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Preparing for Tax Treaty Negotiation

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1. Introduction

Preparations are an extremely important part of the negotiation process. Without adequate preparations the team will be at a disadvantage during the negotiation and will most probably not achieve an optimal result for the country they are representing. In the following paragraphs some of the important aspects of the negotiation preparations are detailed.

2. Prepare your model treaty

When the decision to negotiate tax treaties has been made, the first step will be to prepare a model treaty. Before drafting a model treaty it will be necessary to agree on policy in order to decide on important issues that have to be taken care of in the treaty¹. Study the United Nations Model Double Taxation Convention between Developed and Developing Countries (“UN Model Convention”), the Organisation for Economic Co-operation and Development’s Model Tax Convention on Income and on Capital (“OECD Model Convention”), regional model (if any) and models made by countries you would prefer to be compared with. When drafting your model’s provisions, it is advisable to follow the recognised wording used in international models unless you have good reasons to use alternative wording. Such good reasons can for example be found in relation to industries where the employees are working on a rotation basis. For example, activities on the continental shelf is usually based on people staying at a platform for two weeks at a time, then spending the next four weeks in their home country. In such a case the 183 days test in Article 15 of the UN and OECD Model Convention will not work properly and new wording may be necessary either by reducing the number of days or look at the days of employment rather than the days of presence.

However, different wording can create issues, such as arguments over whether the commentaries to that provision will apply. It may also create uncertainty whether a new wording is supposed just to be an improvement or introducing a new meaning. Be aware that both the UN Model Convention and the OECD Model Convention have drafted alternative optional provisions in their commentaries that can be very useful if the model articles

When creating a model some countries will set up a study group consisting of representatives from relevant ministries and the private sector while others will hire consultants as advisers when preparing their model treaty. Such consultants can be private persons with experience in international tax matters and treaty negotiations, or agencies dealing with international tax questions.

3. Obtain authority to negotiate

Familiarity with your country's constitutional and legal requirements for negotiating and giving effect to treaties is essential. The process varies from country to country. In some cases an approval from the Ministry of Foreign Affairs is required. In some cases it is the prerogative of the Ministry of Finance or Treasury. Some countries prefer to submit a priorities report to the Ministers that seeks approval for the negotiation work programme for the next year or for the next few years. This really comes down to what will work within your country's legal and political framework. An approval of the work program may then replace an individual approval. In other countries an authority to negotiate is given in response to individual requests either from other countries or from industries in your home country. Even if the government has decided that the country as a general policy should enter into tax treaties with other countries and has decided on an approved negotiation programme, it will usually in each individual case be necessary to get an authority to negotiate. Such authority will usually be given when the Ministry of Finance or Treasury has agreed on the content and policy framework of the individual treaty. Even if the relevant authority to give approval for negotiations may vary, the Ministry of Foreign Affairs should be consulted before any decision is made. It may also be advisable to consult with the ministries responsible for trade. Some countries prefer in addition to consult with the private sector to ascertain whether there are any particular problems that need to be resolved.

An authority to negotiate should be obtained before any final decision on negotiation with another country is made and is necessary whether one is considering approaching another country asking for negotiations or deciding on a request from another country.

There may be several reasons for not entering into negotiations at a specific point of time and it may be necessary to prioritise among several countries. In some cases, treaties with neighbouring countries will have first priority. In other cases treaties with countries with which important economic relations exist will be prioritised. It may also be that a request is received from a country with which there is no economic or political reason to enter into a treaty. However, in some cases it

may also happen that there are important political or economic reasons why a tax treaty should not be negotiated. Such reasons could; for instance, be diplomatic tensions between the two countries or that the other country is a tax haven, which could be a reason not to have a tax treaty. Another reason could be that the balance of benefits between the two countries is heavily in favour of only one of them.

4. Logistics

When a decision to proceed with negotiations is made, there are several issues that have to be decided.

