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# Post-negotiation Activities

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# Post-negotiation Activities

*Odd Hengsle*

## 1. Introduction

This paper deals with several issues that have to be dealt with after agreement is reached on all major issues. The first issue regards the drafting of the two articles on "Entry into Force" and "Termination" where several problems may be met. The paper then continues with a discussion of how to proceed with the preparation for signature, including translation (if necessary), getting the authority to sign and the actual signing. Also issues related to post signing activities necessary to bring the treaty into force and obligations after the treaty has entered into force are discussed. However, questions related to the fulfilment of obligations laid down in the articles on "Exchange of Information" and "Assistance in the Collection of Taxes" is not discussed in this paper.

## 2. Entry into force and termination

When the two teams have resolved all outstanding issues, two remaining articles must be drafted: the "Entry into force" and the "Termination" articles. These two Articles are important since there should be no doubt as to when the treaty could be applied for the first time, or if it is terminated, which income year would be the last year for which it should be applied.

When drafting the "Entry into Force" article it is wise to consult the Ministry of Foreign Affairs to make sure that the domestic law for the entering into force and ratification of a treaty has been complied with.

Some states have a requirement that instruments of ratification must be exchanged before a treaty can enter into force. However, most states will only ask for a notification that the legal requirements for the entry into force are complied with. To avoid any misunderstanding or confusion it should be stated in the treaty provision that the notification should be in writing and sent through the diplomatic channel. An exchange of e-mails between competent authorities will not provide for the necessary clarity or possible legal certainty. One example of such drafting is:

*"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 thirtieth 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 for any year of income beginning on or after …… (date and month) next following that in which this Convention enters into force;*

b. *In State B in respect of taxes on income relating to any calendar year next following that in which the Convention enters into force."*

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

*"This Convention shall remain in force until terminated by a Contracting State. Either of the Contracting State may after the expiration of 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, this 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[1], 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 industries 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.

informing the public that an agreement has been reached and is being prepared for signing, it may be advisable that the two teams agree on the wording of such press release.

In some countries the procedures before signing are comprehensive and time-consuming. There are examples that years have passed between initialling and signature. This is unfortunate, but is sometimes unavoidable due to these comprehensive procedures.

Most countries must submit the initialled draft for comments or approval by a legal authority before they can begin the preparations for signature. Such an authority may be the Ministry of Foreign Affairs, the Ministry of Justice, the Supreme Court or an authority established for the purpose of commenting on new tax legislation proposals as well as initialled tax treaties. This authority may have comments on the drafting or on the content, which have to be presented and discussed with the other country. Even if the authority has no comments to make, a review by such an authority could easily delay the signature process. The other country may even decide to defer completion of its own processes until it is clear that the relevant authority has given its approval.

If several years pass by before signing, the initialled treaty may in some respects be obsolete. One or the other country may be reluctant to sign and may ask for redrafting of some of the agreed articles. To get an idea of the time usually required in preparing the treaty for signature, it is recommended that information be exchanged during the negotiations on the procedures that are needed to get approval for signing.

### 3.2 Translation

When the initialled draft treaty is not negotiated in the official language of one or both states the first step will be for each country to translate the draft into its own language.

If, due to time constraints, a thorough proofreading was not done at the time of initialling, it should be done before the translation takes place. The articles in the initialled draft should read exactly the way the negotiators have agreed. If errors are discovered later, they may easily delay the signature process, especially if there are disagreements on the correct content or wording of a provision. On the other hand, minor misprints can easily be corrected in writing or by e-mails at any time before signature.

Who carries out the translation may vary from one state to another. In some states the negotiators themselves do the translation, in other states an office 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 someone unfamiliar with the international terms used in tax treaties does the translation, it is also highly advisable that the translation is proofread to check that the terms used are consistent with international standards used in the United Nations Model Double Taxation Convention between Developed and Developing Countries ("UN Model Convention") and the Organisation for Economic Co-operation and Development's Model Tax Convention on Income and on Capital ("OECD Model Convention") . It is therefore helpful if the translator is provided with existing treaties in order to ensure that he is aware of these specific terms.

