



THE INTERNATIONAL COOPERATION ON
EXCHANGE OF INFORMATION TO
PREVENT TAX EVASION

BY
MS. KRITTIYA VARAPIANG

AN INDEPENDENT STUDY PAPER SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF LAWS
(TAXATION LAW)

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ABSTRACT

According to the study of tax avoidance and tax evasion and the investigation of measures to prevent tax evasion and tax evasion, the UN and the OECD model measures found that the aims of these measures are the same; It is to prevent and combat tax evasion and tax evasion. And from the research it can apply for tax avoidance and tax evasion at home and abroad as follows:

Establishing international cooperation to avoid tax evasion to exchange information in order to prevent and combat tax evasion and tax evasion. The modification and adjustment of applicable laws to reduce the complication and to be flexible to adopt when avoidance or evasion takes place.

For any transaction, especially in the international transaction, the rules and regulations for exchanging information between the state or between the organization should be more stringent and enforceable.

The legislation of the laws, rules and regulations applicable to the international tax avoidance and tax evasion case.

Adam Smith's good tax policy that prescribed 4 canons of good tax policy, namely Equality, Certainty, Convenience, Economy, should be followed in order to issue the good tax rules and regulations to be applied with international tax evasion.

Furthermore, with regard to the study and research, it was founded that tax avoidance and tax evasion continue to increase with regard to the increase of the investment because the purpose of the investment is the advantages and in order to gain more benefit the investor tries to reduce their costs and one of those advantages is to reduce the tax burden. And tax planning is the way to reduce the tax burden, but sometimes they try to avoid taxes and avoid tax evasion. To solve the problems, the International Cooperation to Prevent Tax Evasion should be established, and when the

case of international tax evasion occurs, the international rules and regulations should be issued to apply with the international tax.

Therefore, in order to avoid international tax evasion, the International Cooperation to Prevent Tax Evasion should be established, especially on information exchange. To exchange information regarding the international transaction between the contracting states. Because at the present the international transaction still increasing regarding the open market and some country did not have their resource so such country try to attract the investor to invest in their country by provided the incentive for the foreign investor and one of such incentive to provided low tax or no tax for the foreign investor in order to attract them to run the business inside the country. It is the way the investor uses for their tax planning in order to avoid paying tax that is the result of international tax evasion, according to the reason mentioned herein.

Recommendation for this study is as follows: 1) legislating the applicable law by each country's government establishes the standard for the transfer of personal information, in particular on financial account information, by making the rules specified in an agreement; The procedures and regulations governing the exchange of information and 2) specify the applicable law which may apply to the general country and also specify a penalty in the event that the Member State and/or country does not comply with or violate any rules, procedures and regulations requiring the exchange of information, especially in tax matters.

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Chapter 1

Introduction

1.1 Background General Statement of the Problem

Taxation is a financial government instrument to impose tax through government institutions. Taxation purposes is to bring in revenue for the public interest. The government collects several taxes based on the tax, namely income tax, property tax, and consumption tax. Taxation purpose to balance with government expenditures. It is also the essential tool for distributing income, supporting economic growth, economic stabilization, controlling public consumption and adhering to government policies.

Mostly provided for in the Constitution, the good tax policy provides that the taxpayer should pay tax according to law. And to regulate good tax law, some important principles should be considered in order to catalyze the tax payer who is willing to pay tax and can effectively enforce such law. And the good taxation should follow Adam Smith's good tax policy, which is Equity, Certainty, Convenience and Economy.

The appropriate system of taxation could promote economic development. But if the system isn't good it will lead to problem of tax evasion. It is the obstacle to the country's development as most revenue came from the taxation. And if the law has the loophole, evading tax will be easy for the taxpayer and the government will also lose the income.

Tax evasion led to the government's loss of revenue. As already mentioned, most government revenue came from taxation, when the government cannot be fully taxed, it cannot be used in the country's administration. For tax avoidance or as we call tax planning, it is the tool to pay tax in accordance with the law at a minimum rate and in law. But tax evasion, on the other hand, is that taxpayers use illegal or fraudulent means to evade taxes which are illegal and punishable by law.

There are many ways of evading taxes. They often incorporate the company at low tax rates or no tax jurisdiction called "Tax Haven" for the company. The country or jurisdiction that was the incorporation popularity to evade taxes such as the British Virgin Island, the Cayman Islands, the Bahamas and Mauritius, etc. These companies will send the revenue derived from their business to tax haven to avoid paying income tax in their country of residence.

Moreover, the company prefers establishing at tax haven is also to be used as a source of money laundering. Most of these firms operate illegal businesses, namely drug trafficking, arms trafficking, and casino. They are going to send the illegal money to tax haven to launder that money and then bring it back in clean. It's hard to find the evidence for that money to prove the source of the money. This is why the offense preferred depositing their money in tax haven.

As we see the reason the company registered at the tax haven as mentioned above, it is because of the taxation reason that their tax burden should be eliminated. Even they claim that tax planning is the reason the company was established at tax haven. But we all knew this is tax evasion.

When this happens, it does not impose tax on the country effectively in accordance with Adam Smith's Good Tax Policy, which includes Equity, Certainty, Convenience and Economy. If the country is inefficient in imposing tax, it will be the country's income loss and it affects infrastructure development, it is because most of the income comes from taxation.

1.2 Hypothesis of the Study

Currently, many countries faced with tax evasion problems, both domestically and internationally, as taxpayers seek to reduce and eliminate their tax burden by shifting their income from high-tax countries to low-tax or no-tax countries and jurisdiction known as "Tax Havens" or Some of them try to avoid shifting their income from their tax authorities to another jurisdiction which has a policy of non-disclosure or confidentiality. International organizations such as the Organization for Economic Co-operation and Development (OECD), the United Nations (UN), including the United States, are attempting to eliminate or prevent countries from tax evasion by defining and drawing up a model for exchanging information, particularly on tax issues between the Contracting States. Under the Model Agreement on Information Exchange in Tax Matters, Contracting States may obtain the report from other Contracting States, such as profits, taxes paid, and assets of each entity, etc. Through a Model Agreement on Information Exchange in Tax Matters, however, it is not yet possible for the country that adopted such a model to receive information from its taxpayer that has invested in some country. The main factor that cannot access the data is caused by that country's internal laws, and the model's compulsory.

1.3 Objective of the Study

The purposes of this Independent Study are as follows;

1.3.1 Studying the general principles of tax avoidance and tax evasion regarding mechanisms, impacts of tax evasion at home and abroad and including international cooperation to prevent tax evasion.

1.3.2 To study domestic legislation and information exchange measures to prevent tax evasion.

1.3.3 Studying international rules and regulations to avoid tax evasion related to the Double Taxation Agreement and the Tax Information Exchange Agreement.

1.3.4 To analyze tax evasion problems relating to international cooperation in order to prevent tax evasion.

1.3.5 To recommend the exchange of information for international cooperation in order to prevent tax evasion.

1.4 Study Methodology

This study's methodology is that of documentary research. The primary source mainly includes the domestic-level information. And the secondary source is the pertinent as international rules and regulations. Tax evasion is the study which leads to tax fraud. It shows the illustration of how tax can be avoided and evaded, and how tax fraud related to it. This paper on the issues will arise from tax evasion at both domestic and international level. Most important of this research is to study how international cooperation can be established to prevent tax evasion. It also discovers the tax evasion resolutions which will affect the country's tax-imposing tax, according to the method of good tax policy.

1.5 Scope of the Study

The scope of this research focuses on tax evasion and how international cooperation to prevent tax evasion should be established. And to study the impact on the host country's tax-imposing system according to Adam Smith's principle of good taxation policy. It will also study distinguish between tax avoidance or tax planning as well as tax evasion. This Independent Research will also focus on how tax evasion can lead to tax

fraud and tax crimes, it's summarized. Hence, it seeks out the problems that will arise from tax evasion that will affect the country's taxation. Lastly, the most important thing in this research is to find out the resolutions and measures to solve the problems resulting from tax evasion and to protect and suppress the impact that international cooperation will have on preventing tax evasion.

1.6 Expectation of the Study

1.6.1 Identify the general principle of tax avoidance and tax evasion relating to mechanisms, impacts of tax evasion at home and abroad and including international cooperation to prevent tax avoidance.

1.6.2 To understand domestic laws and information-sharing measures to prevent tax evasion.

1.6.3 Identify international rules and regulations to prevent tax evasion on the Double Taxation Agreement and the Exchange Agreement on Tax Information.

1.6.4 To analyze tax evasion problems relating to international cooperation in order to prevent tax evasion.

1.6.5 Finding a solution to tax evasion through international cooperation in an exchange of information particularly on tax matters.

Chapter 2

General Principle of Tax Evasion

2.1 Tax Evasion

Tax evasion is using illicit means to avoid paying taxes. Tax evasion usually involves hiding or misrepresenting revenues. This could be under-reporting income, inflating deductions without proof, hiding cash transactions or hiding money in offshore accounts or not reporting them.

Tax evasion is part of an overall definition of tax fraud, which is the illegitimate intentional failure to pay tax. Fraud can be defined as "a deceiving or misrepresenting act," and that's what somebody evading taxes does — deceiving the IRS about income or expenses.

2.1.1 Principles of Taxation

Taxation is the tax that the government imposed from the citizens. The government brought this tax to use for public interest of the society. The nature of taxation is to enforce to impose tax. Generally, every person had a duty to pay tax providing by the law. All citizens had the responsibility to pay tax. The purposes of impose taxes is to use as a public interest.

Most country around the world-imposed tax under the principle of Good Tax of Adam Smith as we know as “4 Cannons”, it is including:

1. Equity ¹
2. Certainty ²
3. Convenience ³

¹ The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. (EQUITY)

² The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. (CERTAINTY)

4. Efficiency⁴

The main point of 4 cannons of Adam Smith provided in “The Wealth of Nations” can explain as following;

Equity, the people should donate or give some money to their government of the state depend on their income, it is the main concept of this principle so, the good tax imposed should be consider of the ability of the taxpayer. For the tax exemption or to increasing tax rate should beware of the minimum tax rate which is the taxpayer bear in generally. Most of the ability or economic wells being can evaluate from the income, wealth or the expenditure. Furthermore, to consider about equity should go together with equality as well.

The economist separated the principle of equity into two categories according to tax imposition. First, the principle of absolute equity, it is to consider the ability to pay tax of the tax payer from cash. That means the tax payer subject to be tax in the same rate. Second, modified equity principle, it is separate the principle of equity into two types namely the benefit principle and the ability to pay principle.

Certainty, taxation impose by the government should be clear and certain both in tax rate, tax assessment, and tax imposition. This certainty it depends on reasonable, it did not depend on the willingness of the tax payer. It means the government should provide or to legislate the measure about taxation such as tax rate, calculation and tax imposition in clearly. Moreover, it should be specifying clearly about the date, time and place of payment as well. The certainty should be related to the convenience in the view of Adam Smith.

Convenience, every kind of taxation should be imposed on time, so, tax imposition should be convenience to the tax payer to pay their tax as much as it can. And it is including the place of payment should be convenience for tax payer to pay tax as well. For this principle, the government should be considering to the convenience of the taxpayer first. If it is convenience to pay tax it will lead the taxpayer to pay tax as well.

Economy, every categories of taxation imposed by the government for the government revenue had the same amount of the taxpayer. So, the government should

³ Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it. (CONVENIENCE)

⁴ Every tax ought to be contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state. (EFFICIENCY)

reduce the expenditure occur from the payment of taxpayer in order to reduce the tax liability of the taxpayer as well. To get more benefit of the taxation system, even the government not enough the tax authority but it should be work more efficiency in order to reduce the expenditure of the government and get more benefit for the government revenue and it is to reduce the liability of the taxpayer as well. It is the main point of economy principle.

2.1.2 The Purposes of Taxation

Taxation is imposed on individuals and company by the government or its agency on a product, income, or service. Despite many people complaining of making tax contributions to government, these contributions are very important for the economy of a country. This is because these financial contributions are used by government for the implementation of various socio-economic development projects such as the construction of roads and bridges, schools, health facilities and provision of social services like national security, provision of salaries for civil servants including the police, the army, judges, doctors, nurses and teachers.

Taxes are divided into two main groups of direct taxes and indirect taxes. On one hand, the direct taxes can be said to be those paid directly to the government by the individuals or a company on whom it is being imposed. On the other hand, Indirect tax, also referred to as goods and services tax, is a tax collected by an intermediary, such as a retail store from a person who bears the ultimate economic burden of the tax (such as the customer). Indirect taxes are computed in the cost of goods or services an individual or organization purchases. There are a various number of income sources that are taxable from income an individual or organization earns, which is generally net income from employment, business and rentals. There are many sources of income but the most common are salary and wages, which is the kind of income that the majority of people have to deal with when filing their taxes and is what individuals earn from a job. Another source is self-employment income, which is any money that an individual makes outside a regular job from services rendered.⁵

The major objective of taxation is to raise revenues. But other objectives are also important in the design of a tax system. The principle of taxation can be chosen only

⁵ UK Essays, [Explaining The Primary Purpose of Taxation Economics Essay](https://www.ukessays.com/essays/economics/explaining-the-primary-purpose-of-taxation-economics-essay.php), at [https:// www. ukessays.com/essays/economics/explaining-the-primary-purpose-of-taxation-economics-essay.php](https://www.ukessays.com/essays/economics/explaining-the-primary-purpose-of-taxation-economics-essay.php), (last visited 26 July 2019).

in terms of the goals which are accepted as the appropriate objectives of the economic system. However, the purpose of tax can be used as follows:

- Using for government activities
- To achieve fairness in distribution an income
- To manage the resource in efficiently
- To support for economic growth
- To maintain the stability of economic

But most of taxation that impose by the government it had nothing to give back directly to the tax payer. It is the result, when the tax payer earned more income they need to pay more tax because most country using progressive rate most in the personal income tax. So, it is made the tax payer unwanted to bring such income to calculate for tax. Then, the tax payer try to reduce their tax burden so, they try to find the way to reduce such tax burden. There are three famous mechanisms to reduce the tax burden both in legal and illegal side namely tax planning, tax avoidance and tax evasion.

2.2 Principle of Tax Evasion and Tax Avoidance

Tax evasion and tax avoidance are two very distinct things with different definitions and consequences.

2.2.1 Principle of Tax Evasion

Tax evasion is the illegal. It is the way that the tax payer use the illegal means or fraudulent to reduce or to eliminate their tax burden.

For example, the tax payer who had duty to filling tax and had duty to pay tax but they did not file the tax and did not pay any tax. And the tax payer represent their income lower than the real income for reduce their tax burden or they report the expense higher than the real expense it is to reduce their profit and to pay less tax or for some case they report the expense to show their net loss in order to not to taxable. Moreover, their make fraudulent tax invoice to filling VAT (Value Added Tax) return and in addition to deduct as an expense to calculate net profit to pay corporate income tax (CIT). Furthermore, it is including the importation of goods without pay tax, it is the tax evasion as well.

Tax evasion is considered as an illegal. It is a tax crime which is a criminal offence. There are criminal and civil penalties. In addition, tax evasion is an illegal so, it means it is an illegal act providing by the law and it also has a punishment by the law.

Consequently, the tax evasion in one country may not be the tax evasion in another country it depends on the law of each country.

2.2.2 Principle of Tax Avoidance

Tax avoidance is legal means. It is the legal mechanism aimed to giving an effect to the tax burden of tax payers in order to pay tax in lower rate. Generally, tax avoidance operated under the loopholes. It is the distortion to taxable. So, tax avoidance is taxpayer using a method that is not illegal to reduce tax burden or without pay any tax. This includes, tax payer use the ambiguity or defection of the law to reduce their tax burden or to eliminate their tax burden as well. It is also the tax avoidance. The method of tax avoidance, focus on cheapness first and it focus on rightness later. It is differing from the “tax planning”⁶. That means the different between tax avoidance and tax planning namely tax avoidance is the cheapness and the rightness and tax planning it focus on tax management.

Furthermore, the taxpayer improved its economic behavior in order to pay less tax, it may be considered as tax avoidance. For example, the government impose high tax rate in one kind of gasoline so, the car user changes the car engine to the lower one.

There are two categories of tax avoidance.

- 1.* Acceptable Tax Avoidance or Non-Abusive Tax Avoidance ⁷
2. Unacceptable Tax Avoidance or Abusive Tax Avoidance ⁸

In addition, the mechanism to separate which one is acceptable or unacceptable depend on the provision of the law.

⁶ Tax planning is to determine in advance or arrangements for the tax correctly and economically. Tax planning is not taxable or to reduce the tax by use the legal means. In addition, the tax planning is meant to handle personal business or to pay lower tax.

⁷ Acceptable Tax Avoidance or Non-Abusive Tax Avoidance is the tax management, it is deemed to be tax planning and it also tax legal means as well.

⁸ Unacceptable Tax Avoidance or Abusive Tax Avoidance it is not a tax planning but it is the tax evasion or not, it depends on the law which is provide to any action is illegal and had the punishment under the law or not.

2.2.3 The Comparison between Tax Evasion and Tax Avoidance Tax Evasion

- It is an illegal practice
- It is an act of infringement and violation of the law
- It is an act that offense and punishable by law
- It is the tax fraud
- It had civil and criminal penalties
- It is not the tax planning
- It is not reporting income or reporting expense not legally or without paying taxes

2.2.4 Tax Avoidance

- It is legal practices
- It is not an infringement and not the violation of the law
- It uses the loopholes or the law gaps
- It is the tax management
- It is no penalty
- It is the tax planning
- It avoids taxes by taking all legitimate deductions and other means, all are legal and following the law

There are many different between tax evasion and tax avoidance. But it can conclude that main point to identify tax evasion or tax avoidance according to legal or illegal or not. If it is legal it can suppose that it is tax avoidance but if it is illegal it can suppose, it is tax evasion.

