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Article 25

MUTUAL AGREEMENT PROCEDURE

Article 25 (alternative A)

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of ~~a~~Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

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

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, ~~shall~~may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this ~~a~~Article. ~~In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure.~~

Note from the Subcommittee: In October 2010, the Committee has decided to replace "shall" by "may" in the second sentence of paragraph 4 (this requirement does not seem, in many cases, to be complied with in practice) and to delete the last sentence of paragraph 4 (this provision is a merely unilateral provision and is not relevant in the context of a DTA).

Article 25 (alternative B)

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of ~~a~~Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it

is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

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

4. The competent authorities of the Contracting States may communicate with each other

COMMENTARY

Article 25

MUTUAL AGREEMENT PROCEDURE

A. GENERAL CONSIDERATIONS

1. Two alternative versions are given for ~~of~~ Article 25 of the United Nations Model Convention~~are provided~~. Alternative A reproduces Article 25 of the OECD Model Convention with the addition of a second sentence in paragraph 4 but excludes arbitration as is provided for in ~~without~~ paragraph 5 of the OECD Model~~, which deals with the arbitration of issues that would~~ otherwise prevent a mutual agreement. Alternative B repro

include paragraph 2 of Article 9 in a convention should therefore clarify during the negotiations the consequences of the absence of paragraph 2 as to the scope of the mutual agreement procedure. Article 9 of the United Nations Model Convention contains a paragraph 3 which provides that the provisions of paragraph 2 shall not apply where in relation to the adjustment of profits under paragraph 1 an enterprise has suffered a penalty for fraud, groo.( )-30(l)25vef0 apris

– despite the fact that only a small number of cases remain unsolved, each of these cases represents a situation where there is no solution for a case where one competent authority

Model Convention. As regards the last sentence of paragraph 1, however, some members of the Committee noted that, in bilateral negotiations, States may wish to agree on a different time limit for the presentation of the case to the competent authority of a Contracting State.

95. The Committee considers that t~~T~~he following ~~passages~~ part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention (as it read on 22 October 2010) is applicable to the corresponding paragraphs of both alternatives A and B of Article 25 (the additional comments that appear in italics between square brackets, which are not part of the Commentary on the OECD Model, have been inserted in order to reflect the differences between the provisions of the OECD Model and those of this Model):

> [7.] The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. ~~-~~When taxation not in accordance

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[10.] Article 25 also provides machinery to enable competent authorities to consult with

[18.] However, in the case already alluded to where a person who is a national of one State but a resident of the other complains of having been subjected in that other State to an action or taxation which is discriminatory under paragraph 1 of Article 24, it appears more appropriate for obvious reasons to allow him, by way of exception to the general rule set forth above, to present his objection to the competent authority of the Contracting State of which he is a national. Finally, it is to the same competent authority that an objection has to be presented by a person who, while not being a resident of a Contracting State, is a national of a Contracting State, and whose case comes under paragraph 1 of Article 24.~~" [para. 15] .~~

[19.] On the other hand, Contracting States may, if they consider it preferable, give taxpayers the option of presenting their cases to the competent authority of either State. In such a case, paragraph 1 would have to be modified as follows:

> "~~'~~"1.~~—~~ Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.~~' " [para. 16] ."~~

[20.] The time limit of three years set by the second sentence of paragraph 1 for presenting objections is intended to protect administrations against late objections. This time limit must be regarded as a minimum, so that Contracting States are left free to agree in their bilateral conventions upon a longer period in the interests of taxpayers, *e.g.*~~,~~. on the analogy in particular of the time limits laid down by their respective domestic regulations in regard to tax conventions. Contracting States may omit the second sentence of paragraph 1 if they concur that their respective domestic regulations apply automatically to such objections and are more favourable in their effects to the taxpayers affected, either because they allow a longer time for presenting objections or because they do not set any time limits for such purpose.~~" [para. 17] .~~

[21.] The provision fixing the starting point of the three ~~-~~year time limit as the date of the "~~'~~"first notification of the action resulting in taxation not in accordance with the provisions of the ~~Convention'~~Convention" should be interpreted in the way most favourable to the taxpayer. Thus, even if such taxation should be directly charged in pursuance of an administrative decision or action of general application, the time limit begins to run only from the date of the notification of the individual action giving rise to such taxation, that is to say, under the most favourable interpretation, from the act of taxation itself, as evidenced by a notice of assessment or an official demand or other instrument for the collection or levy of tax. Since a taxpayer has the right to present a case as soon as the taxpayer considers that taxation will result in taxation not in accordance with the provisions of the Convention, whilst the three ~~-~~year limit only begins when that result has materialised, there will be cases where the taxpayer will have the right to initiate the mutual agreement procedure before the three ~~-~~year time limit begins (see the examples of such a situation given in paragraph 14 above).

