

Class #12 (April 2). Dispute Resolution

Please read and consider:

1. Article 25, Paragraph 5 of the OECD Model Treaty (attached).
2. Article 25, Paragraph 5 of the U.S.-Germany Protocol (attached).
3. IRS, U.S./Germany Tax Treaty Modified to Include Mandatory Arbitration (2008) (attached).
4. Treasury Department, Arbitration Board Operating Guidelines (2008) (attached).
5. U.S.-Germany Memorandum of Understanding (2008) (attached).
6. Treasury Department, Technical Explanation of the U.S.-Germany Protocol (2007) (attached)
7. The following Notes and Questions.

Notes and Questions

1. What is the purpose of the OECD proposal for mandatory arbitration? Who do you suppose is pressing for this new provision?
2. Why the secrecy in the arbitration proceeding? Should the public be informed when its government is using an outside arbitrator to settle cases worth large sums of money? What types of disclosure are proper or improper?
3. The OECD treats mandatory arbitration as an extension of the MAP. Is that a correct approach? Are court proceedings an extension of MAP? If not, how does mandatory arbitration by an outside board differ in principle from a court proceeding for purposes of MAP?
4. Can a Contracting State avoid mandatory arbitration? Consider, for example, the possibility of a Contracting State refusing to engage in MAP from the beginning in order to avoid mandatory arbitration.
5. Is the taxpayer requesting mandatory arbitration bound by the decision of the arbitration board? Are the governments? Can you explain why taxpayers and governments are not treated the same in this respect?
6. Can a taxpayer force mandatory arbitration even it is not facing double taxation? How? Does it make sense to limit mandatory arbitration to double-taxation cases, as is done by the European Union? Why do you suppose the OECD did not impose such a requirement?
7. Note that government servants are not eligible to serve on an arbitration panel? Why? They can and do serve on panels under the EU arbitration procedures.

8. Note that tax advisors (lawyers and accountants) can serve on the arbitration panel, even if they have client interests in the outcome of the arbitration. Even the president of the company forcing the arbitration can sit on the panel. Note also that there are no conflict of interest rules in place to limit opportunities for abuse by members of the arbitration panel. Why do you suppose no such rules were put in place? What rules would you recommend? At a minimum, would you require that members of the panel not be allowed to work for the taxpayer for some reasonable period (e.g., 5 years) after the conclusion of the arbitration?
9. Do you expect that most arbitration cases will involve attempts by the taxpayer to avoid double taxation or to avoid all taxation? What is the reason for your speculation?
10. Do you prefer the “baseball” arbitration (arbitration panel picks one side’s position, without the power to compromise and split the difference) in the U.S.-Germany treaty over the arbitration proposed in the OECD Model Convention? Why or why not?
11. Why has the U.S. declined to add the equivalent of Article 25(5) to its Model Convention? What does this omission say about U.S. tax treaty policy?
12. In its original write-up of its proposal, the OECD stated that it is “rare” for the current MAP system to fail to reach agreement. One commentator suggested that if MAP works well except in rare cases, then the need for arbitration is weak. In response, the OECD omitted the word “rare” in its final report recommending adoption of Art. 25(5).
13. In a treaty between an OECD country and a non-OECD country, who should be given the power to appoint the chair of the arbitration panel if the two other members of the panel fail to agree on a chair?
14. From the compensation package recommended for panel members, how long do you think the U.S. expects the arbitration panel to take in reaching its decision? Is that time estimate realistic?
15. Should the taxpayer be required to bear the costs of arbitration? Why or why not?
16. The guidelines in the U.S.-Germany protocol suggest that the arbitrators should be knowledgeable about taxation but not necessarily about arbitration proceedings. Is that result sensible? Is arbitration experience important or even particularly helpful to the arbitrators in achieving a fair result? Why or why not?

OECD Model Tax Convention (2012)

Article 25

MUTUAL AGREEMENT PROCEDURE

* * *

5. Where,
- a) under paragraph 1, 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 this Convention, and
 - b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State.

Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.¹

¹ In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 65 of the Commentary on the paragraph. As mentioned in paragraph 74 of that Commentary, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals.

Protocol to U.S.-Germany Tax Convention
Article 25(5) (2008)

5. Where, pursuant to a mutual agreement procedure under this Article, the competent authorities have endeavored but are unable to reach a complete agreement in a case, the case shall be resolved through arbitration conducted in the manner prescribed by, and subject to, the requirements of paragraph 6 and any rules or procedures agreed upon by the Contracting States, if:

a) tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case;

b) the case

aa) is a case that

A) involves the application of one or more Articles that the Contracting States have agreed shall be the subject of arbitration, and

B) is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration, or

bb) is a particular case that the competent authorities agree is suitable for determination by arbitration; and

c) all concerned persons agree according to the provisions of subparagraph d) of paragraph 6.

6. For the purposes of paragraph 5 and this paragraph, the following rules and definitions shall apply:

a) The term “concerned person” means the presenter of a case to a competent authority for consideration under this Article and all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration;

b) The “commencement date” for a case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities;

c) Arbitration proceedings in a case shall begin on the later of:

aa) Two years after the commencement date of that case, unless both competent authorities have previously agreed to a different date, and

bb) The earliest date upon which the agreement required by subparagraph d) has been received by both competent authorities;

d) The concerned person(s), and their authorized representatives or agents, must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either Contracting State or the arbitration board, other than the determination of such board;

e) Unless any concerned person does not accept the determination of an arbitration board, the determination shall constitute a resolution by mutual agreement under this Article and shall be binding on both Contracting States with respect to that case; and

f) For purposes of an arbitration proceeding under paragraph 5 and this paragraph, the members of the arbitration board and their staffs shall be considered “persons or authorities” to whom information may be disclosed under Article 26 (Exchange of Information and Administrative Assistance) of the Convention.

