FEDERAL COURT OF AUSTRALIA

Oracle Corporation Australia Pty Ltd v Commissioner of Taxation (Stay Application) [2024] FCA 1262

File numbers:	NSD 1302 of 2023 NSD 1303 of 2023 NSD 1304 of 2023
Judgment of:	**PERRAM J**
Date of judgment:	31 October 2024
Catchwords:	**PRACTICE AND PROCEDURE** – application for stay of proceedings – double taxation treaties – mutual agreement procedure – where Australian Tax Office suspended mutual agreement procedure under Australia-Ireland double taxation treaty – where proceeding concerns meaning of 'royalty' under treaty – where taxpayer instituted domestic proceedings to preserve rights – whether stay of domestic proceedings appropriate under s 23 of *Federal Court of Australia Act 1976* (Cth)
Legislation:	*Constitution* s 75(v) *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 3, 5, Schedule 1 *Federal Court of Australia Act 1976* (Cth) s 23 *Income Tax Assessment Act 1936* (Cth) ss 6, 128B(2B) *International Tax Agreements Act 1953* (Cth) ss 4(2), 11K *International Taxation Agreements Act 1953* (Cth) ss 5, 11K *Judiciary Act 1903* (Cth) ss 39B(1), (1A)(c) *Taxation Administration Act 1953* (Cth) s 14ZZN *Income tax: royalties - character of payments in respect of software and intellectual property rights* (Draft TR 2024/D1) *Income tax: royalties - character of receipts in respect of software* (Draft TR 2021/D4) *Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains,* signed on 31 May 1983, [1983] ATS 25 (entered into force on 21 December 1983) Preamble and arts 3(1)(j)(i)-(ii), 3(3), 13, 13(3), 26,

26(1)

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, signed on 7 June 2017, [2019] ATS 1 (entered into force on 1 May 2019) Preamble and arts 2(1)(a), 16, 16(1), 16(2), 19, 19(1), 19(2), 19(4)(b)(i), 20(2), 23(1)(c)

Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, [1974] ATS 2 (entered into force 27 January 1980) arts 31, 31(1), 31(3)(b), 32

OECD, 'Commentary on Article 25 Concerning the Mutual Agreement Procedure' in *Model Tax Convention on Income and Capital: Condensed Version* (OECD Publishing, 2017) [9], [17], [25], [27], [28], [35], [41(b)], [44], [76], [76(a)], [77]

OECD, *Explanatory Statement to the MLI* (adopted on 24 November 2016) [1]-[4], [51], [193], [217]

OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (OECD Publishing, 2015) [4], [51]

Cases cited:

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd [2019] FCA 964; 138 ACSR 42

Basfar v Wong [2022] UKSC 20; [2023] AC 33

Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd [2007] FCAFC 16; 158 FCR 325

Epic Games, Inc v Apple Inc [2021] FCAFC 122; 286 FCR 105

Glencore Energy UK Ltd & Anor v The Commissioners for Her Majesty's Revenue and Customs [2019] UKFTT 438 (TC)

HVAC Construction (Qld) Pty Ltd v Energy Equipment Engineering Pty Ltd [2002] FCA 1638; 44 ACSR 169

Infrastructure Services Luxembourg SARL v Kingdom of Spain [2019] FCA 1220

Kingdom of Spain v Infrastructure Services Luxembourg SARL [2023] HCA 11; 275 CLR 292

Langford v RCL Cruises Ltd t/as Royal Caribbean Cruises [2023] FCA 626

Michael Wilson & Partners Ltd v Emmott [2021] NSWCA 315; 396 ALR 497

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Monasky v Taglieri, 589 US 68, 79-80 (2020)

	North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep 3 *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation* [2018] FCAFC 118 *Povey v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 *Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) 34 FCR 287 *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 *Thomson Australian Holdings Pty Ltd v Trade Practices Commissioner* (1981) 148 CLR 150 *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562
Division:	General Division
Registry:	New South Wales
National Practice Area:	Taxation
Number of paragraphs:	88
Date of hearing:	2 September 2024
Counsel for the Applicants:	Mr T Bannon SC with Mr J Schwarz, Ms C Winnett, Mr J Elks and Ms L Dargan
Solicitor for the Applicants:	Herbert Smith Freehills
Counsel for the Respondent:	Mr M O'Meara SC with Mr D Hume
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 1302 of 2023

BETWEEN:	**ORACLE CORPORATION AUSTRALIA PTY LTD ACN 003 074 468** First Applicant
	VANTIVE AUSTRALIA PTY LTD ACN 076 201 619 Second Applicant
	ORACLE CAPAC SERVICES UNLIMITED COMPANY Third Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

ORDER MADE BY: **PERRAM J**

DATE OF ORDER: **31 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The Applicants' claim for interlocutory relief in the originating application be dismissed with costs.

THE COURT GRANTS:

2. Leave to the Applicants to appeal from Order 1.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

NSD 1303 of 2023

BETWEEN:	**ORACLE CORPORATION AUSTRALIA PTY LTD ACN 003 074 468** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

ORDER MADE BY:	**PERRAM J**
DATE OF ORDER:	**31 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The Applicant's interlocutory application be dismissed with costs.

THE COURT GRANTS:

2. Leave to the Applicant to appeal from Order 1.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

NSD 1304 of 2023

BETWEEN:	**ORACLE CORPORATION AUSTRALIA PTY LTD ACN 003 074 468** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

ORDER MADE BY:	**PERRAM J**
DATE OF ORDER:	**31 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The Applicant's interlocutory application be dismissed with costs.

THE COURT GRANTS:

2. Leave to the Applicant to appeal from Order 1.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

1 The question on the present applications is whether these three proceedings should be temporarily stayed pending the conclusion of a mutual agreement procedure under the terms of a double taxation treaty between Australia and Ireland. I conclude that they should not be for the following reasons.

BACKGROUND

2 The Applicants are all part of the Oracle group of companies. The Third Applicant ('Oracle Ireland') is resident for tax purposes in Ireland whilst the First Applicant ('Oracle Australia') is resident in Australia. The Second Applicant ('Vantive') is the provisional head company of a sub-group of companies associated with Oracle Australia.

3 Oracle Australia purchases enterprise software and hardware from Oracle Ireland and distributes these products in Australia. The supply by Oracle Ireland to Oracle Australia is governed by complex contractual arrangements under which Oracle Australia made sublicence fee payments to Oracle Ireland. One bundle of rights which Oracle Australia obtained from Oracle Ireland related to Oracle Australia's use of computer programs in which Oracle Ireland owned the copyright. The sublicence fee payments were made in the income years ending 31 May 2013 to 31 May 2018.

4 If these sublicence fee payments are found to be 'royalties' within the meaning of Art 13(3) of the *Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains*, signed on 31 May 1983, [1983] ATS 25 (entered into force on 21 December 1983) ('DTA'), then Oracle Ireland will be liable to pay withholding tax on them: *Income Tax Assessment Act 1936* (Cth) ss 6 (definition of 'royalty'), 128B(2B); *International Tax Agreements Act 1953* (Cth) ss 4(2), 11K.

5 The DTA is a 'Covered Tax Agreement' for the purposes of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, signed on 7 June 2017, [2019] ATS 1 (entered into force on 1 May 2019) ('the MLI') to which both Ireland and Australia have acceded: MLI Art 2(1)(a). The DTA defines, in the case of Ireland, the Revenue Commissioners or their authorised representative ('the IRC') and, in the case of

Australia, the Commissioner of Taxation or his authorised representative ('the Commissioner' or 'the ATO'), as each state's respective competent authorities: DTA Art 3(1)(j)(i)-(ii). DTA Art 26 establishes a mutual agreement procedure for competent authorities to resolve between themselves complaints by taxpayers relating to the DTA. MLI Art 16 alters the operation of that procedure and MLI Art 19 supplements it with mandatory binding arbitration provisions. The mutual agreement procedure does not result in an arbitration between the two competent authorities in every case. Nevertheless, the arbitration procedure in MLI Art 19 is properly seen as part of the mutual agreement procedure.

6 The text of the MLI operates directly on the text of the DTA. For ease of understanding, the parties relied upon a document entitled 'the Synthesised Text' which seeks to incorporate into the text of the DTA the effects that the MLI has had upon it. The Synthesised Text represents the shared understanding of Australia and Ireland's competent authorities as to the modifications made to the DTA by the MLI. A copy of the Synthesised Text is attached to these reasons in Schedule A.

7 Both the MLI and the DTA have the force of Commonwealth law in Australia: *International Taxation Agreements Act 1953* (Cth) ss 5, 11K.

8 This matter arose from tax processes pertaining to two sets of tax years: (1) the income year ending 31 May 2013 and (2) the income years ending 31 May 2014 to 31 May 2018. The reasons why these tax years proceeded on administratively separate paths are not material to any issue on this application. Nonetheless, I set out their relevant procedural steps for clarity.

9 In the case of the income year ending 31 May 2013, the facts are as follows:

(1) In April 2015, the Commissioner commenced an audit of Vantive. Among other topics, this audit covered certain withholding tax payable in relation to payments made by Oracle Australia to Oracle Ireland.

(2) Following that audit, on 30 May 2018, the Commissioner sent a notice of penalty to Oracle Australia ordering it to pay $25,876,525.80.

(3) On 26 June 2018, the Commissioner sent a notice of non-resident royalty withholding tax to Oracle Ireland advising that it was also liable to that sum and that a general interest charge applied.

(4) On 6 December 2019, the Commissioner decided not to remit the penalty for failure to withhold from the royalty payments.

(5) On 3 February 2020, Oracle Australia filed a notice of objection against the Commissioner's 30 May 2018 penalty notice and 6 December 2019 decision not to remit that penalty.

10 In the case of the income years ending 31 May 2014 to 31 May 2018, the facts are as follows:

(1) In October 2019, the Commissioner engaged in another audit of Vantive. Among other topics, this audit also covered certain withholding tax payable in relation to payments made by Oracle Australia to Oracle Ireland.

(2) On 23 March 2022, the Commissioner sent a notice of penalty to Oracle Australia ordering it to pay $227,662,233.00.

(3) That same day, the Commissioner also decided not to remit the penalty for failure to withhold from the royalty payments.

(4) On 20 May 2022, Oracle Australia filed a notice of objection against the Commissioner's 23 March 2022 penalty notice and decision not to remit that penalty.

(5) On 17 June 2022, the Commissioner sent a notice of non-resident royalty withholding tax to Oracle Ireland advising that it was also liable to approximately the penalty amount and that a general interest charge applied.

11 Whilst these procedures were in train, Oracle Ireland enlivened the mutual agreement procedure in Art 26 of the DTA by making a request for a mutual agreement procedure on 18 May 2021 to the IRC. This first request related only to the income year ending 31 May 2013.

12 On 8 September 2023, the Commissioner disallowed Oracle Australia's objections concerning the income year ending 31 May 2013 and the income years ending 31 May 2014 to 31 May 2018. Oracle Ireland then lodged a second request for a mutual agreement procedure under the DTA on 2 November 2023, this time concerning the income years ending 31 May 2014 to 31 May 2018.

13 Both of Oracle Ireland's requests for mutual agreement procedures were accepted by the IRC although at different times. Both mutual agreement procedures were in progress until the events giving rise to this application. By that point, the first mutual agreement procedure had

advanced sufficiently far for the ATO to have provided the IRC with its position paper and it was expected that the IRC would shortly deliver its position paper.

14 Any appeal to this Court from the Commissioner's disallowance of Oracle Australia's objections on 8 September 2023 was required to be made by 7 November 2023: *Taxation Administration Act 1953* (Cth) s 14ZZN. The taxpayers filed these proceedings on 7 November 2023 which preserved their domestic rights of appeal. At the same time, the taxpayers immediately sought a temporary stay of the proceedings to permit the mutual agreement procedures (including any arbitration) to progress to finality.

15 Art 19(2) of the MLI recognises that either competent authority may suspend the mutual agreement procedure 'because a case with respect to one or more of the same issues is pending before a court or administrative tribunal'. On 17 November 2023, the ATO suspended the first mutual agreement procedure and, on 21 December 2023, it suspended the second.

16 A suspension has the effect of stopping time running on the pre-arbitration period: MLI Art 19(2). The pre-arbitration period is contained in MLI Art 19(1), which provides that where the relevant competent authorities are unable to reach an agreement resolving a case presented by a taxpayer within two years, any unresolved issues arising from the case 'shall' be submitted to arbitration if the taxpayer so requests in writing.

17 MLI Art 19(2) also recognises that time will begin to run again if the domestic proceeding 'has been suspended or withdrawn' (or if it is finally determined). It was accepted on both sides that a stay of these proceedings would result in their 'suspension' within the meaning of MLI Art 19(2). The parties also agreed that if the proceedings were suspended in that sense, then the ATO would be obliged to continue the mutual agreement procedure as a matter of Commonwealth law. Consistently therewith, the Commissioner made clear during argument that if a stay of the proceedings was granted, he would re-enliven the mutual agreement procedure.

18 The provisions of the DTA and the MLI give no explicit guidance on the circumstances in which the suspension of the domestic proceeding referred to in MLI Art 19(2) should occur. Although it is sometimes said that the power to grant a temporary stay to permit a case in another court to proceed is a 'case management stay' (*Michael Wilson & Partners Ltd v Emmott* [2021] NSWCA 315; 396 ALR 497 at [103] and [106] per Brereton JA (Leeming JA agreeing at [1] and Emmett AJA agreeing at [137])) or an aspect of the Court's powers to control its

own proceedings (*Sterling Pharmaceuticals Pty Ltd v Boots Co (Aust) Pty Ltd* (1992) 34 FCR 287 at 290-291 per Lockhart J ('*Sterling Pharmaceuticals*')), the actual power is located in s 23 of the *Federal Court of Australia Act 1976* (Cth) ('FCA Act'): *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* [2019] FCA 964; 138 ACSR 42 at [50] per Moshinsky J. This provision authorises the Court to make such orders, including interlocutory orders, as the Court thinks appropriate.