- x *How to communicate.* The initial approach requesting negotiations will usually be made through diplomatic channels or by a request made directly from the Minister in charge for negotiation of tax treaties in one country to the relevant Minister in the other country. To continue to approach each other only through diplomatic channels should be avoided. The aim should be to open a more informal dialogue between lead negotiators through email and/or phone calls so that the logistics can be more easily worked through. Most countries have an updated directory of persons that are allowed to act as competent authorities in relation to tax treaties. It is always useful to obtain such a directory from the other country, even if such directory does not tell who will be part of the forthcoming negotiation team. Such updated directory will, however, be more useful after the treaty has become effective and you for some reason need to get in direct contact with persons that are allowed to act as competent authorities. However, during the preparation period, direct contact with persons in the other country that are responsible for the preparath

resources asks for the negotiations to take place in their country, a developed country may be willing to do the travelling for the first round of negotiations. If, as is usually the case, the negotiations require more than one round, it could be agreed to continue on a rotation basis.

The country hosting the negotiation should be prepared to offer suggestions to the visiting delegation about suitable hotels within easy travel of the venue as well as other information that is relevant.

The advantages of having the negotiations “at home” lie in having easy access to reference materials, the possibility to consult with other officers in the department or even having access to the relevant policy makers. By having negotiations at home you will also avoid travel costs, jet lag and other inconveniences of travel. It is also customary that the host country tables its model and asks for negotiations to proceed on the basis of that model, a request that is usually accepted. It is always an advantage to have one’s own model as a working document. On the other hand it will be difficult to escape from your other duties such as treaty interpretation issues or other urgent matters which you are required to deal with on a daily basis.

- x *In which language will the negotiations be performed?* If both countries speak the same language, there is of course no problem. However, if the two countries speak different languages, it will be necessary to agree on the language to be used during the meeting. Since the English language is the language most commonly used, it is advisable that the negotiating team members have good knowledge of English. If the team members of the two countries are unable to carry out the negotiations in the same language, it will be necessary to have an interpreter present during the meeting. This should be agreed upon in advance. In some cases both countries would prefer to have their own interpreter in order to facilitate discussions within each team. However, there will in many cases be difficulties in finding interpreters with adequate knowledge in treaty language. Such lack of knowledge may create difficulties and unnecessary misunderstanding during the discussions. It is advisable that the interpreters have learned and understand terms used in tax treaties prior to the meeting. This can be done by insisting that they study terms used in other treaties you have entered into or used in internationally recognised models such as the UN or OECD Model Conventions.

The two teams will also have to agree upon which language the two draft treaties should be prepared.

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- x *How many members should the negotiating team consist of?* In most cases there should be at least three members; one to lead the negotiations, one to provide advice to the leader, and one to take comprehensive notes. One team member needs to be made responsible for maintaining the agreed text. This matter is made easier if the text can be electronically displayed on a screen. If that is not possible, accurate paper drafts need to be kept. In countries where the tax administration is separate from the policy department, it is advisable to include members from both areas. The number may vary depending on where the meeting is to take place, but should not exceed six people (including any interpreter). If the negotiations are taking place at home, it could be beneficial to have more people present in the room in order for them to gain experience. However, these additional people would be ~~present~~ ~~visually~~ as observers, and would genera

many delegations like to bring their own laptop computers to the negotiations, adequate power outlets are preferable. The same applies to Internet connectivity, if available.

If the meeting room is in a secured building, the necessary security passes or escorts to the meeting room should be arranged in advance for members of both teams. For this reason, and as a matter of courtesy, each team should advise the other of the number of people in their team, their names, role and contact details, and who is the leader of the team. It is also advisable to make the gender of each team member clear (e.g. by giving them a gender-specific title such as Mr or Ms), since this may not be readily apparent to the other team from the name alone.

The team that has to do the travelling has to remember to apply for travel permission and, if necessary, visas. This should be done early to avoid unnecessary delays. For a team to wait until the last minute before having final confirmation of the arrival of a treaty partner may create a bad impression and may not be conducive to the negotiation.

Some countries like to provide gifts to the other delegation, either to each member of the delegation or just to the delegation leader. Other countries have public sector policies against accepting gifts. One should therefore be careful with gifts and they should always be of small value. Always be aware that gifts are subject to airport inspections, and some countries impose restrictions on the import on some products. It is also advisable to avoid bulky or heavy gifts.

5. Define roles of each member of the team

In the preparations for the negotiations, as well as during the negotiations, it is important that all members of the team know which duties they are allocated.