2.3 International Taxation

International taxation related to international transaction. It is cover to all transaction about international taxation, including transfer of product, capital, money and international trade. It is focus on international transfer transaction. So, it is different from general taxation that focused on domestic transaction.

On the other hand, international taxation is the duplicate enforcement of taxation law on the international transfer transaction. The international transaction will be related to more than two country and each country had they own taxation law, it is not the conflict between the taxation law but it is the double taxation. Because each country had

absolutely power to taxed their resident under the “resident rule”. Moreover, they had the right to taxed non-resident who earned the income from their country under “source rule”. So, it will lead to double taxation.

There are two main of taxation imposition system. First, resident rule, for this rule the person who are the resident of the country both individual and the corporate which registered under the country’s law subject to be taxed from their worldwide income under worldwide rule. Second, source rule, for this rule the person who are non-resident of the country but earned the income from that country subject to be taxed from the income occurred from that country under territorial rule.

The main purpose of international taxation, it is to eliminate double taxation which is occurred from international transaction. Furthermore, there are several purposes of international taxation.

Firstly, it is to eliminate double taxation. International transaction is cross-border transaction. It is normally to be taxed in more than two countries or over. So, it will lead to double taxation.

Double taxation means same benefit subject to be taxed more than one time in the different country. There are two types of double taxation;

1. Juridical Double Taxation ⁹

2. Economic Double Taxation ¹⁰

Secondary, it is to promote for non-discrimination to imposing taxation. In general, the state-imposed tax both in resident and non-resident. So, the state or the tax authority of the state should impose tax in the same product or same services in the same rate for both residence or non-residence in equality.

Third, it is the appropriate right to taxed. The country should make an agreement about the right to taxed in the case of double taxation.

⁹ Judicial Double Taxation occurs when the same taxpayer is taxed by two or more countries (usually for the identical period, same subject matter and by comparable taxes).

¹⁰ Economic Double Taxation is when the same income is taxed two or more times (usually in the hands of different tax payers, and by different countries). This is the case when a country imposes corporate tax on the on the profits of a company, then it imposes WHT on the dividends distributed from that profit and the dividends are taxed by the residence country in the hands of the shareholders.

Moreover, the economic growth in the form of interdependence of the world economy is affected to increasing of the demand for the monitoring of economics influences of cross-border transaction. So, when it has the increasing of the international transaction it will affect to the domestic economic as well and it will lead to domestic economic growth and it also has more international transaction. As the result, more international transaction it will influence to taxation also. It is because it has more investment and most of investor desire to invest in low or no tax jurisdiction or in the country that provide any tax incentive. Because of the most investment to get margin as much as they can, it means the investor try to use the tax measures as a tax management to earn more benefits. If any country taxed in low or no tax or provide some tax incentive it will attract more investor to invest in such country. Such mechanism is a legal practice provide by the tax law of each country.

Nevertheless, there are illegal practices to reduce the tax burden over the provision of the tax law. Because some investor they try to reduce more tax burden so, they find a new way to pay less or without paying any tax it depends on the tax law because for some mechanism to reduce tax burden it can acceptable but for some mechanism it cannot acceptable.

The most popular mechanism is tax planning, for the tax planning it is the legal practice because it followed the provision of the tax law and this mechanism it focusses on the rightness first and it focus on cheapness later. Moreover, we have one more legal practice it is the tax avoidance. But for tax avoidance, we can say that it is the legal practice because this mechanism it following the tax law but it different from the tax planning because tax avoidance focus on the cheapness first and the rightness later and the main point of tax planning it help the tax payer to reduce their tax burden by using the loopholes and tax gaps. And we can say that tax avoidance it is not an illegal practice because it has no the provision of the law provide that there are illegal and it also no punishment by the law. It is opposite to the tax evasion. This tax evasion is an illegal practice because it is not following the law. The tax payer use this mechanism because they intent to pay no taxes. For some case, the tax payer report unreal income in order to escaping to taxes payment. Moreover, the tax payer use fake invoice to filling tax return of the VAT¹¹ or Value Added Tax. Tax evasion is the illegal practice because it is

¹¹ VAT Value added tax or VAT is an indirect tax, which is imposed on goods and services at each stage of production, starting from raw materials to final product. VAT is levied on the value additions at different stages of production. VAT is widely

the violation to the law and the law provided the punishment for such act and it also has both civil and criminal penalties as well.

2.3.1 International Tax Avoidance

Generally, tax avoidance is the legal practice to reduce tax burden of the tax payer. This tax avoidance focusses on cheapness first and then it will be focus on rightness. By it is following the provision of the law by using the law gaps or the loopholes to reduce tax burden for the tax payer. There are no prohibition and the punishment by the law about tax avoidance. So, it generally can acceptable.

There are several practices about tax avoidance such as:

- Tax Havens
- Double Taxation Agreement or DTA
- Treaties Shopping ¹²
- Transfer Pricing
- Thin Capitalization ¹³
- Open Offshore Account
- Holding Company
- Using Tax Incentives (e.g. under the Promotion Act) etc.

Such practical as mention above it usable for the international tax avoidance as far as not over the law and as far as it can acceptable by the country as well.

For the international tax planning, we had the internationalization rules and regulations provided about an acceptable act of tax avoidance. The internationalization rules and regulations are needed because each country had their own tax law, some action

applied in the European countries. However, now a number of countries across the globe have adopted this tax system.

¹² Treaty Shopping is the practice of structuring a multinational business to take advantage of more favorable tax treaties available in certain jurisdictions. A business that resides in a home country that doesn't have a tax treaty with the source country from which it receives income can establish an operation in a second source country that does have a favorable tax treaty in order to minimize its tax liability with the home country. Most countries have established anti-treaty shopping laws to circumvent the practice.

¹³ Thin Capitalization is an excessively high ratio of debt to equity in a corporation's capital structure.

can accept to one other country but it can be unacceptable for other one so, we need to have the globalization rules and regulation as well.

2.3.2 International Tax Evasion

Normally, tax evasion is the illegal practice. The tax payer dishonest to report their income or they did not report or some case they added more expense in order to deductible to calculate their taxable moreover, they also use fake invoice as well.

There is the same practice between international tax evasion and domestic tax evasion. It had the provision of the law to prohibit for an action that led to tax evasion. And there also had the punishment for the tax payer who evaded taxes.

For cross-border transaction, we cannot identify which transaction is illegal. But we had OECD they made some efforts to give a definition of international tax evasion and according to its 1987 report “International Tax Avoidance and Evasion”. The term tax evasion cover to the tax payer’s act has intentions to breaking the law and furthermore, it is also cover to the tax payer has an intention to escaping to payment of tax. Moreover, from the report of OECD the word “tax evasion” mean the action that violation of the tax law provision and it also the failure to filling the tax return for taxation and it including the using of fake invoice.

2.4 Mechanism of Tax Evasion

Tax evasion is an illegal practice. Taxpayers evade taxes in order to minimize or to eliminate tax liability in a whole or in a part. And it can say it is a fraudulent mechanism or technique. It is willful non-payment of taxes. It is punishment by both criminal charges and civil penalties.

2.4.1 Domestic Tax Evasion

The main of government’s budget come from taxation both direct and indirect tax. And the government used the money collected from the taxpayer for public interest such as for infrastructure and the public security etc. when the government-imposed tax, it will also have the following problems. It is the result that, the government cannot impose tax inefficiently. Because the taxpayer they try to find the way to reduce or to eliminate their tax liability as much as they can by using variety way both legal and illegal practice. For the legal practice the taxpayer used the tax planning and tax avoidance to reduce their tax liability according to the tax law provision. But it also has illegal

practice that can eliminate such tax liability more than tax planning and tax avoidance but it is unlawful called tax evasion.

Domestic tax evasion, it is the instrument that the taxpayer to escaping to payment taxes. It can help taxpayer minimize or eliminate whole or in a part of their tax liability. This way also the violation to the provision of the state's law in exactly. There are several practices to evade tax in domestic.

1. Report Unreal Income

First, the taxpayer report unreal income in order to escaping to pay fully taxes. This way the taxpayer will show incomplete income statement by they show some of the income to pay less tax. For this mechanism can use for individual and corporate as well.

2. Report Unreal Expense

Second, taxpayer also report unreal expense. Because when it is the end of taxable year or accounting period the taxpayer had the duty to do income statement. In the income statement taxpayer to report both income and the expenses to calculate the net profits to be tax. Normally, all of the taxpayer needed to get a lot of benefits but if they had much more benefits they will subject to tax in higher rate as well. So, the taxpayer has to find the way to minimize or eliminate their tax liability or tax burden by they added more expense to deduct with income to reduce the net profit and pay less taxes.

3. Used Fake Tax Invoice

Thirdly, the taxpayer most in corporate sector used the fake tax invoice in order to filling VAT or Value Added Tax return. This way, the taxpayer can get VAT return as well.

These three mechanisms, in addition to minimize or to eliminate the tax liability or tax burden and then also make the taxpayer get more profit. Nevertheless, it is doing not forget that it is unlawful or illegal practice and it unacceptable and it also had both criminal charges and civil penalties.

The example of tax evasion, "The defendant, John L. Cheek, became a pilot for American Airlines in 1973. Through the tax year 1979, Cheek filed Federal income tax returns. Beginning with the 1980 tax year, Cheek stopped filing Federal income tax returns. He began claiming up to sixty allowances on his Form W-4 withholding statement submitted to his employer. From 1982 to 1987, Cheek was also involved in at

least four civil cases challenging the Federal income tax. Among the arguments raised in those cases were: (1) the argument that he was not a taxpayer within the meaning of the law; (2) the argument that wages are not income; (3) the argument that the Sixteenth Amendment does not authorize an income tax on individuals; and (4) the argument that the Sixteenth Amendment is unenforceable. In all four cases, the courts stated that these arguments were erroneous. Cheek also attended two criminal trials of individuals charged with tax crimes. John Cheek himself was eventually charged with six counts of willfully failing to file Federal income tax returns under 26 U.S.C. § 7203 for 1980, 1981, 1983, 1984, 1985 and 1986. He was also charged with tax evasion under 26 U.S.C. § 7201 for years 1980, 1981, and 1983. At his own criminal trial, John Cheek represented himself. He also testified that around 1978 he had begun attending seminars conducted by a group that believed that the Federal income tax system was unconstitutional.[8] Cheek stated that based on the seminars and his own study, he sincerely believed that the tax laws were being unconstitutionally enforced, and that his actions were lawful. Cheek specifically testified about his own interpretations of the U.S. Constitution, court opinions, common law and other materials. He testified that he had relied on those materials in concluding that he was not required to file tax returns, that he was not required to pay income taxes, and that he could claim refunds of the money withheld from his pay. Cheek also contended that his wages from a private employer (American Airlines) did not constitute income under the internal revenue laws. Cheek argued that he therefore had acted without the "willfulness" that was required for a criminal tax conviction."

2.4.2 International Tax Evasion

It is also unlawful to evade tax in the international as well. It is the way that the company or the individual who receive the income paid from foreigner country if that money transferred into the resident country such company or an individual subject to be tax according to the domestic tax law. It is no problem if the resident country is the low tax rate but if its high tax rate taxpayer always needs to minimize such tax liability. There are several techniques for international tax evasion.

1. Tax Haven

1) Concept of Tax Haven

Tax haven generally as knows as a low or no tax jurisdiction. It is easily to establish the company. It is also had the rules and regulations about secrecy of transaction and it had no exchange information to other country.

At the present, tax haven is not meaning about low or no tax jurisdiction only but it is including the country or jurisdiction which is providing the incentive for running the business or for some transaction. Or even they collect tax in equal or high tax rate than other country but it is providing the tax measure to attract the investor or providing the incentive for the business.

To specify the category of tax haven, according with it is had no definition of tax haven using in the international. So, it can specify tax haven in various forms.

- (1) To classify by geographic
- (2) To classify by the incentive
- (3) To classify by financial regulatory standards

2) Method of Tax Haven

To using tax haven for the company benefits, it is using territorial of one country to avoid tax liability of one another country. If it is the individual person, it is just moving the domicile or just changed the nationality but if it is the corporation most it will establish the company or subsidiary at tax haven to run the process as follow.

- (1) For transfer any properties.
- (2) To trading goods by set up the company or subsidiary to trade the material or goods within related company or the representative of parent company by using transfer pricing in order to transfer the profit to the country that the company decide to retain the profit there.

(3) To do as an agency or to service for parent company and related company in order to transmit the profit of parent company or related company to tax haven.

(4) Establish conduit company, it is using the incentive under the double taxation agreement by establish the company at the country that have been sign the double taxation agreement with the resident country of the party and when they get the incentive provide by the agreement then they will transfer such money to the real beneficially.

(5) To establish financial company or a bank by set up the corporate for provide loan within related company and when they pay the interest to the lender situated at tax haven without pay any tax or in low tax rate.

(6) Establish insurance company in order to insure for the related company. To set up the insurance company in tax haven not for the tax incentive only but it is to avoid the strictly rules and regulations of the country as well.

(7) Establish holding company to hold the share of other company in related and it will be pay the dividend and these holding company had low tax rate about the dividend or some case it had no tax liability.

2. Transfer Pricing

1) Concept of Transfer Pricing

Transfer pricing is the estimation of the transformation of goods and services or both tangible and intangible property between the party in related companies, and such price is not match with the market price setting among independent companies. Such estimation, most use among related company which had been run international business. By the related company will set up the price higher or lower than market price in order to hidden the actual cost in order to get highest profits.

2) Method of Transfer Pricing

To run the international business, the multinational corporate most is the large company and also had related company to do their transaction. And the multinational corporate will always establish the organization or the institute or management office in various countries in order to manage and to allocate the resources. So, transfer pricing is the important instrument for the parent company in order to manage the cost and profits that the parent company will be transfer from the related company.

In practice, transfer pricing is the way to setting up the price of goods and services differ from it should be for the benefit to reduce tax liability or to make the related company pay lowest tax in total. This distortion of transfer price is the transference income to low or high tax rate in order to distort the actual profit and it will make such company had low net profit and it will be pay tax in lower than it should be pay. The transfer price to distort the market price can specify into two main categories namely set up high transfer price than the general market price and set up low transfer price than the general market price.

First, to set up high transfer price than general market price is the related company plan by transfer the margin to trader or servicer's country situated therein in order to increase tax liability to get the benefit for the payment of tax at the low tax rate or tax liability and in the same time this transfer price will influence to the trader or the servicer in one another country that had high tax rate or tax liability had a net loss, it will affect to related company that situated in high tax rate had low tax liability or in some case it can eliminate tax liability because the company get the net loss show in the accounting statement.

Second, to set up low transfer price than general market price is the related company do tax planning by transfer the profit to the trader or servicer's country situated therein. It is because that country is the low tax rate country and it will make the company had low tax liability. In the same times, the trader or the servicer in one another country which had high tax liability will get loss because they had low income, it will make them subject to pay no tax or pay tax in lower rate because they get net loss for the accounting period.

3. Treaty Shopping

1) Concept of Treaty Shopping

At the present multinational corporation can do the international transaction easily than the previously and it had the connection more than one country so, it began to plan by using treaty shopping. Treaty shopping is the layout of transaction or business in the way to receive the benefit from the double taxation agreement in illegal by the entrepreneur who had the related company situated in many countries using double taxation agreement of the third country in order to eliminate tax liability or to exempt tax liability for their international transaction. Multinational corporation who intend to get the benefit by using treaty shopping most is the company who had no right under the double taxation agreement of the third country because they are not the taxpayer of the contracting party of the double taxation agreement that such agreement desire to provide the incentive to. So, to get the tax incentive, the multinational corporation try to tax planning for the business by avoid to investment at the high tax rate country but they will set up conduit company or institute as the intermediately establish at the third country in order to transmit income had earned at one country of the residency of one another country by using the loophole of double taxation agreement in order to get the incentive to reduce tax liability and to increase the business profit of the multinational corporation.

2) Method of Treaty Shopping

Treaty shopping can be doing in many ways. Some case treaty shopping go-together with tax haven. For example, to manage tax burden by reduce or avoid or to evade to pay tax such as withholding tax, royalties, dividend and interest. For example, company A the resident of country X and company B the resident of country Y by country X and Y had been signed the double taxation agreement but the withholding tax rate according to double taxation agreement of country X and Y is higher than the tax rate define in double taxation agreement between country Y and Z (the third country) and

most of the third country is the tax haven and country Z is the conduit of such income that mentioned above.

Furthermore, multinational corporate often to establish subsidiary or conduit-company in order to avoid or evade to pays tax. For example, company A incorporated in country X and company B incorporated in country Y both companies are the related company. Company A intend to get the profit from their business invest in country Y but both countries had no double taxation agreement. So, to avoid or to evade to pays tax from the income earned by the investment then, the parent company of both company set up the subsidiary in country Z which is the third country that had been signed the double taxation agreement with both country in order to transmit income derive in country Y to the company established in country Z and then transmit that income into company A which is the residency of country X.

So, for the international transaction, multinational-corporation frequently had to find the information of tax rate and the conditional of double taxation agreement in order to find the loophole to get more benefit from double taxation agreement.

2.5 Impact of Tax Evasion

Taxation is the main revenue of the government. In order to following the government policy in efficiency the government had to use much more money. So, the government had to impose a lot of tax to increase the government revenue by following the tax law. In order to motivate the economic growth as well as to warrantee the public infrastructure, social welfare, social securities and other government activities needs big amount of resources. But taxpayer did not want to pay a lot of tax. Then taxpayer trying to evade tax by use the way which is against the law. And it is also had the impact of tax evasion both in domestic and international.