19 The scope of s 23 may be affected by the statutory context of a particular case. For example, where the Court has another specific power of injunction subject to some limitation, s 23 does not authorise an injunction which evades that limitation: *Thomson Australian Holdings Pty Ltd v Trade Practices Commissioner* (1981) 148 CLR 150 at 161-163 per Gibbs CJ, Stephen, Mason and Wilson JJ.

20 The matters relevant to the grant of a temporary stay under s 23 include not only case management matters of the kind described by Lockhart J in *Sterling Pharmaceuticals*, but also what can be inferred from the subject matter, purpose and scope of any relevant legislative context: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J (Gibbs CJ agreeing at 30 and Dawson J agreeing at 71). That case was concerned with the identification of relevant and irrelevant considerations in the context of an administrative decision, but there is no reason to think that any different approach applies to a statutory judicial power. It has been accepted before that the discretion under s 23 may be affected by the legislative policy attending the occasion for its exercise: *HVAC Construction (Qld) Pty Ltd v Energy Equipment Engineering Pty Ltd* [2002] FCA 1638; 44 ACSR 169 at [48]-[49] per French J (as his Honour then was). In this case, the relevant legislative context is the DTA and the MLI since both have the force of Commonwealth law.

21 For completeness, I note that the Applicants in their written submissions ('AS') contended that guidance in the current situation could be gleaned from the decisions in *Langford v RCL Cruises Ltd t/as Royal Caribbean Cruises* [2023] FCA 626, *Onslow Salt Pty Ltd v Buurabalayji Thalanyji Aboriginal Corporation* [2018] FCAFC 118 ('*Onslow Salt*'), *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2019] FCA 1220 and *Websyte Corporation Pty Ltd v Alexander (No 2)* [2012] FCA 562. The situation in the current case is *sui generis* and very different to those cases. I do not regard them as providing any real guidance.

TREATY CONSIDERATIONS

22 In determining the subject matter, purpose and scope of the DTA and the MLI, both treaties are to be interpreted in accordance with Arts 31 and 32 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, [1974] ATS 2 (entered into force 27 January 1980). Both the DTA and the MLI entered into force after January 1980. Thus, both treaties are to be interpreted in accordance with the ordinary meaning of their terms in their context and in light of their object and purpose: Vienna Convention Art 31(1). Further, there is also to be taken into account, together with context, any subsequent practices in the application of the treaties which establish the agreement of the parties regarding their interpretation: Vienna Convention Art 31(3)(b).

23 It is established in relation to double taxation treaties based on the *Model Convention with Respect to Taxes on Income and on Capital* ('the Model Convention') prepared by the Organisation for Economic Co-operation and Development ('OECD') that it is permissible to take into account the OECD's 'Commentary on Article 25 Concerning the Mutual Agreement Procedure' in *Model Tax Convention on Income and Capital: Condensed Version* (OECD Publishing, 2017) ('the Commentary') when interpreting the provisions of such a treaty: see *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 ('*Thiel*') at 344 per Mason CJ, Brennan and Gaudron JJ, 349 per Dawson J and 356-357 per McHugh J. For the same reasons given in *Thiel*, I also conclude that it is permissible to take into account, when interpreting the DTA and the MLI, the OECD's *Explanatory Statement to the MLI* (adopted on 24 November 2016) ('Explanatory Statement') and the OECD's *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report* (OECD Publishing, 2015) ('Action 14 Report'). The Explanatory Statement explains at [1]-[4] that the OECD/G20 Project to tackle Base Erosion and Profit Shifting ('the BEPS Project') was approved by the OECD's Committee on Fiscal Affairs and endorsed by all G20 Leaders in September 2013, that the Action 14 Report and the MLI arose from the BEPS Project, that the OECD Council and G20 Leaders endorsed the Action 14 Report in November 2015, and that the Action 14 Report accompanied the Explanatory Statement. Both the Action 14 Report and Explanatory Statement inform the operation of the relevant international double taxation treaties.

24 The following aspects of the subject matter, scope and purpose of the DTA and the MLI are relevant to the exercise of the Court's discretion under s 23 of the FCA Act.

25 First, if a temporary stay is not granted then the mutual agreement procedure will not be capable of affecting Oracle Ireland's liability to Australian royalty withholding tax or Oracle Australia's liability to penalty. Once these proceedings result in a final determination of whether the payments are royalties within the meaning of DTA Art 13, the Commissioner, as an officer of the Commonwealth within the meaning of s 75(v) of the Constitution, will be bound by Australian law to give effect to it: *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16; 158 FCR 325 at [3]-[7] per Allsop J (as his Honour then was) (Stone J agreeing at [1] and Edmonds J agreeing at [48]).

26 Although the pre-arbitration period will begin to run again once a final judicial determination is made, it will not be possible for the ATO to reach an agreement with the IRC which contradicts that final judicial determination, as the Commissioner will be bound by law only to act on the basis of whatever that determination is. This situation is recognised in paragraph 27 of the Commentary:

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

27 Thus, whilst it may remain possible for the IRC and the ATO to reach some other agreement to avoid the double taxation of Oracle Ireland, necessarily any such agreement would not involve a consensus contrary to the judicial determination. I do not accept the taxpayers' submission that once a judicial determination is made then the ATO will be required to negotiate with the IRC other than in good faith. The Applicants rely on *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3 ('*North Sea Continental Shelf Cases*') at [85(a)]. This submission proceeds on the incorrect assumption that the avoidance of double taxation cannot be achieved by other means (for example, foreign tax credits). In any event, I do not think that the actions of the ATO in negotiating in accordance with any domestic judicial interpretation could constitute bad faith in the relevant sense. The situation which would then obtain is very different to that considered in the *North Sea Continental Shelf Cases*.

28 Further, if a mutual agreement procedure follows a judicial determination in this proceeding, and the IRC and the ATO are unable to reach an agreement, the matter will *not* then proceed to arbitration because Ireland and Australia have made the reservation in MLI Art 19(12) that:

> any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in [the MLI] shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting [State].

29 The effect of the refusal of the stay will therefore be to make the determination of the royalty question by this Court (or any higher court) definitive of Oracle Ireland's liability to Australian royalty tax and Oracle Australia's cognate liability to pay the penalties for non-withholding.

30 Secondly, the rejection of the stay may carry with it a risk of double taxation. That risk arises from the possibility that the revenue and judicial authorities of Ireland and Australia may arrive at different interpretations of the royalties clause in the DTA. But this risk is not certain and is likely to be ameliorated by a joint desire on the part of at least the judicial authorities to avoid that outcome.

31 On the other hand, granting the stay will reduce but not eliminate the same risk. The potential risk reduction arises from the fact that the mutual agreement procedure (and any arbitration) may result in an outcome which avoids double taxation. But the risk is not eliminated because the taxpayers may choose not to accept the outcome of that procedure or arbitration, in which case the issues will be determined through the Australian courts. That carries with it, again, the risk that the Irish and Australian revenue authorities and courts may arrive at different conclusions.

32 The various outcomes arising from this kind of situation, in circumstances where a stay is denied, are recognised in the Commentary at paragraph 35 (see also the last sentence of paragraph 28):

> If a claim has been finally adjudicated by a court in either State, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision (i.e. it is obliged, as a matter of law, to follow the court decision) or will not depart from the court decision as a matter of administrative policy or practice. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.

33 Thirdly, it is evident that the central purpose of the DTA is the avoidance of double taxation: see DTA Preamble; MLI Preamble; Commentary at paragraph 9. The mutual agreement procedure in DTA Art 26 and the binding mandatory arbitration procedure in MLI Art 19 are detailed attempts to achieve the central purpose of the DTA.

34 Fourthly, the proceedings were commenced because of the time limit imposed by s 14ZZN of the *Taxation Administration Act 1953* (Cth). The reason that 60 day period began to run was because the Commissioner issued his objection decisions. So, if a stay is refused in the current circumstances, it will empower the Commissioner to make taxpayers elect between the mutual agreement procedure and their domestic proceedings. Indeed, the Commissioner was open about this in his written submissions ('CS') at [43], contending that the Applicants could re-enliven the mutual agreement procedure by the expedient of discontinuing the present proceedings (and thereby surrendering their domestic appeal rights).

35 Such a power in the Commissioner is inconsistent with a number of textual indications in the DTA and the MLI, which contemplate that a taxpayer should be permitted to access the mutual agreement procedure *in addition* to any domestic procedures. For example:

(1) prior to the adoption of the MLI, DTA Art 26(1) stated that the taxpayer may present his case to the relevant competent authority 'notwithstanding the remedies provided by the national law of those States';

(2) MLI Art 16(1), which [193] of Explanatory Statement explains modified DTA Art 26(1) to facilitate the taxpayer's ability to present its case, repeats that a person may present their case to the relevant competent authorities 'irrespective of the remedies provided by the domestic law';

(3) MLI Art 16(2) also provides that 'Any agreement reached [through the mutual agreement procedure] shall be implemented notwithstanding any time limits in the domestic law of the Contracting States'; and

(4) further, any agreement reached by the competent authorities under the mutual agreement procedure does not bind the taxpayer and the same is true of the arbitration procedure under MLI Art 19(4)(b)(i). Whilst it is the taxpayer that initiates the mutual agreement procedure, only the two competent authorities are bound by its outcome.

36 Fifthly, the Explanatory Statement, the Action 14 Report and the Commentary also support the proposition that the taxpayer is to have access to both procedures. For example, at [217], the Explanatory Statement provides that 'the mutual agreement procedure is available to taxpayers irrespective of the judicial and administrative remedies provided by the domestic law of the Contracting Jurisdictions'. Similarly, at [4], the Action 14 Report notes that 'Countries should

ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure'. Paragraph 77 of the Commentary also states:

> A second issue involves the relationship between existing domestic legal remedies and arbitration where these legal remedies have not been exhausted. In that case, the approach that would be the most consistent with the basic structure of the mutual agreement procedure would be to apply the same general principles when arbitration is involved. Thus, the legal remedies would be suspended pending the outcome of the mutual agreement procedure involving the arbitration of the issues that the competent authorities are unable to resolve and a tentative mutual agreement would be reached on the basis of that decision. As in other mutual agreement procedure cases, that agreement would then be presented to the taxpayer who would have to choose to accept the agreement, which would require abandoning any remaining domestic legal remedies, or reject the agreement to pursue these remedies.

37 I reject the Commissioner's submission at CS [37] that paragraph 77 is not addressed to the situation where the competent authority has suspended the mutual agreement procedure. This is correct so far as it goes, but that does not detract from the fact that it demonstrates that the Commentary contemplates that the taxpayer is to have access to both procedures. The Commissioner is also correct to say that paragraph 77 does not state that the suspension of the mutual agreement procedure should be lifted by a stay of the domestic proceedings. However, it provides lean pickings for the proposition that any such stay application should be refused.

38 It is also relevant that paragraph 17 of the Commentary states that access to the mutual agreement procedure 'should be as widely available as possible'. On the other hand, the Commentary also shows that whilst the taxpayer is to have access to both procedures, it cannot pursue them simultaneously. Paragraph 76(a) of the Commentary states:

> For the arbitration process to be effective and to avoid the risk of conflicting decisions, a person should not be allowed to pursue the arbitration process if the issues submitted to arbitration have already been resolved through the domestic litigation process of either State (which means that any court or administrative tribunal of one of the Contracting States has already rendered a decision that deals with these issues and that applies to that person). This is consistent with the approach adopted by most countries as regards the mutual agreement procedure and according to which:
>
> > a) A person cannot pursue simultaneously the mutual agreement procedure and domestic legal remedies. Where domestic legal remedies are still available, the competent authorities will generally either require that the taxpayer agree to the suspension of these remedies or, if the taxpayer does not agree, will delay the mutual agreement procedure until these remedies are exhausted.

39 In this case, however, the Commissioner is not seeking a stay of the proceedings as paragraph 76(a) generally appears to contemplate but is instead resisting a stay application brought by the taxpayer. The Commissioner submitted at CS [35] and [36] that paragraph 76 of the

Commentary was not directed to a circumstance where domestic proceedings had been commenced and a competent authority had exercised the right to suspend the mutual agreement procedure. I do not agree. It shows that generally, where domestic proceedings are commenced, a competent authority in the position of the ATO should seek to suspend the domestic proceedings, as the Applicants submitted at AS [26]. That the ATO has decided to suspend the mutual agreement procedure, pending the Applicants' application to stay these proceedings, throws no light on what position it ought to be taking on the stay application.

40 Sixthly, the Action 14 Report and the Commentary suggest that the taxpayer – not the competent authority – typically chooses whether to proceed by mutual agreement procedure or domestic procedures. For example, at [51], the Action 14 Report highlights that 'countries should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes whilst observing the general principle that the choice of remedies should remain with the taxpayer'. Similarly, paragraph 44 of the Commentary states:

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

41 It is true, as the Commissioner correctly submitted at CS [34], that this is qualified by the presence of contrary domestic procedures. The relevant domestic procedure in this case is this Court's decision whether to grant a stay, so a degree of circularity emerges.

42 On the other hand, paragraph 44 provides no support for the notion that the choice between the domestic proceedings and the mutual agreement procedure sits with the competent authorities. Although the Commissioner disclaimed during argument that a competent authority could determine which was to proceed, this is nevertheless the effect of the posture he has embraced. By making the objection decisions, causing time to commence on the bringing of any appeal and then objecting to a stay of those proceedings, the Commissioner contended for the practical outcome that the taxpayers must abandon one of the two procedures. Whilst he cannot directly force that upon the taxpayers because the decision on the stay application is this Court's to make, nevertheless the position for which he contended in this Court, if acceded to, requires the taxpayers to choose which procedure they are to pursue. I am unpersuaded that this is what the DTA or the MLI contemplate.

