profits" includes taxes on gains from the alienation of movable or immovable property. The multilateral Agreement, in sub-paragraph b), further permits the inclusion of taxes imposed by or on behalf of political sub-divisions or local authorities. Such taxes are covered by the Agreement only if they are listed in the instrument of ratification, approval or acceptance.

9. Bilateral agreements will cover, at a minimum, the same four categories of direct taxes (i.e., taxes on income or profits, taxes on capital, taxes on net wealth, and estate, inheritance or gift taxes) unless both parties agree to waive one or more of them. A Contracting Party may decide to omit any or all of the four categories of direct taxes from its list of taxes to be covered but it would nevertheless be obligated to respond to requests for information with respect to the taxes listed by the other Contracting Party (assuming the request otherwise satisfies the terms of the Agreement). The Contracting Parties may also agree to cover taxes other than the four categories of direct taxes. For example, Contracting Party A may list all four direct taxes and Contracting Party B may list only indirect taxes. Such an outcome is likely where the two Contracting Parties have substantially different tax regimes.

Paragraph 2

10. Paragraph 2 of the multilateral version provides that the Contracting Parties may agree to extend the Agreement to cover indirect taxes. This possible extension is consistent with Article 26 of the OECD Model Convention on Income and on Capital, which now covers "taxes of every kind and description." There is no equivalent to paragraph 2 in the bilateral version because the issue can be addressed under paragraph 1. Any agreement to extend the Agreement to cover indirect taxes should be notified to the depositary. Paragraph 2 of the bilateral version is discussed below together with paragraph 3 of the multilateral version.

Paragraph 3

11. Paragraph 3 of the multilateral version and paragraph 2 of the bilateral version address "identical taxes", "substantially similar taxes" and further contain a rule on the expansion or modification of the taxes covered by the Agreement. The Agreement applies automatically to all "identical taxes". The Agreement applies to "substantially similar taxes" if the competent authorities so agree. Finally, the taxes covered by the Agreement can be expanded or modified if the Contracting Parties so agree.

12. The only difference between paragraph 3 of the multilateral version and paragraph 2 of the bilateral version is that the former refers to the date of entry into force whereas the later refers to the date of signature. The multilateral version refers to entry into force because in the multilateral context there might be no official signing of the Agreement between the Contracting Parties.

13. In the multilateral context the first sentence of paragraph 3 is of a declaratory nature only. The multilateral version lists the taxes by general type. Any tax imposed after the date of signature or entry into force of the Agreement that is of such a type is already covered by operation of paragraph 1. The same holds true in the bilateral context, if the Contracting Parties choose to identify the taxes by general type. Certain Contracting Parties, however, may wish to identify the taxes to which the Agreement applies by specific name (*e.g.*, the Income Tax Act of 1999). In these cases, the first sentence makes sure that the Agreement also applies to taxes that are identical to the taxes specifically identified.

14. The meaning of "identical" should be construed very broadly. For instance, any replacement tax of an existing tax that does not change the nature of the tax should be considered an "identical" tax. Contracting Parties seeking to avoid any uncertainty regarding the interpretation of "identical" versus "substantially similar" may wish to delete the second sentence and to include substantially similar taxes within the first sentence.

Article 4 (Definitions)

Paragraph 1

15. Article 4 contains the definitions of terms for purposes of the Agreement. Article 4, paragraph 1, sub-paragraph a) defines the term "Contracting Party". Sub-paragraph b) defines the term "competent authority." The definition recognises that in some Contracting Parties the execution of the Agreement may not fall exclusively within the competence of the highest tax authorities and that some matters may be reserved or may be delegated to other authorities. The definition enables each Contracting Party to designate one or more authorities as being competent to execute the Agreement. While the definition provides the Contracting Parties with the possibility of designating more than one competent authority (for

instance, where Contracting Parties agree to cover both direct and indirect taxes), it is customary practice to have only one competent authority per Contracting Party.

16. Sub-paragraph c) defines the meaning of "person" for purposes of the Agreement. The definition of the term "person" given in sub-paragraph c) is intended to be very broad. The definition explicitly mentions an individual, a company and any other body of persons. However, the use of the word "includes" makes clear that the Agreement also covers any other organisational structures such as trusts, foundations, "Anstalten," partnerships as well as collective investment funds or schemes.

17. Foundations, "Anstalten" and similar arrangements are covered by this Agreement irrespective of whether or not they are treated as an "entity that is treated as a body corporate for tax purposes" under sub-paragraph d).

18. Trusts are also covered by this Agreement. Thus, competent authorities of the Contracting Parties must have the authority to obtain and provide information on trusts (such as the identity of settlors, beneficiaries or trustees) irrespective of the classification of trusts under their domestic laws.

19. The main example of a "body of persons" is the partnership. In addition to partnerships, the term "body of persons" also covers less commonly used organisational structures such as unincorporated associations.

20. In most cases, applying the definition should not raise significant issues of interpretation. However, when applying the definition to less commonly used organisational structures, interpretation may prove more difficult. In these cases, particular attention must be given to the context of the Agreement. *Cf. Article 4, paragraph 2*. The key operational article that uses the term "person" is Article 5, paragraph 4, sub-paragraph b), which provides that a Contracting Party must have the authority to obtain and provide ownership information for all "persons" within the constraints of Article 2. Too narrow an interpretation may jeopardise the object and purposes of the Agreement by potentially excluding certain entities or other organisational structures from this obligation simply as a result of certain corporate or other legal features. Therefore, the aim is to cover all possible organisational structures.

21. For instance an "estate" is recognised as a distinct entity under the laws of certain countries. An "estate" typically denotes property held under the provisions of a will by a fiduciary (and under the direction of a court) whose duty it is to preserve and protect such property for distribution to the beneficiaries. Similarly a legal system might recognise an organisational structure that is substantially similar to a trust or foundation but may refer to it by a different name. The standard of Article 4, paragraph 2 makes clear that where these arrangements exist under the applicable law they constitute "persons" under the definition of sub-paragraph c).

22. Sub-paragraph d) provides the definition of company and is identical to Article 3, paragraph 1 sub-paragraph b) of the OECD Model Convention on Income and on Capital.