[22.] In most cases it will be clear what constitutes the relevant notice of assessment, official demand or other instrument for the collection or levy of tax, and there will usually be domestic law rules governing when that notice is regarded as "given". Such domestic law will usually look to the time when the notice is sent (time of sending), a specific number of days after it is sent, the time when it would be expected to arrive at the address it is sent to (both of which are times of presumptive physical receipt), or the time when it is in fact physically received (time of actual physical receipt). Where there are no such rules,

either the time of actual physical receipt or, where this is not sufficiently evidenced, the time when the notice would normally be expected to have arrived at the relevant address should usually be treated as the time of notification, bearing in mind that this provision should be interpreted in the way most favourable to the taxpayer.

[23.] In self assessment cases, there will usually be some notification effecting that assessment (such as a notice of a liability or of denial or adjustment of a claim for refund), and generally the time of notification, rather than the time when the taxpayer lodges the self-assessed return, would be a starting point for the three year period to run. There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of "notification" would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention. This could, for example, be when information recording

but many taxpayers will attempt to address these difficulties by initiating a mutual agreement procedure whilst simultaneously initiating domestic law action, even though the domestic law process is initially not actively pursued. This could result in mutual agreement procedure resources being inefficiently applied. Where domestic law allows, some States may wish to specifically deal with this issue by allowing for the three year (or longer) period to be suspended during the course of domestic law proceedings. Two approaches, each of which is consistent with Article– 25 are, on one hand, requiring the taxpayer to initiate the mutual agreement procedure, with no suspension during domestic proceedings, but with the competent authorities not entering into talks in earnest until the domestic law action is finally determined, or else, on the other hand, having the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions. This second possibility is discussed at paragraph 42 of this Commentary. In either of these cases, the taxpayer should be made aware that the relevant approach is being taken. Whether or not a taxpayer considers that there is a need to lodge a "protective" appeal under domestic law (because, for example, of domestic limitation requirements for instituting domestic law actions) the preferred approach for all parties is often that the mutual agreement procedure should be the initial focus for resolving the taxpayer's issues, and for doing so on a bilateral basis.

[26.] Some States may deny the taxpayer the ability to initiate the mutual agreement procedure under paragraph 1 of Article 25 in cases where the transactions to which the request relates are regarded as abusive. This issue is closely related to the issue of "improper use of the Convention" discussed ~~in paragraph 9.1 and the following paragraphs of the Commentary on Article 1~~*[…] [in paragraph 8 and the following paragraphs of the Commentary on Article 1of the UN Model]*. In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure, however. The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting a r(9ET1e2 0.88 refBT/F0 1i)-210(Td0.0039o)-320(t)

the other competent authority of this and duly explain the legal basis of its position. More usually, genuine domestic law impediments will not prevent a matter from entering into the mutual agreement procedure, but if they will clearly and unequivocally prevent a competent

possible by making such adjustments or allowing such reliefs as appear to be justified. In this situation, the issue can be resolved without resort to the mutual agreement procedure. On the other hand, it may be found useful to exchange views and information with the competent authority of the other Contracting State, in order, for example, to confirm a given interpretation of the Convention~~." [para. 21]~~.

[33.] If, however, it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other State, it will be incumbent on it, indeed it will be its duty — as clearly appears by the terms of paragraph 2 — to set in motion the mutual agreement procedure proper. It is important that the authority in question carry out this duty as quickly as possible, especially in cases where the profits of associated enterprises have been adjusted as a result of transfer pricing adjustments~~." [para. 22]~~.

[34.] A taxpayer is entitled to present his case under paragraph 1 to the competent authority of the State of which he is a resident whether or not he may also have made a claim or commenced litigation under the domestic law of that State. If litigation is pending, the competent authority of the State of residence should not wait for the final adjudication, but should say whether it considers the case to be eligible for the mutual agreement procedure. If it so decides, it has to determine whether it is itself able to arrive at a satisfactory solution or whether the case has to be submitted to the competent authority of the other Contracting State. An application by a taxpayer to set the mutual agreement procedure in motion should not be rejected without good reason~~." [para. 23]~~.