43 The Commissioner next submitted that paragraph 44 is not addressed to the situation where the mutual agreement procedure has been suspended: CS [33]-[34]. I accept this submission but the Commissioner's description of the present situation is materially incomplete. The full situation is that the mutual agreement procedure has been suspended because domestic proceedings were commenced and that those proceedings were only initiated to meet a time limit that the Commissioner triggered by issuing his objection decisions. It is clear that the taxpayers did not wish to commence the proceedings from the fact that they immediately applied to stay them. Further, nothing in the text of the DTA, the MLI (including Art 19(2)), the Commentary, the Action 14 Report or the Explanatory Statement provides support for the view that a competent authority may seek to force a taxpayer to pursue its domestic remedies by opposing a taxpayer's application to stay its own proceeding.

44 That conclusion is supported by the decision of the First-Tier Tribunal Tax Chamber in *Glencore Energy UK Ltd & Anor v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 438 (TC) ('*Glencore*'), a case concerned with the double taxation treaty between the United Kingdom and Switzerland. At [69] the First-Tier Tribunal Tax Chamber recognised that it is for the taxpayer and not the competent authority to choose between domestic remedies and a mutual agreement procedure. However, I would prefer not to base my own conclusions on that decision since its reasoning to this statement is to an extent obscure. This makes it unnecessary to consider the Commissioner's oral submission that *Glencore* could be distinguished because the UK-Swiss double taxation treaty did not contain an analogous provision to MLI Art 19(2). Had it been necessary, I would have accepted that submission.

45 Seventhly, the Commentary recognises that time limits in domestic law could create difficulties by requiring a taxpayer to choose between domestic remedies and the mutual agreement procedure. Paragraph 25 of the Commentary states:

> The three year period continues to run during any domestic law (including administrative) proceedings (e.g. a domestic appeal process). This could create difficulties by in effect requiring a taxpayer to choose between domestic law and mutual agreement procedure remedies. Some taxpayers may rely solely on the mutual agreement procedure, but many taxpayers will attempt to address these difficulties by initiating a mutual agreement procedure whilst simultaneously initiating domestic law action, even though the domestic law process is initially not actively pursued. This could result in mutual agreement procedure resources being inefficiently applied. Where domestic law allows, some States may wish to specifically deal with this issue by allowing for the three year (or longer) period to be suspended during the course of domestic law proceedings. Two approaches, each of which is consistent with Article

> 25 are, on one hand, requiring the taxpayer to initiate the mutual agreement procedure, with no suspension during domestic proceedings, but with the competent authorities not entering into talks in earnest until the domestic law action is finally determined, or else, on the other hand, having the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions. This second possibility is discussed at paragraph 42 of this Commentary. In either of these cases, the taxpayer should be made aware that the relevant approach is being taken. Whether or not a taxpayer considers that there is a need to lodge a "protective" appeal under domestic law (because, for example, of domestic limitation requirements for instituting domestic law actions) the preferred approach for all parties is often that the mutual agreement procedure should be the initial focus for resolving the taxpayer's issues, and for doing so on a bilateral basis.

46 The second sentence of paragraph 25 shows that the prospect of time limits requiring a taxpayer to choose between remedies is regarded as a difficulty, and the last sentence recognises the possibility of a domestic proceeding being commenced only because of time limits. The Commissioner correctly submitted at CS [32] that the last sentence of this passage does not state a rule. However, it is a recognition of the existence of protective proceedings in the face of domestic time limits and that these are, in terms of the second sentence, a difficulty. The last sentence also underscores point six above, namely, that the intention of the drafters of the DTA was for the taxpayer – not the competent authority – to choose whether to proceed by a mutual agreement procedure or domestic proceedings.

47 The Commissioner made a number of other submissions as to why a stay should be refused.

48 First, he submitted at CS [26] that there was no point staying these proceedings since the mutual agreement procedure had itself been suspended: 'It is not the progression of these proceedings which curtails the MAP process … The MAP processes have been curtailed because they have been suspended in the circumstances contemplated by the [DTA]'. I do not accept this submission. The mutual agreement procedure has been suspended because the Commissioner issued his objection decisions, thereby forcing the taxpayers to commence protective proceedings and thereafter using the commencement of those protective proceedings to choose to suspend the mutual agreement procedure. This chain of events leads to a taxpayer being forced to forgo its domestic rights as the price to be paid to keep alive its mutual agreement procedure. I reject the allied submission at CS [43] that the taxpayers have not been shut out of the arbitration procedure because they still have the Hobson's choice of forgoing the mutual agreement procedure or withdrawing their domestic proceedings.

49 Secondly, the Commissioner submitted at CS [28] that it was not the case that the terms of the DTA and the MLI contemplated that the mutual agreement procedure would take precedence

over judicial proceedings. So much may be accepted. However, the question is whether they contemplate a situation where a taxpayer is forced to elect between remedies by commencing protective proceedings in the face of a time limit under s 14ZZN itself enlivened by the Commissioner's own objection decisions. The answer to that question is that they do not.

50 Thirdly, the Commissioner submitted at CS [39] that MLI Art 19(2) accommodated the possibility that a competent authority would suspend the mutual agreement procedure 'where concurrent domestic proceedings are commenced to avoid concurrent processes *and because the competent authority considers that the public interest favours the resolution of the dispute by the domestic legal processes*' (emphasis added). On its face MLI Art 19(2) contemplates that the competent authority may suspend the mutual agreement procedure 'because a case with respect to one or more of the same issues is pending before court or administrative tribunal'. In its terms, this confers a discretion on the competent authority, but the treaty machinery is silent on the matters which are relevant to its exercise.

51 In relation to the income year ending 31 May 2013, the Commissioner's exercise of the power to suspend the mutual agreement procedure was expressed to be, in part, because he did not consider it to be 'now the best avenue to resolve with any finality, whether the payments at issue are royalties'. For the income years ending 31 May 2014 to 31 May 2018, the expressed reason was simply because the present proceedings had been commenced.

52 Without expressing a concluded view, because the DTA has the force of Commonwealth law it is likely that decisions under MLI Art 19(2) were also made under the *International Tax Agreements Act 1953* (Cth). Since that Act does not appear in the list of excluded statutes in Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (Cth), such decisions may be reviewed under that Act: see ss 3 (definition of 'decision to which this Act applies', cl (d)), 5. Review in this Court under ss 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth) may also be possible. No proceedings to set aside the Commissioner's decisions to suspend the two mutual agreement procedures have, however, been commenced or determined.

53 In that circumstance, it is not necessary to determine the matters the Commissioner is entitled to take into account in exercising his power under MLI Art 19(2). Later in these reasons, I conclude that it is open to this Court in considering whether to exercise the power to grant a stay of the proceedings to take into account matters of public interest. It may be that considerations of symmetry might suggest that a similar decisional freedom is open to the

Commissioner. If so, then the Commissioner would be correct to argue that he was entitled to exercise the power under MLI Art 19(2) because he thought it in the public interest that the royalty issue be resolved in these proceedings. However, whether this is a relevant matter for the exercise of the discretion under MLI Art 19(2) should await a case in which the question arises.

54 Fourthly, the Commissioner submitted at CS [39]-[40] that it would subvert the competent authority's discretion under MLI Art 19(2) to suspend the mutual agreement procedure if the Court grants the stay and thereby re-enlivens the procedure. For the reasons I have given, the provisions of the DTA and MLI persuade me that, generally speaking, the power in MLI Art 19(2) should not be exercised in a way which results in the taxpayer being forced to choose between its domestic remedies and the mutual agreement procedure. Were it not for the time limits resulting from the Commissioner's objection decisions, MLI Art 19(2) would not have that effect because the taxpayers would not be required to have commenced their proceedings to preserve their rights to seek review of the Commissioner's notices. But where, as here, a domestic time limit forces a taxpayer's hand, generally MLI Art 19(2) should not be used to force the taxpayer to choose between its remedies. Leaving aside public interest considerations, this suggests that in such cases the competent authority should not oppose the grant of a stay sought by the taxpayer of their own domestic proceedings.

55 Indeed, the Commissioner's authority to suspend the mutual agreement procedure found at MLI Art 19(2) is not inconsistent with the conclusion that the text of the DTA and the MLI indicate that taxpayers should have access to both the mutual agreement procedure and domestic procedures. I accept that the Commissioner may suspend a mutual agreement procedure under MLI Art 19(2) 'because a case with respect to one or more of the same issues is pending before a court or administrative tribunal' and that he did so here. However, as the Applicants contended in their reply submissions ('ASR') at [10], that same provision also contemplates that the 'case' may be 'suspended or withdrawn'. Consequently, the DTA and the MLI provide the requisite flexibility to accommodate both outcomes and, contrary to the Commissioner's submission at CS [40], no 'inexplicable tension' arises from the text of MLI Art 19(2).

NON-TREATY DISCRETIONARY CONSIDERATIONS

56 In cases where the parties have by contract agreed to adopt a non-curial dispute resolution procedure and, in the face of that agreed procedure, curial proceedings have been commenced, it is accepted that the burden rests on the party opposing the stay of those proceedings to establish that there is good reason not to grant the stay: *Onslow Salt* at [15], [19] per Besanko, Barker and Colvin JJ.

57 I do not think that this principle is apposite in the present case. The dispute resolution mechanism in the DTA does not derive from an agreement between the taxpayers and the Commissioner from which the Commissioner is seeking to depart. It derives from an agreement between Australia and Ireland which confers rights in international law on the taxpayers. The thinking underpinning cases such as *Onslow Salt* is that parties who contract with each other should generally be held to their bargain including any stipulation as to dispute resolution. If they wish to be relieved of the burden of their bargain, then they must show good reason for the Court taking that course: *pacta sunt servanda*. But here there is no such bargain, and the Commissioner is not seeking to reprobate some agreement he has with the taxpayers. Essentially, the problem is one of the absence of privity.

58 It follows that I do not accept that the Commissioner bears the onus of demonstrating that there is good reason to refuse the stay. That leaves unresolved where the onus does in fact lie. I would prefer to resolve that question by ordinary principles of interlocutory procedure. The applicants for the stay are the taxpayers. All other things being equal, it is the moving party on an interlocutory application which bears the burden of demonstrating an entitlement to the relief claimed: *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 551-53 per Beaumont, Drummond and Sundberg JJ. I therefore proceed on the basis that it is the burden of the taxpayers to show that the stay that they seek should be granted.

59 As will be seen, I do not think that where the burden lies in this case matters very much. As I have explained, the terms of the DTA provide a powerful reason why the stay should be granted and, as I will explain, there is also a powerful reason why a stay should not be granted. In that context, the question of who bears the burden on the application is not especially helpful. Both sides have established good and understandable reasons for their positions. The substantial question is which of these good reasons is to prevail.

60 The Commissioner pointed to a number of discretionary matters which he submittted favour the refusal of the stay application.

61 First, he submitted at CS [44] that the critical royalty issue at the heart of the proceeding concerns the construction and application of Australian copyright law. The Federal Court has expertise in Australian copyright law whereas any arbitral panel constituted under MLI Art 20(2) will consist of members 'with expertise or experience in international tax matters'. Whilst it is true that the panel members must have that experience, MLI Art 20(2) does not prevent the appointment of a person who has experience in international tax matters *and* Australian copyright law. Such persons certainly exist. Given that the ATO will have the right to appoint one of the panel members, this tends to suggest that it is unlikely that any such panel will necessarily be bereft of Australian copyright expertise. Even so, I accept that there is some risk that any panel will not have the same expertise as this Court since this reasoning would only extend to one member of the panel. As such, it is a matter militating towards the refusal of the stay. On the other hand, I regard as neutral the fact that the proceedings will involve the interpretation of Art 3(3) of the DTA and the law of California (which the Applicants submitted is the law governing the various agreements). I see no reason why this Court or the panel should be seen as instrumentally more suited to issues of these kinds.

62 Secondly, the Commissioner submitted that a judicial determination by this Court (or, more likely, any appellate court) will provide guidance both to him and other taxpayers about the operation of the royalty tax. In that regard, Ms Melissa Spurge, a Deputy Commissioner of Taxation, gave evidence that there were approximately fifteen other entities whose distribution of software or related arrangements require consideration of the definition of 'royalty' for Australian tax purposes.

63 In addition to those matters, it is also apparent that the Commissioner's approach to what constitutes a royalty for the purpose of double taxation treaties has created friction with the United States. The Commissioner's position on royalties in relation to software distribution arrangements is the subject of two draft taxation rulings: *Income tax: royalties - character of receipts in respect of software* (Draft TR 2021/D4) and its revised version, *Income tax: royalties - character of payments in respect of software and intellectual property rights* (Draft TR 2024/D1). On 23 August 2022, Mr Jose E. Murillo, Deputy Assistant Secretary (International Tax Affairs) in the Office of Tax Policy within the US Treasury Department, wrote to Mr Marty Robinson, First Assistant Secretary – CBR in the Corporate and

International Tax Division of the Australian Treasury, indicating that the United States had 'strong concerns' about the approach to software distribution flagged in Draft TR 2021/D4. He also indicated that it would be inconsistent with United States Treasury regulations which provide that payments of the present kind are to be treated as payments in exchange for services which were not royalties. On 5 April 2024, the US Department of the Treasury again wrote to the Australian Treasury urging the ATO to withdraw Draft TR 2024/D1 or to 'revise it as it applies to the Australia-U.S. tax treaty to bring it into conformity with the OECD Model Commentaries'.