U.S./Germany Tax Treaty Modified to Include Mandatory Arbitration in Certain Circumstances

Internal Revenue Service (2008)

Background

On December 28, 2007, the Protocol Amending the Convention Between the United States and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes (the 2006 Protocol) entered into force. The 2006 Protocol modified certain provisions of the Convention between the United States and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes (the Convention). Among other things, the 2006 Protocol revises Article 25 (Mutual Agreement Procedure) of the Convention to provide for mandatory arbitration of certain cases in the mutual agreement procedure (MAP). The competent authorities of the United States and Germany are jointly developing procedures for implementing the arbitration process. Information regarding the relevant procedures will be incorporated into a mutual agreement at a future date. This Announcement provides interim guidance concerning the “commencement date” for MAP cases for purposes of the arbitration process until a formal mutual agreement is published.

Commencement date

New paragraph 6(c)(aa) of Article 25 of the Convention provides that arbitration proceedings generally shall begin two years after the commencement date of a MAP case. Under paragraph 4 of Article XVII of the 2006 Protocol, the commencement date for a MAP case that was already under consideration by the competent authorities as of December 28, 2007, shall be December 28, 2007.

For requests for competent authority assistance received on or after December 28, 2007, new paragraph 6(b) of Article 25 of the Convention provides that the commencement date of such a MAP case is the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities. For purposes of a competent authority request in the United States, the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the U.S. competent authority under Revenue Procedure 2006-54, Section 4.05. For purposes of a competent authority request in Germany, the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the German competent authority under Memorandum IV B 6 – B 1300- 340/06. See paragraph 22(p) of Article XVI of the 2006 Protocol.

The competent authorities of the United States and Germany agree that, within 45 days after receipt of a request for competent authority assistance, each competent authority shall determine whether the taxpayer's request provides information necessary to undertake substantive consideration. The agreement will also provide that, if the necessary information has been provided, then the relevant competent authority will advise the taxpayer and the other competent authority that the information submitted with the taxpayer's request is sufficient to undertake substantive consideration of the request.

If the necessary information is not provided, the relevant competent authority will inform the taxpayer and other competent authority of what additional information is needed. After the relevant competent authority has determined that it has the necessary information it will inform the taxpayer and the other competent authority of its determination.

The agreement will also provide that the competent authorities shall inform taxpayers in writing of the commencement date consistent with new paragraph 6(b) of Article 25 of the Convention.

A case initially submitted to the competent authorities as a request for an Advance Pricing Agreement (APA) is eligible for arbitration, but only to the extent tax returns have been filed with respect to all taxable years at issue. For purposes of establishing a commencement date for cases initially submitted as a request for an APA, paragraph 22(p)(aa) of Article XVI of the 2006 Protocol provides that the information necessary to undertake substantive consideration for a mutual agreement is the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2006-9, section 4 (or any applicable successor provisions). The competent authorities agree that they will modify this rule pursuant to paragraph 22(q) of Article XVI of the 2006 Protocol to take into account the procedures related to processing APA requests. Such agreement will indicate that the commencement date for cases initially submitted as a request for an APA shall be the earlier of, the date the countries exchange position papers, or two years from the date the taxpayer submits the information required by Revenue Procedure 2006-9, section 4. The competent authorities shall inform the taxpayers in writing of the commencement date.

1. Chair appointment

a. Within 5 business days after the appointment of the second board member by a competent authority, the board members shall contact each other to discuss appointment of a third board member, who will serve as chair.

b. Within 60 calendar days after the appointment of the second board member by a competent authority, the two board members shall appoint a third member, who will serve as a chair. (See paragraph 22(e) of the Protocol.)

c. The competent authorities will provide to their appointed board members a list of persons who the competent authorities have agreed may potentially serve as chair of the board. The competent authorities encourage the board members to select a person from the list, particularly because of issues regarding governmental contracting.

d. The two board members selected by the competent authorities may select as a chair a person not on the list, however, the board members should inform the competent authorities, in writing, prior to making the appointment. If they select a person not on the list, the person need not have arbitration experience; however, he or she should have significant familiarity with international tax issues.

2. Non-disclosure

Pursuant to paragraph 22 (n) of the Protocol, upon confirmation of appointment of the arbitration board, each board member must agree in a statement to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 of the Convention and the applicable domestic laws of the Contracting States, as well as to the Memorandum of Understanding and these guidelines.

3. Installation of Board

a. When the chair accepts his or her appointment, the chair shall write to both competent authorities to inform them of his or her acceptance, providing the non-disclosure agreements, and indicating the date of appointment and provide the chair's contact information.

4. Operating Procedures

a. To the extent needed, the board may adopt any additional procedures necessary for the conduct of its business, provided that the procedures are not inconsistent with any provision of Article 25 of the Convention, the Protocol, or any other related agreement between Germany and the U.S.

b. If the board adopts any additional procedures, the chair shall provide a written copy of them to the competent authorities.