2.5.1 Impact on Domestic Tax Evasion

Taxation is important to the development of the country and it is the instrument of the government to increasing revenue. And it also supports for the development of economic of the country. Furthermore, taxation can control the consumption of the people and to create social stability. Normally, the government-imposed tax both from individual and corporation who had earned the income both from direct tax and indirect tax.

So, taxation is the main revenue of the country and it is so important. Then, the government trying to impose more tax but in the other hand, the taxpayer had to pay less tax. Finally, taxpayer try to eliminate their tax liability by evade to paying tax.

Tax evasion has a great impact in economic growth. The impact of tax evasion on domestic are follow.

First of all, the most important impact occurred from tax evasion is the government will loss a huge amount of tax revenue. As a result, the government cannot distribute fully for basic needs to their people. Generally, the government revenue came from two sources namely tax revenue and non-tax revenue. Such revenue used for the public interest according to the government policy. The government trying to impose tax in efficiency by following the tax law to increase the revenue. But on the other hand, the taxpayer who had duty to pay tax did not get direct benefit back from the tax they paid. So, some of the taxpayers try to evade tax. It is because the taxpayer did not receive any well fair from the government compare with the tax that they had to pay. It is the result that, the government had more expenditure but not enough revenue it will affect to the development of the country. It is unbalance between government expenditure and government revenue. When the government had not enough revenue it cannot use the revenue to develop the country such as for the infrastructure, social security, social well fair, education, etc.

Secondary, tax evasion will obstruct the government development activities such as the infrastructure, social security, and social welfare. And it is will oblige the government to loan that will affect to the economic growth. It is because the economic growth related to the government revenue. Generally, higher government income can support to large revenue and large revenue can helps to motivate economic growth of a country. But according to the tax evasion a lot amount of government revenue is not collected. So, the government has to shortcut the budget as well.

Thirdly, tax evasion obstructs to the investment sector. Normally, the government has to provide various plans to develop the economic. But when it is lack of fund or the government get lost revenue that plan cannot implemented. And it is the result that the government cannot support fund to the investment sector.

Forth, tax evasion will obstruct to the employment. This impact, the government cannot secure or guarantee to the employment opportunity. It is because the government has not enough funds to create such opportunity.

Fifth, tax evasion affects to the distribution of wealth. It is will effect to cash flow inside the country. And it is also unfair to the taxpayer whose pay taxes. Because most of the taxpayer whose evade to pay tax is the rich person or the owner who have

power to do tax evasion. But for the employee who work and had earned the income in the form of salary, they will be subject to withholding tax when they had earn the income that mean they cannot escape to pay tax because they will be withhold tax by the company before the company pay them salary. It is unfair because the employee who had little income but subject to taxed and on the other hand, the owner which had more income but they did not pay tax or pay tax in less than amount they have subject to be paid. But when the government provide for public interest both employee and the company or the owner receive the equal for that interest provide by the government. So, the rich will become richer and the poor will become poorer. And it also had the gap between the rich and the poor people as well.

Finally, for the impact occurred from tax evasion above, it will affect to the domestic tax law as well. It is because the state cannot apply domestic tax law in efficiently or the domestic tax law cannot enforce in fully or it can say that tax evasion distorted the power of domestic tax law. And it is also affected to the power of the tax authority or the tax administrators that cannot use their power in fully to be tax to the taxpayer. And for some case we can say that tax evasion lead to the problems of tax administrator is the law it is because their will get something back from the taxpayer in order to help the taxpayer eliminate their tax liability.

2.5.2 Impact on International Tax Evasion

As we known tax evasion had an impact on domestic so much. Furthermore, tax evasion always had an impact to the international as well. It is the result of the impact on the domestic tax evasion. There are several impacts on international tax evasion as follow.

Firstly, tax evasion will affect to the global economy. As same as tax evasion affected to state economy, it is also affected to the global economy as well. As we known, tax evasion will make the government loss the revenue in a huge amount. In a similar way, it will affect to the member state as well such as in the European country (EU) and ASEAN. It will affect to the cash flow of the member state.

For example, if each the member state of EU had the same problem of domestic tax evasion, each of them will reduce or invest in outside country in a small part. Because each country has to try to maintain their economy in order to maintain the stable of the country. If most of the member state did in the same way, the activities of the EU group cannot run in efficiently. And if every group of the country face with the same problem it is exactly had an impact to the global economy.

Secondary, according to transfer pricing, it will lead to inflation. It is because for transfer pricing the company can set up their own price between related companies. It can set up the price depend on their objective both to reducing or increasing their profit in order to manage their tax liability. Transfer pricing can make the inflation by if the company set up the price between related company by did not follow the market price in extremely, the market of such product will had more money from that price and when the money a lot or many cash flow inside the market it will lead to money inflation.

Third, tax evasion is created in a competitive fashion in order to lower the effective tax rate. Normally, the companies intend to carry their business in the country which has no or low tax rate or in the country which provide tax incentive to their investment in order to pay lower tax rate and receive high marginal. So, the source countries most are the developing country or the country that cannot carry business by itself try to attract the foreign investor by provide tax incentive or promote their country as no or low tax rate as we known as tax haven in order to attract the investor to carry business inside the country in order to make the cash flow inside the country. We can say that tax evasion can lead to the competitive fashion in order to lower the effective tax rate because most of the developing country try to attract the foreign investor and the most favorite to promote their country is to reduce or provide tax incentive as a lower or no tax rate jurisdiction. And some country or jurisdiction their promote their country or jurisdiction in order to attract the foreign investor to open bank account by promote the policy to disclose the information of the customer who's open the bank account in their country. So, the resident country or the other country who deal with such company cannot check or the resident country cannot investigate the source of the money or income that such company report to the state revenue is correct or not. And when many developing countries try to follow this trend in order to attract the foreign investor by reduce tax rate it will affect to the resident company as well. Because the country provides the tax incentive for the foreigner company but it not provides to their resident so, the residence company will move their business to invest in other country which is provide tax incentive or give no or low tax rate to their business. And when this trend became the popular it will affect to the tax rate provide in the domestic tax law or called "legislate tax rate" because instead of the country use the legislation tax rate to tax the company from their income but the country will use the effective tax rate to be tax. Moreover, it will lead to the discrimination between resident and the foreigner as well. It is unfair to the resident company.

Fourth, tax evasion will make the problem on mobility. It is according to the problem of competitive fashion in order to lower effective tax rate. It is the discrimination between resident and the foreigner company because the foreigner will receive the tax incentive more than the resident. So, resident company try to shift or move their business to no or low tax rate as well.

Fifth, tax evasion will lead to VAT fraud. The example of the basic carousel fraud, Company A exports goods to company B in another member state and export sale is VAT zero rate. Then company B (the missing trader) purchases goods from company A, in member state 2 and pays no VAT on purchases, because export by A is zero-rate and charge VAT on sale to company C and disappears without remitting the VAT to the revenue authorities. Next, company C (buffer) buys goods from B at VAT inclusive price, and sells to D charging VAT and C may be wholly unaware of the fraud (they may be multiple buffer companies between B and D, some or all of which may be honest). Finally, company D pays VAT on purchase from company C and exports goods to company A and claims a refund for VAT on exported goods, in effect reclaims the VAT not paid by B.

Sixth, tax evasion will affect to the transferring of money to the resident country. Generally, the companies run their business in order to get the profit or earn a lot of margin. So, the companies try to find the way to eliminate the unnecessary expense including tax as well. Then, the company retain their income in outside their country by chose the country which is no or low tax rate such as tax haven to retain their income instead of transfer to their resident country which subject to be tax in high tax rate.

For example, company A is the resident of the country A and was incorporated under the law of country A carry business at country B and receive the income from country B but company A shift that income to country C as a tax haven jurisdiction instead of transfer to country A which is the resident country in order to evade to pay tax under the tax law of country A which is used the world-wild rules. So, it will affect to country A that no transferring the money from their resident income.

Finally, the impact of tax evasion in the international will affect to the lack of political. It is because one international transaction must include the two parties from different country that means one international transaction had both source and resident who had the right to tax. So, if between that countries have no agreement about taxation agreement. It will make the problem that which country had the right to tax first and how much the country can be tax from that transaction. If the two countries had no agreement called double taxation agreement together this problem will occur. But in the real, many

countries did not sign the double taxation agreement. So, it will lead to the conflict between the country and it will lead to the politic as well. Because the country or the government cannot use the power to be taxes in fully. And if the country cannot negotiate it will lead to the lack of political.

2.6 International Cooperation to Prevent Tax Evasion

In generally, each country had their own laws or rules and regulations to enforcement inside their country about the internal activities. But in the realistic, each country also had to cooperate with other country in many fields such as political and economy. So, the country should to cooperate with other country by establish the international cooperation.

The international cooperation is the organization of the country or the state more than two countries or state are established. In order to conducted about the international relationship. And it is also supporting the cooperation and develop the country's activities for the benefit about economy and society of member state and humanity.

The general purposes of the international cooperation as follow.

- To arrange the conference between the member state
- To regulate rules and regulations about the relationship among the member state
- To allocate the resource
- To represent the collective defense
- To represent the method of the peacekeeping operations
- Promoting cooperation in various specializations

2.6.1 Exchange Information Agreement

According to the increasing of globalization and liberalization of the world economies and the movement of the foreign investment and foreign exchange and it also had the increasing of cross-border transactions. It will have the influences to the economy of the country. When it had the increasing of cross-border transaction it also provided the opportunities for tax evasion. And when the taxpayers most who is having the worldwide operations evade tax on the other hand, the tax authority or the tax administrations cannot get their information available for such case. In addition, to prevent tax evasion practicing by the taxpayer and to provide the tax authority or the tax administrator to enforcement

domestic laws in fully power. Each country or the state should be sharing all of the information as much as they can about their taxpayer's cross-border transaction.

To sharing the information of the taxpayer about their cross-border transaction it can be done in the form of the agreement called "exchange information agreement". It is becoming the most popular to many countries to join or to cooperate to each other.

The exchange information agreement is the agreement to exchange the information between the countries. When the country had to cooperate to other country most of them will sign the contract together in order to give the promise to each other or to exchange the importance information according to the cross-border transaction.

The advantages of the exchange information agreement most is to prevent or to tackling tax evasion that become the harmfulness to many countries right now. Moreover, the exchange information agreement can provide the information to the other party in order to doing any contract or any transaction. Furthermore, it is good for the tax administrator in order to investigate the detail of the taxpayer. It is not complicate to the tax administration to work as well. And it is good to the company when they had an intention to run their business with the foreign company it can be check the information through the internal revenue. The most advantage of the exchange information agreement, it is to eliminate the opportunity for the taxpayer in order to evade to paying tax to their country.

From the advantages of the exchange information agreement that mention above, in the present many countries most in the contracting state have been sign this agreement together.

2.6.2 Measure to Prevent Tax Evasion

In practically, when the country or the state had to protect or to prevent something that the country or the state did not want that thing happen it can be done in various form including the country or the state by the government can issue the law or by provide in the form of the measure.

For the measure to prevent tax evasion can be write in the form of unilateral or it can be in the form of bilateral or it is also in the form of multilateral. The measure to prevent tax evasion in the form of unilateral most of this form written by single state or the country in order to prevent or to tackling tax evasion in the domestic. The measure to prevent tax evasion in the form of bilateral contract most have been sign between two countries called contracting state in order to prevent or tackling tax evasion which is will

occur from any transaction between the contracting states. And the measure to prevent tax evasion in the form of the multilateral agreement normally sign by the group of the country in order to do something as the cooperation among the country in order to prevent or tackling tax evasion happen by any activities from the member state.

2.6.3 Bilateral Agreement

Bilateral is an agreement formed under the purposes to exchange of promise in which the promise of one party is consideration supporting the promise of the other party. A bilateral agreement is differing from a unilateral agreement, a promise made by one party in exchange for the operation of some act by the other party. The party to a unilateral agreement whose operates is sought is not obligated to act, but if they do, the party that made the promise is bound to comply with the terms of the agreement. In a bilateral agreement both parties are bound by their exchange of promises. Both parties to a bilateral agreement make promises. With respect to the promise in issue, the party making the promise is the promisor and the other party is the promisee. The legal harmfulness incurred by the promisee consists of a different promise by them to do something or refrain from doing something that he or she was not previously legally obligated to do or to avoid from doing. This legal harmfulness constitutes consideration, the cause, motive, or benefit that induces one to enter into a contract. Consideration is an essential component of the agreement. Traditionally, courts have distinguished between unilateral and bilateral contracts by determining whether one or both parties provided consideration and at what point they provided the consideration. Bilateral contracts were said to bind both parties the minute the parties exchange promises, as each promise is deemed sufficient consideration in itself. Unilateral agreement is said to bind only the promisor and do not bind the promisee unless the promisee accepts by performing the obligations specified in the promisor's offer. Until the promisee performs, they had provided no consideration under the law.

For example, if someone offered to drive you to work on Mondays and Tuesdays in exchange for your promise to return the favor on Wednesdays and Thursdays, a bilateral contract would be formed binding both of you once you provided consideration by accepting those terms. But if that same person offered to pay you \$10 each day you drove him to work, a unilateral contract would be formed, binding only upon the promisor until you provided consideration by driving him to work on a particular day.

Modern courts have de-emphasized the distinction between unilateral and bilateral agreement. These courts have found that an offer may be accepted either by a promise to perform or by actual performance. An increasing number of courts have concluded that the traditional distinction between unilateral and bilateral agreement fails to significantly advance legal analysis in a growing number of cases where performance is provided over an extended period of time.

Most courts would rule that the act of beginning performance under these circumstances converts a unilateral agreement into a bilateral agreement, requiring both parties to fulfill the obligations contemplated by the agreement. However, other courts would analyze the facts of each case so as not to frustrate the reasonable expectations of the parties. In neither of these cases are the legal rights of the parties ultimately determined by the courts by applying the concepts of unilateral and bilateral agreement. In still other jurisdictions, courts have simply expressed a preference for interpreting agreement as creating bilateral obligations in all cases where there is no clear evidence that a unilateral agreement was intended. The rule has been stated that in case of doubt an offer will be presumed to invite the formation of a bilateral agreement by a promise to perform what the offer requests, rather than the formation of a unilateral agreement commencing at the time of actual performance. The bottom line across most jurisdictions is that as courts have been confronted by a growing variety of fact patterns involving complicated agreement disputes, courts have shifted from rigidly applying the concepts of unilateral and bilateral agreement to a more ad hoc approach. Mutuality of obligation must exist in an enforceable bilateral agreement, and this involves the concept of reciprocity. A cannot enforce B's promise unless A's promise entails a legal detriment, and B can enforce A's promise only if B's promise involves a legal detriment. If a minor enters a bilateral agreement with an adult that is unenforceable due to the minor's age, the adult party cannot assert absence of mutuality as a defense if the minor sues to enforce the agreement. This principle applies to any situation where the law grants a particular party a privilege to avoid an agreement because of their status.

2.7 Exchange of Information to Prevent Tax Evasion under Thai Law

Tax is a government tool for increasing state revenue for administrative and national development, which will be collected from income, sales of products and services from individuals and juristic persons. At present, Thailand has tax collection

both direct taxes and indirect taxes consisting of personal income tax, corporate Income Tax, value added tax, specific business tax and stamp duty under the tax law provided in the Revenue Code. In addition, other main taxes are collected, such as excise and customs tax.

Since many countries, including Thailand, have to face with tax evasion problems from taxpayers, both individuals and juristic persons causing the government to not be able to fully collect taxes and result in the country not having enough budget to manage and develop the country.

In addition, the current volume of international trade and investment has increased and can be easily implemented. In addition, the business model is more complex so that the entrepreneurs can get the most profit and therefore have various tax plans in order to have the lowest tax cost by transferring profits from the countries that have high tax rates to countries with lower tax rates, whether by transfer pricing, exploitation of double tax treaties (treaty shopping) or the use of investment structures with higher borrowing than capital (thin-capitalization) which Thailand does not have the provisions in the Revenue Code that allow the Revenue Department to prevent or take action against entrepreneurs who evade taxes in various forms as mentioned above, causing Thailand to lose fair share of tax that should be. Thailand therefore needs to have provisions on the prevention of tax evasion in various forms as well as foreign country.

The measures to prevent tax avoidance problems mentioned above are as follows.

- (1) General Anti Avoidance Rules (GAARs) Determination of penalties for tax evasion in the Revenue Code for severe penalties
- (2) Specification of provisions in the Revenue Code to support the provisions of the Double Taxation Convention in order to be effective as well as internal laws.
- (3) Specification of specific departments responsible for the examination of the case of tax evasion

However, to prevent tax evasion, at present, Thailand has the following provisions:

2.7.1 The Measures to Prevent Transfer Pricing According to Thai Laws

1. Provisions under the Revenue Code relating to the protection of transfer pricing

- 1) Section 65 Bis(4)

“Section 65 The calculation of net profit and net loss under this Part shall follow the following conditions:

(4) In the case of transfer of assets, provision of service or lending of money without remuneration, fee or interest; or with remuneration, fee or interest that is lower than the market price without reasonable cause, an assessment official shall have the power to assess such remuneration, fee or interest in accordance with the market price on the date of transfer, provision or lending.....”

2) Section 70 Ter

“Section 70 Ter For any company or juristic partnership sending goods abroad to or under an order of a head office, branch, associated company or juristic partnership, principal, agent, employer or employee, such sending of goods shall be deemed to be also a sale in Thailand and the market price of goods on the sending date shall be deemed to be the income for the accounting period in which the goods are sent.

The provisions in Paragraph 1 shall not apply if such goods

- (1) are samples or for research purpose
- (2) are transit goods
- (3) are goods imported into Thailand and re-exported to the sender within one year from the date that such goods is imported into Thailand
- (4) are goods exported out of Thailand and returned to the sender in Thailand within one year from the date in which such goods is exported out Thailand.”