64 The taxpayers submitted that these matters should be given little weight and that the stay should not be refused to allow the Commissioner's quest for guidance on the issue: ASR [12]. In that regard, it was submitted that the dispute with the United States is a diplomatic issue. Whilst this is no doubt formally true, it does not gainsay the fact that it is a diplomatic issue concerned with the meaning of word the 'royalty' in a treaty with the United States. Further, that word derives from the Model Convention and appears in a large number of other double taxation agreements which Australia has made with other members of the OECD. Thus, the dispute with the United States is potentially emblematic of a larger dispute within the OECD about how royalties are to be approached in the case of software distribution arrangements. To some extent, this observation is borne out by the Applicants' oral submission that the dispute with the United States was just the 'tip of the iceberg' because Australia's approach to the meaning of royalties was highly controversial and contrary to long-standing practice reflected in the OECD's Commentary on the royalty article in the Model Convention. The OECD's commentary can be found in the 'Commentary on Article 12 Concerning the Taxation of Royalties' in *Model Tax Convention on Income and Capital: Condensed Version* (OECD Publishing, 2017). But this only appears to widen the potential breadth of dispute with the United States into a larger dispute with other members of the OECD.

65 I accept that any decision by this or an appellate court will provide guidance to the Commissioner about his draft ruling. If this guidance were for the Commissioner alone, I would be disposed to see the force of the Applicants' submission. However, there are approximately 15 other taxpayers whose arrangements raise the principal issue in these proceedings, an ongoing dispute with an important trading partner and, if one accepts the Applicants' submission about the highly controversial nature of the Commissioner's position, possibly other similar disputes in the wings.

66 These matters, which it is true do not directly relate to the current taxpayers, are a powerful discretionary consideration favouring the refusal of the stay application. Under Art 23(1)(c) of the MLI, the decisions of an arbitral panel have no precedential effect and are not to include 'a rationale or any other explanation of the decision'. In the context of 15 other taxpayers whose circumstances seem to raise similar concerns, a dispute with at least one significant trading partner, and the potential for additional disputes with other contracting states in future, it would be useful to have a judicial determination of whether arrangements such as the present do or do not involve a royalty under the various double taxation treaties which exist. A series of 15 arbitrations would give no guidance on the correct answer and each decision would provide no guidance to the Commissioner as to what he was to do with the other cases. Indeed, I accept that there is a risk that the arbitrations may result in inconsistent outcomes including in this case (because there are two mutual agreement procedures on foot which need not be determined by the same panel). Nor would any such arbitral decisions provide guidance in negotiating the dispute with the United States.

67 To this may be added another consideration. The existence of a final appellate conclusion on whether distribution arrangements such as the present involve royalties will assist in the conduct by the IRC and ATO of other mutual agreement procedure cases and any subsequent arbitrations. Contrary to the Applicants' submissions at AS [30(d)] and ASR [5], such a determination will clarify, rather than 'constrain', the options available for resolving the issues in dispute between the ATO and IRC through a mutual agreement procedure. These last two matters are powerful considerations in favour of refusing the present stay application.

68 Thirdly, the Commissioner submitted at CS [47] that the grant of a stay will cause significant delay because, if the ATO and IRC cannot agree to resolve the disputes, then there could be no arbitration on the first request until September 2025 and none on the second request until September 2026. It is likely therefore that there will be no resolution under the DTA until 2027. Further, since the taxpayers are not bound by the outcome of the arbitration, they could then re-enliven these proceedings. There is force in this submission. However, it is unlikely that these proceedings will be heard in 2025 given the state of my docket and a hearing in 2026 is more likely. An appeal to the Full Court is inevitable and an appeal to the High Court possible. Thus, the most likely outcome is that these proceedings will also not be resolved until 2027. I accept that that same timeline would need to be applied after any arbitration with which the taxpayers were not satisfied. This would potentially push the final determination out to

2029 if a stay is granted. However, this post-arbitration delay is a function of the DTA and the MLI which make the arbitration non-binding on the taxpayer. Even so, I do accept that this delay is relevant to the exercise of the Court's discretion under s 23. I regard this matter as favouring the refusal of the stay application although not strongly.

69 Fourthly, the Commissioner submitted at CS [49] that the mutual agreement procedure is not very far advanced since all that has happened is the preparation of the ATO's position paper, and at CS [45] and [48] that hearing this matter will not waste the Court's resources. Whilst nothing has been done in these three proceedings either, apart from this stay application, I agree that the refusal of the stay will not result in much non-time related prejudice or waste to any party. On the other hand, if the matter proceeds down the mutual agreement procedure, it is possible that an arbitral result will occur which the taxpayer will not accept and thereafter that these proceedings will be reactivated. If that occurs, there will be wasted effort in the form of the entire mutual agreement procedures. As with the question of delay, this effect is a consequence of the treaty machinery. Again, I nevertheless regard it is as relevant to the exercise of the Court's discretion under s 23. Accordingly, I reject the Applicants' contrary submissions at AS [25], [30(c)] and ASR [14]-[15] and regard this matter as favouring the refusal of the stay application although not strongly.

70 The Applicants advanced a number of reasons why the stay should be granted (in addition to their submissions on the correct operation of the DTA and the MLI).

71 First, it was submitted that the taxpayers' case was 'justified' and this was demonstrated by the fact that the IRC had accepted Oracle Ireland's requests for a mutual agreement procedure: AS [27]. I accept that this demonstrates that Oracle Ireland's contentions about the meaning of the term 'royalties' in DTA Art 13 are of substance. However, I would have reached that conclusion without the fact that the IRC had accepted the mutual agreement procedure requests. The Commissioner submitted in response that the strength or otherwise of Oracle Ireland's position was irrelevant to the grant of the stay: CS [51]. I would not accept that proposition in an absolute form because the merits of a proceeding pending in another place may, in an appropriate case, be relevant to the question of whether a proceeding in this Court should be stayed. However, in this case, it is clear for present purposes that the position of both parties on the question of royalties is of substance and, in that circumstance, assuming that matter is relevant, I regard it as a neutral factor.

72 Secondly, the taxpayers submitted that the royalties issue was within the scope of the mutual agreement procedure and, as yet, was unresolved: AS [28]. Along the same lines it was also submitted that the mutual agreement procedure was capable of resolving the whole dispute between the parties: AS [29(a)]. Accepting the *sui generis* nature of the treaty structure, I nevertheless do consider that the fact that the mutual agreement procedure may resolve the whole dispute between the parties is a consideration relevant to the grant of the stay. However, it must also be tempered by the fact that the taxpayers are not bound to accept the outcome. On that issue, the taxpayers pointed to the fact that it is 'statistically likely' for taxpayers to accept the outcome of mutual agreement procedures and they proffered a reason why this would be so: by accepting the outcome of the mutual agreement procedure they could be confident that they would avoid double taxation: ASR [6]. Whilst I have some doubt whether it is entirely sound to rely upon 'statistics' of how disparate taxpayers have responded to the outcome of other mutual agreement procedures involving other states, I do think that this is a matter which can at least be taken into account as a discretionary consideration. Overall, I accept that these matters favour the grant of a stay.

73 Thirdly, the taxpayers submitted that both Australia and Ireland recognised that the mutual agreement procedure would be useful to determine the double taxation question, and that this was evidenced by their participation in the process and their agreement to extend the pre-arbitration period by one year: AS [29(b)]. The utility of the mutual agreement procedure is also evidenced by the fact that (1) the ATO had already provided its position paper at the time that it suspended the mutual agreement procedure and (2) one aspect of the Applicants' taxation concerns was resolved through the mutual agreement procedure (an issue regarding transfer pricing not before the Court). This is a matter which favours the grant of the stay.

74 Fourthly, the taxpayers submitted that both Ireland and Australia had committed to the MLI's arbitration provisions and that the integrity of the mutual agreement procedure would be best served by the grant of a stay: AS [29(d)(i)], [29(d)(iii)]. I do not think that this adds to the matters I have already considered when assessing the treaty machinery.

75 Fifthly, the taxpayers submitted that the grant of the stay would not occasion any prejudice to the Commissioner because all that he would lose would be the guidance of the Court: AS [29(d)(ii)]. As I have explained above, if all that were at stake was the guidance of the Commissioner there might be some force in this. However, also relevant are the position of the 15 other taxpayers and the Commonwealth's dispute with the United States. Further, if the

taxpayers' oral submission is correct that the dispute with the United States is merely the 'tip of the iceberg', then the weight of this factor is augmented. Since I have already dealt with this when dealing with the Commissioner's related submission, it is not necessary to take it into account a second time.

76 Sixthly, the taxpayers submitted that the Commentary (at paragraph 41(b)) suggested that mutual agreement cases should be settled on their own merits and not by reference to the balance of results in other cases: AS [29(d)(ii)]. However, this submission seems to me to underscore the correctness of the Commissioner's contention that, because the interests of approximately 15 other taxpayers are impacted by the outcome of the mutual agreement procedure, this procedure might not be an appropriate means of resolving the issues in dispute. This view is augmented by the fact that the arbitration results may conflict. Since I have already taken this aspect of the matter into account, I note it here only for completeness.

77 Seventhly, the taxpayers submitted that they had a 'right' to invoke the mutual agreement procedure together with any arbitration: e.g. AS [21], [30]. As I have explained, generally the taxpayer chooses whether to pursue domestic proceedings or a mutual agreement procedure. The language of a 'right' in this context may be inapposite, or at least unhelpful, when that right is qualified by the right of the competent authority to suspend the mutual agreement procedure on the commencement of domestic proceedings. I regard this submission as subsumed in my conclusions about the ordinary operation of the DTA and the MLI.

78 Eighthly, as developed principally in their oral submissions, the taxpayers submitted that the ATO was acting otherwise than in good faith. There were two versions of this argument. The first, which rested on the *North Sea Continental Shelf Cases*, has been dealt with above.

79 The second was that the power to suspend a mutual agreement procedure in MLI Art 19(2) had not been exercised in good faith. There were two elements to the submission. First, it was said that by acting as it had the ATO had usurped the role of the IRC in making the decision to accept the mutual agreement procedure request in the first place. I do not accept this submission. If the submission were correct, then the power in MLI Art 19(2) could never be exercised, since the occasion for its exercise would always necessarily follow an anterior decision by a foreign competent authority to accept the mutual agreement procedure request (excluding mutual agreement requests initially submitted to the ATO). That cannot be right.

80 Secondly, it was said that the power had been exercised for the improper purpose of obtaining a judicial determination of the question pending under the mutual agreement procedure. I do accept that obtaining a judicial determination is one of the reasons why the ATO exercised the power in MLI Art 19(2). However, I do not accept that this demonstrates bad faith on the part of the ATO. It is evident that the ATO and the taxpayers simply have different views about how the treaty provisions operate.

81 For completeness, I note that the taxpayers also initially submitted that the suspension of the mutual agreement procedure was not a suspension within the meaning of MLI Art 19(2) because the Commissioner did not intend to re-enliven the mutual agreement procedure if the stay was refused: ASR [11]. However, it became apparent during the hearing that the Commissioner regarded himself as bound to recommence the mutual agreement procedure if the stay were granted. It is thus not necessary to deal with this submission.

DECISION

82 The Court's decision of whether to stay the proceedings is discretionary. The terms of the treaties show that, generally speaking, in a case where a taxpayer has been forced to commence domestic proceedings to meet a time limit, proceedings should be stayed to permit the mutual agreement procedure (including any arbitration) to proceed if that is what the taxpayer wishes. It is the taxpayer which, generally speaking, gets to choose whether to pursue domestic proceedings or to enliven the mutual agreement procedure between the competent authorities. Denying a stay in such cases would effectively result in the competent authority being able to force the taxpayer to abandon one process. Because this is not what the treaties contemplate, this is a powerful consideration favouring the grant of the stay sought.

83 However, the question of what a royalty is under the various double taxation agreements and how it is to be applied to 15 different taxpayers is a question which subtends the position of the taxpayers in this case, as does the dispute with the United States. This larger consideration speaks powerfully to the need for there to be a final appellate judicial determination of the issue. Such a determination will provide guidance to the various competent authorities, to the other taxpayers, to arbitrators and to any other trading partners with whom the Commonwealth is presently in dispute about the nature of a royalty. This consideration strongly suggests that one case should proceed to final appellate determination for the guidance of all.

84 No doubt, this Court and any higher appellate court will be guided in determining the meaning of royalties under DTA Art 13 by the principle that uniform interpretation where treaty provisions are concerned is an important value: *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2023] HCA 11; 275 CLR 292 at 316 [38] per Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ; *Povey v Qantas Airways Ltd* [2005] HCA 33; 223 CLR 189 at [25] per Gleeson CJ, Gummow, Hayne and Heydon JJ; *Basfar v Wong* [2022] UKSC 20; [2023] AC 33 at 55 [16]; *Monasky v Taglieri*, 589 US 68, 79-80 (2020).

85 Were it not for the position of the 15 other taxpayers and the dispute with the United States, I would grant the stay sought. The balance of the other discretionary matters are outweighed by my impression of how these treaties are generally to operate in circumstances such as the present.

86 However, the need for a judicial determination of the royalties question for the benefit of others persuades me that a stay should not be granted for public interest reasons.

87 For completeness, it will be noted that I therefore accept that the public interest is a legitimate input into the exercise of the Court's discretion: *Sterling Pharmaceuticals* at 293; *Epic Games, Inc v Apple Inc* [2021] FCAFC 122; 286 FCR 105 at [53], [60] per Middleton, Jagot and Moshinsky JJ. It will be recalled that I have not found it necessary to determine whether the public interest is a legitimate input into the exercise of the Commissioner's power under MLI Art 19(2). As I have said, that question should await a proceeding in which it arises.

88 The conclusion that the stay should be refused has a significant impact on the taxpayers and on the administration of the tax system. It is appropriate to grant the taxpayers leave to appeal so that its correctness can be tested before the Full Court.

I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perram.