5. Communication with the CAs

a. Before the chair is appointed, the competent authorities will send any correspondence concurrently to both board members.

b. After the chair is appointed, the competent authorities will send any correspondence to the chair. Similarly, the chair will send any correspondence concurrently to the competent authorities.

c. No board member will have any ex parte communications, except for administrative or logistical matters, with one competent authority.

d. All communication, except for logistical matters, between the board and the competent authorities must be in writing. Written communication by fax or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email. Express mail or air mail shall be used for all correspondence other than that sent via facsimile or email.

e. The board members may communicate by telephone, videoconference, fax or face-to-face meetings. Board members may communicate by email; however, they must not include any taxpayer information in the email.

f. All three board members must be present during substantive discussions.

g. No board member shall have communications regarding the issues or matters before the board with the taxpayers involved in the case or their representatives during or subsequent to the arbitration process.

6. *Position papers and supporting papers*

a. Within 90 days of the appointment of the chair, each competent authority shall submit four copies of the following documents to the board:

i. A proposed resolution paper not to exceed 5 pages, and

ii. A supporting position paper not to exceed 30 pages, plus annexes.

b. The chair will send a copy of each competent authority's proposed resolution and supporting position papers to the other competent authority within 5 days of receipt of the later submission by the board.

c. In the event that only one competent authority submits a Proposed Resolution and supporting Position Paper within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the board in that case and the Proceeding shall be terminated.

7. *Reply Submissions*

a. Within 180 days of the appointment of the chair, each competent authority may submit four copies of a reply submission not to exceed 10 pages, to address any points raised by the proposed resolution or position paper submitted by the other competent authority.

b. The chair will send a copy of each competent authority's reply submission paper to the other competent authority within 5 days of receipt of the later reply by the board.

8. *Requesting additional information*

a. The competent authorities may not submit to the board any additional information, unless the board so requests. (See paragraph 22(g) of the Protocol.)

b. The board may request additional information only from either competent authority. Such a request shall be in writing and include a response deadline. On the date the board issues the request, the board shall send a copy of the request to the other competent authority.

c. The board shall send a copy of a competent authority's response to the other competent authority.

9. *Board meetings*

a. The competent authorities encourage the members to use tele- and video-conferencing. If a face-to-face meeting is necessary, the chair will contact the competent authority of the country that initiated the mutual agreement proceeding and ask it to arrange facilities for the meeting.

i. For requests for competent authority assistance concerning an adjustment raised in either Germany or the United States, the competent authority of the country that proposed the adjustment (or in the case where there is no adjustment, denied the credit or claim) is considered the competent authority initiating the Mutual Agreement Procedure.

ii. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the Mutual Agreement Procedure. If the parent company is a resident of a 3rd state, the competent authorities will determine the competent authority serving as the one initiating the MAP.

b. The competent authority will arrange meeting facilities in a location that minimizes the board's travel time and expenses. Each competent authority may arrange a meeting in the other's meeting facilities, as needed.

10. *A board member's use of staff*

a. The competent authorities anticipate that board members will be able to perform their duties without the use of additional staff.

b. If a board member uses staff, that staff person must sign a non-disclosure agreement before performing any work on the matter.

c. The board member must send the non-disclosure agreement to the competent authorities.

d. The staff person must be subject to the same conflict of interest rules as the board member.

e. The competent authorities will not compensate the staff member.

11. Payment of board members

a. The expenses of members of the board shall be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators, as in effect on the date on which the arbitration proceedings begin. (See paragraph 22(o) of the Protocol.). This applies in particular for hotel, meals and incidental costs. With regard to travel expenses, board members will be reimbursed for economy class travel.

b. With respect to fees, each board member will be compensated for no more than three days of preparation, for two meeting days and for travel days.

c. If the board members feel they require additional time to properly consider the case, the Chair will contact the competent authorities to request additional time.

12. Inability of a board member to fulfill duties

a. If the chair is unable to fulfill his or her duties, the remaining two board members will jointly inform both competent authorities and select a new chair within 14 days.

b. If one of the other board members is unable to fulfill his or her duties, the chair will notify the competent authorities. The competent authority that selected the board member who is unable to fulfill his or her duties will select a substitute board member within 14 days.

c. If any board member is unable to fulfill his or her duties the competent authorities will consult with the remaining board members to determine a new timetable, if necessary.

d. Should it come to light that a board member has a conflict of interest which would have prevented that member's original appointment, the board member must recuse himself or herself from consideration of the case and inform the competent authorities.

13. Process for board's determination

a. The board must make a determination by adopting one of the proposed resolutions submitted by the competent authorities.

b. For each issue, each board member must choose one of the proposed resolutions.

c. A majority vote shall determine the decisions of the board in a case.

14. Multiple issue cases

a. If a case contains more than one issue (for example, the case involves the transfer of tangible goods, the transfer of intangible goods and the performance of services) the board will make a determination on each issue individually.

15. Permanent establishment cases

a. If the competent authorities have not reached an agreement on the existence of a permanent establishment, the board members must first determine whether a permanent establishment exists.

b. Once it is determined that a permanent establishment exists, the board members must then determine the amount of profits attributable to that permanent establishment. Accordingly, the competent authorities may submit a position paper and supporting paper that take alternative positions. For example, a competent authority may take the position that a permanent establishment does not exist. That competent authority may also take the position that if the board determines that a permanent establishment exists, a certain amount of income should be allocated to that permanent establishment.