3) Section 71 Bis

* “Section 71 Bis In case companies or juristic partnerships having mutual relationship have commercial or financial conditions different from the conditions which should have been made by an independent companies or independent juristic partnerships as well as such related companies or juristic partnerships make transactions on the way which is believable that there is to transfer profits each other, an assessment officer has authority to adjust revenue and expenses of such companies or juristic partnerships so that the assessment officer shall adjust them to revenue supposed to be earned and expenses supposed to be paid by an independent company or juristic partnership by deeming that such companies or juristic partnerships earned and paid for the adjusted amount in order to compute amount of net profits under Section 65 or assessable income under Section 70 or Section 70 Bis in accordance with rules, procedures, and conditions as prescribed by Ministerial Regulation.

The company or juristic partnership having mutual relationship under Paragraph one means two or more related companies or related juristic partnership having relationships as following characteristic:

(1) An entity holds shares or is a partner of the other entity, either directly or indirectly, not less than 50 percent of the other entity's total capital;

(2) A shareholder or a partner holding shares or being a partner of an entity, either directly or indirectly, not less than 50 percent of the entity's total capital holds shares or is a partner of the other entity, either directly or indirectly, not less than 50 percent of the other entity's total capital;

(3) Related entities have mutual capital, management, or control relationships in a way that an entity cannot separate its independent of business operation from the other entity as prescribed by Ministerial Regulation.

In case the revenue and expense adjustments of the companies or juristic partnerships having mutual relationship made by the assessment officer in pursuance of Paragraph one result in the fact that the companies or juristic partnerships paid tax or was deducted withholding tax in an excessive amount which should have been paid or without liability to pay for, the companies or juristic partnerships having mutual relationship are entitled to file application for request of tax refund within 3 years as of the last date of corporate-tax-return filing as prescribed by law, or within 60 days as of the date when the assessment officer informed a written notice on the adjustments as announced by Notification of Director-General."

4) Section 71 Ter

* "Section 71 Ter The company or juristic partnership having mutual relationships with other company or juristic partnership where they are fallen into any characteristic in pursuance of Paragraph two of Section 71 Bis, whether or not there are relationships throughout an accounting period or mutual transactions in the accounting period, shall submit the document with regard to information of the companies or juristic partnerships having mutual relationship and the values of mutual transactions in each accounting period according to the form as specified by the Director-General to an assessment officer, together with the tax return, within the period under Section 69.

Within 5 years as of the submission date of the document on information of the companies or juristic partnerships having mutual relationship in pursuance of Paragraph one, an assessment officer, with approval by the Director-General, may send a notice to and request the companies or juristic partnerships having mutual relationship in pursuance of Paragraph one to submit documents or evidence on necessary information so that the assessment officer can analyze condition of mutual transaction regarding the companies or juristic partnerships having mutual relationship as announced by Notification of Director-General. The recipient of the notice shall execute

within 60 days as of the date when receiving the notice. If the recipient has a necessary cause and is unable to execute within the scheduled period, the Director-General can permit to extend the scheduled period which shall not be exceeding 120 days as of the date when receiving the notice. Especially in case the recipient receives the notice at the first time, the recipient shall execute within 180 days as of the date when receiving the notice.

The provision under this Section shall not apply to the companies or juristic partnerships earning an income, which is derived from business or as a result of business, in an accounting period not over than the amount or having any other characteristic as prescribed by Ministerial Regulation. The amount of income under Ministerial Regulation shall not be less than 200 million Baht.

5) The Revenue Department's Order No. Por. 113/2545 on Transfer Pricing According to the Market Price for Corporate Income Tax

Thailand currently has a lot of foreign investment. This is due to having a strong economic, social, political and environmental background. Causing business management in a multinational business and more products and services are being sold in both domestic and international groups which the pricing and trading service will depend on the policies of each business but in recognition of income in accordance with the accounting standards and the calculation of net profit according to the Revenue Code for tax purposes such price must be a market price that reflects the actual price.

Therefore, the Revenue Department has formulated a practical guideline which has ordered the Revenue Department No. Por. 113/2545 regarding the corporate income tax or a juristic partnership in the case of transfer pricing to be in accordance with the market price for the entrepreneurs to have a guideline for determining the market price and analyzing clear multinational businesses as the same standard and to allow entrepreneurs to know the rules, procedures and conditions to be able to perform correctly, in order to reduce the burden and save time to proving the market price to the Revenue Department.

Such guidelines cover the pricing criteria which is internationally accepted, the documents that entrepreneurs should prepare for determining the price, including the opportunities for entrepreneurs to submit an advance pricing arrangement with the Revenue Department.

The provision of The Revenue Department's Order No. Por. 113/2545 on Transfer Pricing According to the Market Price for Corporate Income Tax as appeared in Appendix A.

2.7.2 The Measures to Prevent the Exploitation of Double Tax Treaties by Third Nationals (Treaty Shopping) According to Thai Laws

1. The provision under the Revenue Code relating to the protection of treaty shopping

1) Section 3

“Section 3 For taxes collectible under this Revenue Code, a Royal Decree may be issued for the following purposes:

- (1) to reduce or exempt tax as suitable to circumstances, nature of business, or local condition;
- (2) to exempt tax to persons or international organizations under the commitment between Thailand and United Nations, under international laws, under Conventions, or under reciprocal basis;¹
- (3) to exempt tax to government, state enterprise, Tassaban (municipal), Sukapiban (municipal), religious body or public charitable organization; The reduction or exemption under (1), (2) and (3) may be amended or revoked by issuing a Royal Decree.

2. The provision under The Royal Decree relating to the protection of treaty shopping

1) Royal Decree No. 18

The main important of the Royal Decree No 18 is that taxes and duties under the Revenue Code shall be exempted for persons in accordance with the agreements on avoidance of double taxation which the government of Thailand has entered into or shall enter into with the governments of foreign countries. The details as appeared in Appendix B.

Regarding the study and research on the prevention of tax evasion from the provisions of the said Thai law. Thailand has two laws to prevent tax evasion namely prevention of transfer pricing and prevention of exploitation of double tax treaties (treaty shopping) by third nationals which the law on the prevention of transfer pricing has been announced and enforced in the year 2018, which is defined as Section 70 bis and

Section 70 ter of the Revenue Code to prevent the transfer pricing between juristic persons that are related, the details are as follows

(1) The assessment official has the power to improve the income and expenses for calculating corporate income tax of the juristic person that has such relationship to be in accordance with the Arm's Length Price.

(2) The juristic person has the right to apply for a tax return as assessed by the assessment official under 1) within 3 years from the last day of the tax filing deadline or within 60 days from the date of receiving the notification from the said official.

(3) The assessment official has the power to notify the document or evidence showing the information necessary for analyzing the transfer pricing of the transaction between each other. The juristic person shall submit documents within 60 days from the date of notification unless there is a necessity, it can be extended for not more than 120 days from the date of receiving the notification. If violating the criminal penalty shall not exceed 200,000 baht, etc.

However At this time, there has been no announcement of rules, procedures for filing a registration between legal entities that are related to the above mentioned.

Chapter 3

International Rules and Regulations to Exchange of Information in Order to Prevent Tax Evasion

3.1 The Measures to Prevent Tax Evasion of the Organization for Economic Co-operation and Development (OECD)

The OECD contributes to the development of information network exchange through the Global Forum on Transparency and Information Exchange for Tax Purposes.

3.1.1 OECD Model Agreement on Exchange of Information in Tax Matters

This Agreement is intended to promote international cooperation in tax matters through information exchange.

The Agreement was developed by the Working Group on Effective Information Exchange ("the Working Group") of the OECD global forum. The Working Group consisted of representatives from OECD Member States, 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 OECD's work in tackling harmful tax practices. See the 1998 OECD report entitled "Harmful Tax Competition: An Emerging Global Issue" ("Report 1998"). The 1998 Report identified 'lack of effective information exchange' as one of the key criteria for determining harmful tax practices. The workgroup's mandate was to develop a legal instrument that could be used to establish effective information exchange. The Agreement represents the standard for effective exchange of information about harmful tax practices for the purposes of the OECD initiative.

This Agreement is not a binding instrument but contains two models for bilateral agreements drawn up in the light of the OECD commitments and the jurisdictions committed. It is important, in this context, that financial centers around the world meet the tax information exchange standards set out in this document. Cooperation in this important endeavor should be encouraged to as many economies as possible. It is not in the interests of participating economies that implementation of the standard set out in the Agreement should lead to business migration to economies that do not cooperate in information exchange. To avoid this result, measures are required to defend the integrity of tax systems against the impact of a lack of cooperation in matters relating to tax

information exchange. The OECD members and committed jurisdictions need to engage in ongoing dialog to work towards the standard's implementation. The OECD and the committed jurisdictions will jointly establish an adequate framework for this purpose, in particular as such a framework would help to achieve a level playing field where no party is unfairly disadvantaged.

The Agreement is presented both as a multilateral instrument and as a model for bilateral agreements or treaties. In the traditional sense, the multilateral instrument isn't a "multilateral" agreement. Rather it provides the foundation for an integrated bundle of bilateral treaties. A Party to the Multilateral Agreement would only be bound by the Agreement vis-à-vis the particular parties it agrees to be bound with. Thus, a party wishing to be bound by the Multilateral Agreement must specify the party or parties in its instrument of ratification, approval or acceptance to which it wishes to be so bound. The Agreement then enters into force and creates rights and obligations only as between those parties who have identified each other in their instruments of ratification, approval or acceptance deposited with the Agreement's depositary. The bilateral version is intended to serve as a role model for bilateral information exchange agreements. As such, in bilateral agreements, amendments to the text may be agreed to implement the standard set out in the model.

As mentioned above, the Agreement is designed to set the standard of what constitutes effective information exchange for the purposes of the OECD initiative on harmful tax practices. However, the Agreement's purpose is not to prescribe a specific format for how to achieve that standard. Thus, the Agreement is only one of several ways in which the standard can be implemented in either of its forms. Other instruments, including double taxation agreements, may also be used as long as both parties agree to do so, given that other instruments are generally more extensive in scope.

There is a detailed commentary for each Article in the Agreement intended to illustrate or interpret its provisions. The Commentary's relevance for the Agreement's interpretation is determined by principles of international law. Parties wishing to ensure that the Commentary is an authoritative interpretation could, in the bilateral context, insert a specific reference to the Commentary in the text of the exchange instrument, for example in the provision equivalent to Article 4(2). The details, as set out in Appendix C.

3.1.2 Tax Information Exchange Agreement (TIEAs) Model Agreement on Exchange of Information in Tax Matters (Model TIEA)

This Agreement is intended to promote international cooperation in tax matters through information exchange. It has been developed by the working group of the OECD Global Forum on Effective Information Exchange.

The Agreement grew out of the OECD's work in tackling harmful tax practices. One of the key criteria when determining harmful tax practices is the lack of effective exchange of information. The Agreement represents the standard for effective exchange of information about harmful tax practices for the purposes of the OECD initiative.

This Agreement, released in April 2002, does not constitute a binding instrument but contains two models for bilateral agreements. A considerable number of bilateral agreements were based on this Agreement.

1. Model Protocol¹⁴

The OECD Fiscal Affairs Committee (CFA) approved a Model Protocol to the Accord in June 2015. Jurisdictions may use the Model Protocol if they wish to extend the scope of their existing TIEAs to cover the automatic and/or spontaneous information as well.

* In so doing, jurisdictions will be able to base a bilateral competent authority agreement with a view to establishing the automatic exchange of information in accordance with the Common Reporting Standard or the automatic exchange of country-by-country reports on a TIEA; in particular where the exchange of information under the relevant Multilateral Competent Authority Agreement cannot (yet) take place automatically.

Jurisdictions may also choose to use the wording of the Model Protocol Articles should they wish to include in TIEA the automatic and spontaneous exchange of information provisions.

A Template model for requesting information under the TIEAs has been designed to assist TIEA partners' competent authorities in making requests for

¹⁴ OECD, Model Agreement on Exchange of Information in Tax Matters (Model TIEA), Model Protocol, at <https://www.oecd.org/tax/exchangeoftaxinformation/taxinformationexchangeagreementstieas.htm>, (last visited 13 March 2020).

information. It is available in both English and French and in Spanish, German, Italian, Japanese, Korean and Turkish languages.

2. Content of the Model Protocol

The Model Protocol may be used by jurisdictions that have a TIEA in place between them and wish to rely on their TIEA to establish the legal basis for automatic and/or spontaneous information exchange.

The inclusion in a TIEA of the automatic exchange of information (Article 5A) by means of a Model Protocol would only create the legal basis for the Contracting Parties to agree on the information items to be automatically exchanged; As well as the procedures governing automatic exchange, such as the methods of transmission, the timing of the exchange of information and the technical aspects relating to automatic exchange. In this respect, the actual automatic exchange of information is understood to take place between the competent authorities of the Contracting Parties.

For example, under Article 5A, the Contracting Parties may agree, on the basis of a TIEA, to implement the Standard or Country-by-Country Reporting for Multinational Enterprise Groups. In the event that the Contracting Parties wish to specify that their competent authorities have the power under Article 5A to conclude a competent authority agreement, the Contracting Parties may amend the wording on Article 5A accordingly.

The Model Protocol also contains Article 5B which allows for the spontaneous exchange of information in order to bring the forms for the exchange of information under a TIEA into line with the forms foreseen by the Multilateral Convention and Article 26 of the OECD Model Tax Convention.

In the event that jurisdictions wish to further clarify the scope of the spontaneous exchange of information under this provision, they may consider concluding an agreement with a competent authority under Article 13 of the TIEA.

Since Article 5A reflects the content of Article 6 of the Multilateral Convention, and since paragraphs 1 and 2 of Article 5B correspond to Article 7 of the Multilateral Convention, comments on Articles 6 and 7 of the Multilateral Convention may be used for the interpretation of Articles 5A and Articles 1 and 2 of Article 5B, respectively.

In order to allow the Contracting Parties to expressly agree on the applicability of the automatic and spontaneous exchange of information provisions of Articles 5A and 5B, the Model Protocol provides that two additional subparagraphs may

be added to Article 15(3) of the TIEA model. The subparagraphs allow the Contracting Parties to specify from which date the automatic and spontaneous exchange of information provisions will take effect and with respect to which reporting periods.

Finally, Article IV sets out the mechanism by which the Model Protocol between the Contracting Parties is affected, depending on the domestic requirements of each Contracting Party. Modeling Protocol as shown in Appendix D.

3.1.3 Double Taxation Agreement

According to the rules and regulations adopted to define each country's tax burden or tax liability are different such as source rules, resident rules and nationality rules so when the country adopts different tax rules it will result in international double taxation. Double taxation agreement to solve international double taxation. The receiver's source country and resident country will negotiate and sign the contract to eliminate double taxation for double taxation agreements. The double taxation agreement occurred before the United Nation was formed. The concept of a double taxation agreement is to eliminate international double taxation, it excludes income tax but it is about the inheritance tax convention between Great Britain and Canton of Vaud. The elimination of double taxation unilaterally launched under Great Britain's laws by providing the incentive for inheritance tax paid in foreign countries and included the inheritance property located in Great Britain. Then, in the United States, the unilateral of double taxation was developed by law to bring in the tax had been paid in foreign countries as a tax credit of the tax that will be paid in the United States. Then, after unilateral adoption of double taxation, use of bilateral agreement to eliminate double taxation is begun. But the bilateral double taxation agreement will also specifically limit the tax incentive to contracting country.

1. Purposes of Double Taxation Agreement

The purpose of the double taxation agreement is to eliminate double taxation by granting the right to be taxed in one contracting country by determining the regulation that which country was entitled to tax in any kind of income and, on the other hand, by suspending the right of other parties and allowing each other to be taxed in order to eliminate double taxation. But it does not allow the taxpayer to have a waiver from both countries. Preparing a double taxation agreement is aimed at eliminating double taxation in the country's law and authority and eliminating tax discrimination, as well as eliminating tax avoidance and tax evasion. In addition, it is to support the country's fiscal

and tax policy and to motivate the investment inside the country to attract foreign investors to invest in the country by building confidence among investors.

The Structures of Double Taxation Agreement

Double taxation agreement included four importance parts as following.

1) Framework of double taxation agreement

(1) Double taxation agreement covers to the resident of the contracting country only.

(2) Generally speaking, the double tax agreement covers personal income tax, corporate income tax and petroleum tax, direct tax and not local tax. For direct tax, the taxpayer had a duty to pay tax, so it should mitigate the tax burden on the taxpayer, they cannot reclaim their tax burden on another person. For indirect tax, there is no provision under the double taxation agreement such as VAT or value added tax, SBT or specific business tax.

2. Types of Income

Double taxation agreement is not determined to be payable among taxes, but it determines the right of the contracting country to be taxed in any kind of income for source country or resident country to be taxed. But if the tax rate was provided by the double taxation agreement, the country which was entitled to tax cannot be taxed in the rate over the rate provided by the double taxation agreement.

3. The Elimination of Double Taxation

This section will apply if the right to tax for both countries is provided for in Part 2 and will result in double taxation. By double taxation agreement provide for the elimination of double taxation in different ways such as determining the measure to eliminate double taxation by the method of exemption used, meaning that the resident country has to exempt the tax already paid in the source country. But if the arrangement using credit method, the resident country still had the right to tax the income that the taxpayer derived at source country but the resident country should bring the tax had been paid at source country deduct with the resident country's tax rate.

4. General Provision

General provision on the definition, provision on information exchange between the contracting country, mutual agreement procedure, non-discrimination and entry into force and termination has been established. In addition, it provides for the

elimination of discrimination and information exchange between authorities, and also provides the measure for diplomatic agents and consular officers. And it's also determined on expanding the double taxation network.