[35.] If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation~~." [para. 24]~~.

[36.] In its second stage — which opens with the approach to the competent authority of the other State by the competent authority to which the taxpayer has applied — the procedure is henceforward at the level of dealings between States, as if, so to speak, the State to which the complaint was presented had given it its backing. But ~~while~~whilst this procedure is indisputably a procedure between States, it may, on the other hand, be asked:

— whether, as the title of the Article and the terms employed in the first sentence of paragraph 2 suggest, it is no more than a simple procedure of mutual agreement, or constitutes the implementation of a '*pactum de* ~~contrahendo~~'*contrahendo* laying on the parties a mere duty to negotiate but in no way laying on them a duty to reach agreement;

— or whether on the contrary, it is to be regarded (based *[in the case of alternative B of the Article]* on the existence of the arbitration process provided for in paragraph 5 *[of that alternative]*

Paragraph 5 *[of alternative B]*, however, provides a mechanism that will allow an agreement to be reached even if there are issues on which the competent authorities have been unable to reach agreement through negotiations.

[38.] In seeking a mutual agreement, the competent authorities must first, of course, determine their position in the light of the rules of their respective taxation laws and of the provisions of the Convention, which are as binding on them as much as they are on the taxpayer. Should the strict application of such rules or provisions preclude any agreement, it may reasonably be held that the competent authorities, as in the case of international arbitration, can, subsidiarily, have regard to considerations of equity in order to give the taxpayer satisfaction~~." [para. 27]~~.

[39.] The purpose of the last sentence of paragraph 2 is to enable countries with time limits relating to adjustments of assessments and tax refunds in their domestic law to give effect to an agreement despite such time limits. This provision does not prevent, however, such States as are not, on constitutional or other legal grounds, able to overrule the time limits in the domestic law from inserting in the mutual agreement itself such time limits as are adapted to their internal statute of limitation. In certain extreme cases, a Contracting State may prefer not to enter into a mutual agreement, the implementation of which would require that the internal statute of limitation had to be disregarded. Apart from time limits there may exist other obstacles such as ~~'~~"final court decisions"~~'~~ to giving effect to an agreement. Contracting States are free to agree on firm provisions for the removal of such obstacles. As regards the practical implementation of the procedure, it is generally

the full application of this right.

Paragraph [42] is subject to the concluding remarks of paragraph [45] (which came immediately after the second sentence of paragraph [42] before 2005), according to which the solution that is presented to the taxpayer but with respect to which the taxpayer defers his acceptance does not have to be implemented before the taxpayer gives his agreement and renounces to his legal recourses.

Moreover, the competent authorities have the opportunity to decide not to enter into talks in earnest until the domestic law action is finally determined (see paragraph [25] of the OECD Model quoted above). This choice could, however, be detrimental to the taxpayer where competent authorities consider that they cannot deviate from a domestic court

A contrary view, held by many States, is that Article 25 indicates all that a taxpayer must do before the procedure is initiated, and that it imposes no such requirement. Those States find support for their view in the fact that the procedure may be implemented even before the taxpayer has been charged to tax or notified of a liability (as noted at paragraph 14 above) and in the acceptance that there is clearly no such requirement for a procedure initiated by a competent authority under paragraph 3.

[47.] Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. States therefore should as far as possible take into account the cash flow and possible double taxation issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. As a minimum, payment of outstanding tax should not be a requirement to

possibilities is open will ultimately depend on the domestic law (including administrative requirements) of a particular State, but they are the sorts of options that should as far as possible be considered in seeking to have the mutual agreement procedure operate as effectively as possible. Where States require some payment of outstanding tax as a precondition to the taxpayer initiated mutual agreement procedure, or to the active consideration of an issue within that procedure, they should have a system in place for refunding an amount of interest on any underlying amount to be returned to the taxpayer as

— where the laws of a State have been changed without impairing the balance or

the basis that the actions of one or both of the Contracting States have resulted for a person in taxation not in accordance with the provisions of this Convention. Where the mutual agreement procedure is not available, for example because of the existence of serious violations involving significant penalties (see paragraph 26), it is clear that paragraph 5 is not applicable.