23. Sub-paragraphs e) through h) define "publicly traded company" and " collective investment fund or scheme." Both terms are used in Article 5 paragraph 4, sub-paragraph b). Sub-paragraphs e) through g) contain the definition of publicly traded company and sub-paragraph h) addresses collective investment funds or schemes.

24. For reasons of simplicity the definitions do not require a minimum percentage of interests traded (*e.g.*, 5 percent of all outstanding shares of a publicly listed company) but somewhat more broadly require that equity interests must be "readily" available for sale, purchase or redemption. The fact that a collective investment fund or scheme may operate in the form of a publicly traded company should not raise any

issues because the definitions for both publicly traded company and collective investment fund or scheme are essentially identical.

25. Sub-paragraph e) provides that a "publicly traded company" is any company whose principal class of shares is listed on a recognised stock exchange and whose listed shares can be readily sold or purchased by the public. The term "principal class of shares" is defined in sub-paragraph f). The definition ensures that companies that only list a minority interest do not qualify as publicly traded companies. A publicly traded company can only be a company that lists shares representing both a majority of the voting rights and a majority of the value of the company.

26. The term "recognised stock exchange" is defined in sub-paragraph g) as any stock exchange agreed upon by the competent authorities. One criterion competent authorities might consider in this context is whether the listing rules, including the wider regulatory environment, of any given stock exchange contain sufficient safeguards against private limited companies posing as publicly listed companies. Competent authorities might further explore whether there are any regulatory or other requirements for the disclosure of substantial interests in any publicly listed company.

27. The term "by the public" is defined in the second sentence of sub-paragraph e). The definition seeks to ensure that share ownership is not restricted to a limited group of investors. Examples of cases in which the purchase or sale of shares is restricted to a limited group of investors would include the following situations: shares can only be sold to existing shareholders, shares are only offered to members of a family or to related group companies, shares can only be bought by members of an investment club, a partnership or other association.

28. Restrictions on the free transferability of shares that are imposed by operation of law or by a regulatory authority or are conditional or contingent upon market related events are not restrictions that limit the purchase or sale of shares to a "limited group of investors". By way of example, a restriction on the free transferability of shares of a corporate entity that is triggered by attempts by a group of investors or non-investors to obtain control of a company is not a restriction that limits the purchase or sale of shares to a "limited group of investors".

29. The insertion of "readily" reflects the fact that where shares do not change hands to any relevant degree the rationale for the special mention of publicly traded companies in Article 5, paragraph 4, sub-paragraph b) does not apply. Thus, for a publicly traded company to meet this standard, more than a negligible portion of its listed shares must actually be traded.

30. Sub-paragraph h) defines a collective investment fund or scheme as any pooled investment vehicle irrespective of legal form. The definition includes collective investment funds or schemes structured as companies, partnerships, trusts as well as purely contractual arrangements. Sub-paragraph h) then defines "public collective investment funds or schemes" as any collective investment fund or scheme where the interests in the vehicle can be readily purchased, sold, or redeemed by the public. The terms "readily" and "by the public" have the same meaning that they have in connection with the definition of publicly traded companies.

31. Sub-paragraphs i, j) and k) are self-explanatory.

32. Sub-paragraph l) defines "information gathering measures." Each Contracting Party determines the form of such powers and the manner in which they are implemented under its internal law. Information gathering measures typically include requiring the presentation of records for examination, gaining direct access to records, making copies of such records and interviewing persons having knowledge, possession, control or custody of pertinent information. Information gathering measures will typically focus on

obtaining the requested information and will in most cases not themselves address the provision of the information to the applicant Party.

33. Sub-paragraph m) defines "information". The definition is very broad and includes any fact, statement or record in any form whatever. "Record" includes (but is not limited to): an account, an agreement, a book, a chart, a table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a telegram and a voucher. The term "record' is not limited to information maintained in paper form but includes information maintained in electronic form.

34. Sub-paragraph n) of the multilateral version provides that the depositary of the Agreement is the Secretary General of the OECD.

35. Sub-paragraph o) defines criminal tax matters. Criminal tax matters are defined as all tax matters involving intentional conduct, which is liable to prosecution under the criminal laws of the applicant Party. Criminal law provisions based on non-intentional conduct (*e.g.*, provisions that involve strict or absolute liability) do not constitute criminal tax matters for purposes of the Agreement. A tax matter involves "intentional conduct" if the pertinent criminal law provision requires an element of intent. Sub-paragraph o) does not create an obligation on the part of the applicant Party to prove to the requested Party an element of intent in connection with the actual conduct under investigation.

36. Typical categories of conduct that constitute tax crimes include the wilful failure to file a tax return within the prescribed time period; wilful omission or concealment of sums subject to tax; making false or incomplete statements to the tax or other authorities of facts which obstruct the collection of tax; deliberate omissions of entries in books and records; deliberate inclusion of false or incorrect entries in books and records; interposition for the purposes of causing all or part of the wealth of another person to escape tax; or consenting or acquiescing to an offence. Tax crimes, like other crimes, are punished through fines, incarceration or both.

37. Sub-paragraph p) defines the term "criminal laws" used in sub-paragraph o). It makes clear that criminal laws include criminal law provisions contained in a tax code or any other statute enacted by the applicant Party. It further clarifies that criminal laws are only such laws that are designated as such under domestic law and do not include provisions that might be deemed of a criminal nature for other purposes such as for purposes of applying relevant human rights or other international conventions.

Paragraph 2

38. This paragraph establishes a general rule of interpretation for terms used in the Agreement but not defined therein. The paragraph is similar to that contained in the OECD Model Convention on Income and on Capital. It provides that any term used, but not defined, in the Agreement will be given the meaning it has under the law of the Contracting Party applying the Agreement unless the context requires otherwise. Contracting Parties may agree to allow the competent authorities to use the Mutual Agreement Procedure provided for in Article 13 to agree the meaning of such an undefined term. However, the ability to do so may depend on constitutional or other limitations. In cases in which the laws of the Contracting Party applying the Agreement provide several meanings, any meaning given to the term under the applicable tax laws will prevail over any meaning that is given to the term under any other laws. The last part of the sentence is, of course, operational only where the Contracting Party applying the Agreement imposes taxes and therefore has "applicable tax laws."