The scope of double taxation agreement

1) Personal scope

a) Under the double taxation agreement only the resident of the contracting country will receive the incentive.

b) A branch deemed to be a resident of the parent company but the separate entity with the parent company is a subsidiary.

c) The resident of the contracting country may, if they are the actual owner of that income, claim or receive the incentive under a double taxation agreement.

d) If there is doubt as to the resident's status, the payer or the tax authority may ask those who claim to show the certificate of residence document. The certification has to be recommended by an embassy or consulate.

2) Double taxation agreement, which is the national tax, will force income tax. Double taxation agreement which covers only direct taxation. And for indirect taxation like Value Added Tax or Specific Business Tax, not covered by a double taxation agreement, it still collects according to each country's domestic laws.

5. Thai Double Taxation Agreement¹⁵

To eliminate double taxation in the Kingdom of Thailand, the country signs the contract by the government in the form of a bilateral agreement with the contracting country to eliminate double international taxation.

Thailand first entered into a double tax treaty (DTA) with Sweden in 1963. The Thai DTA network is continuing to expand and to update. Thailand has concluded DTAs with 56 countries until now (as of May2006). A DTA generally consists of 4 major parts.

First, Scope of double Taxation Agreement.

1) Covered persons The DTA applies to persons residing in Contracting States. A person must be one of the following if he is to be classified as a Thai resident and entitled to treaty benefits:

¹⁵ Double Taxation Agreement, Introduction to DTA by Revenue Department, at <http://www.rd.go.th/publish/21973.0.html>, (last visited 23 July 2015).

- An individual residing in Thailand for a period or periods exceeding 180 days in a tax year in total;
- A legal person incorporated under Thailand's Civil and Commercial Code;

2) Tax Covered, the DTA only applies to income taxes, i.e. personal income tax, corporate income tax and petroleum tax. The DTA does not cover other indirect taxes, such as value added tax and particular business tax.

Second, revenue types, generally the DTA does not stipulate any particular income and tax rate items. It provides whether certain income is taxable by the source or resident country. If the source country has taxing rights, the income will be taxable according to that country's domestic laws.

The DTA also prescribes a level of tax on investment income; that is, dividends, interest, and royalties. The source country may then tax such income at a rate that does not exceed the rate prescribed in the Agreement. In many cases, tax rates within the DTA are lower than domestic tax rates to reduce tax obstacles to cross-border trade and investment.

Certain articles of the DTA clearly do not allow the source country to exercise income taxing rights, such as income from international air transport and business profits, provided that the business is not carried by a permanent establishment in the country of origin.

Thirdly, elimination of double taxation, a DTA focuses on eliminating double taxation. Each DTA may prescribe different ways in which a resident country can eliminate double taxation of a person:

- Exemption method

The country of residence does not tax the revenue that is taxed in the source country according to the DTA.

- Credit method

The resident country retains the right to tax revenue that was already taxed in the country of origin. It calculates its tax on the basis of the total income of the taxpayer including revenue from the other country that is taxed in that other country according to the DTA. However, it allows for the tax paid in the other country to be deducted from its own tax. Where a DTA does not exist with a particular country, the Royal Decree No. 300 provides for a unilateral credit relief against Thai tax for tax payable by a Thai legal person in the other country.

Fourth, general provisions, the last part of the Double Tax Agreement provides administrative assistance, such as information exchange between tax administrations and procedures for dispute resolution.

3.1.4 Exchange of Information under Double Taxation Agreement

Double taxation agreement as we know the purpose is to eliminate or alleviate double taxation as well as eliminate tax avoidance and tax evasion. In order to exchange the necessary information, especially in taxation, the section on information exchange is provided. In addition, the Exchange of Information article will be provided.

The exchange of information's article provided as following.

ARTICLE 28 Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the implementation of the provisions of this Convention or of the domestic laws of the Contracting States relating to taxes covered by the Convention, insofar as the taxation thereof is not contrary to the Convention. Article 1 (General Scope) doesn't restrict the exchange of information. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information for those purposes only. They may disclose the information in proceedings before public courts or in court decisions.

2. The provisions of paragraph 1 shall in no case be construed so as to impose an obligation on a Contracting State:

- 1) Implement administrative measures in contravention of the laws and administrative practices of that or the other Contracting State;
- 2) To provide information that cannot be obtained by law or in the normal course of administration of that or the other Contracting State;
- 3) Providing information that would disclose any trade, business, industrial, commercial, or professional secret or trade process, or disclosure of that information would be contrary to public policy (public order).

Subject to the provisions of paragraph 2 of Article 31 (Termination), if information are requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same

manner and to the same extent as if the tax of the first-mentioned State were the tax of that other State and were being imposed by that other State. The application of this paragraph shall be suspended until such time as the United States Government receives a diplomatic note from the Government of Thailand indicating that Thailand is prepared and able to implement the provisions of this paragraph. For the purposes of this Article, the Convention shall apply, notwithstanding the provisions of Article 2 (Taxes Covered) to all taxes imposed:

- i) In the case of the United States, under the Internal Revenue Code; and
- ii) In the case of Thailand, under the Revenue Code, and under the Petroleum Income Tax Act.

3.2 UN model's Exchange of Information¹⁶

Tax treaty provisions based on the UN Model Convention are not the only way countries can agree to exchange information. Bilaterally, countries may enter into Tax Information Exchange Agreements ("TIEAs") that differ from comprehensive tax treaties, since they only deal with administrative assistance through information exchange. Since 2011, the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters³⁴ ('Multilateral Convention') has been opened for signature by non-OECD or Council of Europe member states. The Multilateral Convention contains extensive provisions for mutual administrative assistance through information exchange and through cross-border assistance in tax collection.

It is normal practice for an article to be included in all bilateral tax treaties on the exchange of information, generally based on Article 26 of the UN or OECD model convention. In the different editions of the two Model Conventions, the scope of this Article has changed, and is now significantly broader than before. According to the current version of Article 26 of the UN Model Convention, the exchange of information is not restricted by Articles 1 and 2 of the Model, so that it is not limited to persons who are residents of one or both of the Treaties, nor is it limited to taxes covered by the Tax

¹⁶ UN model's Exchange of Information, Papers on Selected Topics in Administration of Tax Treaties for Developing Countries: Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion, at http://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper9A_Baker.pdf, (last visited 3 September 2015).

Treaty only. The test for information exchange is whether that information is "predictably relevant" either to implement the tax treaty provisions, or to administer or enforce domestic tax legislation. It is the exchange of information which is particularly highlighted here for the purposes of implementing domestic anti-avoidance rules.

Traditionally, information-sharing provisions such as Article 26 of the UN Model Convention cover three forms of information-sharing. First, the exchange on request is that one State makes a specific request for information from the other. Secondly, spontaneous exchange of information where one state's tax authorities receive information that they consider would be predictably relevant for tax administration in the other state. Thirdly, automatic exchange of information: where certain categories of information – payments of bank interest to account holder's resident in the other state, for example – are exchanged on an automatic and regular basis. Automatic exchange of information in particular may identify taxpayers who have sought to avoid tax by transferring assets abroad and have failed to include the income from those assets in their tax returns.

The effectiveness of the automatic exchange of information is largely dependent on the ability of the receiving state to bind that information to a particular taxpayer within its jurisdiction. Precise information about the beneficial owner of the income, or even the identification number of the owner's taxpayer, can help greatly in improving the effectiveness.

The current version of Article 26 of the UN Model Convention reflects the development of the most recent international consensus on exchange of information. Thus, under Article 26(4) of the UN Model Convention, the requested state is required to use its information gathering measures to obtain the information requested, even though it does not need the information for its own tax purposes. Put another way round, the requested state cannot decline to gather and supply information solely because it has no domestic interest in such information. Previously, it was the position of some countries that they would supply information already contained in their files, but would not go out and gather information solely for the purposes of exchange. The "no domestic interest" consensus now requires the gathering of information solely for the purposes of exchange with another country.

Secondly, Article 26(5) of the UN Model Convention reflects the consensus that, for example, a State may not refuse to supply information because it is held in fiduciary capacity by a bank or by another person. This reflects the consensus that the secrecy of banking should not be a barrier to tax exchange of information between countries.

Finally, Article 26(6) of the UN Model Convention authorizes competent authorities to develop appropriate methods and techniques concerning exchange of information. This would provide a basis for agreements to identify categories of information to be subject to automatic exchange, as well as other methods for using exchange of information to supplement the effectiveness of anti-avoidance provisions. Examples might be agreements between the competent authorities to carry out joint audits of taxpayers who operate in both of the countries concerned, or a sharing of information between the two competent authorities relating to aggressive tax planning schemes which have been identified in one or other of the countries.

The provisions for the exchange of information in tax treaties in many respects provide one of the most powerful weapons in revenue authorities' hands to combat both aggressive tax planning schemes and tax fraud.

3.3 The United States of America Measurement on the Exchange of Information to Prevent Tax Evasion

The United States is the powerful country that had the large economic in the world. It is made the United States as the most interesting capital resource attract the foreign investor and in the same time, the United States entrepreneur most are the importance entrepreneur which had the highest capital and they also invest in the lower cost country than the United States. It affects to the rules and regulations about the prevention of taxation of the United States. So, it is necessary to enforcement strictly in order to keep the benefits of the administration and taxation of the government. It can say that, the United States had strict of prevention of tax avoidance and tax evasion country. The domestic laws are close to the guideline of transfer pricing of OECD. According to the principle of the United States, it affects to other countries give an importance to tax avoidance and tax evasion also.

Furthermore, to solve tax haven issues and other forms of tax avoidance and tax evasion, the U.S. cannot easily get into tax information in. So, in order to prevent tax avoidance and tax evasion, the United States Congress had the resolution to approve the laws namely the Foreign Account Tax Compliance Act (FATCA).

3.3.1 Foreign Account Tax Compliance Act (FATCA)

Foreign Account Tax Compliance Act (FATCA) had the purposes to prevent tax avoidance and tax evasion both of individual and corporation of the United States (the residency of the United States) that had the international finance transaction by open an account with the financial institution or it had the transfer the income or shift the profit out of the country through the investment company or any offshore account situated at outside the United States. Foreign Account Tax Compliance Act defined 2 regulations namely first, in the case of the foreign financial institution had agreement with the Internal Revenue Services (IRS) of the United States and second, in the case of the foreign government negotiate with the United States Treasury Department in order to make an agreement in the form of Intergovernmental Agreement (IGA). At the present, tax haven such as British Virgin Islands, Cayman Islands, Bahamas and Bermuda was already signed an agreement with the United States.

In practice, the Foreign Account Tax Compliance Act (FATCA) provisions had the result of increasing the provision of the United States Internal Revenue Code (IRC). By defining the foreign financial institution had the obligation to report the United States customer's financial information to Internal Revenue Services.

The characteristics of foreign financial institutions (FFIs) as follow.

- To deposit in normal trade of bank transaction or other business that doing business as deposit money.
- The main point of the business is to do business in the form of open account about the investment in bond or financial property.
- The importance business is about the investment or re-investment or securities trade or in other form about the options and future or forward contracts in property or any goods or the contract about the profit, gain or any benefits about the property for investment or from the benefits of partnership interests.
- The insurance that provide the business to insure cash value insurance or any compensation in the form of cash. In addition, Foreign Account Tax Compliance Act (FATCA) did not clarify that any types of insurance is in the scope of Foreign Financial Institutions (FFIs). But it can define that the specified insurance company means the insurance company in the form of cash value insurance contract and annuity contract.

In addition, it defined Non-Financial Foreign Entities (NFFEs) as a low risk of tax evasion, such as foreign government or an organization established by foreign government, international organization, central bank and institution or any staff that the Internal Revenue Service (IRS) would agree with.

3.4 The Measure to Prevent Base Erosion and Profit Shifting (BEPs)

The OECD / G20 BEPS project (base erosion and profit shifting) resulted in an action plan designed to prevent multinationals from shifting their profits to low-tax countries or even avoiding taxation altogether. The OECD and G20 countries agreed that only internationally coordinated measures can solve the problems. The primary purpose of the BEPS project is to ensure that profits are taxed in the jurisdiction where there was an economic activity that gave rise to the profit.

3.4.1 What is BEPs

Corruption tax base and profit shift to foreign countries is an issue that many government agencies worldwide focus on collecting revenue, including OECD countries and the ASEAN countries. Consequently, BEPs are one of the current issues that have been discussed continuously within the framework of international economic, tax and fiscal cooperation.

BEPs are a form of tax evasion by making use of legal loopholes. In particular, corporate income tax of multinational corporations with many offices worldwide in different forms, such as transferring profits to countries with low tax rates that do not have actual activities or transactions of the company or Branch companies that are parties to a transaction between themselves by determining the purchase price of a product or by providing a service which is different from the market price for tax evasion purposes. This action resulted in the government losing a lot of revenue, particularly to countries with a large corporate income tax collection compared to income from all non-taxable income excluding oil and gross domestic product (GDP), such as Indonesia, and Malaysia including other countries offering tax advantages in the form of tax holidays, tax reduction measures and tax deductions to attract foreign investors to invest in the country. In addition to causing the government to lose income from corporate income tax that should normally be collected, BEPs also cause unfairness between taxpayers who are small business entrepreneurs or small businesses and those who are also large business operators paying taxes.

3.4.2 Initiatives to Implement Preventive Measures for the Use of BEPs

From the above-mentioned effects, the G-20 countries are beginning to focus on collaborating to create measures to prevent BEPs from occurring, since such measures not only help to promote more revenue from the government; But it can also

reduce the movement of capital that illegally including money laundering and corruption by government officials and later the OECD countries carried out a study analyzing taxpayer data and setting out measures to prevent and resolve BEPs in five main forms as follows:

1. Setting up the tax structure to support the digital economy industry
2. Determining measures to solve transfer pricing problems
3. Creating transparency by laying down rules for the obligatory disclosure of tax planning and issuing relevant support measures
4. Technical protection measures such as the eradication of the tax base by preventing thin capitalization, the shopping of contracts and the strengthening of rules governing foreign companies
5. Developing effective dispute resolution mechanisms and making tax conventions multilateral

3.4.3 Cooperation on Measures to Prevent the Occurrence of BEPs in the ASEAN Framework

The effects of BEPs had been realized for the ASEAN framework. The ASEAN Finance Minister assigned the tax sub-committee to debate on this issue at the meeting. The Revenue Department is the head of the department for Thailand and the Department of Excise and the Office of Fiscal Policy also participate. The guidelines for organizing BEPs measures in the next phase, ASEAN Member States will specify the extent of cooperation which allows domestic laws to be used as a database to create mechanisms for exchanging information between Member States.

3.4.4 Thailand Framework with the Measures to Prevent Base Erosion and Profit Shifting

A resolution approving the BEPs Project of the Organization for Economic Co-operation and Development (OECD) as an Associate Country Member under the Inclusive Framework was passed by the Cabinet according to the Ministry of Finance offer. The BEPs plan can be summarized as:

1. Study of transactions in a digital economy. The emergence of borderless trade in the digital world is currently creating a stream of internal and international scrutiny of digital transaction taxation.
2. Measures to prevent tax planning using different laws of each country to transfer profits, such as limiting the deduction of interest expenses by means of

measures to prevent low capital setting (thin capitalization), measures to protect profitability in countries with low tax rates by means of the Controlled Foreign Company Rule and the exploitation of double tax treaties (treaty shopping), etc.

3. Providing transparency and dispute-related measures, such as providing taxpayers with a tax planning report which is considered aggressive tax planning and studying barriers that prevent the use of Mutual Agreement Procedures.

4. Increase measures on transfer pricing protection by providing a transfer pricing document with more detailed inter-transaction reports including Country by Country Report.

In this regard, Thailand's participation in the BEPs project will help enhance Thailand's roles to sustainably expand the income tax base, in line with the objectives of the state tax reform.



Chapter 4

Problems of Tax Evasion Concerning International Cooperation on the Exchange of Financial Information

4.1 The Problem of an Exchange of Information with Domestic Policy, Especially on the Personal Data Protection.

The law relating to the protection of personal data is the law stipulating the collection and use of personal data which may be acquired by the government, public sector or private sector and which can be classified as follows:

- (a) General privacy laws which have an overall bearing on individuals' personal information and affect policies governing many different areas of information.
- (b) Specific data protection laws designed to govern specific types of information.

Certain examples include:

- (1) Communication privacy laws
- (2) Financial privacy laws
- (3) Health privacy laws
- (4) Information privacy laws
- (5) Online privacy laws
- (6) Privacy in one's home

4.1.1 Banking or Financial Secrecy Laws

Banking secrecy is the policy of bank confidentiality or other names, such as financial privacy, bank discretion or bank security. This is the agreement between the bank or financial institution and their clients that the transaction needs to be secure, confidential and private. Some of the bank or financial institution willing to protect their customer's personal data as a secret while some of the bank or financial institution has the privacy policy according to law enforcement and domestic law protection, particularly in the Offshore Financial Center (OFC).

Most of the time, the bank's standard of personal data protection policy is prohibited from the bank or financial institution disclosing their customers' personal data to any third party without the customers' consent except by criminal request. This protection of personal data is very famous and extensive in many countries, especially in

the least natural resource country or the countries characterized by the island such as Switzerland, Luxembourg, Monaco, Hong Kong, Singapore, Ireland and in the Offshore Banking Institutions countries.

Protecting the bank or financial institution's business of the client will be covered by information received from any sector that customers contact and other resources within the bank or financial institution. If the bank or financial institution requires that such information be used, it shall receive prior consent from the customers and shall only be in accordance with the objectives and conditions agreed between the customers and the bank or financial institution and not have used such information for any person's personal interest.

