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Post-negotiation Activities

Odd Hengsle

1. Introduction

This paper deals with several issues that have to be

“1. The Contracting States shall notify each other in writing, through diplomatic channels, that the legal requirements for the entry into force of the Convention have been complied with.

2. The Convention shall enter into force on the date of the later of these notifications and shall thereupon have effect in both Contracting States in respect of taxes on income relating to any calendar year next following that in which the Convention enters into force.”

The two states may also agree that the treaty shall enter into force when a certain period of time has elapsed after the exchange of instruments of ratification or after the later confirmation that each state has completed the procedures required for the entry into force. One way to deal with this kind of requirement is to draft paragraph 1 as follows:

“1. The Contracting States shall notify each other in writing, through diplomatic channels, that the legal requirements for the entry into force of the Convention have been complied with.

2. The Convention shall enter into force on the tenth day after the day of the later of these notifications and shall thereupon have effect in both Contracting States in respect of taxes on income relating to any calendar year next following that in which the Convention enters into force.”

If the initialled draft also contains an article on capital taxes, these taxes should also be covered by the entry into force provision. Some states may regard their capital gains taxes as being different to ordinary taxes on income. For those states, it is necessary to make a reference to such taxes as well. Normally, however, a capital gains tax is considered to be a tax on income.

It may also happen that the two states have different income years. If that is the case, the article on entry into force has to be drafted accordingly. One example of such drafting might be:

“1. The Contracting States shall notify each other in writing, through diplomatic channels, that the legal requirements for the entry into force of the Convention have been complied with.

2. This Convention shall enter into force upon the date of the later of these notifications and shall thereupon have effect:

- a. In State A in respect of taxes on income ~~in~~ ⁱⁿ every year of income beginning on or after (date and month) next following ~~the~~ ^{that} which this Convention enters into force;
- b. In State B in respect of taxes on income ~~relating~~ ^{relating} to any calendar year next following that in which the Convention enters into force.”

If the two states have an existing Convention ~~in~~ ⁱⁿ the existing Convention should be terminated at the same time as the new Convention enters into force. One example of drafting is to add a third paragraph in the article of entry into force:

“3. The Convention between State A and State B for the(name of Convention) signed at on shall be terminated and shall ~~be~~ ^{not} have effect in ~~spec~~ ^{spec}t of the taxes to which this Convention applies in accordance ~~with~~ ^{with} the provisions of paragraph 2 of this Article.”

Or (and adding the solution if it exist a later Protocol to the existing treaty)

“3. The Convention between State A and State B for the..... (name of Convention) signed at on, with Protocol, signed at..... on... shall be terminated with effect from the date of entry into force of this Convention and shall cease to have effect for any period thereafter for which the provisions of this Convention shall apply.”

When the “Entry into force” article has been finalized, ~~the~~ ^{the} “Termination” article has to be drafted. To avoid any uncertainty it is wise to consult the Ministry of Foreign Affairs. It is important that there is no doubt as to the last period for which the Convention should be applied.

The purpose of a tax treaty is to improve ~~the~~ ^{the} economic relations ~~between~~ ^{between} the two countries concerned. The negotiations have ~~been~~ ^{been} given priority, time has ~~passed~~ ^{passed} and compromises made to reach an agreed wording of the ~~treat~~ ^{treat} a treaty should be terminated before it has been tested, time and efforts would have been wasted. To leave ~~enough~~ ^{enough} time to see if the treaty fulfils its purpose, some states are of the opinion that the Convention ~~should~~ ^{should} remain in force for at least a certain period of time. If this is agreed, wording to that effect ~~should~~ ^{should} be inserted into the article on termination and might read:

“This Convention shall remain in force until ~~terminated~~ ^{terminated} by a Contracting State. Either of the Contracting State may after the expiration of ~~a~~ ^a period of five years from the date of its entry

into force, terminate this Convention, by giving written notice of termination to the other Contracting State through the diplomatic channels at least six months before the end of any calendar year. In such event, the Convention shall cease to have effect:

1. a)
2. b)

It is important that the termination notice should be in writing and sent through diplomatic channels.

3. Preparing for signature

3.1 Introduction

When the two leaders of the teams have initialled the agreed draft, the next step is to prepare the treaty for signature.

When preparing the treaty for signature it is important to note that in relation to the Title of the treaty, the Preamble and signature block your country should be mentioned first in your own copy or copies (if more than one language). The other country should be mentioned first in their copy or copies. In the rest of the treaty there should be no alternation, but leave the paragraphs or subparagraphs in the order agreed upon in the draft treaty.