Article 5 (Exchange of Information Upon Request)

Paragraph 1

39. Paragraph 1 provides the general rule that the competent authority of the requested Party must provide information upon request for the purposes referred to in Article 1. The paragraph makes clear that the Agreement only covers exchange of information upon request (*i.e.*, when the information requested relates to a particular examination, inquiry or investigation) and does not cover automatic or spontaneous exchange of information. However, Contracting Parties may wish to consider expanding their co-operation in matters of information exchange for tax purposes by covering automatic and spontaneous exchanges and simultaneous tax examinations.

40. The reference in the first sentence to Article 1 of the Agreement confirms that information must be exchanged for both civil and criminal tax matters. The second sentence of paragraph 1 makes clear that information in connection with criminal tax matters must be exchanged irrespective of whether or not the conduct being investigated would also constitute a crime under the laws of the requested Party.

Paragraph 2

41. Paragraph 2 is intended to clarify that, in responding to a request, a Contracting Party will have to take action to obtain the information requested and cannot rely solely on the information in the possession of its competent authority. Reference is made to information "in its possession" rather than "available in the tax files" because some Contracting Parties do not have tax files because they do not impose direct taxes.

42. Upon receipt of an information request the competent authority of the requested Party must first review whether it has all the information necessary to respond to a request. If the information in its own possession proves inadequate, it must take "all relevant information gathering measures" to provide the applicant Party with the information requested. The term "information gathering measures" is defined in Article 4, paragraph 1, sub-paragraph l). An information gathering measure is "relevant" if it is capable of obtaining the information requested by the applicant Party. The requested Party determines which information gathering measures are relevant in a particular case.

43. Paragraph 2 further provides that information must be exchanged without regard to whether the requested Party needs the information for its own tax purposes. This rule is needed because a tax interest requirement might defeat effective exchange of information, for instance, in cases where the requested Party does not impose an income tax or the request relates to an entity not subject to taxation within the requested Party.

Paragraph 3

44. Paragraph 3 includes a provision intended to require the provision of information in a format specifically requested by a Contracting Party to satisfy its evidentiary or other legal requirements to the extent allowable under the laws of the requested Party. Such forms may include depositions of witnesses and authenticated copies of original records. Under paragraph 3, the requested Party may decline to provide the information in the specific form requested if such form is not allowable under its laws. A refusal to provide the information in the format requested does not affect the obligation to provide the information.

45. If requested by the applicant Party, authenticated copies of unedited original records should be provided to the applicant Party. However, a requested Party may need to edit information unrelated to the request if the provision of such information would be contrary to its laws. Furthermore, in some countries authentication of documents might require translation in a language other than the language of the original record. Where such issues may arise, Contracting Parties should consider discussing these issues in detail during discussions prior to the conclusion of this Agreement.

Paragraph 4

46. Paragraph 4, sub-paragraph a), by referring explicitly to persons that may enjoy certain privilege rights under domestic law, makes clear that such rights can not form the basis for declining a request unless otherwise provided in Article 7. For instance, the inclusion of a reference to bank information in paragraph 4, sub-paragraph a) rules out that bank secrecy could be considered a part of public policy (ordre public). Similarly, paragraph 4, sub-paragraph a) together with Article 7, paragraph 2 makes clear that information that does not otherwise constitute a trade, business, industrial, commercial or professional secret or trade process does not become such a secret simply because it is held by one of the persons mentioned.

47. Sub-paragraph a) should not be taken to suggest that a competent authority is obliged only to have the authority to obtain and provide information from the persons mentioned. Sub-paragraph a) does not limit the obligation imposed by Article 5, paragraph 1.

48. Sub-paragraph a) mentions information held by banks and other financial institutions. In accordance with the Report "*Improving Access to Bank Information for Tax Purposes*"(OECD 2000), access to information held by banks or other financial institutions may be by direct means or indirectly through a judicial or administrative process. As stated in the report, the procedure for indirect access should not be so burdensome and time-consuming as to act as an impediment to access to bank information. Typically, requested bank information includes account, financial, and transactional information as well as information on the identity or legal structure of account holders and parties to financial transactions.

49. Paragraph 4, sub-paragraph a) further mentions information held by persons acting in an agency or fiduciary capacity, including nominees and trustees. A person is generally said to act in a "fiduciary capacity" when the business which he transacts, or the money or property, which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating confidence and trust on the one part and good faith on the other part. The term "agency" is very broad and includes all forms of corporate service providers (*e.g.*, company formation agents, trust companies, registered agents, lawyers).

50. Sub-paragraph b) requires that the competent authorities of the Contracting Parties must have the authority to obtain and provide ownership information. The purpose of the sub-paragraph is not to develop a common "all purpose" definition of ownership among Contracting Parties, but to specify the types of information that a Contracting Party may legitimately expect to receive in response to a request for ownership information so that it may apply its own tax laws, including its domestic definition of beneficial ownership.

51. In connection with companies and partnerships, the legal and beneficial owner of the shares or partnership assets will usually be the same person. However, in some cases the legal ownership position may be subject to a nominee or similar arrangement. Where the legal owner acts on behalf of another person as a nominee or under a similar arrangement, such other person, rather than the legal owner, may be the beneficial owner. Thus the starting point for the ownership analysis is legal ownership of shares or partnership interests and all Contracting Parties must be able to obtain and provide information on legal

ownership. Partnership interests include all forms of partnership interests: general or limited or capital or profits. However, in certain cases, legal ownership may be no more than a starting point. For example, in any case where the legal owner acts on behalf of any other person as a nominee or under a similar arrangement, the Contracting Parties should have the authority to obtain and provide information about that other person who may be the beneficial owner in addition to information about the legal owner. An example of a nominee is a nominee shareholding arrangement where the legal title-holder that also appears as the shareholder of record acts as an agent for another person. Within the constraints of Article 2 of the Agreement, the requested Party must have the authority to provide information about the persons in an ownership chain.