[69.] Where two Contracting States that have not included the paragraph in their Convention wish to implement an arbitration process for general application or to deal with a specific case, it is still possible for them to do so by mutual agreement. In that case, the competent authorities can conclude a mutual agreement along the lines of the sample wording presented in the annex, to which they would add the following first paragraph:

1. Where,

a) under paragraph 1 of Article 25 of the Convention, 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 of the Article within …*[three]* 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 in accordance with the following paragraphs if … *[either competent authority so requests. The person who has presented the case shall be notified of the request]*. 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 *[both competent authorities agree on a different solution within six months after the decision has been communicated to them or unless]* a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, the competent authorities hereby agree to consider themselves bound by the arbitration decision and to resolve the case pursuant to paragraph 2 of Article 25 on the basis of that decision.

This agreement would go on to address the various structural and procedural issues discussed in the annex. Whilst the competent authorities would thus be bound by such process, such agreement would be given as part of the mutual agreement procedure and would therefore only be effective as long as the competent authorities continue to agree to follow that process to solve cases that they have been unable to resolve through the traditional mutual agreement procedure.

[70.] Paragraph 5 provides that *[either competent authority]* … may request that any unresolved issues arising from *[a]* … case be submitted to arbitration *[and in that case, that the person who has presented the case to the competent authority of a Contracting State pursuant to paragraph 1 shall be notified of that request. The obligation to notify the person who has presented the case is, however, not a condition for initiating arbitration and the failure to notify such person does not suspend the arbitration process.]*. This request may be made at any time after a period of … *[three]* years that begins when the case is presented to the competent authority of the other Contracting State. Recourse to arbitration is therefore not automatic; the … *[competent authorities]* … may prefer to wait beyond the … *[three]* year period (for example, to allow … *[themselves]* more time to

[71.] Under paragraph 2 of Article 25, the competent authorities must endeavour to resolve a case presented under paragraph 1 with a view to the avoidance of taxation not in accordance with the Convention. For the purposes of paragraph 5, a case should therefore not be considered to have been resolved as long as there is at least one issue on which the competent authorities disagree and which, according to one of the competent authorities, indicates that there has been taxation not in accordance with the Convention. One of the competent authorities could not, therefore, unilaterally decide that such a case is closed and that … *[the other competent authority]* cannot request the arbitration of unresolved issues; similarly, the two competent authorities could not consider that the case has been resolved … if there are still unresolved issues that prevent them from agreeing that there has not been taxation not in accordance with the Convention. Where, however, the two competent authorities agree that taxation by both States has been in accordance with the Convention, there are no unresolved issues and the case may be considered to have been resolved, even in the case where there might be double taxation that is not addressed by the provisions of the Convention.

[72.] The arbitration process is only available in cases where the person considers that taxation not in accordance with the provisions of the Convention has actually resulted from the actions of one or both of the Contracting States; it is not available, however, in cases where it is argued that such taxation will eventually result from such actions even if the latter cases may be presented to the competent authorities under paragraph 1 of the Article … For that purpose, taxation should be considered to have resulted from the actions of one or both of the Contracting States as soon as, for example, tax has been paid, assessed or otherwise determined or even in cases where the taxpayer is officially notified by the tax authorities that they intend to tax him on a certain element of income.

[73.] As drafted, paragraph 5 only provides for arbitration of unresolved issues arising from a request made under paragraph 1 of the Article. States wis(m)18(ies)9(ol117.96 418.6(i)-12(on)10( )-40(no)10(t)

paragraph 5 (see the annex) should specify which type of information will normally be sufficient for that purpose.

[76.] The paragraph also deals with the relationship between the arbitration process and rights to domestic remedies. For the arbitration process to be effective and to avoid the risk of conflicting decisions, … the arbitration process *[should not be available]* if the *[relevant*] issues … have already been resolved through the domestic litigation process of

~~the dispute resolution mechanism which is discussed in paragraphs 44.1 to 44.7 of the OECD Model Convention, reproduced below:~~

~~"Interaction of the mutual agreement procedure with the dispute resolution mechanism provided by the General Agreement on Trade in Services~~

~~The application of the General Agreement on Trade in Services (GATS), which entered~~

(*a*) Aspects of the mutual agreement procedure that should be dealt with~~Other issues~~

21~~10~~. The procedural arrangements for mutual agreements in general should be suitable to the number and types of issues expected to be dealt with by the competent authorities and to the administrative capability and resources of those authorities. The arrangements should not be rigidly structured but instead should embody the degree of flexibility required to facilitate consultation and agreement

State, where these are different);

— a description of the procedural status of the case in the other Contracting State, *e.g.* whether a tax audit report has been produced, a tax assessment received, an appeal filed or litigation undertaken; and

— a reference to the relevant provisions of the applicable tax treaty and the analysis supporting the claim that there is or will be taxation not in accordance with these provisions (when available, the legal analysis of the tax authorities of the other Contracting State should also be provided).