When the treaty has been translated into an official language, it should be transmitted to the other country for approval. It is important that the translation is correctly done and that all official versions of the treaty have similar wording and have the same result, even if the languages are different. If the persons checking the translation are not familiar with the other country's language, they should consult with the translation office in the Ministry of Foreign Affairs or any other office established for the purpose of translations. If the office checking the translation is not satisfied with the wording in the translated version, the two countries should negotiate to find wording accepted by both countries. More serious differences between the two texts may also occur, for instance, when a paragraph in an article is missing. When both countries agree that the translated drafts completely and accurately reflect the initialled draft text, the next step for the signing of the treaty will begin.

When the two states do not have a common language, the initialled draft may not necessarily be in the official language of either of the two states, or the language of the negotiated draft may be in the official language of only one of the states. When more than one language is involved, it is necessary to decide in which language the treaty will be signed. Depending on the domestic regulations in a state, it may be agreed that the treaty will be signed in one, two or three languages. To clarify the domestic regulations, it is important to consult with the Ministry of Foreign Affairs.

Only the languages used for the signed treaty are regarded as constituting the official text. However, in all states a translation into the official language(s) is normally necessary even if the treaty is not going to be signed in that language, but it will then only be an unofficial translation.

A treaty may be negotiated in the English language even if the two countries are not English speaking countries. To avoid a problem with translation errors, the two countries may agree to have

the treaty signed in the English language only and have two unofficial translations. Alternatively they may agree to have three official languages where the English language shall prevail in case of differences of interpretation. An example of a Convention signed in three official languages can be found in the treaty between Norway and Georgia signed on 10 November 2011:

> *"In witness whereof the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.*
>
> *Done in Duplicate at Tblisi this 10th day of November 2011,in the Norwegian, Georgian and English languages, all three texts being equally authentic. In the case of divergence of interpretation, the English text shall prevail."*

As one will see from the example above a country will always have *its* official language mentioned first, the language of the other treaty partner mentioned second and the prevailing language last.

If signed in several languages, remember there will be one copy of the text in each language to be signed. Each country should have a signed version of the treaty in all official languages.

Even if there is only one language, there are always *two* copies to be signed, one of which will be retained by each state.

If a treaty is signed in two languages, both languages will be equally authentic. If there are differences discovered after the signing, but before the entry into force of the treaty, the two countries may consult in order to agree on the necessary corrections. Such consultations will usually be made through diplomatic channels. It will be the Ministries of Foreign Affairs that will decide on the procedure and if a new signature process is necessary.

Differences discovered after the treaty has entered into force may create a more difficult situation, especially if these differences lead to a different understanding. Unless the differences are minor, a protocol to the treaty will be necessary to correct the mistakes. Such protocol will have to follow the same legal procedure as the original treaty.

### 3.3 The signing of the treaty

When any necessary translation is complete and agreed by the two countries, the next step will be to ask for approval from your government to sign the treaty. To get approval, the (translated) treaty and

a technical explanation will normally have to be submitted to the Minister of Finance or an approved authority.

The procedure for approval may vary from one country to the other.

In some countries the Minister is required to present the treaty to the Cabinet for approval. When approval to sign the treaty is given, the text will normally be transmitted to the Ministry of Foreign Affairs, which is usually the government agency responsible for arranging the signing ceremony and for deciding who will sign the treaty on behalf of the state.

According to Article 7 (Full Powers) in the Vienna Convention on the Law of Treaties, signed in Vienna on 23 May 1967 and entered into force on 27 January 1980, it will in most cases only be the Head of State, Head of Government and the Minister of Foreign Affairs that have full powers to bind a country by signing a treaty without having to produce full powers. If the Minister of Finance or any other minister or person is the person signing the treaty, that person will need a power of attorney signed by the Minister of Foreign Affairs stating that they have been given the appropriate full powers to sign. Many countries also consider that the Vienna Convention accepts that heads of diplomatic missions have the power of attorney to sign a convention, though other countries do not agree.