52. In connection with trusts and foundations, sub-paragraph b) provides specifically the type of identity information the Contracting Parties should have the authority to obtain and provide. This is not limited to ownership information. The same rules should also be applied to persons that are substantially similar to trusts or foundations such as the "Anstalt." Therefore, a Contracting Party should have, for example, the authority to obtain and provide information on the identity of the settlor and the beneficiaries and persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

53. Certain trusts, foundations, "Anstalten" or similar arrangements, may not have any identified group of persons as beneficiaries but rather may support a general cause. Therefore, ownership information should be read to include only identifiable persons. The term "foundation council" should be interpreted very broadly to include any person or body of persons managing the foundation as well as persons who are in a position to direct how assets of the trust or foundation are to be dealt with.

54. Most organisational structures will be classified as a company, a partnership, a trust, a foundation or a person similar to a trust or foundation. However, there might be entities or structures for which ownership information might be legitimately requested but that do not fall into any of these categories. For instance, a structure might, as a matter of law, be of a purely contractual nature. In these cases, the Contracting Parties should have the authority to obtain and provide information about any person with a right to share in the income or gain of the structure or in the proceeds from any sale or liquidation.

55. Sub-paragraph b) also provides that a requested Party must have the authority to obtain and provide ownership information for all persons in an ownership chain provided, as is set out in Article 2, the information is held by the authorities of the requested State or is in the possession or control of persons who are within the territorial jurisdiction of the requested Party. This language ensures that the applicant Party need not submit separate information requests for each level of a chain of companies or other persons. For instance, assume company A is a wholly-owned subsidiary of company B and both companies are incorporated under the laws of Party C, a Contracting Party of the Agreement. If Party D, also a Contracting Party, requests ownership information on company A and specifies in the request that it also seeks ownership information on any person in A's chain of ownership, Party C in its response to the request must provide ownership information for both company A and B.

56. The second sentence of sub-paragraph b) provides that in the case of publicly traded companies and public collective investment funds or schemes, the competent authorities need only provide ownership information that the requested Party can obtain without disproportionate difficulties. Information can be obtained only with "disproportionate difficulties" if the identification of owners, while theoretically possible, would involve excessive costs or resources. Because such difficulties might easily arise in connection with publicly traded companies and public collective investment funds or schemes where a true public market for ownership interests exists, it was felt that such a clarification was particularly warranted. At the same time it is recognised that where a true public market for ownership interests exists there is less of a risk that such vehicles will be used for tax evasion or other non-compliance with the tax law. The

definitions of publicly traded companies and public collective investment funds or schemes are contained in Article 4, paragraph 1, sub-paragraphs e) through h).

Paragraph 5

57. Paragraph 5 lists the information that the applicant Party must provide to the requested Party in order to demonstrate the foreseeable relevance of the information requested to the administration or enforcement of the applicant Party's tax laws. While paragraph 5 contains important procedural requirements that are intended to ensure that fishing expeditions do not occur, subparagraphs a) through g) nevertheless need to be interpreted liberally in order not to frustrate effective exchange of information. The following paragraphs give some examples to illustrate the application of the requirements in certain situations.

58. Example 1 (sub-paragraph (a))

Where a Party is asking for account information but the identity of the accountholder(s) is unknown, sub-paragraph (a) may be satisfied by supplying the account number or similar identifying information.

59. Example 2 (sub-paragraph (d)) ("is held")

A taxpayer of Country A withdraws all funds from his bank account and is handed a large amount of cash. He visits one bank in both country B and C, and then returns to Country A without the cash. In connection with a subsequent investigation of the taxpayer, the competent authority of Country A sends a request to Country B and to Country C for information regarding bank accounts that may have been opened by the taxpayer at one or both of the banks he visited. Under such circumstances, the competent authority of Country A has grounds to believe that the information is held in Country B or is in the possession or control of a person subject to the jurisdiction of Country B. It also has grounds to believe the same with respect to Country C. Country B (or C) can not decline the request on the basis that Country A has failed to establish that the information "is" in Country B (or C), because it is equally likely that the information is in the other country.

60. Example 3 (sub-paragraph (d))

A similar situation may arise where a person under investigation by Country X may or may not have fled Country Y and his bank account there may or may not have been closed. As long as country X is able to connect the person to Country Y, Country Y may not refuse the request on the ground that Country X does not have grounds for believing that the requested information "is" held in Country Y. Country X may legitimately expect Country Y to make an inquiry into the matter, and if a bank account is found, to provide the requested information.

61. Sub-paragraph d) provides that the applicant Party shall inform the requested Party of the grounds for believing that the information is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party. The term "held in the requested Party" includes information held by any government agency or authority of the requested Party.

62. Sub-paragraph f) needs to be read in conjunction with Article 7, paragraph 1. In particular, see paragraph 77 of the Commentary on Article 7. The statement required under sub-paragraph f) covers three elements: first, that the request is in conformity with the law and administrative practices of the applicant Party; second that the information requested would be obtainable under the laws or in the normal course of administration of the applicant Party if the information were within the jurisdiction of the applicant Party;

and third that the information request is in conformity with the Agreement. The "normal course of administrative practice" may include special investigations or special examinations of the business accounts kept by the taxpayer or other persons, provided that the tax authorities of the applicant Party would make similar investigations or examinations if the information were within their jurisdiction.

63. Sub-paragraph g) is explained by the fact that, depending on the tax system of the requested Party, a request for information may place an extra burden on the administrative machinery of the requested Party. Therefore, a request should only be contemplated if an applicant Party has no convenient means to obtain the information available within its own jurisdiction. In as far as other means are still available in the applicant Party, the statement prescribed in sub-paragraph g) should explain that these would give rise to disproportionate difficulties. In this last case an element of proportionality plays a role. It should be easier for the requested Party to obtain the information sought after, than for the applicant Party. For example, obtaining information from one supplier in the requested Party may lead to the same information as seeking information from a large number of buyers in the applicant Party.

64. It is in the applicant Party's own interest to provide as much information as possible in order to facilitate the prompt response by the requested Party. Hence, incomplete information requests should be rare. The requested Party may ask for additional information but a request for additional information should not delay a response to an information request that complies with the rules of paragraph 5. For possibilities of declining a request, see Article 7 and the accompanying Commentary.