The information that the bank or financial institution protects consists of customer information and customer personal information, including information about the financial transaction between the customer and the bank, such as bank account, asset retention account, trading account, internal credit assessment account or other customer information that the bank has, including to an information related to the bank's secrets.

In addition, the bank or financial information shall protect the personal data of their customers without disclosure to third parties by prescribing some of the exemption from disclosure, such as:

Receiving prior written consent from the client for such information to be disclosed.

There is a law forcing such information to be disclosed.

Banking responsibility to disclose such information to the public under the supervision of the related agencies.

Disclosure of information to protect the assets of the bank without conflicting with laws such as disclosure of information to police in the event of reasonable doubt about corruption and fraud, etc.

However, most of these countries are low or no tax jurisdictions, called "Tax Haven" in the least natural resources countries or island countries. Most of Tax Haven has the measure to attract foreign investors to invest in their countries by providing a tax incentive policy, and the protection of personal data is one of the measures, because it is impossible to find a transaction, in particular an illegal one.

Considering those countries lack of transparency with Non-disclosure policy and have no powerful exchange of tax information so, often used as a country source, most of such income has been transferred and deposited in a bank account or financial institution. In addition to being revenue generated from the company's business

operations called "Active Income," it is also popular to be a source of income that is an easy to transfer natural fruit such as dividend, interest, royalty called "Passive Income."

4.1.2 The Principle of Privacy Data Protection Laws

The most important principle of privacy data protection laws are as follows.

1. Collection Limitation Principle

Collection of personal information should be limited and appropriate, using a legitimate and reasonable method for informing or consenting the owner of personal information as well.

2. Data Quality Principle

Personal information collected must be relevant to the purpose of using of information as necessary and must be accurate, complete and up-to-date.

3. Purpose Specification Principle

In collecting personal information, it is important to inform the purpose specific to the owner of the personal information for immediate acknowledgement when collecting such information and the use of the information must be consistent with the purpose or any other case and not contrary to that purpose as has been changed.

4. Use Limitation Principle

Personal information shall not be disclosed or used to inform the owner of personal information in accordance with other purposes, unless the owner of the personal information given consent or is in use in accordance with the law.

5. Security Safeguards Principle

Personal information shall be kept secure to protect against any risks, damages, accessibility without consent, including destruction, use, modification or disclosure without consent.

6. Individual Participation Principle

The owner shall have the rights as follows:

1) Receive information from the controller of personal information or have confirmed that the controller of personal information has or does not have information relating to him.

2) Receive any contact with appropriate charge and fee in due time.

3) Recognize any reason if the request is rejected pursuant to clauses (a) and (b) and is entitled to defend for such refusal.

4) Rights to dispute information relating to itself and in the event of a successful dispute, the owner of the personal information shall have the right to receive correct, complete or updated information.

7. Accountability Principle

It is the responsibility of the controller of personal information to comply with the measure affecting the protection of personal data as mentioned, including to inform the owner of personal information in order to acknowledge the purpose of the collection of information, person or entity to which the information is to be disclosed, identity and Information controller address Includes contact information, options, methods of handling, use and disclosure of personal information including access to and correction of personal information, as well as notification of personal information breaches.

The above principles also appear in the Personal Information Protection Act of the European Union, which is the EU General Data Protection Regulation (GDPR) and the Singapore Personal Information Protection Act, which is characterized by harsh legislation; consequently, both laws have a more stringent set of personal data protection principles than the OECD Privacy Framework and the APEC Privacy Framework, an international agreement that looks like a Soft Law, particularly in the GDPR with a detailed set of personal data protection principles, both the European Privacy Act and the Singapore Privacy Act, specify additional Privacy Policy, namely:

* 1) Storage Limitations *

Personal information should be kept in a format capable of identifying the owner of personal information, which should not be kept longer than necessary for the purpose of processing that information except as required by law, and should be carefully destroyed when the use of such information is no longer necessary.

2) Data Protection Officer Personal data protection officers will be responsible for overseeing the agency's compliance with GDPR guidelines for the protection of personal data.

3) Penalty

If the controller of personal information or the processor of personal information does not meet the specified criteria, fines may be imposed for a calculation based on global performance while at the same time blaming the controller for personal information that violates the non-compliance with the Singapore Privacy Protection Act, both fines and imprisonment may apply.

4) Binding Corporate Rules (BCRs)

Binding Corporate Rules (BCRs) certification is the acceptance of measures for the transfer of personal information between groups of companies. The BCRs are legally binding and applicable to the group of entrepreneurs in the member countries. Each business group must accept the principles of protection of personal information, and must adhere to principles such as standards that must be applied throughout.

4.1.3 Sample of Privacy and Disclosure Law by Countries

1. Panama

Panama is regarded as an offshore tax haven country and is a longstanding international tax avoidance issue. OECD identifies four countries or territories that do not impose taxes or collect taxes at a lower rate, lack effective exchange of tax information, lack of transparency (lack of documentary base), and a lack of serious government action, for Panama, is consistent with all of the above, including effective information exchange.

Panama's Privacy and Disclosure Law is a high degree of strictness and reserved for disclosing financial information only in certain cases, such as requiring financial institutions to disclose information only in cases of serious crimes such as cases of drug trafficking etc. In addition, Panama is a country with other countries without a Double Taxation Agreement. Thus, in the case of tax disputes or questions from other countries' Revenue Department that their taxpayers collect money in Panama or not, it would not be able to use the taxpayers' request for income information through the Double Taxation Agreement channel.

Panama has many laws concerning the disclosure of information to protect people's or taxpayers' rights, as follows:

1) Panama Privacy Constitution Articles

- Article 17 provides that the authorities of Panama shall protect the honor, life and goods of its citizens and foreigners under the jurisdiction of Panama;
- Articles 26 and 29 provide that residences, domiciles and mail or correspondence of its citizens and foreigners residing here shall be respected and may be entered only with the express permission of the owner.
- Article 26 provides specifically that residences and places of residence are inviolable. No one can enter the premises without a consent from the owner or a written order from a competent authority; or to assist victims of crime or disaster. For

inspecting violations of their respective laws, labor, public health, and social security officials may conduct job or home visits with proper identification.

- Article 29 specifically states that, for specific purposes and using legal formalities, private documents and correspondence are inviolable and cannot be examined or held except by order of the competent authority; Furthermore, private telephone communications are inviolable too and cannot be recorded or intercepted.

- Article 44 provides for the protection of private ownership of private investments and real estate insofar as it is legally acquired by a legal entity or natural person.

2) Panama Privacy Codes

- Law 6 of 2002, The Panama Family Code, requires that the State provide the necessary protection of the family's honor and intimacy and the right to self-image. The Family Code requires that the State set up mechanisms to protect all persons and families.

- Law 6 of 2002, The Panama Judicial Code, provides that personal information may only be disclosed to interested parties and prohibits the disclosure of the same information to third parties.

- The Panama Criminal Code, Law 6 of 2002, makes it a criminal offense for businesses to violate the confidentiality of information stored in their databases and records. (Articles 164 and 283 to 286)

3) Panama Privacy Conventions

Panama has signed various international conventions on the "privacy rights" These include the 1976 approved International Pact for Civil and Political Rights, which provides that judicial proceedings must protect against the release of information which could severely damage a party's private life.

4) Panama Privacy Laws

- Law 26 of 1992 protects HIV-infected patients from disclosure of their identities and of patient information.

- Law 13 of 1994 provides for restrictions in the fight against drug sales and trafficking by preventing the recording of telephone conversations because it violates Article 29 of the Panama Constitution.

- Law 11 of 1998 regulates the disclosure of private, electronically stored information.

- Law 6 of 2002 gives all persons the right to access all public files, registers and databases which contain personal information. Said person is entitled to know the reason for the collection of this information, and to request corrections, and to request its removal.
- Law 51 of 2008 known as the Electronic Commerce Law provides that providers of electronic document storage shall guarantee the protection, proper use and reliability of the data and information stored on behalf of their clients.
- Panama Corporation Laws also provides the means to establish fully anonymous corporations using nominee directors and officers, and to issue share certificates to "Bearer" rather than to an individual.
- The Panama Private Interest Foundation Law provides for full anonymous ownership where the name of the true proprietor never appears in any publicly registered documents.
- Panama Bank Secrecy Laws also protects the privacy of all bank account holders by making it a criminal offense for bank employees to disclose to unauthorized persons any information concerning accounts and their owners.

Additionally, protection of Panama's personal information is considered constitutional, protected by law to protect such individuals' individuals and families, as well as the privacy of legal entities. Panama is therefore considered to be a country with a strong banking secrecy, and what investors should know about Panama is as follows.

1) The Best Banking Secrecy Laws in the World

Panama has legislation that protects the privacy of all bank account holders. The laws of banking secrecy make it a criminal act for anyone working for a bank in Panama to disclose any information about a customer's account to anyone not authorized to receive such information. This includes governments, local and global government agencies and judiciary, private investigators, individuals, and businesses. Only by a Panama court order can somebody get information about the Panama bank account of another and such orders are rarely issued, especially in cases involving terrorists or international criminals.

2) Panama has a Strong Banking Sector

Banks in Panama are very solvent because they issue secure loans, invest conservatively, and keep larger reserves than banks in the United States. Because of these reasons, Panama banks have not suffered from the global financial crisis

of 2008 which still has a negative impact on the economies of many countries. Panama's Superintendent of Banking reported 10.5 per cent growth in 2011 and 11.6 per cent growth in 2012, according to Panama's largest daily newspaper, La Prensa. In fact, in 2012 the CIA World Fact Book listed Panama as the richest Central American country with an annual per capita income higher than the average for the whole Central America region.

3) The U.S. Dollar has been the currency standard since 1903

Those looking for a stable currency such as the U.S. dollar can feel confident knowing that since Panama became an independent country in 1903, the U.S. has allowed Panama to be the first country to have its currency on a par with the U.S. dollar. So, Panama's offshore banking is run using the U.S. dollar.

Aside from the three things above, many Panama banks offer a platform for making global investments that may not be available in your country. Your Panama bank may establish a brokerage account to invest in foreign currencies (known as Forex), commodities, foreign government bonds, global corporate stocks, and other securities around the world.

Also, all Panama bank account interest earned and worldwide investment profits from the Panama brokerage account are income-tax-free.

To conclude, offshore banking in Panama is tax-free, in US dollars, in a country with a strong economy and solvent banking sector, and provides complete privacy.

2. Singapore

1) Personal Data Protection Act

The Singapore Personal Data Protection Act requires organizations that are in foreign countries where personal information is legally required to be transferred to provide a standard equivalent to this law for the protection of personal information. Legal duties may be duties arising from the law or contract provisions or pursuant to the Binding Corporate Rules or other principles and the Board. The protection of personal information may be written in writing for any organization to acknowledge that the organization may be exempted from proceeding as prescribed by this Act and may specify conditions for such exceptions in writing without being enacted in the Royal Gazette, and that exception may be revoked at any time by the Information Protection Committee. Furthermore, penalties are also imposed in cases of violation of personal information, the principles which appear in the law.

2) The objectives of the Personal Data Protection Act

Today, for a variety of reasons, vast amounts of personal data are collected, used and even transmitted to third party organizations. This trend is expected to grow exponentially as processing and analyzing large amounts of personal data with ever more sophisticated technology becomes possible.

With such a trend comes growing concerns about how their personal data is being used by individuals. Therefore, it is necessary to have a data protection regime governing the collection, use and disclosure of personal data in order to address these concerns and maintain the confidence of individuals in the data management organizations.

The PDPA also aims to strengthen and consolidate Singapore's competitiveness and position as a trusted, world-class hub for businesses by regulating the flow of personal data between organizations.

3) How does the Personal Data Protection Act work

By complementing sector-specific legislative and regulatory frameworks, the PDPA will ensure a baseline standard of protection for personal data across the economy. This means that organizations, when handling personal data in their possession, will have to comply with the PDPA as well as common law and other relevant laws that are applied to the specific industry to which they belong. The PDPA takes the following notions into account:

(1) Consent Organizations may only gather, use or disclose personal data with the knowledge and consent of the individual (with a few exceptions);

(2) Purpose Organizations may collect, use or disclose personal data in a manner appropriate to the circumstances and only when they have informed the individual of the purposes for the collection, use or disclosure; and

(3) Reasonableness Organizations may collect, use or disclose personal data only for purposes which in the given circumstances would be deemed appropriate for a reasonable person.

4) Enforcement of the Data Protection Provisions

If the PDPC finds that an organization is in breach of any of the PDPA's data protection provisions, the organization may be given such directions that it considers appropriate to ensure compliance. These may include requiring the organization to:

(1) stop the collection, use or disclosure of personal information in contravention of the Act;

(2) Destroy personal data collected in contravention of the Act;

- (3) Provide access to or correct the personal data; and/or
- (4) Pay a financial penalty of an amount not exceeding \$1 million.

4.2 Problem on Exchange of Financial Account Information between the Countries¹⁷

Tax transparency should be improved and, with the help of the global standard for automatic exchange of financial account information (AEOI), cross-border tax evasion avoided. In Switzerland the necessary legal foundations had to be created to enable the implementation of the AEOI.

4.2.1 Problem of Exchange of Information between the Countries

A growing number of international transactions are currently taking place, resulting in the transfer of money between sources of income to countries where the parent company is located which is a transfer of profits to reduce or eliminate the tax burden on the company and resulting the tax authorities are unable to access and exchange the information of their taxpayer, as there are specific laws in some countries that prohibit the disclosure of the investors who investing in their countries. Additionally, there are many problems that not allow the tax authorities to access and exchange the information from the other countries where their investors entered the transaction, as follows:

1. General Problems

Globalization and the liberalization of economic activity, resulting in an exponential increase in commercial and financial transactions across borders, had effectively transformed the private sector into a world without borders. This has created a major problem for national tax authorities as globalization in the private sector has not been accompanied by similar changes in national tax authorities' reach and enforcement powers. This has created a major problem for national tax authorities as globalization in the

¹⁷ David Spencer, Problems of exchange of information, Accountancy business and the Public Interest Vol. 5, No. 1, Exchange of Tax Information, at http://www.taxjustice.net/cms/upload/pdf/Spencer_06_Exchange_of_Tax_Informaton.pdf, (last visited 3 September 2015).

private sector has not been accompanied by similar changes in national tax authorities' reach and enforcement powers.

National tax authorities face several problems in confronting the impact of globalization and economic liberalization as follows.

First, it is precisely that which is national tax authorities, an administration of one national government.

Second, there aren't any international tax authorities yet.

Third, there is a traditional rule of law that one government does not enforce other government's tax laws. That, is one government isn't going to help another government collect taxes from that other government.

Fourthly, national tax authorities' technical expertise has not sufficiently developed to cope with the growth in volume and complexity of commercial and financial transactions.

Fifth, bank secrecy and other confidentiality laws ("de jure bank secrecy") in many jurisdictions prevent the disclosure to government authorities of relevant information by financial institutions, except in specified, limited facts. In some countries which are international financial centers, and in some tax haven jurisdictions, this de jure bank secrecy exists. Tax havens are a "double issue" Some are finance centers that receive deposits from banks and other passive investments. And often third-country investments are routed through tax havens to get the confidentiality cloak. (A resident (corporate or individual) of Country X, establishes a corporation in Country Y, establishes a tax haven with confidentiality and/or bank secrecy law, and makes an investment in Country Z).

Sixth, many governments normally don't get the relevant information from financial institutions and other cross-border income payers. Those governments therefore don't have the relevant information to exchange with other governments. That results in "bank secrecy de facto."

Seventh, multi-country laws prohibit the transfer of tax-related information to other governments except where the two governments have an international agreement.

Eight, there are practical problems in implementing information exchange between governments, in particular automatic information exchange, which involves the transfer of substantial amounts of information from one government to another.

Ninth, Governments have conflicting interests in information exchange. Governments usually want to get income information from other countries that their residents and citizens derive from. However, some governments, particularly international

financial centers, especially international financial centers, generally want to attract foreign investments, especially bank deposits and other interest-bearing investments. Those governments may attract such investments by offering (a) tax-free treatment for interest income resulting from such investments, and (b) bank secrecy or other confidential treatment for such investments (i.e., no information exchange). So, governments that want to attract such investments may not want to exchange information with the country's government where the foreign investor is a resident or a citizen.

Governments have suffered from tax revenue losses, including, in particular, from transfer-pricing issues, resulting in taxpayers shifting their income from one jurisdiction to another, usually from higher tax jurisdictions to lower tax jurisdictions. Governments have stressed the need for more information exchange as a result of the need for greater tax revenues. Because it is the responsibility of national tax authorities to enforce national tax laws, national tax authorities have sought to confront those changes in the private sector. Those national tax authorities recognize that exchanging tax information between them is essential to tackling the challenges of globalization in the private sector.

2. The Problems of Exchange of Information on Legal Framework

1) Putting in Place the complete Legal Framework for Exchange¹⁸

(1) There must be a domestic legislative framework requiring financial institutions to collect and report the information:

a. It should be effective from 1 January before the exchange year from which financial institutions should begin collecting self-certifications (including tax residency and tax identification number of the account holder) upon opening new accounts. This is also the beginning of the period within which all preexisting accounts must be analyzed and reported as required for exchange.

b. It should require that information be gathered for at least all relevant partners interested in the jurisdiction.