16. Board's Determination

a. Within 9 months of the appointment of the chair, the chair shall provide the written determination concurrently to each competent authority. (See paragraph 22(h) of the Protocol.)

b. The written determination shall include only one of the two proposed resolutions for the issue(s) presented to the Board except for in circumstances described in paragraph 11 of the Memorandum of Understanding.

c. The board will not determine the treatment of any associated interest or penalties; rather that treatment will be determined by applicable domestic law of Germany and the United States, as the case may be. (See paragraph 22(m) of the Protocol.)

d. The written determination shall not include any rationale or analysis. (See paragraph 22(j) of the Protocol.)

e. The determination of the board will have no precedential value. (See paragraph 22(j) of the Protocol.)

f. No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of Germany or the United States. (See paragraph 22(n) of the Protocol.)

17. Terminating a Proceeding

a. A Proceeding may be terminated by the board's determination in the matter, by the competent authorities reaching a mutual agreement, or by a taxpayer's withdrawal of its competent authority request.

b. If a taxpayer withdraws its competent authority request, the competent authorities will notify the board that the taxpayer has withdrawn its request and the arbitration process is terminated.

c. If the competent authorities wish to terminate a proceeding (for example, because they have reached an agreement on the treatment of the case), the competent authorities will notify the board that they have reached a mutual agreement and the arbitration process is terminated.

d. At the termination of any proceeding each board member must immediately destroy all documents or other information received from either competent authority, or otherwise reflecting the considerations or discussions of the arbitration board, and delete all information that may be stored on any computer, personal data assistant or other electronic device or media.

MEMORANDUM OF UNDERSTANDING BETWEEN
THE COMPETENT AUTHORITIES OF
THE FEDERAL REPUBLIC OF GERMANY AND
THE UNITED STATES OF AMERICA (2008)

Introduction

The competent authorities of the Federal Republic of Germany and of the United States of America hereby enter into the following agreement (“the Agreement”) regarding the application of the arbitration procedure under paragraph 5 and 6 of Article 25 (Mutual Agreement Procedure) of the Convention Between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to certain other Taxes signed on 29 August 1989 as amended by the Protocol signed on 1 June 2006 (“the Convention”). The Agreement is entered into under paragraph 22(q) of the Protocol to the Convention (“the Protocol”). The purpose of this Agreement is to provide guidance under which the U.S.-German arbitration procedure will operate.

1. *Competent Authority Assistance in General*

a. A request for competent authority assistance must comply with the requirements as set out for the United States in Revenue Procedures 2006-54 and 2006-9, or subsequent guidance, and for Germany in the Ministry of Finance circular of 13 July 2006 (IV B 6 – S 1300 – 340/06), or subsequent guidance.

b. Taxpayers shall submit their requests for competent authority assistance to the Contracting State of which the person is a resident. In situations involving allocation of income or deductions between related persons, each person will send its request to the Contracting State of which it is a resident.

2. *Cases eligible for arbitration*

a. According to paragraph 5 of Article 25 of the Convention, arbitration is available in respect of any case where the competent authorities have endeavored but are unable to reach an agreement under Article 25 regarding the application of those Articles of the Convention that are specified under paragraph 22 sentence 1 of the Protocol.

b. An unresolved competent authority request which originated with a bilateral advance pricing agreement (APA) request is eligible for arbitration procedures. For procedures regarding APAs, see paragraph 20 below.

c. Once a case is accepted into the mutual agreement procedure, neither competent authority will cease unilaterally to consider a case, except for the circumstances described in paragraph 3.

3. *Cases ineligible for arbitration*

a. Arbitration is not available for cases which a competent authority has not accepted, or in which a competent authority ceases to provide assistance, in accordance with the Convention, the Protocol or published guidance.

i. The German competent authority will generally not accept a request for competent authority assistance or will generally cease providing assistance to a taxpayer, and thus not provide for arbitration if the taxpayer does not comply with the requirements or under circumstances as described in the Federal Ministry of Finance's circular of 13 July 2006 – IV B 6 – S 1300 – 340/06 – (or any applicable subsequent guidance). Such requirements and circumstances are described in particular in circumstances described in sections 3.2.1., 3.3.1 and 5 of the circular.

ii. The U.S. competent authority generally will not accept a request for competent authority assistance or will cease providing assistance to a taxpayer, and thus not provide for arbitration in the circumstances described in section 12.02 (Denial of Assistance) of Revenue Procedure 2006-54 (or any applicable subsequent guidance). In addition, the U.S. competent authority will not provide for arbitration for a case in which the taxpayer has reached a settlement on the issue with IRS Appeals (including an Appeals settlement through the Appeals arbitration process) or with Chief Counsel pursuant to an executed closing agreement or other written agreement such as Form 870-AD.

b. Arbitration is not available for cases that have been accepted for competent authority consideration, but for which the competent authorities agree that the particular case is not suitable for determination by arbitration pursuant to paragraph 5 (b)(aa)(B) of Article 25 of the Convention. This agreement may, depending on the circumstances of the particular case, be either a final decision, or a temporary deferral as is contemplated in paragraph 5.a.i below. The competent authorities will consider such agreement, for instance, in the following scenarios:

i. There is an inordinate and/or repeated delay in the response of a taxpayer to a request for information; or

ii. In the event the taxpayer docket the case for which it requested competent authority assistance for litigation, the case will be considered as not suitable for arbitration if the court does not allow for suspension of the litigation proceedings until such a time as a competent authority resolution has been reached.

iii. A temporary deferral of arbitration proceedings may also be considered in the case of an administrative appeal if the appeals proceedings have not been suspended.