24. It may be more difficult to obtain some of the above information when the relevant transactions involve third parties which are not associated enterprises of the person making the request. In addition, certain information might not be available at the time the request is made. The information provided at the initial stage should, however, be sufficient to allow the competent authority to which the case is presented to determine whether the objection is justified. A competent authority would not in any case be able to initiate a mutual agreement procedure where the person making the request provides insufficient or inadequate information.

25. The mutual agreement procedure under paragraph 1 of Article 25 is only available in cases where a person considers that the actions of one or both States result or will result in taxation that is not in accordance with the provisions of the Convention. There may be cases where double taxation will arise because a taxpayer has failed to observe procedural rules (*e.g.* the expiry of time limits) without there being any taxation contrary to the provisions of the Convention; in those cases, that mutual agreement procedure will not be available.

(~~a~~c) Information on adjustments

2611. The competent authorities should decide on the extent of the information to be provided on adjustments involving income allocation and the time when it is to be given by one competent authority to the other. Thus, the information could cover adjustments proposed or ~~concluded~~ finalized by the tax administration of one country, the related entities involved and the general nature of the adjustments.

2712. Generally speaking, most competent authorities are likely to conclude that the automatic transmittal of such information is not needed or desirable. The competent authority of the country making an adjustment may find it difficult or time-consuming to gather the information and prepare it in a suitable form for transmission. In addition, the other competent authority may find it burdensome merely to process a volume of data routinely transmitted by the first competent authority. Moreover, a taxpaying corporation can usually be counted upon to inform its related entity in the other country of the proceedings and the latter is thus in a position to inform, in turn, its competent authority. For this reason, the functioning of a consultation system would be aided if a tax administration considering an adjustment possibly involving an international aspect were to give the taxpayer as much warning as possible.

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is itself able to arrive at a satisfactory solution. If it is unable to do so, it must determine ~~The~~

of double taxation, the taxpayer would generally have little to lose in initially using clearly improper allocations. Hence, if the competent authorities possess such discretion and there were a risk to the taxpayer of economic double taxation, he would be deterred from taking such action and would be more careful in his allocations. Other countries may feel, however, that the key objective of the treaty should be to avoid double taxation and, hence, matters such as fraud should be left to other provisions of law, although even here they might concede some modicum of discretion to be used in outrageous cases.

20. Putting such situations to one side, some countries may not desire a provision requiring

position to handle a matter having potential international consequences that arises from an adjustment proposed by a political subdivision of thea State even if the competent authority represents the government of the central government of that Statetaxing unit in the country other than the central body. This is, of course, an aspect of domestic law as affected by the treaty.

3524. As another minimum procedural aspect, the competent authorities must should indicate the extent to which a taxpayer may be allowed to participate in the competent authority procedure and the manner of his participation. Some countries may wish to favour a reasonable degree of taxpayer participation. Some countries may wish to allow a taxpayer to present information and even to ag

follow the present practice and thus may not want to bind taxpayers or may not be in a position to do so under domestic law. This would appear to be a matter on which developing experience would be a useful guide.

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payment of a reallocated amount. Thus, if income is imputed and taxed to a parent corporation because of service to a related foreign subsidiary, the related subsidiary

[88.] The application of the General Agreement on Trade in Services (GATS), which entered into force on 1 January 1995 and which all ~~M~~member countries have signed, raises particular concerns in relation to the mutual agreement procedure~~." [para. 44.1] .~~

[89.] Paragraph 3 of Article XXII of the GATS provides that a dispute as to the application of Article XVII of the Agreement, a national treatment rule, may not be dealt with under the dispute resolution mechanisms provided by Articles XXII and XXIII of the Agreement if the disputed measure ~~'~~"falls within the scope of an international agreement between them relating to the avoidance of double taxation"~~'~~ (*e.g.*~~,~~ a tax convention). If there is disagreement over whether a measure ~~'~~"falls within the scope~~'~~" of such an international agreement, paragraph 3 goes on to provide that either State involved in the dispute may bring the matter to the Council on Trade in Services, which shall refer the dispute for binding arbitration. A footnote to paragraph 3, however, contains the important exception that if the dispute relates to an international agreement ~~'~~"which exist~~([s)]~~ at the time of the entry into force"~~'~~ of the Agreement, the matter may not be brought to the Council on Trade in Services unless both States agree~~." [para. 44.2] .~~

