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Introduction

At its 2007 meeting, the Committee of Experts on International Cooperation in Tax Matters (the Committee) considered recent developments in the area of dispute resolution, as well as possible changes to the United Nations Model Double Taxation Convention Between Developed and Developing Countries (the UN Model Tax Convention). According to its mandate,[1] the Committee focused on questions in this area of specific interest to developing countries and countries in transition. Professor Robert Waldburger, as coordinator of the subcommittee on Dispute Resolution (the subcommittee), presented a paper on dispute resolution[2] to the Committee that raised a number of such questions.

The main conclusion of the 2007 meeting was that options for the resolution of disputes arising in the mutual agreement procedure (MAP), including arbitration, should be further considered by the subcommittee. It was also decided that the subcommittee should consider both mandatory and voluntary arbitration in its work. The subcommittee was accordingly asked to continue its activities in light of the views expressed in the 2007 meeting, particularly in relation to ways of improving MAP. As indicated in the summary record of the meeting (paragraphs 66-67 of document E/C.18/2007/19), it was noted that the offer made by the Organisation for Economic Co-operation and Development (OECD) and the European Union to assist with the work in this area had been accepted.

Pursuant to the subcommittee's directive to consider options for improving the mutual agreement procedure, this report addresses the resolution of disputes that prevent contracting states from reaching agreement in the MAP and examines proposed supplementary dispute resolution mechanisms, including those discussed at the Committee's 2007 meeting.

3 of Article 25 similarly provides that the competent authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

This language does not oblige the contracting states to reach agreement in the MAP, but only to use their best efforts to do so. As a result, there will occasionally be circumstances in which the competent authorities are unable to agree on a MAP resolution and the MAP case is closed without an agreement. In such situations, there may be unrelieved double taxation or taxation not in accordance with the convention.

The language of Article 25 similarly does not oblige the contracting states to reach timely agreement in the MAP. Where taxation not in accordance with the convention remains unresolved for an unreasonably long period, taxpayers may face many of the same burdens that they would face in a situation in which there is no competent authority agreement in the MAP.

This inability to ensure a final (or timely) resolution of MAP cases is one of the primary obstacles to an effective MAP. When a taxpayer or a tax administration is unsure that a matter will be resolved through the MAP, it may be hesitant to commit time and resources to seeking a MAP resolution. In addition, a competent authority may not take all possible steps to find a resolution through the MAP where there is no obligation to do so and no mechanism in place to break a stalemate in MAP negotiations.

In light of these shortcomings of the MAP, many tax administrations and r an ive ministratiobion would fa2(cl)x p-3P, ligd r

- Identifying broader systemic or procedural issues that may create more general obstacles to reaching a MAP resolution

Because the role of the mediator is to facilitate competent authority consultation and agreement, mediation does not require the same detailed rules for its implementation as, for example, an arbitration procedure. The competent authorities may accordingly provide for mediation in a general manner (for example, once the consideration of a MAP case has exceeded a certain time threshold) or on an ad hoc basis in specific cases.

However provision for mediation is made, it would be expected that mediators would be made to subject to the same rules as the competent authorities regarding the communication and confidentiality of taxpayer information related to MAP cases.

3. Conciliation

An additional supplementary dispute resolution mechanism that could prove useful in the MAP is conciliation.

Like mediation, conciliation involves the use of an independent third party (a "conciliator") with the same specialized skills and expertise as a mediator (for example, skills in facilitating communication and the negotiation process) to assist the two parties to a dispute in reaching an agreement. Conciliation may accordingly make the same contributions to MAP discussions (described above) as mediation.

Unlike a mediator, however, a conciliator will also necessarily have expert knowledge of the field in which the dispute arises – that is, in a MAP dispute, the field of international tax. The conciliator will accordingly take a more active role with respect to the subject matter of the MAP discussion, and will do more than simply facilitate the MAP process and competent authority consultation. In the MAP, for example, a conciliator could make suggestions for a potential resolution or provide substantive advice in the same manner as an expert. The competent authorities will themselves determine the extent to which they make use of a conciliator's international tax knowledge and expertise.

The extent to which the competent authorities accept substantive advice or suggestions provided by a conciliator is also left to their discretion. Like mediation, conciliation does not itself resolve the issues that the competent authorities are unable to resolve – the conciliator would not himself or herself come to a decision.