4. *Commencement Date*

a. Within 45 days of receipt of a MAP request for assistance each competent authority will review the request and verify whether it contains the information necessary to undertake substantive consideration for a mutual agreement, pursuant to paragraph 6(b) of Article 25 of the Convention and paragraph 22(p) of the Protocol.

b. If a competent authority determines that the request for assistance is not complete, that competent authority will inform the taxpayer in writing within 45 days of receipt of the request, what information is necessary consistent with Rev. Proc. 2006-54 (or subsequent guidance) or the information required under the section 2.3.3 and 11.3.2 of the Federal Ministry of Finance circular of 13 July 2006 (or subsequent guidance).

c. Once complete information is provided, pursuant to paragraph 22 (p) of the Protocol, each competent authority will inform the other competent authority of the date it received the information necessary to undertake substantive consideration for a mutual agreement. The latter of these dates will be the Commencement Date. (See paragraph 6(b) of Article 25 of the Convention.)

d. Simultaneously, the competent authorities will confirm with each other that each has received the same information.

e. When the Commencement Date is established,

i. the competent authorities will exchange correspondence with each other confirming the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration, and

ii. each competent authority will inform the concerned persons resident in its territory in writing of the Commencement Date and the date the arbitration proceedings potentially shall begin for any subsequently necessary arbitration.

5. *Date Arbitration Proceedings Begin*

a. Arbitration proceedings in a case shall begin on the later of:

i. Two years after the Commencement Date of that case, unless both competent authorities have agreed prior to the date arbitration proceedings begin to a different date, and

ii. The earliest date upon which the nondisclosure agreements have been received by both competent authorities. (See paragraph 6 of Article 25 of the Convention.)

b. If the competent authorities agree to begin arbitration proceedings on a date different from that generally required, then the competent authorities will confirm that date in writing to each other and to the concerned persons resident in their territory.

6. *Board member appointment*

a. Each competent authority will appoint a member to the arbitration board by sending a written communication indicating their appointment to the other competent authority within 60 days of the date on which the arbitration proceedings begin. (See paragraph 22(e) of the Protocol.)

b. If either competent authority fails to appoint a member, the appointed board member shall contact the competent authority that appointed him or her. That competent authority shall contact the highest-ranking member of the Secretariat at the Center for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen of either Germany or the United States, who shall appoint a board member by written notice to both countries within 60 days of the date of such failure. (See paragraph 22(e) of the Protocol.)

c. If the board members appointed by the competent authorities fail to agree upon the third member, the appointed board member(s) will contact their appointing competent authority(ies) and the necessary appointments will be made by the highest-ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organization for Economic Co-operation and Development (OECD) who is not a citizen of either Germany or the United States, by written notice to both countries within 60 days of the date of such failure. (See paragraph 22(e) of the Protocol.)

d. The competent authorities will not appoint current government employees, or former government employees, within two years of their last employment in the government.

e. The competent authorities will appoint members who have significant international tax experience. They need not, however, have experience as either a judge or arbitrator. Every member of an arbitration board shall be impartial and independent of the contracting states and the Concerned Persons at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceeding and for a reasonable time thereafter.

f. If a board member is unable to fulfill his or her duties the chair will notify the competent authorities. The competent authority that selected the board member who is unable to fulfill his or her duties will select a substitute board member within 14 days.

g. If any board member is unable to fulfill his or her duties the competent authorities will consult with the remaining board members to determine whether a new timetable is necessary.

7. *Nondisclosure Issues*

a. Each concerned person and their authorized representatives or agents must agree prior to the beginning of arbitration proceedings not to disclose to any other person any information received during the course of the arbitration proceeding from either competent authority or the arbitration board, other than the determination of the board. (See paragraph 22(d) of the Protocol.)

8. *List of Chairs*

a. The competent authorities will identify and jointly agree to 5 – 10 persons who are qualified and willing to serve as a Chair for an arbitration board.

b. The competent authorities will review or revise this list every third year.

c. Persons to be identified for this list will have significant international tax experience. They need not, however, have experience as either a judge or arbitrator. Consistent with paragraph 6(e), the Chair shall be impartial and independent of the contracting states and the Concerned Persons at the time of accepting an appointment to serve, and shall remain so during the entire arbitration proceeding and for a reasonable time thereafter.

9. *Proposed Resolution, Position Papers and Reply Submissions*

a. Each competent authority will be permitted to submit, within 90 days of the appointment of the Chair of the arbitration board, a Proposed Resolution paper, not to exceed five pages, describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case, and a supporting Position Paper, not to exceed 30 pages, plus annexes, for consideration by the arbitration board. (See paragraph 22(g) of the Protocol.)

b. The Proposed Resolution should be drafted in a form that provides a resolution for each specific amount of income, expense or tax at issue in the case. The Proposed Resolution may also address any related issues identified by a taxpayer's request for competent authority assistance, that are required to be resolved to determine the specific amount of income, expense or tax, for example, the threshold existence of a permanent establishment (see paragraph 13 below). Thus, as may be appropriate in a particular case, the competent authorities may agree that a Proposed Resolution (or portion thereof) need not be "an amount of income, expense or tax".