(2) There must be an international legal framework allowing for the automatic exchange of information with all relevant partners concerned:

¹⁸ OECD, Putting in place the complete legal framework for exchange, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Information Implementation Report 2017, at <https://www.oecd.org/tax/transparency/reporting-on-the-implementation-of-the-AEOI-standard.pdf>, (last visited 14 August 2018).

a. For the exchange period, which may be multilateral, such as the Multilateral Convention on Mutual Administrative Assistance in Tax Matters ('the Multilateral Convention') or bilateral, underlying legal gateway for exchange should be in place. Double tax agreements or tax information exchange agreements which provide for AEOI.

b. An administrative agreement between two jurisdictions is also required, setting out the details of the exchanges. This may also be multilateral, such as the Multilateral Competent Authority Agreement (MCAA) with respect to the Convention-based AEOI Standard, or it may also be a bilateral agreement.

Jurisdictions without the Complete Domestic Legislative Framework in Place

| Country | Primary Legislation | Secondary Legislation |
|------------------------|---------------------|-----------------------|
| 1. Aruba | Not yet in place | Not yet in place |
| 2. Dominica | Not yet in place | Not yet in place |
| 3. Israel | In place | Not yet in place |
| 4. Qatar | Not yet in place | Not yet in place |
| 5. Russian | Not yet in place | Not yet in place |
| 6. Saint Maarten | Not yet in place | Not yet in place |
| 7. Trinidad and Tobago | Not yet in place | Not yet in place |

3. Additional Problems of Implementing of Exchange of Information focus on the Developing Countries

1) Illicit Financial Flows from Developing Countries (IFFs)

Illicit financial flows (IFFs) are illegal money or capital movements from one country into another. When the funds are illegally earned, transferred and/or used, GFI classifies this movement as an illicit flow. Certain examples of illicit financial flows could include:

- A drug cartel using commercial money laundering techniques to mix legal money from the sale of used cars with illicit drug money;
- An importer who uses trade default invoices to evade customs duties, VAT or income tax;
- A corrupt public official who uses an anonymous shell company to transfer dirty money into a US bank account;
- A human trafficker carrying and depositing a briefcase of cash across the border at a foreign bank; or

- A terrorist who wired money from the Middle East to a European operative.

The impact of illicit financial flows on developing countries is a huge amount of money flowing out of the country, which means illegitimate financial flows from developing countries and ending up in developed countries or tax havens or offshore financial centres. The country should enact the policy as follows to limit illicit financial flows:

- Detect and deter cross-border tax evasion;
- Eliminate anonymous shell company;
- Strengthen anti-money laundering laws and practices;
- Work to curtail trade miss invoicing; and
- Improve transparency of multinational corporations.

4.2.2 Jurisdictions and Countries List which is undertaking Automatic Exchanges of Information (AEOI)

1. AEOI Status of Commitments¹⁹
 - 1) Jurisdictions having initial exchanges in 2017, a list of countries as shown in Appendix E.
 - 2) Jurisdictions undertaking first exchanges by 2018, as shown in Appendix F, list of countries.
2. AEOI Commitments by Developing Country Members without Financial Centers
 - 1) Jurisdictions undertaking first exchanges by 2018
 - Azerbaijan
 - Ghana
 - Pakistan
 - 2) Jurisdictions undertaking first exchanges by 2019/2020

¹⁹ The United States has undertaken automatic information exchanges pursuant to FATCA from 2015 and entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.

- Albania
- Maldives
- Nigeria
- Peru

3. Developing Countries Having not yet Set the Date for First Automatic Exchanges, a List of the Countries Appeared as Appendix G.

4.2.3 The Report of Tax Havens and Bank Secrecy Countries List (Year 2017 – 2018)

1. Tax Havens Countries List, Appeared as Appendix H.

1) Includes Alderney, Guernsey (4), Jersey (4), Great Stark, Herm, Little Sark, Brechou, Jethou e Lihou.

2) Remaining Pacific Islands not included in this list.

3) Spitsbergen Archipelago and Bjornoya Island.

4) The Portuguese Authorities have signed several Tax Information Exchange Agreements which may allow the removal of the following jurisdictions from the Portuguese list of tax havens: Andorra, Antigua and Barbuda, Belize, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Gibraltar, Guernsey, Liberia,-Saint Lucia, Saint Kitts and Nevis and Turks and Caicos. There are also agreements with Isle of Man and Jersey on the exchange of information for tax purposes (jurisdictions excluded from the list of tax havens with Ministerial Order no. 345 A/2016, revoked with the State Budget for 2018).

5) Jurisdictions already in force with which the Portuguese authorities have signed a Double Taxation Treaty (DTT), DTTs with Andorra, the United Arab Emirates, Hong Kong, Panama, Kuwait, San Marino, the Sultanate of Oman, Uruguay, Bahrain and Qatar.

4.2.4 The Report of Bank Secrecy, Confidentiality and Privacy

1. Bank Secrecy, Confidentiality and Privacy Countries List

- Cayman Islands*
- Hong Kong
- Singapore
- Luxembourg
- Germany

- Taiwan
- United Arab Emirates (Dubai)
- Guernsey²⁰
- Lebanon
- Panama
- Japan
- Netherlands
- Thailand

4.2.5 European Countries which will not Automatically Exchange Information²¹

- Armenia
- Belarus
- Bosnia and Herzegovina
- Georgia
- Holy See (Vatican City State)
- Kazakhstan
- Macedonia
- Moldova
- * Montenegro
- Serbia
- Ukraine

²⁰ Guernsey, British overseas territory or crown dependency. If Britain's network were assessed together, it would be at the top.

²¹ Swiss Banking Lawyer, European Countries which will not Automatically Exchange Information, Automatic Exchange of Information List of Countries by Swiss-Banking-Lawyer, at <https://swiss-banking-lawyers.com/automatic-exchange-of-information/#1.1>, (last visited 21 August 2018).



Chapter 5

Conclusion and Recommendations

5.1 Conclusion

This independent research study on The International Cooperation on Information Exchange to Prevent Tax Evasion emphasizes the exchange of information, in particular on tax issues between the contracting states.

The researcher provides the hypothesis in Chapter 1 of this independent study that by establishing the International Cooperation to exchange information through a Model Agreement on Information Exchange in Tax Matters, the problems of international tax evasion can be solved.

For the research, the researcher was studying international rules and regulations, and a draft model agreement to exchange information, particularly on tax issues, included the Organization for Economic Co-operation and Development (OECD) measures to prevent tax avoidance and tax evasion; Tax Information Exchange Agreement, United Nation Information Exchange model, and United States of America's Foreign Account Tax Compliance Act (FATCA) measure on information exchange to prevent tax evasion. In addition, the researcher was studying the principle of tax haven, transfer pricing and shopping under the treaty. The research found that the aforementioned rules and regulations founded the problems as follows.

First, bank secrecy and other confidentiality laws ('de jure bank secrecy'), such as personal data protection law, prevent the disclosure of relevant information by financial institutions to government authorities in many jurisdictions, except in specified limited facts. In some countries which are international financial centers, and in some tax haven jurisdictions, this de jure bank secrecy exists. Many countries in the least natural resources countries or countries on the islands are low or have no tax jurisdictions called "Tax Haven". Most of Tax Haven has the measure to attract foreign investors to invest in their countries by providing tax incentive policy and personal data protection is one of the measures, because the transaction, in particular, cannot be found to be an illegal transaction. Some are financial centers that receive bank deposits and other passive investments, and often third-country investments are routed to the cloak of confidentiality via tax havens. In addition, those countries that adopted bank secrecy policy or confidentiality laws also specified the penalty to be imposed on the bank or financial

institution that does not comply with bank secrecy or other confidentiality laws. For example, personal information may be subject to both fines and/or imprisonment in the event that the bank or financial institution does not comply with the specified laws and regulations.

In addition, Governments have conflicting interests in information exchange. Governments usually want to get income information from other countries that their residents and citizens derive from. However, some governments usually want to attract investments from foreigners, particularly international financial centers. Those governments may attract such investments by offering (a) tax-free treatment for interest income resulting from such investments, and (b) bank secrecy or other confidential treatment for such investments (i.e., no information exchange). So, governments that want to attract such investments may not want to exchange information with the country's government where the foreign investor is a resident or a citizen. On the other hand, multi-country laws prohibit the transfer of tax-related information to other governments except where the two governments have an international agreement.

Secondly, there is no legal enforcement and sanction of international rules and regulations or laws issued by one country, particularly on information exchange, so the rules and regulations on information exchange cannot be enforced with another country. Since there is a traditional rule of law that "one government does not enforce other governments' tax laws." That, is one government is not going to help another government collect taxes from another government. It is because rules and regulations on information exchange, particularly on financial account information, are international rules and regulations that differ from domestic laws or rules and regulations because they occur in a society that has different structures and different legal backgrounds. Therefore, it is difficult to apply those laws especially to all countries regarding bank secrecy and confidentiality laws.

5.2 Recommendation

The problems as mentioned hereof were founded by this research. The researcher has an opinion on how to solve the problems of information exchange as follows.

Firstly, the problems of accessing personal information, particularly those relating to financial information and taxpayers' transactions, when considered in the context of foreign countries, it is found that the protection of personal data in each country has different levels of protection for personal information. Some countries have a strict level

of protection of personal data and many countries do not have legislation to protect personal data. The level of protection of personal data in each country is different, which causes inequality in the management of personal data. At the same time, the overly strict protection of personal information is a barrier to business which directly affects the country's development. The governments of each country should therefore ensure taxpayers and civilized nations by setting standards for the transfer of adequate personal information by concluding agreements between countries that will allow information to be exchanged and the conditions for determination to be established. Restrictions on the transfer of personal information from their countries to other countries, including adequate security measures, may be defined as an exception to the transfer of personal information, but that exception must be appropriate to the current risks, taking into account the sensitivity of the data, the purpose and context of the data processing.

Second, resolving the problem of non-enforcement of laws to increase the effectiveness of making laws or regulations defined by international organizations can be applicable to general countries, whether they are member states or countries that are parties to that member state. If speaking according to general principles, it may be difficult because each country has an internal law that applies to that matter, but the researcher is of the opinion that it should be a punishment to get cooperation from different countries. In the event that the Member States or trading partners of the Member States do not clearly comply with the information exchange requirements, which popular international sanctions such as boycotting by terminating contact in one dimension for the sake of punishment or bargaining, refusing to sell products or services to trading partners or not purchasing products or services from the contracting countries or maybe both cases. The boycott in the commercial sense is regarded as one of the worst economic weapons. In order to negotiate for the parties to agree on other terms such as diplomacy, politics, culture, military or even trade because every country in the world must trade together to exchange products and services that they cannot produce themselves or not able to produce enough for domestic needs which the governments of each country can apply such methods to exchange tax or international financial information, such as requiring countries that do not exchange information, especially information related to transactions and may include personal information from the country by the government of the country in which the taxpayer has a residence requesting. Where the country requested to send information on the requesting country's taxpayer transaction does not provide such information. The requesting country has the right not to allow that country to make any specific transactions relating to the bank or financial institution's financial

transactions. In addition, the member country shall appoint the international committee to enforce the laws and regulations to be enforced in order to enforce the laws on information exchange between the countries.

In conclusion, the researcher is of the opinion that in order to solve the problem of exchanging information, particularly on financial account information on tax matters, the countries by their government shall cooperate with each other by adopting a Model Agreement on Information Exchange and by concluding reciprocal agreements for the exchange of information. Lastly, to collect tax from each country should follow Adam Smith's Good Tax Policy to make the tax system more efficient.



Bibliography

Book

Chaiyasit Trachootham. Taxation Law. 9th ed. Bangkok: Thai Bar Association, 2013.

Panit Dhirapharbwongse. International Business Taxation. 3rd ed. Bangkok: Winyuchon Publication House, 2009.

Article

The Association of Chartered Certified Accountants, "Tax Principles: From Adam Smith to Barack Obama." (April 2009): 3.

The Organization for Economic Co-operation and Development, "Article 28 Exchange of Information, Convention between The Government of the Kingdom of Thailand and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income." (26 November 1996): 36.

Internet Network

Adrian Constantin Manea. Cooperation between EU Member States to prevent international tax evasion and fraud. At <http://www.wseas.us/elibrary/conferences/2011/Brasov1/LAW/LAW-37.pdf>, (last visited 1 June 2015).

Edward Christie and Mario Holzner. What Explains Tax Evasion? An Empirical Assessment based on European Data. At <http://www.wiiw.ac.at/pdf/wp40.pdf>, (last visited 26 February 2015).

Economy Watch. Value Added Tax (VAT). At <http://www.economywatch.com/business-and-economy/definition.html>, (last visited 15 August 2015).

Organisation for Economic Co-operation and Development (OECD). OECD's 30 Member Countries. At <http://www.statcan.gc.ca/pub/81-004-x/def/4068717-eng.htm>, (last visited 15 August 2015).

Wikipedia. Cheek v. United States, 498 U.S. 192 (1991). At https://en.wikipedia.org/wiki/Cheek_v._United_States, (last visited 15 August 2015).

Julia Kagan. Effective Tax Rate. At <http://www.investopedia.com/terms/e/effectivetaxrate.asp>, (last visited 15 August 2015).

OECD. Automatic Exchange of Information under OEDC, Global Forum on Transparency and Exchange of Information for Tax Purposes: Automatic Exchange of

- Information: A Roadmap for Developing Country Participation. At <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>. (last visited 3 September 2015).
- OECD. Tax Information Exchange Agreement, AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS. At <http://www.oecd.org/ctp/harmful/2082215.pdf>. (last visited 13 August 2015).
- Revenue Department. Double Taxation Agreement, Introduction to DTA. At <http://www.rd.go.th/publish/21973.0.html>. (last visited 23 July 2015).
- Philip Baker. UN model's Exchange of Information, Papers on Selected Topics in Administration of Tax Treaties for Developing Countries: Improper Use of Tax Treaties, Tax Avoidance and Tax Evasion. At http://www.un.org/esa/ffd/wp-content/uploads/2013/05/20130530_Paper9A_Baker.pdf. (last visited 3 September 2015).
- David Spencer. Problems of Exchange of Tax Information, Accountancy business and the Public Interest Vol. 5, No. 1, Exchange of Tax Information. At http://www.taxjustice.net/cms/upload/pdf/Spencer_06_Exchange_of_Tax_Information.pdf. (last visited 3 September 2015).
- Gov HK. Consultation Paper on Automatic Exchange of Financial Account Information in Tax Matters in Hong Kong. At <http://www.gov.hk/en/residents/government/publication/consultation/docs/2015/AEOI.pdf>. (last visited 16 September 2015).
- OECD. Four key benefits of AEOI for developing countries, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Information: A Roadmap for Developing Countries Participation. At <http://www.oecd.org/tax/transparency/global-forum-AEOI-roadmap-for-developing-countries.pdf>. (last visited 3 September 2015).
- OECD. OECD (2017), Standard for Automatic Exchange of Financial Account Information in Tax Matters, Second Edition, OECD Publishing, Paris. At <http://dx.doi.org/10.1787/9789264267992-en>. (last visited 14 August 2018).
- OECD. Exchange of Information, About exchange of tax information. At <http://www.oecd.org/ctp/exchange-of-tax-information/about-exchange-of-tax-information.htm>. (last visited 14 August 2018).
- OECD. Global Forum on Transparency and Exchange of Information for Tax Purposes. At <http://www.oecd.org/tax/transparency/#d.en.341894>, (last visited 14 August 2018).

- OECD. Convention on Mutual Administrative Assistance in Tax Matters. At <http://www.oecd.org/ctp/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm>. (last visited 14 August 2018).
- OECD. The OECD Oslo Dialogue, About Tax and Crime. At <http://www.oecd.org/ctp/crime/about-tax-and-crime.htm>. (last visited 14 August 2018).
- OECD. The Common Reporting Standard (CRS), Automatic Exchange Portal, Online Support for the Implementation of Automatic Exchange of Information in Tax Matters. At <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>, (last visited 14 August 2018).
- Iris Tax and Customs. Automatic Exchange of Information. At <https://www.revenue.ie/en/companies-and-charities/documents/aeoi/faqs-aeoi.pdf>. (last visited 14 August 2018).
- OECD. Putting in place the complete legal framework for exchange, Global Forum on Transparency and Exchange of Information for Tax Purposes, Automatic Exchange of Information Implementation Report 2017. At <https://www.oecd.org/tax/transparency/reporting-on-the-implementation-of-the-AEOI-standard.pdf>. (last visited 14 August 2018).
- Andres Knobel and Markus Meinzer. Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption (June 2014). At <http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf>. (last visited 15 September 2019).
- OECD. Action Plan on Base Erosion and Profit Shifting. At <https://www.oecd.org/ctp/BEPSActionPlan.pdf>, (last visited 15 September 2019).
- OECD. Jurisdictions Undertaking First Exchanges by 2018. At <https://www.oecd.org/tax/transparency/reporting-on-the-implementation-of-the-AEOI-standard.pdf>. (last visited 25 November 2019).
- OECD. Developing Countries having not yet set the date for First Automatic Exchange. At <https://www.oecd.org/tax/transparency/statement-of-outcomes-yaounde.pdf>. (last visited 26 November 2019).
- Andres Knobel and Markus Meinzer. Bank Secrecy, Secrecy, Confidentiality and Privacy. At <http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf>. (last visited 7 February 2020).
- Tax Justice Network. Bank Secrecy Country Rank. At <https://financialsecrecyindex.com/introduction/introducing-the-fsi>. (last visited 7 February 2020).

- OECD. Agreement on Exchange of Information on Tax Matters. At <https://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf>. (last visited 8 March 8, 2020).
- Global Financial Integrity. Tax Havens. At <http://www.gfintegrity.org/issue/tax-havens-bank-secrecy/>. (last visited 16 March 2020).
- PWC. Tax Havens Country List. At <https://www.pwc.pt/en/pwcinforsisco/tax-guide/2018/tax-havens.html>. (last visited 16 March 2020).