As with mediation, conciliation does not require detailed rules for its implementation, and could be provided for by the competent authorities in a general manner or on an ad hoc basis in specific cases. In addition, it

an advisory commission [*i.e.* an arbitral panel] charged with delivering its opinion on the elimination of the double taxation in question".[8]

Under the model arbitration provision, where the competent authorities fail to reach agreement within two years of the date the case was presented to the "other" competent authority (*i.e.* the competent authority other than the one to which the taxpayer initially presented its MAP case), "any unresolved issued arising from the case *shall* be submitted to arbitration if the [taxpayer] so requests".[9]

As these two arbitration provisions illustrate, mandatory arbitration provisions may take different approaches to designating the party which must initiate the arbitration procedure. Under the EU Arbitration Convention, the contracting state that took the initial action which results, or is likely to result, in double taxation generally takes the initiative to establish the arbitral panel and arrange for its meetings.[10] Under the model arbitration provision, the taxpayer takes the initiative by submitting a request for arbitration to one of the competent authorities.[11]

In general, a mandatory arbitration procedure in which the taxpayer is responsible for initiating arbitration should be expected to lead to the more timely referral of unresolved MAP issues to arbitration, given the taxpayer's direct and immediate interest in obtaining relief from the double taxation which motivated its initial MAP request. Although contracting states will generally uphold the obligations they assume in their tax conventions, they will not have the same incentive promptly to refer the issues in unresolved MAP cases to arbitration. Competent authorities may, moreover, delay the initiation of an arbitration procedure which could potentially result in a loss of tax revenue.

In contrast to mandatory arbitration procedures, under a voluntary arbitration procedure both competent authorities must generally agree to submit unresolved MAP issues to arbitration once the arbitration provision has been triggered. A voluntary arbitration provision could provide, for example, that the competent authorities may agree to submit to arbitration any unresolved issues arising from a MAP case where the competent authorities fail to reach agreement on those issues within a certain period after the date the case was submitted to the other competent authority.

Some countries may prefer voluntary arbitration procedures because they allow greater control over the types of cases that may potentially proceed to arbitration. In certain circumstances, a competent authority may consider it unacceptable to compromise its position with respect to a specific issue – and thus that it is not appropriate for the issue to be submitted to arbitration. Voluntary arbitration is thus one manner in which countries may demonstrate some commitment to the resolution of MAP disputes and at the same time preserve flexibility as to the issues that are subject to the arbitration procedure. Voluntary arbitration may also be viewed as a way to allow countries to develop familiarity and experience with the procedure without requiring them to make the same sort of commitment that a mandatory arbitration procedure would require.

Voluntary arbitration procedures may also be preferred by countries which are concerned about the potential number of cases that could proceed to arbitration. This may be of particular concern to countries with large numbers of cases in inventory and/or limited competent authority resources. These countries may similarly have concerns about the potential costs of arbitration procedures.

A few voluntary arbitrary provisions have been included in treaties but they do not appear to have had much

formalised by the competent authorities themselves in an agreement concluded pursuant to their general Article 25 authority.

4.2 Scope of arbitration

A second important question that must be addressed with respect to arbitration is the scope of the arbitration procedure – that is, what issues may be referred to the arbitral panel for decision?

In general, arbitration should be expected to make the greatest contribution to the effectiveness of the MAP

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- Taxpayers will typically not be permitted simultaneously to pursue both the MAP and domestic law remedies. In general, tax administrations will prefer that domestic law recourse procedures are suspended or put on hold in favour of seeking a bilateral resolution of a case through the MAP. If, however, the taxpayer does not agree to do so, MAP consideration of the case may be put on hold until domestic law remedies are exhausted.

- Under many countries' MAP procedures, a taxpayer is entitled to reject a MAP agreement and then pursue any and all available domestic remedies. Where, however, a taxpayer chooses to accept the MAP resolution, the taxpayer may typically be asked to give up its rights to pursue domestic law remedies with respect to the issues resolved in the MAP.

- In the event that domestic law remedies have been pursued and exhausted, the tax authorities of certain contracting states may take the position that they must follow the decision reached in the domestic forum, and, accordingly, that the MAP may only be used to seek relief from double taxation in the other contracting state.

These same general principles would, of course, apply in a MAP case in which unresolved issues are submitted to arbitration. As a result, where it is known in advance that a domestic court decision will limit the ability of one of the competent authorities to provide MAP relief, it will not be helpful to submit unresolved issues in the case to arbitration. Contracting states should accordingly consider the more general relationship of domestic law remedies and the MAP in structuring an arbitration procedure.

4.4. How does the arbitration procedure work?

The mechanics of the arbitration procedure are set out in the sample mutual agreement annexed to the model arbitration provision. That sample mutual agreement provides the framework for the following discussion of how the arbitration procedure should generally function.