c. In the event that only one competent authority submits a Proposed Resolution within the allotted time, then that Proposed Resolution shall be deemed to be the determination of the board in that case and the Proceeding shall be terminated. (See paragraph 22(g) of the Protocol.)

d. Each competent authority may, if it so desires, submit a Reply Submission, not to exceed 10 pages, to the board within 180 days of the appointment of the Chair, to address any points raised by the Proposed Resolution or Position Paper submitted by the other competent authority. (See paragraph 22(g) of the Protocol.)

e. In a particular case, the competent authorities may agree on different page limitations for the Proposed Resolutions, Position Papers or Reply Submissions.

f. Any annex to a Position Paper must be a document previously made available for the competent authorities to use in negotiation.

g. The competent authorities will send to the Chair four copies of each document submitted to the board, for distribution to the board members and other competent authority.

10. *Requests for Additional Information*

a. Additional information may be submitted to the board only at its request, and copies of the board's request and the competent authority's response shall be provided to the other

competent authority on the date on which the request or the response is submitted. (See paragraph 22(g) of the Protocol.)

- b. The board may request additional information that consists only of existing documents and may not request new or additional analyses.
- c. The board may establish a deadline for responding to the request.

11. Multiple Issues

a. A case may consist of multiple issues. The existence of multiple issues in a case will ordinarily be identified by the assertion of multiple discrete proposed adjustments arising from an audit (or if there is no adjustment, multiple discrete denied credits or claims). The Proposed Resolution and Position Paper should address each issue separately. However, in an appropriate case, the competent authorities may agree to a different presentation of issues to the board, for example, where interrelated adjustments have been proposed.

b. The board will make a determination on each issue separately. Thus, the final decision of the board may be comprised of portions of each of the Proposed Resolutions submitted by the competent authorities.

12. Permanent Establishment Cases

a. Each competent authority is allowed to submit a Proposed Resolution and Position Paper that takes alternative positions. Thus, a competent authority may take the position that no permanent establishment exists. However, the competent authority may propose an amount of income to be allocated to a permanent establishment, if the board determines that a permanent establishment exists.

13. Competent Authority Initiating the Mutual Agreement Procedure

a. For requests for competent authority assistance concerning an adjustment raised in either Germany or the United States, the competent authority of the country that proposed the adjustment (or in the case where there is no adjustment, denied the credit or claim) is considered the competent authority initiating the Mutual Agreement Procedure.

b. Meeting facilities, related resources, financial management, other logistical support, and general administrative coordination of the Proceeding will be provided, at its own cost, by the competent authority that initiated the Mutual Agreement Procedure. (See paragraph 22(l) of the Protocol.)

14. Nondisclosure

a. Pursuant to paragraph 22(n) of the Protocol, upon confirmation of appointment of the arbitration board, each board member must agree in a statement to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 of the Convention

and the applicable domestic laws of the Contracting States, as well as to this Agreement and the Arbitration Board Operation Guidelines.

15. Communication between the Board and the Competent Authorities

- a. Before the chair is appointed, the competent authorities will send any correspondence concurrently to both board members.
- b. After the chair is appointed, the competent authorities will send any correspondence to the chair. Similarly, the chair will send any correspondence concurrently to the competent authorities.
- c. No competent authority will have any ex parte communications, except for administrative or logistical matters, with a board member.
- d. All communication, except for logistical matters, between the competent authorities and the board must be in writing. Written communication by fax or email is allowed, however, no information that may identify the taxpayer(s) may be included in an email. Express mail or air mail shall be used for all correspondence other than that sent via facsimile or email.

16. Fees and Expenses

- a. The fees and expenses will be borne equally by the competent authorities. (See paragraph 22(o) of the Protocol.)
- b. Neither competent authority will charge a taxpayer for costs associated with arbitration.
- c. The fees of members of the arbitration board will be set at the fixed amount of \$2000 (two thousand United States dollars) or the equivalent in euro per day, subject to modification by the competent authorities. (See paragraph 22(o) of the Protocol.)
- d. In general, each board member will be compensated for no more than three days of preparation, two meeting days and for travel days.
- e. In general, the expenses of members of the arbitration board will be set in accordance with the International Centre for Settlement of Investment Disputes Schedule of Fees for arbitrators. (See paragraph 22(o) of the Protocol.)

17. Board Determination

- a. The determination of the board shall constitute a resolution by mutual agreement under Article 25 (Mutual Agreement Procedure) of the Convention and shall be binding on both competent authorities with respect to that case.

b. Within 30 days of receiving the determination each concerned person(s) must accept the determination in writing sent to the competent authority of the Contracting State of which the concerned person is a resident. If the concerned persons fail to accept the determination within 30 days, the determination is considered rejected.

c. If any concerned person fails to advise the competent authority within that period of time, the determination will be considered not to have been accepted and the case will be closed.

d. The treatment of any interest or penalties will be determined by applicable domestic law of Germany or the United States.

18. Terminating Proceedings

a. If a taxpayer terminates an arbitration proceeding by withdrawing its request for assistance, then the competent authorities will exchange letters to close the case.

b. If a taxpayer terminates an arbitration proceeding by withdrawing its request for assistance, the Taxpayer will not ordinarily be allowed access to the competent authority procedures for the same matter and same years.