[90.] That paragraph raises two particular problems with respect to tax treaties~~." [para. 44.3] .~~

[91.] First, the footnote thereto provides for the different treatment of tax conventions concluded before and after the entry into force of the GATS, something that may be considered inappropriate, in particular where a convention in existence at the time of the entry into force of the GATS is subsequently renegotiated or where a protocol is concluded after that time in relation to a convention existing at that time~~." [para. 44.4] .~~

[92.] Second, the phrase ~~'~~"falls within the scope~~'~~" is inherently ambiguous, as indicated by the inclusion in paragraph 3 of Article XXII of the GATS of both an arbitration procedure and a clause exempting pre-existing conventions from its application in order to deal with disagreements related to its meaning. ~~While~~Whilst it seems clear that a country could not argue in good faith[3] that a measure relating to a tax to which no provision of a tax convention applied fell within the scope of that convention, it is unclear whether the phrase covers all measures that relate to taxes that are covered by all or only some provisions of the tax convention~~." [para. 44.5].~~

[93.] Contracting States may wish to avoid these difficulties by extending bilaterally the application of the footnote to paragraph 3 of Article XXII of the GATS to conventions concluded after the f a t is 4920(t)-10 0 0 rgu(p)-10(hras)9(e)14( ) (it)-12 1 rg[(.)10~~9~~42~~4~~( )10([)13(p)10(a)24(r)-7(a)3(

[94.] Problems similar to those discussed above may arise in relation with other bilateral or multilateral agreements related to trade or investment. Contracting States are free, in the course of their bilateral negotiations, to amend the provision suggested above so as to ensure that issues relating to the taxes covered by their tax convention are dealt with through the mutual agreement procedure rather than through the dispute settlement mechanism of such agreements~~." [para. 44.7]~~.

ANNEX TO THE COMMENTARY ON PARAGRAPH 5 OF ALTERNATIVE B

Sample Mutual Agreement on Arbitration

The Committee considers that the paragraphs of the Annex to the Commentary on paragraph 5 of Article 25 of the OECD Model Convention that are reproduced below (as they read on 22 October 2010) are relevant for the application of paragraph 5 of alternative B of the Article. The additional comments that appear in italics between square brackets, which are not part of the Commentary on the OECD Model, have been inserted in order to reflect the differences between the two versions of the paragraph as well as the differences introduced in the sample mutual agreement itself, which are primarily:

- The following sample mutual agreement provides that, unless the competent authorities agree in a particular case that the arbitration panel will issue an independent decision, the so-called "last best offer" or "final offer" approach (commonly referred to as "baseball arbitration") will be followed. Such a simplified arbitration process is less costly. Choosing between the competent authorities' positions on each of the questions to be resolved will be quicker that developing and issuing an independent opinion on each of these questions; in addition, such choice may require only one independent arbitrator even if the basic rule is to have three arbitrators.
- The sample mutual agreement provides also that a case shall not be submitted to arbitration if it involves less than a certain amount of taxes (to be specified by the competent authorities). Such cases shall only be submitted to arbitration if both competent authorities agree that it is appropriate to do so (e.g. in order to resolve a question of principle). Clearly, however, taxpayers expect competent authorities to directly solve cases that involve small amounts of taxes and no questions of principle.
- In order to guarantee their neutrality, the sample agreement provides that the appointed arbitrators are asked to fill in a statement in which they declare that, as far as they know, there exist no circumstances that might give rise to justifiable doubts regarding their independence or impartiality and that they will disclose promptly in writing to both competent authorities any such circumstances arising during the course of the arbitration process.
- The sample mutual agreement contains some rules in order to determine the remuneration of the arbitrators.