Where the conditions for the invocation of the arbitration procedure have been satisfied, the taxpayer may submit a written request to one of the competent authorities that the unresolved issues in the MAP case be submitted to arbitration. The request for arbitration should provide sufficient information to identify the case and be accompanied by a written statement that no decision on the relevant issues has already been rendered by a court or administrative tribunal in either of the contracting states.

The competent authority that receives the request for arbitration should send a copy of the request and accompanying information to the other competent authority within ten days.

Within three months after the request for arbitration has been received by both competent authorities, the competent authorities shall agree on the questions to be resolved by the arbitral panel. These questions are set forth in the "Terms of Reference" for the case. The Terms of Reference may also provide procedural rules that are additional to, or different from, the procedures provided in the contracting states' general mutual agreement on arbitration.

The Terms of Reference are additionally communicated in writing to the person who made the request for arbitration.

The subcommittee on Dispute Resolution has raised the question whether a three-month period is long enough to work out the Terms of Reference in the context of the UN Model Tax Convention.[17]

In this regard, it should be noted that the issues presented in the Terms of Reference will likely have been framed in detail in the process of preparing the position paper (and any rebuttal or response paper). The issues will have been further refined in the competent authority consultations preceding the request for arbitration. As a result, preparing the Terms of Reference should largely be a matter of more formally setting forth issues that have already been identified, described and discussed.

Within three months after the Terms of Reference have been received by the person who made the request for arbitration, each of the competent authorities must appoint one arbitrator. Then, within two months of the latest of these appointments, the two arbitrators appointed by the competent authorities will appoint a third arbitrator, who will serve as the chair of the arbitral panel.

It may occur that certain of these appointments are not made within the required time period. For example, the two arbitrators may not be able to agree on the appointment of the chair of the arbitral panel. In that event, the model arbitration provision provides that the appointment shall be made by the Director of the OECD Centre for Tax Policy and Administration (CTPA) within ten days of receiving a request to that effect from the person who made the request for arbitration.

The subcommittee on Dispute Resolution has also raised questions regarding the role of the Director of the CTPA in choosing the chair of the arbitral panel, in the event of a deadlock, in the context of the UN Model Convention. Non-OECD Member countries may have reservations in providing such a role for an official of an organization of which they are not members.

The Director of the CTPA was chosen for this role because of the Director's ability quickly and impartially to identify suitable arbitrators – that is, independent persons with demonstrated knowledge and expertise in international taxation. Contracting States may, of course, provide that a different official of similar international standing and experience will perform this role (for example, the Chair of the UN Committee of Experts on International Cooperation in Tax Matters).

The model arbitration provision provides that any person, including a government official of a contracting state, may be appointed as an arbitrator, unless that person has been involved in prior stages of the case that results in the arbitration process. As noted by the subcommittee on Dispute Resolution, contracting states must determine whether they consider it appropriate to include government officials on an arbitral panel.

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representatives of the respective competent authorities.

reaching a MAP resolution are, for the most part, due to factors outside the taxpayer's control. It is accordingly inappropriate to oblige a taxpayer to pay the costs of an arbitration procedure that is triggered by such a delay.

Developing countries and countries in transition may also consider different methods to divide the shared costs of the arbitration procedure, especially in contexts in which there is a significant disparity in the level of development in the two contracting states. Depending on circumstances, using an alternative method (for example, a method based on the relative sizes of their economies) may allow for a division of costs that is more consistent with each contracting state's capacity to bear those costs.

4.5. The arbitration decision

Under the model arbitration provision, unless otherwise provided in the Terms of Reference, the decision of the

Transfer pricing issues, and other issues relating to the application of the arm's length principle, are to be decided with reference to the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

The model arbitration provision further provides that the competent authorities may designate other authorities or sources of law to be considered by the arbitrators in the Terms of Reference.

The specific process by which the arbitral panel reaches its decision may vary from case to case. The model arbitration provision provides for two alternative processes – a general process and a "streamlined" arbitration process:

! General arbitration process. Under the general process, the arbitral panel comes to an independent decision, based on the applicable legal principles as described above.

Although the positions of the competent authorities (as well as any position submitted by the person making the request for arbitration) serve as points of reference for the arbitral panel, they do not establish any limits on, or otherw007nel, rr tho153(tw.000 59.7 cc82 -1.153 Td[0 Td.42 0.5klicaklicakli -23.519.98 .082 2.082

The specific process by which the arbitral panel reaches its decision will be determined by negotiation between the contracting states. Certain recent agreements have provided, for example, that the arbitral panel will be