Paragraph 6

65. Paragraph 6 sets out procedures for handling requests to ensure prompt responses. The 90 day period set out in subparagraph b) may be extended if required, for instance, by the volume of information requested or the need to authenticate numerous documents. If the competent authority of the requested Party is unable to provide the information within the 90 day period it should immediately notify the competent authority of the applicant Party. The notification should specify the reasons for not having provided the information within the 90 day period (or extended period). Reasons for not having provided the information include, a situation where a judicial or administrative process required to obtain the information has not yet been completed. The notification may usefully contain an estimate of the time still needed to comply with the request. Finally, paragraph 6 encourages the requested Party to react as promptly as possible and, for instance, where appropriate and practical, even before the time limits established under sub-paragraphs a) and b) have expired.

Article 6 (Tax Examinations Abroad)

Paragraph 1

66. Paragraph 1 provides that a Contracting Party may allow representatives of the applicant Party to enter the territory of the requested Party to interview individuals and to examine records with the written consent of the persons concerned. The decision of whether to allow such examinations and if so on what terms, lies exclusively in the hands of the requested Party. For instance, the requested Party may determine that a representative of the requested Party is present at some or all such interviews or examinations. This provision enables officials of the applicant Party to participate directly in gathering information in the requested Party but only with the permission of the requested Party and the consent of the persons concerned. Officials of the applicant Party would have no authority to compel disclosure of any information in those circumstances. Given that many jurisdictions and smaller countries have limited

resources with which to respond to requests, this provision can be a useful alternative to the use of their own resources to gather information. While retaining full control of the process, the requested Party is freed from the cost and resource implications that it may otherwise face. Country experience suggests that tax examinations abroad can benefit both the applicant and the requested Party. Taxpayers could be interested in such a procedure because, it might spare them the burden of having to make copies of voluminous records to respond to a request.

Paragraph 2

67. Paragraph 2 authorises, but does not require, the requested Party to permit the presence of foreign tax officials to be present during a tax examination initiated by the requested Party in its jurisdiction, for example, for purposes of obtaining the requested information. The decision of whether to allow the foreign representatives to be present lies exclusively within the hands of the competent authority of the requested Party. It is understood that this type of assistance should not be requested unless the competent authority of the applicant Party is convinced that the presence of its representatives at the examination in the requested Party will contribute to a considerable extent to the solution of a domestic tax case. Furthermore, requests for such assistance should not be made in minor cases. This does not necessarily imply that large amounts of tax have to be involved in the particular case. Other justifications for such a request may 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.

68. The applicant Party should set out the motive for the request as thoroughly as possible. The request should include a clear description of the domestic tax case to which the request relates. 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 Party wishes the examination to be conducted in a specific manner or at a specified time, such wishes should be stated in the request.

69. The representatives of the competent authority of the applicant Party may be present only for the appropriate part of the tax examination. The authorities of the requested Party will ensure that this requirement is fulfilled by virtue of the exclusive authority they exercise in respect of the conduct of the examination.

Paragraph 3

70. Paragraph 3 sets out the procedures to be followed if a request under paragraph 2 has been granted. All decisions on how the examination is to be carried out will be taken by the authority or the official of the requested Party in charge of the examination.

Article 7 (Possibility of Declining a Request)

71. The purpose of this Article is to identify the situations in which a requested Party is <u>not</u> required to supply information in response to a request. If the conditions for any of the grounds for declining a request under Article 7 are met, the requested Party is given discretion to refuse to provide the information but it should carefully weigh the interests of the applicant Party with the pertinent reasons for declining the request. However, if the requested Party does provide the information the person concerned cannot allege an infraction of the rules on secrecy. In the event that the requested Party declines a request for information it shall inform the applicant Party of the grounds for its decision at the earliest opportunity.

Paragraph 1

72. The first sentence of paragraph 1 makes clear that a requested Party is not required to obtain and provide information that the applicant Party would not be able to obtain under similar circumstances under its own laws for purposes of the administration or enforcement of its own tax laws.

73. This rule is intended to prevent the applicant Party from circumventing its domestic law limitations by requesting information from the other Contracting Party thus making use of greater powers than it possesses under its own laws. For instance, most countries recognise under their domestic laws that information cannot be obtained from a person to the extent such person can claim the privilege against self-incrimination. A requested Party may, therefore, decline a request if the applicant Party would have been precluded by its own self-incrimination rules from obtaining the information under similar circumstances.

74. In practice, however, the privilege against self-incrimination should have little, if any, application in connection with most information requests. The privilege against self-incrimination is personal and cannot be claimed by an individual who himself is not at risk of criminal prosecution. The overwhelming majority of information requests seek to obtain information from third parties such as banks, intermediaries or the other party to a contract and not from the individual under investigation. Furthermore, the privilege against self-incrimination generally does not attach to persons other than natural persons.

75. The second sentence of paragraph 1 provides that a requested Party may decline a request for information in cases where the request is not made in conformity with the Agreement.

76. Both the first and the second sentence of paragraph 1 raise the question of how the statements provided by the applicant Party under Article 5, paragraph 5, sub-paragraph f) relate to the grounds for declining a request under Article 7, paragraph 1. The provision of the respective statements should generally be sufficient to establish that no reasons for declining a request under Article 7, paragraph 1 exist. However, a requested Party that has received statements to this effect may still decline the request if it has grounds for believing that the statements are clearly inaccurate.

77. Where a requested Party, in reliance on such statements, provides information to the applicant Party it remains within the framework of this Agreement. A requested Party is under no obligation to research or verify the statements provided by the applicant Party. The responsibility for the accuracy of the statement lies with the applicant Party.

Paragraph 2

78. The first sentence of paragraph 2 provides that a Contracting Party is not obliged to provide information which would disclose any trade, business, industrial, commercial or professional secret or trade process.

79. Most information requests will not raise issues of trade, business or other secrets. For instance, information requested in connection with a person engaged only in passive investment activities is unlikely to contain any trade, business, industrial or commercial or professional secret because such person is not conducting any trade, business, industrial or commercial or professional activity.

80. Financial information, including books and records, does not generally constitute a trade, business or other secret. However, in certain limited cases the disclosure of financial information might reveal a trade business or other secret. For instance, a requested Party may decline a request for information on certain purchase records where the disclosure of such information would reveal the proprietary formula of a product.

81. Paragraph 2 has its main application where the provision of information in response to a request would reveal protected intellectual property created by the holder of the information or a third person. For instance, a bank might hold a pending patent application for safe keeping or a trade process might be described in a loan application. In these cases the requested Party may decline any portion of a request for information that would reveal information protected by patent, copyright or other intellectual property laws.