Some states that have not ratified the Vienna Convention recognise it as a statement of customary international law and binding upon them as such. If there is doubt about the authority of the person that is going to sign the treaty, the Ministry of Foreign Affairs should be consulted. There have been several examples of embarrassment at the signing ceremony when a document of full powers has not been presented. If the document of full powers is missing at the signing ceremony, the signing may be delayed until the document of full powers is produced. Another possibility is that the treaty will be signed, but the signature is not recognised until the document is produced. To avoid all kinds of embarrassment and delays it is wise to be aware of this potential problem.

To avoid delays in the entry into force of a treaty, it is important that the treaty is signed as soon as possible. It is generally not desirable to delay entry into force of a treaty unnecessarily, for example waiting for an official visit by a Minister. The treaty is expected to be of economic advantage to the countries concerned and any delay is a disadvantage to the economic relations between the two states.

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, the 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. If 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 a recommendation to approve it. In the rare case where the treaty is not approved, the other country has to be informed and advised of the problems raised by the committee or Parliament. The negotiators will then meet 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 the 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 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 complied with. 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 approval by the Parliament and the exchange of instruments of ratification or the exchange of notes. A delay of this kind may have as an undesired result that the application of the treaty is delayed by a year because the treaty will normally only come into effect from the income year next following the year in which it enters into force. There have been occasions where the Ministries of Foreign Affairs have not been aware of this effect and have exchanged instruments of ratification or sent notes in the beginning of January of a year rather some time in the previous year. In this respect it is important to know whether the two countries have agreed that the treaty shall only come into effect after a certain period (say 30 days) after the exchange of instruments of ratification, or after the confirmation that each state has completed the procedures required for the entering into force of the treaty. The Ministry of Finance (or other relevant authority) and the Ministry of Foreign Affairs should therefore cooperate in order to avoid this kind of unintended delay.

### 3.5 Post entering into force

It may be advisable to ensure that the tax administration is aware of the new treaty and this can be done by way of an explanatory note. Whether this should be done in a separate paper or merely be a reproduction of earlier explanatory notes, will differ from one country to another. It is also important that the industries and other taxpayers are made aware of the new tax treaty. Such information can be furnished in several ways. Usually countries publish a press release with information detailing where to look for details. Most countries publish their treaties on their web site and in many countries the law requires that the treaty also be publish in a government gazette.

### 3.6 New legislation

In the first sentence of paragraph 4 of Article 2 (Taxes covered) in both the UN- and the OECD-Model Conventions it is stated that:

> *"The Convention shall apply also to any identical or substantially similar taxes which are imposed after the date of signature of the Convention, or in addition to, or in place of, the existing taxes".*

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 to in the treaty in force. If the answer is affirmative, there is no problem and the tax administrations in both countries should be informed. However, if the answer is negative, the problem could be resolved through the mutual agreement procedure. If no agreement is achieved, a change in law or a protocol to the treaty may be the only solution.

When, after the entry into force of a treaty, a state makes changes in its domestic tax legislation, it will usually be obliged to inform its treaty partners of such changes, at least if they may have an impact on the treaties in force. This obligation follows from the last sentence of paragraph 4 of the article mentioned above where it is stated that:

> *"The competent authorities of the Contracting States shall notify each other of significant changes made to their tax law".*

The treaty partner should inform its treaty partner of the new legislation, which may have an impact on how the treaty is applied. If the changes are significant enough, the treaty partner may even ask for negotiations with a view to proposing changes to the treaty.

In some cases it may be wise to get an explanation from the other team on the interaction between their domestic legislation and their conventions in order to avoid surprises in the future. In cases where a convention deviates from domestic legislation it is important to have established whether the domestic legislation or the treaty provisions will prevail. There are no current examples that domestic legislation in force at the time of negotiations, will prevail. However, there are examples that later changes in domestic legislation, at least in theory, may prevail over existing conventions. If a state, according to its domestic legislation, may override an existing convention in certain cases, this should be clarified. Many countries claim that such overriding will be contrary to Article 27 (Internal law and observance of treaty) of the Vienna Convention of the Law of Treaties, where is stated:

> *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".*

Even if countries are not signatories to the Vienna Convention, most countries will regard it as representing customary international law and will object to any overriding of the treaty through domestic law. Other countries may disagree, but will 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 loose 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 the 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.