19. Arbitration and requests for Advance Pricing Agreements (APAs)

a. Where the competent authorities have endeavored but are unable to reach an agreement in a case initially submitted to the competent authorities as a bilateral advance pricing agreement (APA) request this case is eligible for arbitration procedures, but only to the extent tax returns have been filed with respect to all taxable years at issue, including any years for which the taxpayer has requested a rollback, provided that the tax returns for the APA years (not including any rollback years) have been filed in accordance with the APA request.

b. For purposes of establishing a Commencement Date for a case initially submitted as a request for an APA, paragraph 22(p) of the Protocol provides that the information necessary to undertake substantive consideration for a mutual agreement in the United States is the information required to be submitted to the Internal Revenue Service under Revenue Procedure 2006-9, section 4 (or any applicable subsequent guidance). In Germany, the information is that which would be required under the Ministry of Finance circular of 5 October 2006—IV B 4—S 1341—38/06—in connection with the 13 July 2006 circular (or any applicable subsequent guidance)

c. Once complete information is provided, the Commencement Date of the case, for purposes of any subsequently necessary arbitration, will be the earlier of i) the date on which the competent authorities have exchanged position papers setting forth their initial negotiating positions, or ii) two years from the earliest date on which the information necessary to undertake substantive consideration for a mutual agreement has been received by both competent authorities. However, the arbitration proceedings will in no event commence before one year after the submission of the tax return for the later of the

corresponding tax years covered by the APA request (including any amendments) has elapsed.

d. For requests originally submitted as an APA, the competent authority of the country in which the parent company is located is considered the competent authority initiating the Mutual Agreement Procedure. If the parent company is a resident of a 3rd state, the competent authorities will determine the competent authority serving as the one initiating the MAP.

e. The provisions of paragraphs 1 through 18 apply as appropriate.

Agreed:

For the Federal Republic of Germany

For the United States of America

Jörg Kraeusel
Deputy Director (International)

Barry B. Shott
Deputy Commissioner (International)
Large and Mid-sized Business Division

Date:

Date:

DEPARTMENT OF THE TREASURY
TECHNICAL EXPLANATION OF THE PROTOCOL
SIGNED AT BERLIN ON JUNE 1, 2006
AMENDING THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE FEDERAL
REPUBLIC OF GERMANY (2007)

Article XIII

Article XIII of the Protocol deletes paragraph 5 of Article 25 (Mutual Agreement Procedure) of the Convention, providing for voluntary binding arbitration, and replaces it with new paragraphs 5 and 6, which introduce a mandatory binding arbitration procedure.

A case shall be resolved through arbitration when the competent authorities have endeavored but are unable to reach a complete agreement regarding a case through negotiation and the following three conditions are satisfied. First, tax returns have been filed with at least one of the Contracting States with respect to the taxable years at issue in the case. Second, the case: (i) is a case that involves one or more enumerated articles of the Convention, and is not a case that the competent authorities agree before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration; or (ii) is a case that the competent authorities agree is suitable for determination by arbitration. Third, all concerned persons and their authorized representatives agree not to disclose to any other person any information received during the course of the arbitration proceeding from either the Contracting States or the arbitration board, other than the determination of the board (confidentiality agreement). The confidentiality agreement may also be executed by any concerned person that has the legal authority to bind any other concerned person on the matter. For example, a parent corporation with the legal authority to bind its subsidiary with respect to confidentiality may execute a comprehensive confidentiality agreement on its own behalf and that of its subsidiary.

Paragraph 22 of Article XVI of the Protocol provides that cases regarding the application of one or more of the following articles may be the subject of mandatory binding arbitration, if the requirements of paragraphs 5 and 6 of Article 25 are otherwise satisfied: Article 4 (Residence) as it relates to residence of a natural person, Article 5 (Permanent Establishment), Article 7 (Business Profits), Article 9 (Associated Enterprises), and Article 12 (Royalties). The application of one or more of the other provisions in the Convention to which Article 25 applies may be the subject of binding arbitration should the competent authorities agree.

A concerned person means the person that brought the case to competent authority for consideration under Article 25 and includes all other persons, if any, whose tax liability to either Contracting State may be directly affected by a mutual agreement arising from that consideration. For example, a concerned person does not only include a U.S. corporation that brings a transfer pricing case with respect to a transaction entered into with its German subsidiary for resolution to the U.S. competent authority, but also the German subsidiary, which may have a correlative adjustment as a result of the resolution of the case.

An arbitration proceeding begins on the later of two dates: two years from the commencement date of that case, unless both competent authorities have previously agreed to a different date, or the earliest date upon which the all concerned persons have entered into a confidentiality agreement and the agreements have been received by both competent authorities.

The commencement date is the earliest date on which information necessary to undertake substantive consideration for mutual agreement has been received by both competent authorities. Clause p) of paragraph 22 of Article XVI of the Protocol provides that each competent authority will confirm in writing to the other competent authority and to the concerned persons the date of its receipt of the information necessary to undertake substantive consideration for a mutual agreement. In the case of the United States, this information is (i) the information that must be submitted to the U.S. competent authority under Section 4.05 of Rev. Proc. 2002-52, 2002-2 C.B. 242, as it might be amended from time to time, and (ii) for cases initially submitted as a request for an Advance Pricing Agreement, the information that must be submitted to the Internal Revenue Service under Section 4 Rev. Proc. 2006-9, 2006-2 I.R.B. 278, as it might be amended from time to time. In the case of the Federal Republic of Germany, this information is the information that must be submitted to the German competent authority pursuant to the German Ministry of Finance's circular of July 1, 1997, -IV C 5 - S 1300 – 189/96. The information will not be considered received until both competent authorities receive copies of all materials submitted by concerned persons in connection with the mutual agreement procedure.