82. The second sentence of paragraph 2 makes clear that the Agreement overrides any domestic laws or practices that may treat information as a trade, business, industrial, commercial or professional secret or trade process merely because it is held by a person identified in Article 5, paragraph 4, sub-paragraph a) or merely because it is ownership information. Thus, in connection with information held by banks, financial institutions etc., the Agreement overrides domestic laws or practices that treat the information as a trade or other secret when in the hands of such person but would not afford such protection when in the hands of another person, for instance, the taxpayer under investigation. In connection with ownership information, the Agreement makes clear that information requests cannot be declined merely because domestic laws or practices may treat such ownership information as a trade or other secret.

83. Before invoking this provision, a requested Party should carefully weigh the interests of the person protected by its laws with the interests of the applicant Party. In its deliberations the requested Party should also take into account the confidentiality rules of Article 8.

Paragraph 3

84. A Contracting Party may decline a request if the information requested is protected by the attorney-client privilege as defined in paragraph 3. However, where the equivalent privilege under the domestic law of the requested Party is narrower than the definition contained in paragraph 3 (*e.g.*, the law of the requested Party does not recognise a privilege in tax matters, or it does not recognise a privilege in criminal tax matters) a requested Party may not decline a request unless it can base its refusal to provide the information on Article 7, paragraph 1.

85. Under paragraph 3 the attorney-client privilege attaches to any information that constitutes (1) "confidential communication," between (2) "a client and an attorney, solicitor or other admitted legal representative," if such communication (3) "is produced for the purposes of seeking or providing legal advice" or (4) is "produced for the purposes of use in existing or contemplated legal proceedings."

86. Communication is "confidential" if the client can reasonably have expected the communication to be kept secret. For instance, communications made in the presence of third parties that are neither staff nor otherwise agents of the attorney are not confidential communications. Similarly, communications made to the attorney by the client with the instruction to share them with such third parties are not confidential communications.

87. The communications must be between a client and an attorney, solicitor or other admitted legal representative. Thus, the attorney-client privilege applies only if the attorney, solicitor or other legal representative is admitted to practice law. Communications with persons of legal training but not admitted to practice law are not protected under the attorney-client privilege rules.

88. Communications between a client and an attorney, solicitor or other admitted legal representative are only privileged if, and to the extent that, the attorney, solicitor or other legal representative acts in his or her capacity as an attorney, solicitor or other legal representative. For instance, to the extent that an attorney acts as a nominee shareholder, a trustee, a settlor, a company director or under a power of attorney

to represent the company in its business affairs, he can not claim the attorney-client privilege with respect to any information resulting from and relating to any such activity.

89. Sub-paragraph a) requires that the communications be "produced for the purposes of seeking or providing legal advice." The attorney-client privilege covers communications by both client and attorney provided the communications are produced for purposes of either seeking or providing legal advice. Because the communication must be produced for the purposes of seeking or providing legal advice, the privilege does not attach to documents or records delivered to an attorney in an attempt to protect such documents or records from disclosure. Also, information on the identity of a person, such as a director or beneficial owner of a company, is typically not covered by the privilege.

90. Sub-paragraph b) addresses the case where the attorney does not act in an advisory function but has been engaged to act as a representative in legal proceedings, both at the administrative and the judicial level. Sub-paragraph b) requires that the communications must be produced for the purposes of use in existing or contemplated legal proceedings. It covers communications both by the client and the attorney provided the communications have been produced for use in existing or contemplated legal proceedings.

Paragraph 4

91. Paragraph 4 stipulates that Contracting Parties do not have to supply information the disclosure of which would be contrary to public policy (ordre public). "Public policy" and its French equivalent "ordre public" refer to information which concerns the vital interests of the Party itself. This exception can only be invoked in extreme cases. For instance, a case of public policy would arise if a tax investigation in the applicant Party were motivated by political or racial persecution. Reasons of public policy might also be invoked where the information constitutes a state secret, for instance sensitive information held by secret services the disclosure of which would be contrary to the vital interests of the requested Party. Thus, issues of public policy should rarely arise in the context of requests for information that otherwise fall within the scope of this Agreement.

Paragraph 5

92. Paragraph 5 clarifies that an information request must not be refused on the basis that the tax claim to which it relates is disputed.

Paragraph 6

93. In the exceptional circumstances in which this issue may arise, paragraph 6 allows the requested Party to decline a request where the information requested by the applicant Party would be used to administer or enforce tax laws of the applicant Party, or any requirements connected therewith, which discriminate against nationals of the requested Party. Paragraph 6 is intended to ensure that the Agreement does not result in discrimination between nationals of the requested Party and identically placed nationals of the applicant Party. Nationals are not identically placed where an applicant state national is a resident of that state while a requested state national is not. Thus, paragraph 6 does not apply to cases where tax rules differ only on the basis of residence. The person's nationality as such should not lay the taxpayer open to any inequality of treatment. This applies both to procedural matters (differences between the safeguards or remedies available to the taxpayer, for example) and to substantive matters, such as the rate of tax applicable.

Article 8 (Confidentiality)

94. Ensuring that adequate protection is provided to information received from another Contracting Party is essential to any exchange of information instrument relating to tax matters. Exchange of information for tax matters must always be coupled with stringent safeguards to ensure that the information is used only for the purposes specified in Article 1 of the Agreement. Respect for the confidentiality of information is necessary to protect the legitimate interests of taxpayers. Mutual assistance between competent authorities is only feasible if each is assured that the other will treat with proper confidence the information, which it obtains in the course of their co-operation. The Contracting Parties must have such safeguards in place. Some Contracting Parties may prefer to use the term "secret", rather than the term "confidential" in this Article. The terms are considered synonymous and interchangeable for purposes of this Article and Contracting Parties are free to use either term.

95. The first sentence provides that any information received pursuant to this Agreement by a Contracting Party must be treated as confidential. Information may be received by both the applicant Party and the requested Party (*see*, Article 5 paragraph 5).