[1.] The following is a sample form of agreement that the competent authorities may use as a basis for a mutual agreement to implement the arbitration process provided for in paragraph 5 of *[alternative B of the Article]*. Paragraphs 2 to 43 below discuss the various provisions of the agreement and, in some cases, put forward alternatives. Competent

appointed as provided in paragraph 5 below, the arbitrators shall communicate to the competent authorities and the person who … *[presented the case]* a revised version of the tentative Terms of Reference based on the lists so communicated. Within one month after the revised version has been received by both of them, the competent authorities will have the possibility to agree on different Terms of Reference and to communicate them in writing to the arbitrators and the person who ... *[presented the case]*. If they do so within that period, these different Terms of Reference shall constitute the Terms of Reference for the case. If no different Terms of Reference have been agreed to between the competent authorities and communicated in writing within that period, the revised version of the tentative Terms of Reference prepared by the arbitrators shall constitute the Terms of Reference for the case.

confidentiality of the information related to the case that results in the arbitration process, each arbitrator shall be designated as authorised representative of the competent authority that has appointed that arbitrator or, if that arbitrator has not been appointed exclusively by one competent authority, of the competent authority of the Contracting State to which the case giving rise to the arbitration was initially presented. For the purposes of this agreement, where a case giving rise to arbitration was initially presented simultaneously to both competent authorities, "the competent authority of the Contracting State to which the case giving rise to the arbitration was initially presented" means the competent authority referred to in paragraph 1 of Article 25.

9. Failure to provide information in a timely manner

Notwithstanding paragrap*[h]* 5 …, where both competent authorities agree that the failure to resolve an issue within the …*[three]* year period provided in paragraph 5 of Article 25 is mainly attributable to the failure of a person directly affected by the case to provide relevant information in a timely manner, the competent authorities may postpone the nomination of the arbitrator for a period of time corresponding to the delay in providing that information.

10. Procedural and evidentiary rules

Subject to this agreement and the Terms of Reference, the arbitrators shall adopt those procedural and evidentiary rules that they deem necessary to answer the questions set out in the Terms of Reference. They will have access to all information necessary to decide the issues submitted to arbitration, including confidential information. Unless the competent authorities agree otherwise, any information that was not available to both competent authorities before the request for arbitration was … *[sent by one]* of them shall not be taken into account for purposes of the decision.

[11. … Independent opinion approach

If the competent authorities so indicate in the Terms of Reference, the "independent opinion" approach will be followed instead of the streamlined arbitration process. Under this approach, the arbitrators will reach their own decision and the following rules shall apply to a particular case:

a) Unless otherwise provided in the Terms of Reference, the decision of the arbitral panel will be presented in writing and shall indicate the sources of law relied upon and the reasoning which led to its result. With the permission of the person who presented the case and both competent authorities, the decision of the arbitral panel will be made public in redacted form without mentioning the names of the parties involved or any details that might disclose their identity and with the understanding that the decision has no formal precedential value.

b) The arbitration decision must be communicated to the competent authorities and the person who presented the case within six months from the date on which the Chair notifies in writing the competent authorities and the person who presented the case that he has received all the information necessary to begin consideration of the case. Notwithstanding the first part of this paragraph, if at any time within two months from the date on which the last arbitrator was appointed, the Chair, with the consent of one of the competent authorities, notifies in writing the other competent authority and the person who presented the case that he has not received all the information necessary to begin consideration of the case, then

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date on which that notice was sent, the arbitration decision must be communicated to the competent authorities and the person who presented the case within six months from the date on which the information was received by the Chair, and

- if the Chair has not received the necessary information within two months

because of the failure of that competent authority to appoint that arbitrator, together with that arbitrator's travel, telecommunication and secretariat costs;

c) the remuneration of the other arbitrators and their travel, telecommunication and secretariat costs will be borne equally by the two Contracting States;

d) costs related to the meetings of the arbitral panel and to the administrative personnel necessary for the conduct of the arbitration process will be borne by the competent authority to which the case giving rise to the arbitration was initially presented, or if presented in both States, will be shared equally; and

e) all other costs (including costs of translation and of recording the proceedings) related to expenses that both competent authorities have agreed to incur, will be borne equally by the two Contracting States.

14. Applicable Legal Principles

The arbitrators shall decide the issues submitted to arbitration in accordance with the applicable provisions of the [*Convention*] and, subject to these provisions, of those of the domestic laws of the Contracting States. Issues of treaty interpretation will be decided by the arbitrators in the light of the principles of interpretation incorporated in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties* … The arbitrators will also consider any other sources which the competent authorities may expressly identify in the Terms of Reference.

15. Arbitration decision

Where more than one arbitrator has been appointed, the arbitration decision will be determined by a simple majority of the arbitrators. …

… [16]. Failure to communicate the decision within the required period

In the event that the decision has not been communicated to the competent authorities within the period provided for in paragraphs 6 *…[b)]* or *… [11 b)]*, the competent authorities may agree to extend that period for a period not exceeding six months or, if they fail to do so within one month from the end of the period provided for in paragraphs 6 *…[b)]* or *… [11 b)]*, they shall appoint a new arbitrator or arbitrators in accordance with

competent authority to the other competent authority and to the person who has presented the case to the competent authority of a Contracting State pursuant to paragraph 1 of Article 25].

