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Dispute Resolution Mutual Agreement Procedure

1. Given the scope and complexity of the issues that a tax treaty must address, Contracting States will inevitably have occasional differences of opinion on how the treaty should be applied in specific cases. In the absence of a mechanism to resolve such disagreements, the certainty of avoiding international double taxation may be compromised.
2. Article 25 of the UN Model sets out two broad areas in which the Contracting States endeavor to resolve their differences by mutual agreement:
 - (1) cases in which a taxpayer considers that the acts of one or both of the Contracting States result or will result for the taxpayer in taxation not in accordance with the provisions of the treaty (covered by paragraphs 1 and 2 of Article 25); and
 - (2)

7. The UN Model, like other Models, uses the term “competent authority” to refer to the person or body within a Contracting State with responsibility for resolving issues that arise in connection with the treaty. The role of the competent authority is to ensure that a tax treaty is properly applied and to endeavor in good faith to resolve any disputes that may arise in its application or interpretation. In performing its functions, the competent authority is to be guided first by the terms of the treaty itself. The competent authority must then refer to any guidance promulgated under the treaty. Such guidance may include, for example, an agreed-upon memorandum of understanding or technical explanation to the treaty, or an agreement of general application concluded by the competent authorities pursuant to the Mutual Agreement Procedure. Model tax treaties (such as the UN Model) upon which the treaty was based, and their commentaries, are an additional important source of guidance.
8. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue statistics or an overall balance of results. Moreover, and especially in light of the principle of reciprocity underlying any international agreement, competent authorities should be consistent in their approach to an issue, regardless of the Contracting State that is favored by that approach in a particular case. Where competent authorities are otherwise unable to reach an agreement, however, they should seek appropriate opportunities for compromise to provide relief from double taxation.
9. The mutual agreement procedure provided for by Article 25 of the UN Model is available to taxpayers irrespective of the remedies provided by the domestic law of the Contracting States. The Mutual Agreement Procedure is a special procedure that exists in addition to domestic law remedies. For example, a taxpayer has the right to request assistance under the Mutual Agreement Procedure even though the taxpayer may have the right to challenge the actions taken by a country’s tax administration in a domestic court or through a domestic administrative process.
10. A Contracting State should determine the procedure to be followed when a taxpayer has invoked both the Mutual Agreement Procedure and a domestic recourse procedure. As a general matter, most tax administrations will deal with a taxpayer’s case in the Mutual Agreement Procedure or in a domestic forum (usually a court), but not both at the same time: one process should be suspended or put on hold pending the outcome of the other.

11. A request for assistance under the UN Model Treaty's Mutual Agreement Procedure is the main way by which a taxpayer makes a competent authority aware that one or both of the Contracting States is not (in the view of the taxpayer) correctly applying the treaty. A request for assistance under the Mutual Agreement Procedure generally must be made to the competent authority of a taxpayer's State of residence (see paragraph 1 of Article 25 of the UN Model).
12. A taxpayer may also make a Mutual Agreement Procedure request to the Contracting State of which it is a national in a case that falls under paragraph 1 of Article 24 (Non-Discrimination) of the UN Model. Under Article 24(1), nationals of a Contracting State may not be subjected in the other Contracting State to taxation or any tax-related requirement which is other or more burdensome than the taxation and tax-related requirements to which nationals of that other State in the same circumstances (including as to their residency) are subjected.
13. Article 26 (Exchange of Information) of the UN Model authorizes the competent authorities of the Contracting States to exchange such information as is necessary for carrying out the provisions of the treaty. Article 26 thus expressly authorizes the exchange of taxpayer information between competent authorities to carry out the Mutual Agreement Procedure provided for by Article 25. Paragraph 1 of Article 26 provides that

discussions may also lead to requests for additional information or other clarification from the taxpayer.

17. As with other aspects of the Mutual Agreement Procedure, Article 25 of the UN Model is silent with respect to how Contracting States will conduct their negotiations. Under Article 25(4), the Contracting States are directed to develop appropriate bilateral procedures to implement the Mutual Agreement Procedure.
18. If the competent authorities of the Contracting States reach an agreement on how to resolve a case that was submitted to the Mutual Agreement Procedure, the agreement will be evidenced by a formal exchange of letters. In most cases these letters would only be signed after the taxpayer ceased any alternative domestic proceedings. In this formal settlement, the competent authorities should take steps to provide correlative relief to prevent double taxation (or unintended under-taxation) in the country of residence. In other words if the profits booked to one related party for tax purposes are increased or reduced in one State, those booked by the related part in the other transaction should be correspondingly decreased or increased in the other State.
19. Importantly, Article 25 does not oblige the Contracting States to reach agreement in the Mutual Agreement Procedure but instead only requires the Contracting States to use their best efforts to reach an agreement. As a result, there will be circumstances in which the competent authorities are unable to agree on a resolution. In such situations, there may be unrelieved double taxation or taxation not in accordance with the treaty.
20. This inability of the Mutual Agreement Procedure of Article 25 to ensure a final (or timely) resolution of a case is one of the primary obstacles to giving foreign investors assurance that their economic activities will not be subject to international double taxation. When a taxpayer or a tax administration is unsure that a matter will be resolved through the Mutual Agreement Procedure, it may be hesitant to commit time and resources to seeking a resolution under Article 25. In addition, a competent authority may not take all possible steps to find a resolution through the Mutual Agreement Procedure where there is no obligation to do so and no mechanism in place to break a stalemate in Mutual Agreement Procedure negotiations.
21. As mentioned in paragraph 36 of the Commentary on Article 25, in light of these shortcomings of the Mutual Agreement Procedure, some tax administrations consider that the Mutual Agreement Procedure could be improved through the addition of an arbitration provision as a tool to ensure that the competent authorities are able to reach an agreed solution to a taxpayer's case.