96. The information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by the Agreement. This means that the information may also be communicated to the taxpayer, his proxy or to a witness. The Agreement only permits but does not require disclosure of the information to the taxpayer. In fact, there may be cases in which information is given in confidence to the requested Party and the source of the information may have a legitimate interest in not disclosing it to the taxpayer. The competent authorities concerned should discuss such cases with a view to finding a mutually acceptable mechanism for addressing them. The competent authorities of the applicant Party need no authorisation, consent or other form of approval for the provision of the information received to any of the persons or authorities identified. The references to "public court proceedings" and to "judicial decisions"' in this paragraph extend to include proceedings and decisions which, while not formally being "judicial", are of a similar character. An example would be an administrative tribunal reaching decisions on tax matters that may be binding or may be appealed to a court or a further tribunal.

97. The third sentence precludes disclosure by the applicant Party of the information to a third Party unless express written consent is given by the Contracting Party that supplied the information. The request for consent to pass on the information to a third party is not to be considered as a normal request for information for the purposes of this Agreement.

Article 9 (Costs)

98. Article 9 allows the Contracting Parties to agree upon rules regarding the costs of obtaining and providing information in response to a request. In general, costs that would be incurred in the ordinary course of administering the domestic tax laws of the requested State would normally be expected to be borne by the requested State when such costs are incurred for purposes of responding to a request for information. Such costs would normally cover routine tasks such as obtaining and providing copies of documents.

99. Flexibility is likely to be required in determining the incidence of costs to take into account factors such as the likely flow of information requests between the Contracting Parties, whether both Parties have income tax administrations, the capacity of each Party to obtain and provide information, and the volume of information involved. A variety of methods may be used to allocate costs between the Contracting Parties. For example, a determination of which Party will bear the costs could be agreed to on a case by case base. Alternatively, the competent authorities may wish to establish a scale of fees for the

processing of requests that would take into account the amount of work involved in responding to a request. The Agreement allows for the Contracting Parties or the competent authorities, if so delegated, to agree upon the rules, because it is difficult to take into account the particular circumstances of each Party.

Article 10 (Implementing Legislation)

100. Article 10 establishes the requirement for Contracting Parties to enact any legislation necessary to comply with the terms of the Agreement. Article 10 obliges the Contracting Parties to enact any necessary legislation with effect as of the date specified in Article 15. Implicitly, Article 10 also obliges Contracting Parties to refrain from introducing any new legislation contrary to their obligations under this Agreement.

Article 11 (Language)

101. Article 11 provides the competent authorities of the Contracting Parties with the flexibility to agree on the language(s) that will be used in making and responding to requests, with English and French as options where no other language is chosen. This article may not be necessary in the bilateral context.

Article 12 (Other International Agreements or Arrangements)

102. Article 12 is intended to ensure that the applicant Party is able to use the international instrument it deems most appropriate for obtaining the necessary information. This article may not be required in the bilateral context.

Article 13 (Mutual Agreement Procedure)

Paragraph 1

103. This Article institutes a mutual agreement procedure for resolving difficulties arising out of the implementation or interpretation of the Agreement. Under this provision, the competent authorities, within their powers under domestic law, can complete or clarify the meaning of a term in order to obviate any difficulty.

104. 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.

Paragraph 2

105. Paragraph 2 identifies other specific types of agreements that may be reached between competent authorities, in addition to those referred to in paragraph 1.

Paragraph 3

106. Paragraph 3 determines how the competent authorities may consult for the purposes of reaching a mutual agreement. It provides that the competent authorities may communicate with each other directly. Thus, it would not be necessary to go through diplomatic channels. The competent authorities may communicate with each other by letter, facsimile transmission, telephone, direct meetings, or any other convenient means for purposes of reaching a mutual agreement.

Paragraph 4

107. Paragraph 4 of the multilateral version clarifies that agreements reached between the competent authorities of two or more Contracting Parties would not in any way bind the competent authorities of Contracting Parties that were not parties to the particular agreement. The result is self-evident in the bilateral context and no corresponding provision has been included.

Paragraph 5

108. Paragraph 5 provides that the Contracting Parties may agree to other forms of dispute resolution. For instance, Contracting Parties may stipulate that under certain circumstances, e.g., the failure of resolving a matter through a mutual agreement procedure, a matter may be referred to arbitration.

Article 14 (Depositary's Functions)

109. Article 14 of the multilateral version discusses the functions of the depositary. There is no corresponding provision in the bilateral context.

Article 15 (Entry into Force)

Paragraph 1

110. Paragraph 1 of the bilateral version contains standard language used in bilateral treaties. The provision is similar to Article 29, paragraph 1 of the OECD Model Convention on Income and on Capital.

Paragraph 2

111. Paragraph 2 of the multilateral version provides that the Agreement will enter into force only between those Contracting Parties that have mutually stated their intention to be bound vis-à-vis the other Contracting Party. There is no corresponding provision in the bilateral context.

Paragraph 3

112. Paragraph 3 differentiates between exchange of information in criminal tax matters and exchange of information in all other tax matters. With regard to criminal tax matters the Agreement will enter into force on January 1, 2004. Of course, where Contracting Parties already have in place a mechanism (*e.g.*, a mutual legal assistance treaty) that allows information exchange on criminal tax matters consistent with the standard described in this Agreement, the January 1, 2004 date would not be relevant. See Article 12 of the

Agreement and paragraph 5 of the introduction. With regard to all other matters the Agreement will enter into force on January 1, 2006. The multilateral version also provides a special rule for parties that subsequently want to make use of the Agreement. In such a case the Agreement will come into force on the 30th day after deposit of both instruments. Consistent with paragraph 2, the Agreement enters into force only between two Contracting Parties that mutually indicate their desire to be bound vis-à-vis another Contracting Party. Thus, both parties must deposit an instrument unless one of the parties has already indicated its desire to be bound vis-à-vis the other party in an earlier instrument. The 30-day period commences when both instruments have been deposited.

Paragraph 4

113. Paragraph 4 contains the rules on the effective dates of the Agreement. The rules are identical for both the multilateral and the bilateral version. Contracting Parties are free to agree on an earlier effective date.

114. The rules of paragraph 4 do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date. A requested Party, however, is not in violation of this Agreement if it is unable to obtain information predating the effective date of the Agreement on the grounds that the information was not required to be maintained at the time and is not available at the time of the request.