Associate:

Dated: 31 October 2024

SCHEDULE A: SYNTHESISED TEXT OF THE MLI AND THE DTA

Australian Government
Australian Taxation Office

SYNTHESISED TEXT OF THE MLI AND THE AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS

If you follow the information in this document, and it turns out to be incorrect, or it is misleading and you make a mistake as a result, the ATO will take that into account when determining what action, if any, we should take.

General disclaimer on this synthesised text document

This document presents the synthesised text for the application of the *Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* signed on 31 May 1983 (the "Agreement") as modified by the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the "MLI") signed by Australia and Ireland on 7 June 2017.

This document was prepared in consultation with the competent authority of Ireland and represents our shared understanding of the modifications made to the Agreement by the MLI.

The document was prepared on the basis of the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and of the MLI position of Ireland submitted to the Depositary upon ratification on 29 January 2019. These MLI positions are subject to modifications as provided in the MLI. Modifications made to MLI positions could modify the effects of the MLI on the Agreement.

The sole purpose of this document is to facilitate the understanding of the application of the MLI to the Agreement and it does not constitute a source of law. The authentic legal texts of the Agreement and the MLI take precedence and remain the legal texts applicable.

The provisions of the MLI that are applicable with respect to the provisions of the Agreement are included in boxes throughout the text of this document in the context of the relevant provisions of the Agreement. The boxes containing the provisions of the MLI have generally been inserted in accordance with the ordering of the provisions of the 2017 OECD Model Tax Convention.

Changes to the text of the provisions of the MLI have been made to conform the terminology used in the MLI to the terminology used in the Agreement (such as "Covered Tax Agreement", and "Agreement", "Contracting Jurisdictions" and "Contracting States"), to ease the comprehension of the provisions of the MLI. The changes in terminology are intended to increase the readability of the document and are not intended to change the substance of the provisions of the MLI. Similarly, changes have been made to parts of provisions of the MLI that describe existing provisions of the Agreement: descriptive language has been replaced by legal references of the existing provisions to ease the readability.

In all cases, references made to the provisions of the Agreement or to the Agreement must be understood as referring to the Agreement as modified by the provisions of the MLI, provided such provisions of the MLI have taken effect.

References

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting [2019] ATS 1 (provides the authentic legal texts of the MLI).

Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains [1983] ATS 25 (provides, in the case of Australia, the authentic legal text of the Agreement).

Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains (provides, in the case of Ireland, the authentic legal text of the Agreement).

Signatories and parties to the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and Profit Shifting (provides the MLI position of Australia submitted to the Depositary upon ratification on 26 September 2018 and the MLI position of Ireland submitted to the Depositary upon ratification on 29 January 2019).

Entry Into Effect of the MLI Provisions

The provisions of the MLI applicable to the Agreement do not take effect on the same dates as the original provisions of the Agreement. Each provision of the MLI could take effect on different dates, depending on the types of taxes involved (taxes withheld at source or other taxes levied) and on the choices made by Australia and Ireland in their MLI positions.

Dates of the deposit of instruments of ratification, acceptance or approval:

26 September 2018 for Australia and 29 January 2019 for Ireland.

Entry into force of the MLI:

1 January 2019 for Australia and 1 May 2019 for Ireland.

In accordance with paragraph 1 of Article 35 of the MLI, the provisions of the MLI (other than Article 16 Mutual Agreement Procedure and Part VI Arbitration) have effect with respect to this Agreement:

a) with respect to taxes withheld at source on amounts paid or credited to non-residents, where the event giving rise to such taxes occurs on or after 1 January 2020; and

b) with respect to all other taxes levied by each Contracting State, for taxes levied with respect to taxable periods beginning on or after 1 November 2019.

In accordance with paragraph 4 of Article 35 of the MLI, Article 16 of the MLI (Mutual Agreement Procedure) has effect with respect to this Agreement for a case presented to the competent authority of a Contracting State on or after 1 May 2019, except for cases that were not eligible to be presented as of that date under the Agreement prior to its modification by the MLI, without regard to the taxable period to which the case relates.

In accordance with paragraph 1 of Article 36 of the MLI, the provisions of Part VI (Arbitration) of the MLI have effect with respect to this Agreement with respect to cases presented to the competent authority of a Contracting State on or after 1 May 2019.

In accordance with paragraph 2 of Article 36 of the MLI, the provisions of Part VI (Arbitration) of the MLI apply to a case presented to the competent authority of a Contracting State prior to 1 May 2019 only to the extent that the competent authorities of both Contracting States agree that it will apply to that specific case.

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF IRELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND CAPITAL GAINS

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF IRELAND,

The following paragraph 3 of Article 6 of the MLI is included in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

[REPLACED by paragraph 1 of Article 6 of the MLI] *DESIRING to conclude an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains,*

The following paragraph 1 of Article 6 of the MLI replaces the text referring to an intent to eliminate double taxation in the preamble of this Agreement:

ARTICLE 6 OF THE MLI – PURPOSE OF A COVERED TAX AGREEMENT

Intending to eliminate double taxation with respect to taxes covered by [*the Agreement*] without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in [*the Agreement*] for the indirect benefit of residents of third jurisdictions),

HAVE AGREED as follows:

Article 1

PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

The following paragraphs 1 and 3 of Article 3 of the MLI apply and supersede the provisions of this Agreement:

ARTICLE 3 OF THE MLI – TRANSPARENT ENTITIES

For the purposes of [*the Agreement*], income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either [*Contracting State*] shall be considered to be income of a resident of a [*Contracting State*] but only to the extent that the income is treated, for purposes of taxation by that [*Contracting State*], as the income of a resident of that [*Contracting State*]. In no case shall the provisions of this paragraph be construed to affect a [*Contracting State's*] right to tax the residents of that [*Contracting State*].

Article 2

TAXES COVERED

(1) The existing taxes to which this Agreement shall apply are-

(a) in Australia:

the Australian income tax, including the additional tax upon the undistributed amount of the distributable income of a private company;

(b) in Ireland:

(i) the income tax;

(ii) the corporation tax; and

(iii) the capital gains tax.

(2) This Agreement shall also apply to any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of this Agreement in addition to, or in place of, the existing taxes. As soon as possible after the end of each calendar year, the competent authority of each Contracting State shall notify the competent authority of the other Contracting State of any substantial changes which have been made in the laws of the State relating to the taxes to which this Agreement applies.

Article 3

GENERAL DEFINITIONS

(1) In this Agreement, unless the context otherwise requires-

(a) the term "Australia" means the Commonwealth of Australia and, when used in a geographical sense, includes-

(i) the Territory of Norfolk Island;

(ii) the Territory of Christmas Island;

(iii) the Territory of Cocos (Keeling) Islands;

(iv) the Territory of Ashmore and Cartier Islands;

(v) the Coral Sea Islands Territory; and

(vi) any area adjacent to the territorial limits of Australia or of the said Territories in respect of which there is for the time being in force, consistently with international law, a law of Australia or of a State or part of Australia or of a Territory aforesaid dealing with the exploitation of any of the natural resources of the sea-bed and subsoil of the continental shelf;

(b) the term "Ireland" includes any area outside the territorial waters of Ireland which in accordance with international law has been or may hereafter be designated, under the laws of Ireland concerning the Continental Shelf, as an area within which the rights of Ireland with respect to the sea-bed and subsoil and their natural resources may be exercised;

(c) the terms "Contracting State", "one of the Contracting States" and "the other Contracting State" mean Australia or Ireland, as the context requires;

(d) the term "person" includes an individual, a company and any other body of persons;

(e) the term "company" means any body corporate or any entity which is assimilated to a body corporate for tax purposes;

(f) the terms "enterprise of one of the Contracting States" and "enterprise of the other Contracting State" mean an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Ireland, as the context requires;

(g) the term "tax" means Australian tax or Irish tax, as the context requires;

(h) the term "Australian tax" means tax imposed by Australia, being tax to which this Agreement applies by virtue of Article 2;

(i) the term "Irish tax" means tax imposed by Ireland, being tax to which this Agreement applies by virtue of Article 2;

(j) the term "competent authority" means:

(i) in the case of Australia, the Commissioner of Taxation or his authorised representative;

(ii) in the case of Ireland, the Revenue Commissioners or their authorised representative.

(2) In this Agreement, the terms "Australian tax" and "Irish tax" do not include any penalty or interest imposed under the law of either Contracting State relating to the taxes to which this Agreement applies by virtue of Article 2.

(3) In the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State relating to the taxes to which this Agreement applies.

Article 4

RESIDENCE

(1) For the purposes of this Agreement, a person is a resident of one of the Contracting States-

(a) in the case of Australia, subject to the provisions of paragraph (2) of this Article, if the person is a resident of Australia for the purposes of Australian tax; and

(b) in the case of Ireland, if the person is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature but not if he is liable to tax in Ireland in respect only of income from sources therein.

(2) In relation to income from sources in Ireland a person who is subject to Australian tax on income which is from sources in Australia shall not be treated as a resident of Australia unless the income from sources in Ireland is subject to Australian tax or, if that income is exempt from Australian tax, it is so exempt solely because it is subject to Irish tax.

(3) Where by reason of the preceding provisions of this Article an individual is a resident of both Contracting States, then his status shall be determined in accordance with the following rules:

(a) he shall be deemed to be a resident solely of the Contracting State in which he has a permanent home available to him;

(b) if he has a permanent home available to him in both Contracting States, or if he does not have a permanent home available to him in either of them, he

shall be deemed to be a resident solely of the Contracting State in which he has an habitual abode;

(c) if he has an habitual abode in both Contracting States, or if he does not have an habitual abode in either of them, he shall be deemed to be a resident solely of the Contracting State with which his personal and economic relations are the closer.

(4) Where by reason of the provisions of paragraph (1) of this Article, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated.

Article 5

PERMANENT ESTABLISHMENT

(1) For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

(2) The term "permanent establishment" shall include especially-

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) an agricultural, pastoral or forestry property;

(h) **[MODIFIED by paragraph 1 of Article 14 of the MLI]**[1] *a building site or construction, installation or assembly project which exists for more than twelve months;*

(i) an installation or structure used for the exploration of natural resources.

(3) **[MODIFIED by paragraph 4 of Article 13 of the MLI]** *An enterprise shall not be deemed to have a permanent establishment merely by reason of-*

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

[1] Refer to text box immediately following paragraph 4 of Article 5 of the Agreement.

The following paragraph 4 of Article 13 of the MLI applies to paragraph 3 of Article 5 of this Agreement:

ARTICLE 13 OF THE MLI – ARTIFICIAL AVOIDANCE OF PERMANENT ESTABLISHMENT STATUS THROUGH THE SPECIFIC ACTIVITY EXEMPTIONS

[Paragraph 3 of Article 5 of the Agreement] shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same *[Contracting State]* and:

a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of [*Article 5 of the Agreement*]; or

b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

(4) An enterprise shall be deemed to have a permanent establishment in one of the Contracting States and to carry on business through that permanent establishment if-

(a) **[MODIFIED by paragraph 1 of Article 14 of the MLI]** *it carries on supervisory activities in that State for more than twelve months in connection with a building site, or a construction, installation or assembly project which is being undertaken in that State;*

(b) substantial equipment is being used in that State by, for or under contract with the enterprise; or

(c) it carries on activities in that State in connection with the exploration or exploitation of the sea-bed, subsoil or their natural resources in that State.

The following paragraph 1 of Article 14 of the MLI applies and supersedes subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of this Agreement:

ARTICLE 14 OF THE MLI – SPLITTING-UP OF CONTRACTS

For the sole purpose of determining whether the periods referred to in *[subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of the Agreement]* have been exceeded:

a) where an enterprise of a *[Contracting State]* carries on activities in the other *[Contracting State]* at a place that constitutes a building site, construction project, installation project or other specific project identified in *[subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of the Agreement]*, or carries on supervisory or consultancy activities in connection with such a place, and these activities are carried on during one or more periods of time that, in the aggregate, exceed 30 days without exceeding the periods referred to in *[subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of the Agreement];* and

b) where connected activities are carried on in that other *[Contracting State]* at (or, where [*subparagraph a) of paragraph 4 of Article 5 of the Agreement*] applies to the supervisory or consultancy activities, in connection with) the same building site, construction project, installation project or other specific project identified in *[subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of the Agreement]* during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,

these different periods of time shall be added to the aggregate period of time during which the first-mentioned enterprise has carried on activities at that building site, construction project, installation project or other specific project identified in *[subparagraph h) of paragraph 2 and subparagraph a) of paragraph 4 of Article 5 of the Agreement]*.

(5) A person acting in one of the Contracting States on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph (6) of this Article applies - shall be deemed to be a permanent establishment of that enterprise in the first-mentioned State if-

(a) he has, and habitually exercises in that State, an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise; or

(b) in so acting, he manufactures or processes in that State for the enterprise goods or merchandise belonging to the enterprise, provided that this provision shall apply only in relation to the goods or merchandise so manufactured or processed.

(6) An enterprise of one of the Contracting States shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a broker, general commission agent or any other agent of an independent status, where that person is acting in the ordinary course of his business as such a broker or agent.

(7) The fact that a company which is a resident of one of the Contracting States controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

(8) The principles set forth in paragraphs (1) to (7) of this Article shall be applied in determining for the purposes of paragraph (5) of Article 12 and paragraph (5) of Article 13 whether there is a permanent establishment outside both Contracting States, and whether an enterprise, not being an enterprise of one of the Contracting States, has a permanent establishment in one of the Contracting States.