[6.] In order to determine that the conditions of paragraph 5 of Article 25 have been met (see paragraph 76 of the Commentary on this Article) the request should be accompanied by statements indicating that no decision on these issues has already been rendered by domestic courts or administrative tribunals in either Contracting State.

[7.] Since the arbitration process is an extension of the mutual agreement procedure that is intended to deal with cases that cannot be solved under that procedure, it would seem inappropriate to ask the person who … *[initiated the mutual agreement procedure]* to reimburse the expenses incurred by the competent authorities in the course of the arbitration proceedings. Unlike taxpayers' requests for rulings or other types of advance agreements, where a charge is sometimes made, providing a solution to disputes between the Contracting States is the responsibility of these States for which they in general should bear the costs.

[8.] A request for arbitration may not be made before … *[three]* years from the date when a mutual agreement case presented to the competent authority of a Contracting State has also been presented to the competent authority of the other Contracting State. Paragraph 2 of the sample agreement provides that for this purpose, a case shall only be considered to have been presented to the competent authority of that other State if the information specified in that paragraph has been so provided. The paragraph should therefore include a list of the information required; in general, that information will correspond to the information and documents that were required to initiate the mutual agreement procedure *[see paragraphs 22 to 24 above dealing with the necessary cooperation of the person who makes the request]*.

arbitrator, or arbitrators, that competent authority's own reply to the questions included in the Terms of Reference, and the arbitrator, or the arbitrators, simply chooses one of the competent authorities' replies. The competent authorities may, as for most procedural rules, amend or supplement the streamlined process through the Terms of Reference applicable to a particular case.] …

[13.] … *[That streamlined process will especially be appropriate to deal with factual issues]*, for example a determination of the amount of adjustments to the income and deductions of the respective related parties. Such circumstances will often arise in transfer pricing cases, where the unresolved issue may be simply the determination of an arm's length transfer price or range of prices (although there are other transfer pricing cases that involve complex factual issues); there are also cases in which an analogous principle may apply, for example, the determination of the existence of a permanent establishment. In some cases, the decision may be a statement of the factual premises on which the

decide the case on a neutral and objective basis; he is no longer functioning as an advocate for the country that appointed him.

…

Practical arrangements

[21.] A number of practical arrangements will need to be made in connection with the actual functioning of the arbitral process. They include the location of the meetings, the language of the proceedings and possible translation facilities, the keeping of a record,

[29.] The fees and the travel, telecommunication and secretariat costs of the other arbitrators will, however, be shared equally by the competent authorities. The competent authorities will normally agree to incur these costs at the time that the arbitrators are appointed and this would typically be confirmed in the letter of appointment. The fees should be large enough to ensure that appropriately qualified experts could be recruited. One possibility would be to use a fee structure similar to that established under the EU Arbitration Convention Code of Conduct.

[30.] The costs related to the meetings of the arbitral panel, including those of the administrative personnel necessary for the conduct of the arbitration process, should be borne by the competent authority to which the case giving rise to the arbitration was initially presented, as long as that competent authority is required to arrange such meetings and provide the administrative personnel (see paragraph 12 of the sample agreement). In most cases, that competent authority will use meeting facilities and personnel that it already has at its disposal and it would seem inappropriate to try to allocate part of the costs thereof to the other competent authority. Clearly, the reference to "costs related to the meetings" does not include the travel and accommodation costs incurred by the participants; these are dealt with above.

[31.] The other costs (not including any costs resulting from the taxpayers' participation in the process) should be borne equally by the two competent authorities as long as they have agreed to incur the relevant expenses. This would include costs related to translation and recording that both competent authorities have agreed to provide. In the absence of such agreement, the party that has requested that particular costs be incurred should pay for these.

[32.] As indicated in paragraph 13 of the sample agreement, the competent authorities may, however, agree to a different allocation of costs *[in a particular case]*. Such agreement can be included in the Terms of Reference or be made afterwards (*e.g.* when

either directly or through his representatives, present a written submission to the arbitrators to the same extent that he may do so during the mutual agreement procedure. and, iIf the arbitrators agree, that person may also

solution arrived at should be completed and presented to the taxpayer within six months from the date of the communication of the decision. This is provided in paragraph … *[18]*