Article 16 (Termination)

115. Paragraphs 1 and 2 address issues concerning termination. The fact that the multilateral version speaks of “termination” rather than denunciation reflects the nature of the multilateral version as more of a bundle of identical bilateral treaties rather than a ”true” multilateral agreement.

116. Paragraph 3 ensures that the obligations created under Article 8 survive the termination of the Agreement.

SCHEDULE "D"

Below is a complete listing of Canada's active double taxation treaties and the date the Treaty came into force:

- Algeria (1999)
- Argentina (1993)
- Armenia (2004)
- Australia (1980)
- Austria (1976)
- Azerbaijan (2004)
- Bangladesh (1982)
- Barbados (1980)
- Belgium (2002)
- Brazil (1984)
- Bulgaria (1999)
- Cameroon (1982)
- Chile (1998)
- China (1986)
- Croatia (1997)
- Cyprus (1984)
- Czech Republic (2001)
- Denmark (1997)
- Dominican Republic (1976)
- Ecuador (2001)
- Egypt (1983)
- Estonia (1995)
- Finland (2006)
- France (1975)
- Gabon (2002) (pending)

- Germany (1981)
- Guyana (1985)
- Hungary (1992)
- Iceland (1997)
- India (1996) (Department of Justice)
- Indonesia (1979)
- Ireland (2003)
- Israel (1975)
- Italy (2002) (pending)
- Ivory Coast (1983)
- Jamaica (1978)
- Japan (1986)
- Jordan (1999)
- Kazakhstan (1996)
- Kenya (1983)
- Kuwait (2002)
- Kyrgyzstan (1998)
- Latvia (1995)
- Lebanon (1998) (pending)
- Lithuania (1996)
- Luxembourg (1999)
- Malaysia (1976)
- Malta (1986)
- Mexico (2006)
- Moldova (2002)
- Mongolia (2002)
- Morocco (1975)
- Netherlands (1986)
- New Zealand (1980)
- Nigeria (1992)
- Norway (2002)

- Oman (2004)
- Pakistan (1976)
- Papua New Guinea (1987)
- Peru (2001)
- Philippines (1976)
- Poland (1987)
- Portugal (1999)
- Republic of Korea (2006)
- Romania (2004)
- Russia (1995) (Department of Justice)
- Senegal (2001)
- Singapore (1976)
- Slovak Republic (2001)
- Slovenia (2000)
- South Africa (1995) (Department of Justice)
- Spain (1976)
- Sri Lanka (1982)
- Sweden (1996)
- Switzerland (1997)
- Tanzania (1995) (Department of Justice)
- Thailand (1984)
- Trinidad and Tobago (1995)
- Tunisia (1982)
- Ukraine (1996) (Department of Justice)
- United Arab Emirates (2002)
- United Kingdom (1978)
- United States (1980)
- Uzbekistan (1999)
- Venezuela (2001)
- Vietnam (1997)
- Zambia (1984)

- Zimbabwe (1992)

SCHEDULE "E"

OECD Country	*Tax Treaties With Tax Havens and Some Other Small Countries*
Australia	Kiribati, Papua New Guinea, Singapore, Taiwan
Austria	Armenia, Azerbaijan, Belarus, Belize, Kyrgyzstan, Malaysia, Moldova, Singapore, Uzbekistan
Belgium	Armenia, Belarus, Georgia, Hong Kong, Malaysia, United Arab Emirates, Uzbekistan
Canada	Barbados, Dominican Republic, Guyana, Jamaica, Kuwait, Kyrgyzstan, Malaysia, Moldova, Papua New Guinea, United Arab Emirates, Uzbekistan
Czech Republic	Belarus, Kuwait, Moldova, Singapore
Denmark	Malaysia, Singapore
Finland	Barbados, Kyrgyzstan, Malaysia, Singapore, United Arab Emirates, Uzbekistan
France	Armenia, Bahrain, Kuwait, Malaysia, Qatar, Singapore, United Arab Emirates, Uzbekistan
Germany	Azerbaijan, Singapore, Tajikistan, United Arab Emirates, Uruguay, Uzbekistan
Greece	Armenia, Georgia, Kuwait, Uzbekistan
Hungary	Belarus, Kuwait, Malaysia, Moldova, Singapore, Uruguay
Iceland	Greenland, Vietnam

Ireland	Malaysia
Italy	Georgia, Kuwait, Malaysia, Mauritius, Oman, Singapore, Uzbekistan
Japan	Singapore
Korea	Belarus, Fiji, North Korea, Kuwait, Myanmar, Singapore, United Arab Emirates, Uzbekistan
Luxembourg	Malaysia, Mauritius, Singapore, Uzbekistan
Mexico	Chile, Ecuador, Singapore
Netherlands	Aruba, Belarus, Kuwait, Moldova, Netherlands Antilles, Singapore, Taiwan, Uzbekistan
New Zealand	Chile, Fiji, Malaysia, Singapore, Taiwan, United Arab Emirates
Norway	Azerbaijan, Barbados, Netherlands Antilles, Singapore
Poland	Armenia, Belarus, Kuwait, Kyrgyzstan, Malaysia, Moldova, Singapore, Tajikistan, United Arab Emirates, Uzbekistan
Portugal	Cape Verde, Cuba, Macau, Singapore
Slovak Republic	Belarus, Turkmenistan, Uzbekistan
Spain	Cuba
Sweden	Barbados, Belarus, Mauritius, Singapore, Taiwan
Switzerland	Barbados, Belarus, Kuwait, Kyrgyzstan, Moldova, Singapore, Uzbekistan

Turkey	Azerbaijan, Belarus, Kuwait, Kyrgyzstan, Malaysia, Moldova, Northern Cyprus, Singapore, Tajikistan, Turkmenistan, United Arab Emirates, Uzbekistan
United Kingdom	Antigua & Barbuda, Azerbaijan, Barbados, Belize, Brunei, Grenada, Guernsey, Isle of Man, Jersey, Kiribati, Kuwait, Mauritius, Montserrat, Oman, St. Kitts & Nevis, Singapore, Taiwan, Tuvalu, Uzbekistan
United States	Barbados, Bermuda, Jamaica, Morocco, the Philippines, Sri Lanka, Trinidad & Tobago, Tunisia, + 9 former USSR states