The following paragraph 1 of Article 15 of the MLI applies to this Agreement:

ARTICLE 15 OF THE MLI – DEFINITION OF A PERSON CLOSELY RELATED TO AN ENTPERISE

For the purposes of the provisions of [*Article 5 of the Agreement*], a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interest in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or

indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

Article 6

LIMITATION OF RELIEF

Where under any provision of this Agreement income is relieved from tax in one of the Contracting States and, under the law in force in the other Contracting State-

(a) the income or a part thereof is exempt from tax; or

(b) a person, in respect of the said income, is subject to tax by reference to the amount thereof which is remitted to or received in that other State, and not by reference to the full amount thereof, then the relief to be allowed under this Agreement in the first-mentioned State shall apply-

(c) where (a) above applies, only to so much of the income as is not exempt from tax in the other State; or

(d) where (b) above applies, only to so much of the income as is remitted to or received in the other State.

Article 7

INCOME FROM REAL PROPERTY

(1) Income from real property may be taxed in the Contracting State in which the real property is situated.

(2) In this Article, the term "real property"-

(a) in the case of Australia, has the meaning which it has under the laws of Australia, and shall also include-

(i) a lease of land and any other interest in or over land, whether improved or not;

(ii) a right to receive variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, oil or gas wells, quarries or other places of extraction or exploitation of natural resources; and

(b) in the case of Ireland, means immovable property according to the laws of Ireland, and shall also include-

(i) property accessory to immovable property;

(ii) rights to which the provisions of the general law respecting landed property apply;

(iii) usufruct of immovable property; and

(iv) a right to receive variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, oil or gas wells, quarries or other places of extraction or exploitation of natural resources.

Ships, boats and aircraft shall not be regarded as real property.

(3) The provisions of paragraph (1) of this Article shall apply to income derived from the direct use, letting or use in any other form of real property.

(4) A lease of land, any other interest in or over land and any right referred to in any of the subparagraphs of paragraph (2) of this Article shall be regarded as situated where the land, mineral deposits, oil or gas wells, quarries or natural resources as the case may be, are situated.

(5) The provisions of paragraphs (1), (3) and (4) of this Article shall also apply to income from real property of an enterprise and to income from real property used for the performance of professional services.

Article 8

BUSINESS PROFITS

(1) The profits of an enterprise of one of the Contracting States shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State, but only so much of them as is attributable to that permanent establishment.

(2) Subject to the provisions of paragraph (3) of this Article, where an enterprise of one of the Contracting States carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment or with other enterprises with which it deals.

(3) In the determination of the profits of a permanent establishment, there shall be allowed as deductions expenses of the enterprise, being expenses which are incurred for the purposes of the permanent establishment (including executive and general administrative expenses so incurred) and which would be deductible if the permanent establishment were an independent entity which paid those expenses, whether incurred in the Contracting State in which the permanent establishment is situated or elsewhere.

(4) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

(5) If the information available to the competent authority of a Contracting State is inadequate to determine the profits to be attributed to the permanent establishment of an enterprise, nothing in this Article shall affect the application of any law of that State relating to the determination of the tax liability of a person provided that that law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles of this Article.

(6) Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

(7) Nothing in this Article shall apply to either Contracting State to prevent the operation in the Contracting State of any provision of its law relating specifically to the taxation of any person who carries on a business of any form of insurance.

Article 9

SHIPPING AND AIR TRANSPORT

(1) Profits from the operation of ships or aircraft derived by a resident of one of the Contracting States shall be taxable only in that State.

(2) Notwithstanding the provisions of paragraph (1) of this Article, such profits may be taxed in the other Contracting State where they are profits from operations of ships or aircraft confined solely to places in that other State.

(3) The provisions of paragraphs (1) and (2) of this Article shall apply in relation to the share of the profits from the operation of ships or aircraft derived by a resident of one of the Contracting States through participation in a pool service, in a joint transport operating organisation or in an international operating agency.

(4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise shipped in a Contracting State for discharge at another place in that State shall be treated as profits from operations of ships or aircraft confined solely to places in that State.

Article 10

ASSOCIATED ENTERPRISES

(1) Where-

(a) an enterprise of one of the Contracting States participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one of the Contracting States and an enterprise of the other Contracting State,

and in either case conditions operate between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to accrue to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

(2) If the information available to the competent authority of a Contracting State is inadequate to determine the profits to be attributed to an enterprise, nothing in this Article shall affect the application of any law of that State relating to the determination of the tax liability of a person, provided that that law shall be applied, so far as the information available to the competent authority permits, in accordance with the principles of this Article.

(3) Notwithstanding the provisions of this Article, an enterprise of one of the Contracting States may be taxed by that Contracting State as if this Article had not entered into force and had not had effect but, so far as it is practicable to do so, in accordance with the principles of this Article.

(4) Where profits on which an enterprise of one of the Contracting States has been charged to tax in that State are also included, by virtue of paragraphs (1), (2) or (3) of this Article, in the profits of an enterprise of the other Contracting State and taxed accordingly, and the profits so included are profits which might have been expected to have accrued to that enterprise of the other State if the conditions operative between the enterprises had been those which might have been expected to have operated between independent enterprises dealing wholly independently with one another, then the first-mentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the first-mentioned State. In determining such an adjustment, due regard shall be had to the other provisions of this Agreement and for this purpose the competent authorities of the Contracting States shall if necessary consult each other.

(5) The provisions of paragraph (4) of this Article relating to an appropriate adjustment are not applicable after the expiration of six years from the end of the year of assessment or

financial year, as the case may be, in respect of which a Contracting State has charged to tax the profits to which the adjustment would relate.

Article 11

DIVIDENDS

(1) Dividends paid by a company which is a resident of Australia for the purposes of Australian tax, being dividends to which a resident of Ireland is beneficially entitled, may be taxed in Ireland. Such dividends may also be taxed in Australia, according to the law of Australia, but the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

(2) (a) Dividends paid by a company which is a resident of Ireland for the purposes of Irish tax, being dividends to which a resident of Australia is beneficially entitled, may be taxed in Australia.

(b) Where a resident of Australia is entitled to a tax credit in respect of a dividend under paragraph (3) of this Article, tax may also be charged in Ireland and according to the laws of Ireland on the aggregate of the amount or value of that dividend and the amount of that tax credit at a rate not exceeding 15 per cent.

(c) Except as aforesaid, dividends paid by a company which is a resident of Ireland for the purposes of Irish tax, being dividends to which a resident of Australia is beneficially entitled, shall be exempt from any tax in Ireland which is chargeable on dividends.

(3) A resident of Australia who receives dividends from a company which is a resident of Ireland shall, subject to the provisions of paragraph (4) of this Article and provided he is the beneficial owner of the dividends, be entitled to the tax credit in respect thereof to which an individual resident in Ireland would have been entitled had he received those dividends, and to the payment of any excess of that tax credit over his liability to Irish tax. Any such credit shall be treated for the purposes of Australian tax as assessable income from sources in Ireland.

(4) The provisions of paragraph (3) of this Article shall not apply where the beneficial owner of the dividends (being a company) is, or is associated with, a company which either alone or together with one or more associated companies controls directly or indirectly 10 per cent or more of the voting power in the company paying the dividends. For the purposes of this paragraph two companies shall be deemed to be associated if one controls directly or indirectly more than 50 per cent of the voting power in the other company, or a third company controls more than 50 per cent of the voting power in both of them.

(5) The term "dividends" in this Article means income from shares and includes any income or distribution assimilated to income from shares under the taxation law of the Contracting State of which the company paying the dividends or income or making the distribution is a resident.

(6) **[Part of the second sentence of paragraph 6 of Article 11 of this Agreement is REPLACED by paragraph 1 and paragraph 4 of Article 7 of the MLI]**[2] Where the company paying a dividend is a resident of one of the Contracting States and the beneficial owner of the dividend, being a resident of the other Contracting State, owns 10 per cent or more of the class of shares in respect of which the dividend is paid, paragraphs (2) and (3) of this Article shall not apply to the dividend to the extent that it can have been paid only out of profits which the company paying the dividend earned or other income which it received in a period ending 12 months or more before the relevant date. For the purposes of this

[2] Refer to text box immediately following Article 28 of the Agreement.

paragraph the term "relevant date" means the date on which the beneficial owner of the dividend became the owner of 10 per cent or more of the class of shares in question: *provided that this paragraph shall not apply if the shares were acquired for bona fide commercial reasons and not primarily for the purpose of securing the benefit of this Article.*

(7) The provisions of paragraphs (1), (2) and (3) of this Article shall not apply if the person beneficially entitled to the dividends, being a resident of one of the Contracting States, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 8 or Article 15, as the case may be, shall apply.

(8) Dividends paid by a company which is a resident of one of the Contracting States, being dividends to which a person who is not a resident of the other Contracting State is beneficially entitled, shall be exempt from tax in that other State except insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or fixed base situated in that other State: provided that this paragraph shall not apply in relation to dividends paid by any company which is a resident of Australia for the purposes of Australian tax and which is also a resident of Ireland for the purposes of Irish tax.

Article 12

INTEREST

(1) Interest arising in one of the Contracting States, being interest to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

(2) Such interest may be taxed in the Contracting State in which it arises, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

(3) The term "interest" in this Article includes interest from Government securities or from bonds or debentures, whether or not secured by mortgage and whether or not carrying a right to participate in profits, and interest from any other form of indebtedness as well as all other income assimilated to income from money lent by the taxation law of the Contracting State in which the income arises but does not include any income which is treated as a dividend under Article 11.

(4) The provisions of paragraphs (1) and (2) of this Article shall not apply if the person beneficially entitled to the interest, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the indebtedness in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 8 or Article 15, as the case may be, shall apply.

(5) Interest shall be deemed to arise in a Contracting State when the payer is that State itself or a political subdivision or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a Contracting State or outside both Contracting States a permanent establishment or fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(6) Where, owing to a special relationship between the payer and the person beneficially entitled to the interest or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the interest paid shall remain taxable according to the law of each Contracting State, but subject to the other provisions of this Agreement.

(7) **[REPLACED by paragraph 1 and paragraph 4 of Article 7 of the MLI]**[3] *The provisions of this Article shall not apply if the indebtedness in respect of which the interest is paid was created or assigned mainly for the purpose of taking advantage of this Article and not for bona fide commercial reasons.*

Article 13

ROYALTIES

(1) Royalties arising in one of the Contracting States, being royalties to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.

(2) Such royalties may be taxed in the Contracting State in which they arise, and according to the law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

(3) The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for-

(a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark, or other like property or right;

(b) the use of, or the right to use, any industrial, commercial or scientific equipment;

(c) the supply of scientific, technical, industrial or commercial knowledge or information;

(d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c);

(e) the use of, or the right to use-

(i) motion picture films;

(ii) films or video tapes for use in connection with television; or

(iii) tapes for use in connection with radio broadcasting; or

(f) total or partial forbearance in respect of the use of a property or right referred to in this paragraph.

(4) The provisions of paragraphs (1) and (2) of this Article shall not apply if the person beneficially entitled to the royalties, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties

[3] Refer to text box immediately following Article 28 of the Agreement.

are paid or credited is effectively connected with such permanent establishment or fixed base. In such a case, the provisions of Article 8 or Article 15, as the case may be, shall apply.

(5) Royalties shall be deemed to arise in a Contracting State when the payer is that State itself or a political subdivision or local authority of that State or a person who is a resident of that State for the purposes of its tax. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a Contracting State or outside both Contracting States a permanent establishment or fixed base in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment or fixed base, then the royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(6) Where, owing to a special relationship between the payer and the person beneficially entitled to the royalties or between both of them and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might have been expected to have been agreed upon by the payer and the person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law of each Contracting State, but subject to the other provisions of this Agreement.

(7) **[REPLACED by paragraph 1 and paragraph 4 of Article 7 of the MLI]**[4] *The provisions of this Article shall not apply if the right or property in respect of which the royalties were paid or credited was created or assigned mainly for the purpose of taking advantage of this Article and not for bona fide commercial reasons.*

Article 14

ALIENATION OF PROPERTY

(1) **[MODIFIED by subparagraph a) of paragraph 1 of Article 9 of the MLI]**[5] *Income or gains from the alienation of real property may be taxed in the Contracting State in which that property is situated.*

(2) For the purposes of this Article-

(a) the term "gains" means, in the case of Ireland, chargeable gains as defined in the taxation law of Ireland;

(b) the term "real property" shall include-

(i) a lease of land or any other interest in or over land;

(ii) rights to exploit, or to explore for, natural resources;

(iii) **[MODIFIED by subparagraph a) of paragraph 1 of Article 9 of the MLI]**[6] *shares or comparable interests in a company the assets of which consist wholly or principally of interests in or over land in one of the Contracting States or of rights to exploit, or to explore for, natural resources in one of the Contracting States;*

(iv) **[MODIFIED by subparagraph a) of paragraph 1 of Article 9 of the MLI]**[7] *any partnership interest, or any interest in settled property deriving its value or the greater part of its value directly or indirectly from interests in or over land in one of the Contracting States or rights*

[4] Refer to text box immediately following Article 28 of the Agreement.
[5] Refer to text box immediately following paragraph (2) of Article 14 of the Agreement.
[6] Refer to text box immediately following paragraph (2) of Article 14 of the Agreement.
[7] Refer to text box immediately following paragraph (2) of Article 14 of the Agreement.

to exploit, or to explore for, natural resources in one of the Contracting States; and

(v) any option, consent or embargo affecting the disposition of interests in or over land in one of the Contracting States or rights to exploit, or to explore for, natural resources in one of the Contracting States; and

(c) real property shall be deemed to be situated-

(i) where it consists of interests in or over land - in the Contracting State in which the land is situated;

(ii) where it consists of rights to exploit, or to explore for, natural resources - in the Contracting State in which the natural resources are situated or the exploration may take place; and

(iii) **[MODIFIED by subparagraph a) of paragraph 1 of Article 9 of the MLI]**[8] *where it consists of shares or comparable interests in a company referred to in clause (iii) of subparagraph (b) of this paragraph, a partnership interest or an interest in settled property referred to in clause (iv) of the said subparagraph, or an option, consent or embargo referred to in clause (v) of the said subparagraph - in the Contracting State in which the land or natural resources are wholly or principally situated or the exploration may take place.*

The following subparagraph a) of paragraph 1 of Article 9 of the MLI applies to paragraph 1 and subparagraphs b(iii), b(iv), and c(iii) of paragraph 2 of Article 14 of this Agreement:

ARTICLE 9 OF THE MLI - CAPTIAL GAINS FROM ALIENATION OF SHARES OR INTERESTS OF ENTITIES DERIVING THEIR VALUE PRINCIPALLY FROM IMMOVABLE PROPERTY

[Paragraph 1 of Article 14 and subparagraphs b(iii), b(iv) and, c(iii) of paragraph 2 of Article 14 of the Agreement] shall apply if the relevant value threshold is met at any time during the 365 days preceding the alienation.