The time gap between initialling and signing should be as short as possible. The industries in the two states will usually be aware that negotiations have taken place and are eager to know the result. The result may be of great importance to the industry when decisions on investment are made. Any delay may result in a situation whereby industries in the two states, due to time delays and uncertainty, make investments in third states instead.

However, the draft treaty is normally confidential, at least until it has been signed. To avoid the situation that treaty provisions are made public in one country while they are still confidential in the other country, it is advisable that the two negotiating teams discuss and agree on the time for publication. If one or both countries, immediately after initialling, wish to issue a press release

¹ See Odd Hengsle, How to Conduct Tax Treaty Negotiation, Paper 4-N of this collection.

Who carries out the translation may vary from one state to another. In some states the negotiators themselves do the translation, in other states it is done in a Ministry or a governmental agency undertakes that task, or a private translation office is engaged. In all cases it should be remembered that the initialled draft is confidential. When some

Post negotiation Activities

Some states are of the opinion that a treaty ~~initialled~~ in one country should be signed in the other country or if a new treaty replaces an old ~~treaty~~, signing of the new treaty should not occur in the same country as the existing treaty was signed, but rather in the other country.

3.4 Post signing activities

In almost all countries the signed treaty has ~~to be~~ presented to the Parliament for final approval and ratification.

When the treaty has been signed, the Ministry ~~of~~ Foreign Affairs should report back to the Ministry of Finance or the authorised agency. A technical ~~explanation~~ will then be prepared. The explanation and the treaty will then be sent to the Parliament ~~where~~ the treaty in most cases will be received by a committee, which will study it and make its ~~comments~~ necessary, the Minister or the person or persons designated thereto will be called ~~by~~ the committee to explain the provisions.

After the Parliamentary Committee has received ~~all the~~ explanations they have asked for, the treaty will, at least in most states, ~~be~~ presented to the Parliament with ~~the~~ commendation to approve it. In the rare case where the treaty is not approved, ~~the~~ country has to be informed and advised of the problems raised by the committee or Parliament. ~~The~~ negotiators will then ~~try~~ to see if there is an easy way to solve the problem. Since the ~~treaty~~ is usually a result of several compromises, a solution may not easily be found. The question ~~of~~ renegotiating one article might lead to the reopening of all articles in the initialled treaty ~~and~~ previous compromises or concessions may be lost.

The mode of dealing with the treaty in the ~~Parliament~~ may differ from one country to the other. A consultation with the Prime Minister's office ~~or~~ the administrative office of the Parliament is advisable. In many countries the approval of a tax treaty will follow the same procedures as the approval of a change in the tax legislation.

The last step in the process of ~~entry~~ into force of a tax treaty is to inform the Ministry of Foreign Affairs that all legal procedures for the entry ~~into~~ force have been dealt with and ask the Ministry to inform the other state in accordance ~~with~~ the article on entry into force. If the treaty provisions require an exchange of instruments of ~~ratification~~, a meeting between representatives from the two countries will take place and the relevant ~~instruments~~ will have to be prepared for exchange. However, in most cases the last ~~step~~ procedure before the treaty enters ~~into~~ force will be a notification in writing, sent through diplomatic channels, informing ~~the~~ other state that all legal requirements for the

entering into force of the treaty have been completed. The treaty will then enter into force either on the receipt of the later of these notifications or at a date specified in the article.

Occasionally a long time may pass between the appr

However, it is not to be expected that new taxes will automatically be accepted and applied by treaty partners. When new taxes are introduced, all treaty partners must be informed as soon as possible and asked if they can agree that the new taxes are of an identical or substantially similar nature, either replacing or supplementing the taxes referred

Even if countries are not signatories to the Vienna Convention, most countries will regard it as representing customary international law and will be subject to any overriding of the treaty through domestic law. Other countries may disagree, but in almost all cases avoid an interpretation of domestic law that sets aside a provision in a tax treaty already in force. It must be remembered that an international treaty imposes obligations on the treaty partners to perform as set out in the treaty.

4. Conclusion

When agreement is reached on all major issues, it is important not to lose momentum in preparing the initialled draft for signature and the entry into force. It is several obstacles to pass before the treaty becomes effective. It may be easy to give priority to other important work put on your table by ministers. But one should remember the purpose of the treaty, which is to improve the economic relations between the two countries. Businesses in two countries may be planning and waiting for a treaty in force to take advantage of the possibilities the treaty offers. If years pass before the signature of the treaty, the whole exercise of negotiation may be a waste of opportunities.