Appendix A

The Revenue Department's Order

No. Por. 113/2545

On Transfer Pricing According to the Market Price for Corporate Income Tax

In order that Revenue Officials may use this Order as guidelines for the examination of, and giving advice to, taxpayers with regard to the calculation of net profit for corporate income tax under Section 65 of the Revenue Code, in the case of setting transfer price according to the market price, the Revenue Department issued orders as follows:

Article 1 A company or juristic partnership established under Thai law or foreign law according to Section 66 and Section 76 Bis of the Revenue Code shall calculate its net profit for the purpose of corporate income tax according to Section 65 of the Revenue Code by taking into account all revenue arising from or in consequence of the business carried on in an accounting period and deducting there from expenses in accordance with conditions prescribed in Sections 65 Bis and 65 Ter of the Revenue Code.

The computation of revenue and expenses in paragraph 1 shall follow accrual basis, whereby all revenue arising in any accounting period, even if not yet received in such accounting period, shall be regarded as revenue in that accounting period. All expenses that relate to such revenue, even if not yet paid in that accounting period, shall be included as expenses of such accounting period.

Article 2 In case that the company or juristic partnership under Article 1 transacts without compensation, or with compensation in an amount lower than market price without reasonable cause, or with expenses higher than market price without reasonable cause, and if the company or juristic partnership does not adjust its revenue or expense to the market price, the Assessment Official shall have the authority to adjust the revenue or expense to the market price.

“Market price” in paragraph 1 means the price of remuneration, service fee or interest that independent contracting parties determine in good faith commercially in case of transfer of goods, provision of service or lending of money, which is of the same characteristic, category or kinds as that between associated parties in question on the same date.

“Independent contracting parties” means contracting parties that are unrelated to each other in respect of the management, control or co-investment, either directly or indirectly.

Article 3 One of the following methods shall be adopted to determine the market price for the calculation of revenue and expense:

(1) Comparable uncontrolled price method, whereby the consideration in return, service charge, or interest duly collected in trade are comparable to such considerations between independent contracting parties in the case of transfer of property, rendering of services, or lending of money, of the same category and type, and subject to the same or similar conditions.

(2) Resale price method, whereby the considerations in return from the transfer of property or the service charge, which the buyer of goods or service from the seller has resold to other person who is an independent contracting party, is deducted by suitable amount of basic profit. Suitable amount of basic profit shall be computed by multiplying the resale price of the said property or service by the rate of basic profit arising from the transfer of property or rendering of service of the same description or category and type to an independent contracting party.

Example

Company G sold goods to Company A, a related company at 50 Baht. Company A sold such goods to Company B, a third party company at 90 Baht. Supposing that the rate of basic profit sold to an independent contracting party in the market that sells goods of the same type is 20% of the resale price.

The market price that Company G shall sell to Company A can be computed as follows:

Resale price for third party companies = 90 Baht

Less basic profit $(90 \times 20\%) = 18$ Baht

Market price = 72 Baht

(3) Cost plus method, whereby the cost of the property or service sold to the buyer of goods or service is added with a suitable amount of basic profit.

(4) The suitable amount of basic profit is computed by multiplying the cost of the said property or rendering of service in the same description or category or type to an independent contracting party.

Example

Company G sold goods to Company A, a related company at 75 Baht. The cost of goods sold is 50 Baht. Company K sold the same goods to Company B, a third party at 100 Baht and the cost of goods sold is 60 Baht. Therefore, the basic profit is 40% of the selling price or 66.67% of the cost of goods sold (40/60).

The market price that Company G shall sell to Company A can be computed as follows:

Cost of goods sold to related company = 50 Baht

Plus basic profit (50 x 66.67%) = 33.34 Baht

Market price = 83.34 Baht

(5) Other methods, whereby the methods under (1), (2) and (3) may not be applied to the computation of income or expenses to obtain market price of the considerations in return, service charge, or interest, other methods that an internationally accepted and are suitable according to the facts in trade concerning the transfer of property, rendering of service, or lending of money, may be used.

Article 4 In examining tax by the assessment officer regarding to the methods of computing income or expenses to obtain market price under Article 3 of a company or juristic partnership under Article 1, the assessment officer shall consider the following documents truly prepared by the company or juristic partnership in each step of transaction and which are kept at the office of the company or juristic partnership.

(6) Document demonstrating the corporate structure and relationship with businesses in the same group, including the structure and business operation of each business

(7) Budget, business plan and financial projections

(8) Documents showing business strategies of the taxpayer as well as business reasons

(9) Documents showing total sales, results of operation of the taxpayer as well as description of transaction made with the businesses in the same group

(10) Documents showing reasons in arranging international transactions duly conducted with businesses in the same group

(11) Policy on price fixing, profit-making ability of each product and marketing information, including share of profit of each business, taking into account the functions, the property and risks of each related business

(12) Documents showing reasons in choosing the price fixing method

(13) In the case where several price-fixing methods can be used, there shall be documents showing details of other methods other than those chosen under (7), and the

reasons why those methods are not chosen, whereby such documents must be prepared at the time of making the decision to choose the method under (7)

(14) Documents that can be used as an evidence to show the basic principle and the grounds of negotiations of taxpayer for the transaction made with businesses in the same group

(15) Other documents related to price-fixing (if any)

“Businesses in the same group” under paragraph one means business in the group of companies or juristic partnerships that have the relationship with each other in respect of management, control, or joint investment, either directly or indirectly.

In the case the company or juristic partnership under Article 1 has prepared the documents under paragraph one with sufficient details to show that the method of computation of income or expense to obtain the market price under Article 3 of the company or juristic partnership is a suitable and correct method, the assessment officer shall base his consideration according to the said method of computation of income or expense to obtain the market price of the company or juristic partnership.

Article 5 In the case the company or juristic partnership under Article 1 wishes to make an agreement on the fixing of price in advance with the Revenue Department in regard to a transaction conducted with its contracting party, the company or juristic partnership shall submit an application for advanced pricing agreement in writing, together with related documents, to the Director-General of the Revenue Department, so that the Director-General may then prescribe bases, procedures and conditions to be complied with by the said company or juristic partnership under such agreement

Ordered this 7th day of February 2001

Ordered this 16th day of May 2002

(Supparat Kawatkul)

Director-General of the Revenue Department

(Ref.: Government Gazette, Volume 119, Part 51 Ngor., of 25th June 2002

Appendix B

ROYAL DECREE

Issued under the Revenue Code
Regarding Revenue Tax Exemption (No. 18),
B.E. 2505 (1962)

BHUMIBOL ADULYADEJ, REX.

Given on the 23rd Day of July B.E. 2505 (1962);
Being the 17th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to exempt taxes and duties under the Revenue Code to persons in accordance with the agreements on avoidance of double taxation which the government of Thailand has entered into or shall enter into with the governments of foreign countries. By virtue of Section 3 of the Revenue Code as amended by the Revenue Code Amendment Act (No. 10), B.E. 2496 (1953), the King's Most Excellent Majesty hereby enacts a Royal Decree as follows:

Section 1 This Royal Decree is called the "Royal Decree Issued under the Revenue Code Regarding Revenue Tax Exemption (No. 18), B.E. 2505 (1962)".

Section 2 This Royal Decree shall come into force on and from the day following the date of its publication in the Government Gazette.

Section 3 Taxes and duties under the Revenue Code shall be exempted for persons in accordance with the agreements on avoidance of double taxation which the government of Thailand has entered into or shall enter into with the governments of foreign countries.

Section 4 The Minister of Finance shall be in charge and control of the execution of this Royal Decree.

Countersigned by:

Field Marshal S. Thanaratch

Prime Minister

Appendix C

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 cooperate 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 mutually 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;
 - 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.

BILATERAL VERSION

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

a) in country A, _____;

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;
- b) the term “competent authority” means the authorities designated by a Contracting Party in its instrument of acceptance, ratification or approval;
- c) the term “person” includes an individual, a company and any other body of persons;
- d) the term “company” means anybody 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 recognized 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 “recognized 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 Organization for Economic Cooperation and Development;
- 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.

BILATERAL VERSION

- a) the term “Contracting Party” means country A or country B as the context requires;
- b) the term “competent authority” means
 - i) in the case of Country A, _____;
 - ii) in the case of Country B, _____;

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 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.

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

1. Where difficulties or doubts arise between the Contracting Parties regarding the implementation or interpretation of the Agreement, the competent authorities shall endeavor to resolve the matter by mutual agreement.
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. The paragraph would not be necessary.

Article 14

Depositary's functions

The article would be unnecessary

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;
 - 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.

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.

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.

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 authorized 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

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 recognizes 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 organizational 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 organizational 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 organizational 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 jeopardize the object and purposes of the Agreement by potentially excluding certain entities or other organizational structures from this obligation simply as a result of certain corporate or other legal features. Therefore, the aim is to cover all possible organizational structures.

21. For instance, an “estate” is recognized 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 recognize an

organizational 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 recognized 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 “recognized stock exchange” is defined in sub-paragraph g) as any stock exchange agreed upon by the competent authorities. One criterion competent authority 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, subparagraph 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 willful failure to file a tax return within the prescribed time period; willful 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 cooperation 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 1). 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 cannot 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 (order 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 organizational 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 recognized 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, subparagraph (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) cannot 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 includes, 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 authorizes, 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 not 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 recognize 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 recognize a

privilege in tax matters, or it does not recognize 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 cannot 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 (order public). “Public policy” and its French equivalent “order 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 are 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 authorization, 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

Appendix D

PROTOCOL

AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF [JURISDICTION A] AND THE GOVERNMENT OF [JURISDICTION B] ON EXCHANGE OF INFORMATION ON TAX MATTERS, SIGNED AT [PLACE OF SIGNATURE] ON [DATE OF SIGNATURE].

The Government of [jurisdiction A] and the Government of [jurisdiction B] (hereinafter “the Contracting Parties”), desiring to amend the Agreement between the Government of [jurisdiction A] and the Government of [jurisdiction B] on Exchange of Information on Tax Matters, signed at [place of signature], on [date of signature] with a view to enabling their competent authorities to automatically and Spontaneously transmit information to each other within the object and scope of this Agreement;

Have agreed as follows:

ARTICLE I

The following shall be added after Article 5 (Exchange of Information upon Request):

“[Article 5A

Automatic Exchange of Information

With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, the Contracting Parties shall automatically exchange information for the purposes referred to in Article 1 (Object and Scope of the Agreement).]

[Article 5B]

Spontaneous Exchange of Information

1. The competent authority of a Contracting Party shall, without prior request, forward to the competent authority of the other Contracting Party the information specified in Article 1 of which it has knowledge in the following circumstances:

a. the first-mentioned Contracting Party has grounds for supposing that there may be a loss of tax in the other Contracting Party;

b. a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Contracting Party which would give rise to an increase in tax or to liability to tax in the other Contracting Party;

c. business dealings between a person liable to tax in a Contracting Party and a person liable to tax in the other Contracting Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other or in both Contracting Parties;

d. a Contracting Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;

e. information forwarded to the competent authority of the first-mentioned Contracting Party by the competent authority of the other Contracting Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Contracting Party.

2. Each Contracting Party shall take such measures and implement such procedures as are necessary to ensure that information described in paragraph 1 will be made available for transmission to the other Contracting Party.

OR

[Article 5B]

Spontaneous Exchange of Information

The competent authority of a Contracting Party may spontaneously transmit to the competent authority of the other Contracting Party information that has come to the attention of the first-mentioned competent authority and that the first-mentioned competent authority considers foreseeably relevant to the accomplishment of the purposes referred to in Article 1 (Object and Scope of the Agreement). The competent authorities of the Contracting Parties may determine the procedures to be used to exchange such information.”

ARTICLE II

1. Article 2 shall be replaced by the following:

“A Contracting 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.”

2. Paragraph 1 of Article 7 shall be replaced by the following:

“A Contracting Party shall not be required to obtain or provide information that the other Contracting 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 a Contracting Party may decline to assist where the request is not made in conformity with this Agreement.”

3. Paragraph 4 of Article 7 shall be replaced by the following:

“A Contracting Party may decline a request for information if the disclosure of the information would be contrary to public policy (order public).”

4. Paragraph 6 of Article 7 shall be replaced by the following:

“A Contracting Party may decline a request for information if the information is requested by the other Contracting Party to administer or enforce a provision of the tax law of that other Contracting Party, or any requirement connected therewith, which discriminates against a national of the first-mentioned Contracting Party as compared with a national of the other Contracting Party in the same circumstances.”

5. The last sentence of Article 8 is changed as follows:

“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 Contracting Party providing the information.”

6. Paragraph 2 of Article 13 shall be replaced by the following:

“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, 5A, [5B] and 6.”

[ARTICLE III]

The following shall be added at the end of Paragraph 3 of Article 15:

- “- with respect to the automatic exchange of information foreseen in Article 5A for taxable periods beginning on or after 1 January [...], where there is no taxable period, for all charges to tax arising on or after 1 January [...];
- with respect to the spontaneous exchange of information foreseen in Article 5B for taxable periods beginning on or after 1 January [...], where there is no taxable period, for all charges to tax arising on or after 1 January [...].”

ARTICLE IV

[This Protocol 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.]

OR

[The Contracting Parties shall notify each other in writing when their necessary internal procedures for entry into force of this Protocol have been completed. This Protocol shall enter into force on the date of the later of such written notifications.]

In witness whereof the undersigned, being duly authorized thereto by the respective Contracting Parties, have signed this Protocol.

Done at [place of signature of the Protocol] in duplicate, this [date of signature of the Protocol] [, in [official language of jurisdiction A] and [official language of jurisdiction B], both texts being equally authentic].

FOR THE GOVERNMENT OF OMNIA
[JURISDICTION A]:

FOR THE GOVERNMENT OF
[JURISDICTION B]:

Appendix E

(a) Jurisdictions undertaking first exchanges in 2017

- Anguilla
- Argentina
- Belgium
- Bermuda
- British Virgin Islands
- Bulgaria
- Cayman Islands
- Colombia
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Faroe Islands
- Finland
- France
- Germany
- Gibraltar
- Greece
- Guernsey
- Hungary
- Iceland
- India
- Ireland
- Isle of Man
- Italy
- Jersey
- Korea
- Latvia
- Liechtenstein

- Lithuania
- Luxembourg
- Malta
- Mexico
- Montserrat
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- San Marino
- Seychelles
- Slovak Republic
- Slovenia
- South Africa
- Spain
- Sweden
- Turks and Caicos Islands
- United Kingdom



Appendix F

(b) Jurisdictions undertaking first exchanges by 2018

- Andorra
- Antigua and Barbuda
- Aruba
- Australia
- Austria
- Azerbaijan
- The Bahamas
- Bahrain
- Barbados
- Belize
- Brazil
- Brunei Darussalam
- Canada
- Chile
- China
- Cook Islands
- Costa Rica
- Curacao
- Dominica
- Ghana
- Greenland
- Grenada
- Hong Kong (China)
- Indonesia
- Israel
- Japan
- Kuwait
- Lebanon
- Macau (China)
- Malaysia

- Marshall Islands
- Mauritius
- Monaco
- Nauru
- New Zealand
- Niue
- Pakistan
- Panama
- Qatar
- Russia
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Samoa
- Saudi Arabia
- Singapore
- Sint Maarten
- Switzerland
- Trinidad and Tobago
- Turkey
- United Arab Emirates
- Uruguay
- Vanuat

Appendix G

(c) **Developing countries having not yet set the date for first Automatic Exchanges**

- Armenia
- Benin
- Botswana
- Burkina Faso
- Cambodia
- Cameroon
- Chad
- Cote d'Ivoire
- Djibouti
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Former Yugoslav Republic of Macedonia
- * • Gabon
- Georgia
- Guatemala
- Guyana
- Haiti
- Jamaica
- Kazakhstan
- Kenya
- Lesotho
- Liberia
- Madagascar
- Mauritania
- Moldova
- Morocco
- Niger

- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Rwanda
- Senegal
- Tanzania
- Thailand
- Togo
- Tunisia
- Uganda
- Ukraine



Appendix H

(d) Tax Havens Countries List, appeared as Appendix H

- American Samoa
- Liechtenstein
- Andorra (5)
- Maldives Islands
- Anguilla
- Marshall Islands
- Antigua and Barbuda
- Mauritius
- Aruba
- Monaco
- Ascension Island
- Monserrat
- Bahamas
- Nauru
- Bahrain (5)
- Netherlands Antilles
- Barbados (5)
- Northern Mariana Islands
- Belize
- Niue Island
- Bermuda (4)
- Norfolk Island
- Bolivia
- Pacific Islands (2)
- British Virgin Islands (4)
- Palau Islands
- Brunei
- Panama (5)
- Cayman Islands (4)
- Pitcairn Island

- Channel Islands (1) (4)
- Porto Rico
- Christmas Island
- Qatar (5)
- Cocos (Keeling)
- Queshm Island
- Cook Islands
- Saint Helena
- Costa Rica
- Saint Kitts and Nevis
- Djibouti
- Saint Lucia
- Dominica
- Saint Pierre and Miquelon
- Falkland Islands or Malvinas
- Samoa
- Fiji Islands
- San Marino (5)
- * French Polynesia
- Seychelles
- Gambia
- Solomon Islands
- Gibraltar (4)
- St Vicente and the Grenadines
- Grenada
- Sultanate of Oman (5)
- Guam
- Svalbard (3)
- Guyana
- Swaziland
- Honduras
- Tokelau
- Hong Kong (5)

- Trinidad and Tobago
- Isle of Man
- Tristan da cunha
- Jamaica
- Turks and Caicos Islands
- Jordan
- Tuvalu
- Kingdom of Tonga
- United Arab Emirates (5)
- Kiribati
- United States Virgin Islands
- Kuwait (5)
- Vanuatu
- Labuan
- Yemen Arab Republic
- Lebanon
- Uruguay (5)
- Liberi