(3) Subject to the provisions of paragraph (1) of this Article, income or gains from the alienation of capital assets of an enterprise of one of the Contracting States or of capital assets available to a resident of one of the Contracting States for the purpose of performing professional services or other independent activities shall be taxable only in that State, but, where those assets form the whole or part of the business property of a permanent establishment or fixed base situated in the other Contracting State, such income or gains may be taxed in that other State.

(4) Income or gains derived by an enterprise of one of the Contracting States from the alienation of ships or aircraft operated in international traffic while owned by that enterprise shall be taxable only in that State.

Article 15

INDEPENDENT PERSONAL SERVICES

(1) Income derived by an individual who is a resident of one of the Contracting States in respect of professional services or other independent activities of a similar character shall be taxable only in that State unless he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities. If he has such a fixed base, the

[8] Refer to text box immediately following paragraph (2) of Article 14 of the Agreement.

income may be taxed in the other State but only so much of it as is attributable to activities exercised from that fixed base.

(2) The term "professional services" includes services performed in the exercise of independent scientific, literary, artistic, educational or teaching activities as well as in the exercise of the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 16

DEPENDENT PERSONAL SERVICES

(1) Subject to the provisions of Articles 17, 19, 20 and 21, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

(2) Notwithstanding the provisions of paragraph (1) of this Article, remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if-

(a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the year of income or year of assessment, as the case may be, of that other State; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and

(c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.

(3) Notwithstanding the preceding provisions of this Article, remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic by a resident of one of the Contracting States may be taxed in that Contracting State.

Article 17

DIRECTORS' FEES

Directors' fees and similar payments derived by a resident of one of the Contracting States in his capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

Article 18

ENTERTAINERS

(1) Notwithstanding the provisions of Articles 15 and 16, income derived by entertainers (such as theatrical, motion picture, radio or television artistes, musicians and athletes) from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

(2) Where income in respect of the personal activities of an entertainer as such accrues not to that entertainer but to another person, that income may, notwithstanding the provisions of Articles 8, 15 and 16, be taxed in the Contracting State in which the activities of the entertainer are exercised.

Article 19

PENSIONS AND ANNUITIES

(1) Pensions (including government pensions) and annuities paid to a resident of one of the Contracting States shall be taxable only in that State.

(2) The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

(3) Any alimony or other maintenance payment arising in one of the Contracting States and paid to a resident of the other Contracting State shall be taxable only in the first-mentioned State.

Article 20

GOVERNMENT SERVICE

(1) Remuneration (other than a pension or annuity) paid by one of the Contracting States or a political subdivision or local authority of that State to any individual in respect of services rendered in the discharge of governmental functions shall be taxable only in that State. However, such remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the recipient is a resident of that other State who:

(a) is a citizen of that State; or

(b) did not become a resident of that State solely for the purpose of rendering the services.

(2) The provisions of paragraph (1) of this Article shall not apply to remuneration in respect of services rendered in connection with any trade or business carried on by one of the Contracting States or a political subdivision or local authority of that State. In such a case, the provisions of Article 16 or Article 17, as the case may be, shall apply.

Article 21

PROFESSORS AND TEACHERS

(1) Remuneration which a professor or teacher who is a resident of one of the Contracting States and who visits the other Contracting State for a period not exceeding two years for the purpose of teaching or carrying out advanced study or research at a university, college, school or other educational institution, receives for those activities shall be taxable only in the first-mentioned State.

(2) This Article shall not apply to remuneration which a professor or teacher receives for conducting research if the research is undertaken primarily for the private benefit of a specific person or persons.

Article 22

STUDENTS

Where a student, who is a resident of one of the Contracting States or who was a resident of that State immediately before visiting the other Contracting State and who is temporarily present in that other State solely for the purpose of his education, receives payments from

sources outside that other State for the purpose of his maintenance or education, those payments shall be exempt from tax in that other State.

Article 23

INCOME NOT EXPRESSLY MENTIONED

(1) Items of income of a resident of one of the Contracting States which are not expressly mentioned in the foregoing Articles of this Agreement shall be taxable only in that Contracting State.

(2) However, if such income is derived by a resident of one of the Contracting States from sources in the other Contracting State, such income may also be taxed in the Contracting State in which it arises.

(3) The provisions of paragraph (1) of this Article shall not apply to income derived by a resident of one of the Contracting States where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In such a case, the provisions of Article 8 or Article 15, as the case may be, shall apply.

Article 24

SOURCE OF INCOME

(1) Income or gains derived by a resident of one of the Contracting States which, under any one or more of Articles 7 to 9, 11 to 19 and Article 23 may be taxed in the other Contracting State, shall for the purposes of the taxation law of the other Contracting State be deemed to be income or gains from sources in the other Contracting State.

(2) Income or gains derived by a resident of one of the Contracting States which, under any one or more of Articles 7 to 9, 11 to 19 and Article 23 may be taxed in the other Contracting State, shall for the purposes of Article 25 and of the taxation law of the first-mentioned Contracting State be deemed to be income or gains from sources in the other Contracting State.

Article 25

METHODS OF ELIMINATION OF DOUBLE TAXATION

(1) (a) Subject to the provisions of the law of Australia from time to time in force which relate to the allowance of a credit against Australian tax of tax paid in a country outside Australia (which shall not affect the general principle hereof), Irish tax paid under the law of Ireland and in accordance with this Agreement, whether directly or by deduction, in respect of income derived by a person who is a resident of Australia from sources in Ireland (not including, in the case of a dividend, tax paid in respect of the profits out of which the dividend is paid) shall be allowed as a credit against Australian tax payable in respect of that income;

(b) in the event that Australia should cease to allow a company which is a resident of Australia a rebate in its assessment at the average rate of tax payable by the company in respect of dividends derived from sources in Ireland and included in the taxable income of the company, the Governments of the Contracting States will enter into negotiations in order to establish new provisions concerning the credit to be allowed by Australia against its tax on the dividends.

(2) Subject to the provisions of the law of Ireland regarding the allowance as a credit against Irish tax of tax payable in a territory outside Ireland (which shall not affect the general principle hereof):

(a) Australian tax payable under the law of Australia and in accordance with this Agreement, whether directly or by deduction, on profits, income or chargeable gains from sources within Australia (excluding in the case of a dividend, tax payable in respect of the profits out of which the dividend is paid) shall be allowed as a credit against any Irish tax computed by reference to the same profits, income or chargeable gains by reference to which Australian tax is computed;

(b) in the case of a dividend paid by a company which is a resident of Australia to a company which is a resident of Ireland and which controls directly or indirectly 10 per cent or more of the voting power in the company paying the dividend, the credit shall take into account (in addition to any Australian tax creditable under the provisions of subparagraph (a) of this paragraph) the Australian tax payable by the company in respect of the profits out of which such dividend is paid.

Article 26

MUTUAL AGREEMENT PROCEDURE

(1) **[The first sentence of paragraph 1 of Article 26 of this Agreement is REPLACED by the first sentence of paragraph 1 of Article 16 of the MLI]** *Where a resident of one of the Contracting States considers that the actions of the competent authority of one or both of the Contracting States result or will result for him in taxation not in accordance with this Agreement, he may, notwithstanding the remedies provided by the national laws of those States, present his case to the competent authority of the Contracting State of which he is a resident.* The case must be presented within three years from the first notification of the action giving rise to taxation not in accordance with this Agreement.

The following first sentence of paragraph 1 of Article 16 of the MLI replaces the first sentence of paragraph 1 of Article 26 of this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

Where a person considers that the actions of one or both of the [*Contracting States*] result or will result for that person in taxation not in accordance with the provisions of [*the Agreement*], that person may, irrespective of the remedies provided by the domestic law of those [*Contracting States*], present the case to the competent authority of either [*Contracting State*].

(2) **[The second sentence of paragraph 2 of Article 26 of this Agreement is REPLACED by the second sentence of paragraph 2 of Article 16 of the MLI]** The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at an appropriate solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation not in accordance with this Agreement. *Notwithstanding any time limits in the national laws of the Contracting States, the solution so reached may be implemented within a period of seven years from the date of presentation of the case by the resident to the relevant competent authority in accordance with paragraph (1) of this Article.*

The following second sentence of paragraph 2 of Article 16 of the MLI replaces the second

sentence of paragraph 2 of Article 26 of this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the [*Contracting States*].

(3) *The competent authorities of the Contracting States shall jointly endeavour to resolve any difficulties or doubts arising as to the application of this Agreement.*

The following paragraph 3 of Article 16 of the MLI applies to this Agreement:

ARTICLE 16 OF THE MLI – MUTUAL AGREEMENT PROCEDURE

The competent authorities of the [*Contracting States*] shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of [*the Agreement*]. They may also consult together for the elimination of double taxation in cases not provided for in [*the Agreement*].

(4) The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

The following Part VI of the MLI applies to this Agreement:

PART VI OF THE MLI – ARBITRATION

Article 19 (Mandatory Binding Arbitration) of the MLI

1. Where:

    1. under [*paragraph 1 of Article 26 of the Agreement*], a person has presented a case to the competent authority of a [*Contracting State*] on the basis that the actions of one or both of the [*Contracting States*] have resulted for that person in taxation not in accordance with the provisions of [*the Agreement*]; and

    2. the competent authorities are unable to reach an agreement to resolve that case pursuant to [*paragraph 2 of Article 26 of the Agreement*], within a period of two years beginning on the start date referred to in paragraph 8 or 9 [*of Article 19 of the MLI*], as the case may be (unless, prior to the expiration of that period the competent authorities of the [*Contracting States*] have agreed to a different time period with respect to that case and have notified the person who presented the case of such agreement),

any unresolved issues arising from the case shall, if the person so requests in writing, be submitted to arbitration in the manner described in this Part, according to any rules or procedures agreed upon by the competent authorities of the [*Contracting States*] pursuant to the provisions [*of paragraph 10 of Article 19 of the MLI*].

2. Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 [*of Article 19 of the MLI*] because a case with respect to one or more of the same issues is pending before a court or administrative tribunal, the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn. In addition, where a person who presented a case and a competent authority have agreed to suspend the mutual agreement procedure, the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] will stop running until the

suspension has been lifted.

3. Where both competent authorities agree that a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority after the start of the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*], the period provided in subparagraph b) of paragraph 1 [*of Article 19 of the MLI*] shall be extended for an amount of time equal to the period beginning on the date by which the information was requested and ending on the date on which that information was provided.

4.

a) The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1 [*of Article 19 of the MLI*]. The arbitration decision shall be final.

b) The arbitration decision shall be binding on both [*Contracting States*] except in the following cases:

i. if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities. The mutual agreement that implements the arbitration decision on the case shall be considered not to be accepted by a person directly affected by the case if any person directly affected by the case does not, within 60 days after the date on which notification of the mutual agreement is sent to the person, withdraw all issues resolved in the mutual agreement implementing the arbitration decision from consideration by any court or administrative tribunal or otherwise terminate any pending court or administrative proceedings with respect to such issues in a manner consistent with that mutual agreement.

ii. if a final decision of the courts of one of the [*Contracting States*] holds that the arbitration decision is invalid. In such a case, the request for arbitration under paragraph 1 [*of Article 19 of the MLI*] shall be considered not to have been made, and the arbitration process shall be considered not to have taken place (except for the purposes of Articles 21 (Confidentiality of Arbitration Proceedings) and 25 (Costs of Arbitration Proceedings) [*of the MLI*]). In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted.

iii. if a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal.

5. The competent authority that received the initial request for a mutual agreement procedure as described in subparagraph a) of paragraph 1 [*of Article 19 of the MLI*] shall, within two calendar months of receiving the request:

a) send a notification to the person who presented the case that it has received the request; and

b) send a notification of that request, along with a copy of the request, to the competent authority of the other [*Contracting State*].

6. Within three calendar months after a competent authority receives the request for a mutual agreement procedure (or a copy thereof from the competent authority of the other [*Contracting State*]) it shall either:

a) notify the person who has presented the case and the other competent

authority that it has received the information necessary to undertake substantive consideration of the case; or

b) request additional information from that person for that purpose.

7. Where pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], one or both of the competent authorities have requested from the person who presented the case additional information necessary to undertake substantive consideration of the case, the competent authority that requested the additional information shall, within three calendar months of receiving the additional information from that person, notify that person and the other competent authority either:

a) that it has received the requested information; or

b) that some of the requested information is still missing.

8. Where neither competent authority has requested additional information pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] shall be the earlier of:

a) the date on which both competent authorities have notified the person who presented the case pursuant to subparagraph a) of paragraph 6 [*of Article 19 of the MLI*]; and

b) the date that is three calendar months after the notification to the competent authority of the other Contracting State pursuant to subparagraph b) of paragraph 5 [*of Article 19 of the MLI*].