Paragraph 22 of Article XVI of the Protocol provides for a several procedural rules once an arbitration proceeding under paragraph 5 of Article 25 ("Proceeding") has commenced, but the competent authorities may modify or supplement these rules as necessary. In addition, the arbitration board may adopt any procedures necessary for the conduct of its business, provided the procedures are not inconsistent with any provision of Article 25 of the Convention.

Subparagraph (e) of paragraph 22 of Article XVI of the Protocol provides that each Contracting State has 60 days from the date on which the Proceeding begins to send a written communication to the other Contracting State appointing one member of the arbitration board. Within 60 days of the date the second of such communications is sent, these two board members will appoint a third member to serve as the chair of the board. The chair may not be a citizen of either Contracting State. In the event that any members of the board are not appointed (including as a result of the failure of the two members appointed by the Contracting States to agree on a third member) by the requisite date, the remaining members are appointed by the highest ranking member of the Secretariat at the Centre for Tax Policy and Administration of the Organisation for Economic Co-operation and Development (OECD) who is not a citizen of either Contracting State, by written notice to both Contracting States within 60 days of the date of such failure.

Clause (g) of paragraph 22 of Article XVI of the Protocol establishes deadlines for submission of materials by the Contracting States to the arbitration board. Each competent authority has 90 days from the date of appointment of the chair to submit a Proposed Resolution describing the proposed disposition of the specific monetary amounts of income, expense or taxation at issue in the case, and a supporting Position Paper. Copies of each State's submissions are to be provided by the board to the other Contracting State on the date the later of the submissions is submitted to the board. Each of the Contracting States may submit a Reply Submission to the board within 180 days of the appointment of the chair to address points raised in the other State's Proposed Resolution or Position Paper. If one Contracting State fails to submit a Proposed Resolution within the requisite time, the Proposed Resolution of the other Contracting State is deemed to be the determination of the arbitration board. No other information may be supplied to the arbitration board, unless it requests additional information. Copies of any such requested

information, along with the board's request, must be provided to the other Contracting State on the date the request or response is submitted.

All communication with the board is to be in writing between the chair of the board and the designated competent authorities with the exception of communication regarding logistical matters.

In making its determination the arbitration board will apply the following authorities as necessary and in descending order of relevance: (i) the provisions of the Convention, (ii) any agreed commentaries or explanation of the Contracting States concerning the Convention, (iii) the laws of the Contracting States to the extent they are not inconsistent with each other, and (iv) any OECD Commentary, Guidelines or Reports regarding relevant analogous portions of the OECD Model Tax Convention.

The arbitration board must deliver a determination in writing to the Contracting States within 9 months of the appointment of the chair. The determination must be one of the two Proposed Resolutions submitted by the Contracting States. The determination may only provide a determination regarding the amount of income, expense or tax reportable to the Contracting States. The determination has no precedential value and consequently the rationale behind a board's determination would not be beneficial and may not be provided by the board.

Unless any concerned person does not accept the decision of the arbitration board, the determination of the board constitutes a resolution by mutual agreement under Article 25 and, consequently, is binding on both Contracting States. Within 30 days of receiving the determination from the competent authority to which the case was first presented, each concerned person must advise that competent authority whether the person accepts the determination. The failure to advise the competent authority within the requisite time is considered a rejection of the determination. In addition, if the case is in litigation, the concerned persons must advise the relevant court of their acceptance of the arbitration determination, and withdraw from the litigation the issues resolved by the MAP arbitration. If a determination is rejected the case cannot be the subject of a subsequent Proceeding. After the commencement of the Proceeding but before a decision of the board has been accepted by all concerned persons, the competent authorities may reach a mutual agreement to resolve the case and terminate the Proceeding.

For purposes of the arbitration proceeding, the members of the arbitration board and their staffs shall be considered "persons or authorities" to whom information may be disclosed under Article 26 (Exchange of Information and Administrative Assistance). Paragraph 22 of Article XVI of the Protocol provides that all materials prepared in the course of, or relating to the Proceeding are considered information exchanged between the Contracting States. No information relating to the Proceeding or the board's determination may be disclosed by members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of the Contracting States. Members of the arbitration board and their staffs must agree in statements sent to each of the Contracting States in confirmation of their appointment to the arbitration board to abide by and be subject to the confidentiality and nondisclosure provisions of Article 26 of the Convention and the applicable domestic laws of the Contracting States, with the most restrictive of the provisions applying.

The applicable domestic law of the Contracting States determines the treatment of any interest or penalties associated with a competent authority agreement achieved through arbitration.

Fees and expenses are borne equally by the Contracting States, including the cost of translation services. In general, the fees of members of the arbitration board will be set at the fixed amount of \$2,000 per day (or the equivalent amount in Euro). The expenses of members of the board will be set in accordance with the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees for arbitrators (in effect on the date on which the arbitration board proceedings begin). The competent authorities may amend the set fees and expenses of members of the board. Meeting facilities, related resources, financial management, other logistical support, and general and administrative coordination of the Proceeding will be provided, at its own cost, by the Contracting State whose competent authority initiated the mutual agreement proceedings. All other costs are to be borne by the Contracting State that incurs them.

