
**Committee of Experts on International
Cooperation in Tax Matters
Twenty-second session**

Online meeting of 19 to 28 April 2021
Item 3(f) of the provisional agenda
Dispute avoidance and resolution

Changes to paragraph 25 of the Commentary on Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries

Note by the Secretariat

Summary

After the approval of the *United Nations Handbook on the Avoidance and Resolution of Tax Disputes* on the first day of the Committee's twenty-second session, it was agreed that a reference to the Handbook should be included in the United Nations Model Double Taxation Convention between Developed and Developing Countries.

This note includes the proposed changes that have been drafted for that purpose.

The Committee is invited to discuss and approve the proposed changes included in this note when it will resume its discussion of item 3(f) of its agenda (Dispute avoidance and resolution).

It is proposed to replace paragraph 2 of the Commentary on Article 25 of the *United Nations Model Double Taxation Convention between Developed and Developing Countries*, which is very long, by the following (changes to the existing version of the paragraph appear in redline):

Article 25

MUTUAL AGREEMENT PROCEDURE

A. GENERAL CONSIDERATIONS

...

2. The mutual agreement procedure is designed not only to furnish a means of settling questions relating to the interpretation and application of the Convention, but also to provide (a) a forum in which residents of the States involved can seek redress for actions not in accordance with the Convention and (b) a mechanism for eliminating double taxation in cases not provided for in the Convention.

2.1 Many developing countries have no or little experience with the practical application of the mutual agreement procedure. Section C below, which addresses various procedural aspects of the mutual agreement procedure, may be particularly useful to these countries. In addition, the *United Nations Handbook on the Avoidance and Resolution of Tax Disputes*,¹ which focusses primarily on the avoidance and resolution of tax disputes from the perspective of developing countries, includes practical additional guidance on the mutual agreement procedure.

2.2 The mutual agreement procedure applies in connection with all Articles of the Convention, and, in particular, to Article 7 on business profits, Article 9 on associated enterprises, Article 10 on dividends, Article 11 on interest, Article 12 on royalties and Article 23 on methods for the elimination of double taxation.

2.3 Even if a bilateral convention does not contain paragraph 2 of Article 9, the inclusion of paragraph 1 of Article 9 is sufficient to indicate that the intention of the Contracting States was to have economic double taxation covered by the convention. As a result, most countries consider that, in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation resulting from adjustments made to profits by reason of transfer pricing falls within the scope of the mutual agreement procedure set up under Article 25 (see paragraph 9 below which quotes paragraph 11 of the OECD Commentary on Article 25). Some countries consider, however, that in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation arising from transfer pricing adjustments does not fall within the scope of the mutual agreement procedure provided for under paragraphs 1 and 2 of Article 25. Contracting States that do not 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.

2.4 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, gross negligence or wilful default. Where the conditions provided for in paragraph 3 are fulfilled, a Contracting State has no obligation to make the corresponding adjustment under paragraph 2 and the taxpayer may not initiate the mutual agreement procedure under Article 25, paragraph 1 in order to request such corresponding adjustment. However, the taxpayer may initiate the mutual agreement procedure where the taxpayer considers that all the conditions provided for in paragraph 3 are not met or that the adjustment of profits is not in accordance with paragraph 1.

¹ United Nations publication, 2021, available at <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2021-06/handbook-dispute-avoidance-resolution-2021.pdf>.