9. Where additional information has been requested pursuant to subparagraph b) of paragraph 6 [*of Article 19 of the MLI*], the start date referred to in paragraph 1 [*of Article 19 of the MLI*] shall be the earlier of:

a) the latest date on which the competent authorities that requested additional information have notified the person who presented the case and the other competent authority pursuant to subparagraph a) of paragraph 7 [*of Article 19 of the MLI*]; and

b) the date that is three calendar months after both competent authorities have received all information requested by either competent authority from the person who presented the case.

If, however, one or both of the competent authorities send the notification referred to in subparagraph b) of paragraph 7 [*of Article 19 of the MLI*], such notification shall be treated as a request for additional information under subparagraph b) of paragraph 6 [*of Article 19 of the MLI*].

10. The competent authorities of the [*Contracting States*] shall by mutual agreement pursuant to [*Article 26 of the Agreement*] settle the mode of application of the provisions contained in this Part, including the minimum information necessary for each competent authority to undertake substantive consideration of the case. Such an agreement shall be concluded before the date on which unresolved issues in a case are first eligible to be submitted to arbitration and may be modified from time to time thereafter.

11. *Omitted.*

12.

a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by [*the MLI*] shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either [*Contracting State*];

b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*], a decision concerning the issue is rendered by a court or administrative tribunal of one of the [*Contracting States*], the arbitration process shall terminate.

Article 20 (Appointment of Arbitrators) of the MLI

1. Except to the extent that the competent authorities of the *[Contracting States]* mutually agree on different rules, paragraphs 2 through 4 [*of Article 20 of the MLI*] shall apply for the purposes of this Part.

2. The following rules shall govern the appointment of the members of an arbitration panel:

a) The arbitration panel shall consist of three individual members with expertise or experience in international tax matters.

b) Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration under paragraph 1 of Article 19 [*of the MLI*] (Mandatory Binding Arbitration). The two panel members so appointed shall, within 60 days of the latter of their appointments, appoint a third member who shall serve as Chair of the arbitration panel. The Chair shall not be a national or resident of either [*Contracting State*].

c) Each member appointed to the arbitration panel must be impartial and independent of the competent authorities, tax administrations, and ministries of finance of the [*Contracting States*] and of all persons directly affected by the case (as well as their advisors) at the time of accepting an appointment, maintain his or her impartiality and independence throughout the proceedings, and avoid any conduct for a reasonable period of time thereafter which may damage the appearance of impartiality and independence of the arbitrators with respect to the proceedings.

3. In the event that the competent authority of a [*Contracting State*] fails to appoint a member of the arbitration panel in the manner and within the time periods specified in paragraph 2 [*of Article 20 of the MLI*] or agreed to by the competent authorities of the [*Contracting States*], a member shall be appointed on behalf of that competent authority by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either [*Contracting State*].

4. If the two initial members of the arbitration panel fail to appoint the Chair in the manner and within the time periods specified in paragraph 2 [*of Article 20 of the MLI*] or agreed to by the competent authorities of the [*Contracting States*], the Chair shall be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development that is not a national of either [*Contracting State*].

Article 21 (Confidentiality of Arbitration Proceedings) of the MLI

1. Solely for the purposes of the application of the provisions of this Part and of the provisions of [*the Agreement*] and of the domestic laws of the [*Contracting States*] related to the exchange of information, confidentiality, and administrative assistance, members of the arbitration panel and a maximum of three staff per member (and prospective arbitrators solely to the extent necessary to verify their ability to fulfil the requirements of arbitrators) shall be considered to be persons or authorities to whom information may be disclosed. Information received by the arbitration panel or prospective arbitrators and information that the competent authorities receive from the arbitration panel shall be considered information that is exchanged under the provisions of [*the Agreement*] related to the exchange of information

and administrative assistance.

2. The competent authorities of the [*Contracting States*] shall ensure that members of the arbitration panel and their staff agree in writing, prior to their acting in an arbitration proceeding, to treat any information relating to the arbitration proceeding consistently with the confidentiality and nondisclosure obligations described in the provisions of [*the Agreement*] related to exchange of information and administrative assistance and under the applicable laws of the [*Contracting States*].

Article 22 (Resolution of a Case Prior to the Conclusion of the Arbitration) of the MLI

For the purposes of this Part and the provisions of [*the Agreement*] that provide for resolution of cases through mutual agreement, the mutual agreement procedure, as well as the arbitration proceeding, with respect to a case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*]:

a) the competent authorities of the [*Contracting States*] reach a mutual agreement to resolve the case; or

b) the person who presented the case withdraws the request for arbitration or the request for a mutual agreement procedure.

Article 23 (Type of Arbitration Process) of the MLI

Final offer arbitration

1. Except to the extent that the competent authorities of the [Contracting States] mutually agree on different rules, the following rules shall apply with respect to an arbitration proceeding pursuant to this Part:

a) After a case is submitted to arbitration, the competent authority of each [*Contracting State*] shall submit to the arbitration panel, by a date set by agreement, a proposed resolution which addresses all unresolved issue(s) in the case (taking into account all agreements previously reached in that case between the competent authorities of the [*Contracting States*]). The proposed resolution shall be limited to a disposition of specific monetary amounts (for example, of income or expense) or, where specified, the maximum rate of tax charged pursuant to [*the Agreement*], for each adjustment or similar issue in the case. In a case in which the competent authorities of the [*Contracting States*] have been unable to reach agreement on an issue regarding the conditions for application of a provision of [*the Agreement*] (hereinafter referred to as a "threshold question"), such as whether an individual is a resident or whether a permanent establishment exists, the competent authorities may submit alternative proposed resolutions with respect to issues the determination of which is contingent on resolution of such threshold questions.

b) The competent authority of each [*Contracting State*] may also submit a supporting position paper for consideration by the arbitration panel. Each competent authority that submits a proposed resolution or supporting position paper shall provide a copy to the other competent authority by the date on which the proposed resolution and supporting position paper were due. Each competent authority may also submit to the arbitration panel, by a date set by agreement, a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. A copy of any reply submission shall be provided to the other competent authority by the date on which the reply submission was due.

c) The arbitration panel shall select as its decision one of the proposed resolutions for the case submitted by the competent authorities with respect to each issue and any threshold questions, and shall not include a rationale or

any other explanation of the decision. The arbitration decision will be adopted by a simple majority of the panel members. The arbitration panel shall deliver its decision in writing to the competent authorities of the [*Contracting States*]. The arbitration decision shall have no precedential value.

2. *Omitted.*

3. *Omitted.*

4. *Omitted.*

5. Prior to the beginning of arbitration proceedings, the competent authorities of the [*Contracting States*] to [*the Agreement*] shall ensure that each person that presented the case and their advisors agree in writing not to disclose to any other person any information received during the course of the arbitration proceedings from either competent authority or the arbitration panel. The mutual agreement procedure under [*the Agreement*], as well as the arbitration proceeding under this Part, with respect to the case shall terminate if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the [*Contracting States*], a person that presented the case or one of that person's advisors materially breaches that agreement.

6. *Omitted.*

7. *Omitted.*

Article 24 (Agreement on a Different Resolution) of the MLI Omitted.

Article 25 (Cost of Arbitration Proceedings) of the MLI

In an arbitration proceeding under this Part, the fees and expenses of the members of the arbitration panel, as well as any costs incurred in connection with the arbitration proceedings by the [*Contracting States*], shall be borne by the [*Contracting States*] in a manner to be settled by mutual agreement between the competent authorities of the [*Contracting States*]. In the absence of such agreement, each [*Contracting State*] shall bear its own expenses and those of its appointed panel member. The cost of the chair of the arbitration panel and other expenses associated with the conduct of the arbitration proceedings shall be borne by the [*Contracting States*] in equal shares.

Article 26 (Compatibility) of the MLI

1. *Omitted.*

2. Any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for in this Part shall not be submitted to arbitration if the issue falls within the scope of a case with respect to which an arbitration panel or similar body has previously been set up in accordance with a bilateral or multilateral convention that provides for mandatory binding arbitration of unresolved issues arising from a mutual agreement procedure case.

3. [*Nothing*] in this Part shall affect the fulfilment of wider obligations with respect to the arbitration of unresolved issues arising in the context of a mutual agreement procedure resulting from other conventions to which the [*Contracting States*] are or will become parties.

4. *Omitted.*

Subparagraph a) of paragraph 2 of Article 28 of the MLI

Pursuant to subparagraph a) of paragraph 2 of Article 28 of the MLI, Australia formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI of the MLI:

Australia reserves the right to exclude from the scope of Part VI [*of the MLI*] any case to the

extent that it involves the application of Australia's general anti-avoidance rules contained in Part IVA of the *Income Tax Assessment Act 1936* and section 67 of the *Fringe Benefits Tax Assessment Act 1986*. Australia also reserves the right to extend the scope of the exclusion for Australia's general anti-avoidance rules to any provisions replacing, amending or updating those rules. Australia shall notify the Depositary of any such provisions that involve substantial changes.

Pursuant to subparagraph a) of paragraph 2 of Article 28 of the MLI, Ireland formulates the following reservations with respect to the scope of cases that shall be eligible for arbitration under the provisions of Part VI of the MLI:

Notwithstanding paragraph 1 of Article 19 (Mandatory Binding Arbitration) a case may not be submitted to arbitration if case is connected with:

1. **Serious penalties**. Ireland reserves the right to exclude from the scope of Part VI cases connected with actions for which the taxpayer or a related person (or a person acting for either the taxpayer or a related person) is liable to a penalty as a result of deliberate behaviour in accordance with Section 1077E Taxes Consolidation Act 1997. For this purpose, 'deliberate behaviour' is to be interpreted in accordance with the guidance contained in the Code of Practice for Revenue Audits and other Compliance Interventions, which will be reviewed on an on-going basis and may be modified to reflect changes in legislation and emerging practices. Any subsequent provisions replacing, amending or updating Section 1077E Taxes Consolidation Act 1997 would also be comprehended. Ireland shall notify the Depositary of any such subsequent provisions.

2. **Domestic anti-avoidance**. Ireland reserves the right to exclude from the scope of Part VI cases involving the application of Ireland's domestic anti-avoidance rules contained in Section 811 and Section 811A Taxes Consolidation Act 1997. Any subsequent provisions replacing, amending or updating these anti-avoidance rules would also be comprehended. Ireland shall notify the Depositary of any such subsequent provisions.

Article 27

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information as is necessary for the carrying out of this Agreement or of the domestic laws of the Contracting States concerning the taxes to which this Agreement applies insofar as the taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by the competent authority of 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) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this Agreement applies and shall be used only for such purposes.

2. In no case shall the provisions of paragraph (1) of this Article be construed so as to impose on a Contracting State the obligation-

a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State;

b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or to supply information the disclosure of which would be contrary to public policy.

Article 28

DIPLOMATIC AND CONSULAR OFFICIALS

Nothing in this Agreement shall affect the fiscal privileges of diplomatic or consular officials under the general rules of international law or under the provisions of special international agreements.

The following paragraph 1 of Article 7 of the MLI applies and supersedes the provisions of this Agreement:

ARTICLE 7 OF THE MLI – PREVENTION OF TREATY ABUSE

(Principal purposes test provision)

Notwithstanding any provisions of [*the Agreement*], a benefit under [*the Agreement*] shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of [*the Agreement*].

The following paragraph 4 of Article 7 of the MLI applies to paragraph 1 of Article 7 of the MLI:

Where a benefit under [*the Agreement*] is denied to a person under [*paragraph 1 of Article 7 of the MLI*], the competent authority of the [*Contracting State*] that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in [*paragraph 1 of Article 7 of the MLI*]. The competent authority of the [*Contracting State*] to which a request has been made under this paragraph by a resident of the other [*Contracting State*] shall consult with the competent authority of that other [*Contracting State*] before rejecting the request.

Article 29

ENTRY INTO FORCE

This Agreement shall enter into force on the date on which the Government of Australia and the Government of Ireland exchange notes through the diplomatic channel notifying each other that the last of such things has been done as is necessary to give this Agreement the force of law in Australia and in Ireland[9], as the case may be, and thereupon this Agreement shall have effect-

a) in Australia-

   (i) with respect to withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 July in the calendar year immediately following that in which the Agreement enters into force;

   (ii) with respect to other Australian tax, in relation to income of any year of income beginning on or after 1 July in the calendar year immediately following that in which the Agreement enters into force;

b) in Ireland-

[9] Notes to this effect were exchanged 21 December 1983, on which date the Agreement entered into force.

(i) with respect to income tax and capital gains tax, for any year of assessment beginning on or after 6 April in the calendar year immediately following that in which the Agreement enters into force;

(ii) with respect to corporation tax, for any financial year beginning on or after 1 January in the calendar year immediately following that in which the Agreement enters into force.

Article 30

TERMINATION

This Agreement shall continue in effect indefinitely, but the Government of Australia or the Government of Ireland may, on or before 30 June in any calendar year beginning after the expiration of five years from the date of its entry into force, give to the other Government through the diplomatic channel written notice of termination and, in that event, this Agreement shall cease to be effective-

a) in Australia-

(i) with respect to withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 July in the calendar year immediately following that in which the notice of termination is given;

(ii) with respect to other Australian tax, in relation to income of any year of income beginning on or after 1 July in the calendar year immediately following that in which the notice of termination is given;

b) in Ireland-

(i) with respect to income tax and capital gains tax, for any year of assessment beginning on or after 6 April in the calendar year immediately following that in which the notice of termination is given;

(ii) with respect to corporation tax, for any financial year beginning on or after 1 January in the calendar year immediately following that in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Agreement and affixed thereto their seals.

DONE in duplicate at Canberra this thirty-first day of May One thousand nine hundred and eighty-three in the English language.

FOR THE GOVERNMENT OF AUSTRALIA:
J S DAWKINS

FOR THE GOVERNMENT OF IRELAND:
JOSEPH SMALL