There is much work to be done during the preparations and it is important that each member of the team, as early as possible, knows what will be his/her responsibility in the preparations

The leader of the team should be a senior official with the authority to make important decisions during the negotiations. Such decisions include accepting or rejecting the other team's proposals, making his or her country's own proposals, and finding and accepting compromises, even if they are ultimately subject to approval by senior authorities. A senior official should always lead the team;

otherwise the other country may get the impression that the negotiation is regarded as of little or no importance. This may create misunderstanding and a negative atmosphere.

It is preferable that the leader has comprehensive knowledge of domestic tax legislation and the interaction of domestic legislation and tax treaties. If not, at least one of the other members of the team should have such knowledge. Experience in tax treaty negotiations is also highly desirable.

It is the leader who should lead the discussion and present the team's arguments. However, the leader may decide to ask one of the other members of the team to present an argument, explain a

initiated the decision to proceed with the negotiation of a tax treaty. This may be due to problems they have met or are anticipating when engaged in cross-border activities. Such problems will usually arise from domestic legislation in one or both of the countries preventing or hampering the desired economic activity or creating a barrier to the desired cooperation between industries in the two countries. It may also be that one of the countries has entered into a tax treaty with a third country giving business in that other country a competitive advantage.

Consultation with business will in most cases provide the team with important information of economic areas which it will be important to address during the negotiations. Such consultations could be done by approaching business associations and asking them to consult with their members to establish if there are particular points of importance to be aware of during the negotiations. Depending on their remarks, a meeting could be arranged.

Relevant ministries and agencies may also have information of importance for the negotiations. For example, they may have information on areas where they would like to encourage or make investments or areas where they would like to attract investments. It may also be advisable to consult with your embassy in the other country. They may have important information in economic as well as non-economic areas that can be of value in the preparations.

7. Prepare the draft model used for a particular negotiation

Many countries will always use their general mode

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Positions do not always indicate a non-negotiable position, they are a very valuable indicator of strongly held positions.

It is important to distinguish between provisions that are really non-negotiable and provisions for which the other country has a strong preference, but which, under certain circumstances can be flexible. Provisions that are only a strong preference should not be presented as completely non-negotiable.

Some countries prefer to list their non-negotiable provisions and present them to the other country during the preparations either in writing or in a pre-meeting. Presenting such provisions in a pre-meeting will give the team the possibility of explaining the reason for its standpoint. By presenting the non-negotiable provisions during the preparations one may avoid unnecessary discussions or entering into negotiations that are doomed to fail.

which are comparable (economically or regionally) to your own. If the treaties used as a comparison are not too old, these will give an indication of their current policy and what the other team may be willing to accept. They may also indicate how strongly the other team is likely to argue for their own position. For example, if the other country has never agreed to a provision allowing withholding tax on fees for technical services, or has never agreed to tax sparing provisions, it is unlikely that it will agree to include such provisions in negotiations with your country. Conversely, if a provision is always included in the other country's treaties, e.g. certain anti-avoidance provisions, you can expect that they will insist on a similar provision being included in any treaty with your country.

If the negotiation at hand is with a developed country, a comparison with treaties that country has entered into with other developing countries will be of more value than a treaty entered into with another developed country.

Treaties entered into many years past are also of less value than new treaties. Recent treaties entered into by the other country may also help the team to develop drafting that is likely to be acceptable to that other country.

During this preparation process it is important to have in mind that you have to look at the overall

It may harm an otherwise good atmosphere between the two teams if it is considered that there has been bad behaviour or someone feels offended due to the lack of knowledge of local customs. A consultation with your embassy in the other country may prevent such incidents. In general, it is advisable to have enough information not to seem ignorant or uninterested.

15. Conclusions

As you will see from this paper, preparations are essential. It may be the most important part of the whole negotiation process. If you do not come to the discussions fully prepared, what you may achieve is a treaty that is not as beneficial to your country as it might otherwise have been. It is easy to miss possibilities. It is advisable not to rush into negotiations, but

Annex 1 Examples on the comparison of draft treaties**Article 15 Dependent Personal Services (B's article 14 Income from Employment)**

Nr	Country A	Country B	B's treaties with country C and D	Comments
1.	Reference to art 16 (Directors' fees) and art 19 (Government Service)	B has reference to the same articles, but numbered art 15 and 18. In addition a		

Annex 2 Examples on the comparison of draft treaties

Red: Proposal from State A

Blue: Proposal from State B

Article 13

Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.
2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise), may be taxed in that other State.
3. Gains derived by an enterprise of a Contracting State

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2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a