UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

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VIA EMAIL

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Dear Mr. Stack:

BEPS implementation and related international tax changes are increasing uncertainty and tax disputes, so improved dispute resolution mechanisms are critically important to support these changes and contribute to a sustainable worldwide tax system. Increased uncertainty and disputes will have a significant impact on cross-border trade and investment. Businesses making investment decisions will have to take into account the need to avoid uncertainty with respect to tax outcomes, to the potential detriment of the business merits of the investment – the opposite result from what BEPS is intended to accomplish. Unresolved tax disputes create significant costs for taxpayers. The amount of tax in dispute is often significant, making double tax payments a significant financial burden for many taxpayers. These "time-value-of money" and related financing/bonding costs often dwarf the dispute resolution costs, making speedy resolution of these disputes critically important for taxpayers. USCIB believes that counterproductive uncertainty and its attendant costs will be significantly reduced if countries are required to resolve tax disputes through mandatory, binding arbitration.

Mandatory, binding arbitration in general promotes the resolution of tax issues. The resolution of tax disputes and elimination of double taxation should be the primary goals of tax treaty arbitration; clarifying the application of the treaty should be of secondary importance.

USCIB therefore strongly supports the availability of mandatory, binding arbitration for the resolution of tax treaty disputes and encourages its widespread adoption.

USCIB prefers "last-best-offer" or "short-form" mandatory, binding arbitration because we believe it best advances the primary goals identified above. We prefer this form of arbitration because it has a number of important virtues. First, it reduces the length of time to decision and therefore minimizes uncertainty and the cost of arbitration. Second, it greatly encourages Competent Authorities and taxpayers to make their best argument during the MAP and results in the resolution of more cases without resorting to arbitration. Third, short-form arbitration

raises fewer concerns about surrendering sovereignty since the arbitrators are merely resolving a single dispute and not deciding any legal issue in a precedential way.[1]

Length of time to decision and cost are both minimized

In short-form arbitration, because the arbitrators are not writing a reasoned opinion, the time and cost associated with the preparation of their decision should be much less than in long-form arbitration. The time spent and costs incurred by the relevant competent authorities in submitting the case to the arbitrators should also be less in short-form arbitration. For example, in the practice of short-form arbitration, the treaty partners typically submit proposed resolutions and supporting papers and possibly a reply, and those papers often have strict page limits. While the arbitrators may be presented in both forms with background documentation from the MAP case itself (or may have the ability to ask for such documentation if not provided), the generally stricter limitations on the documentation to be prepared by all parties in short-form arbitration focus the arbitrators on the issue at hand and reduce the overall time and expense on any particular case. It is also possible for the treaty or accompanying arbitration procedures to place a shorter limit on the time available to arbitrators to consider the matter, further controlling costs. The cost savings and other efficiencies of short-form arbitration were cited by members of the UN Tax Committee as the primary reason for their selection of short-form rather than long-form arbitration for inclusion in the sample competent authority agreement accompanying the arbitration option added to the UN Model Tax Convention in 2011.

Competent Authorities will be incentivized to make their best case during MAP procedures

If an arbitrator is required to choose between two competing positions, then Competent Authorities will be discouraged from taking positions that are unsupported by the tax treaty. It is the experience of business that countries do advance positions based on domestic law or other grounds that should clearly be rejected under an applicable income tax treaty. If these positions would likely be rejected by an independent arbitrator, countries will be much less likely to advance them and will be more likely to advance only good faith interpretations of the applicable treaty.

Even if both countries are in fact advancing good faith interpretations of the applicable treaty, the prospect of having those interpretations reviewed by independent arbitrators who will be required to choose one or the other will force both treaty partners to evaluate the strengths and weaknesses of their interpretation and will have the tendency to drive both sides towards

[1] Agreements adopting long-form arbitration typically provide that the arbitral opinion is not precedential. However, the benefits of long-form arbitration are argued to be that the use of long-form arbitration would clarify the application of the tax treaty and countries (and taxpayers) would get the benefit of the reasoned opinion. The first benefit explicitly contradicts that notion that the opinion is not precedential. The opinion cannot clarify the application of the treaty if is not precedential. The second benefit does not depend on the opinion being precedential, but the benefit is likely to be much greater if in fact the country follows the reasoned opinion on a going forward basis.

an interpretation likely to be acceptable to unbiased third parties. This will inevitably have a moderating influence, which will significantly increase the likelihood of pre-arbitration resolution of the case. It also means that it is unlikely that the arbitrator will be forced to choose an outcome that is not in accordance with the treaty. (The possibility of an outcome inconsistent with the tax treaty is a common complaint of those objecting to short-form arbitration.)

When countries and taxpayers are forced to make their best case during the MAP proceedings, cases are almost always resolved without arbitration. Resolving cases without resort to arbitration of course makes the advantages of short-form even more compelling: speed is further increased, uncertainty and cost are further reduced and objections based on sovereignty disappear.

Sovereignty concerns should be reduced

Short-form arbitration should raise fewer concerns about surrendering sovereignty. The non-precedential resolution of a particular dispute would not have a legal effect on a country's ability to continue interpreting the treaty in accordance with its own view, and the case would be resolved pursuant to the country's initial treaty agreement to accept the arbitral outcome as an extension of the MAP proceeding. Thus, short-form arbitration should be less objectionable to countries with political sovereignty concerns than an independent opinion decision which – even if the opinion is stated to be non-precedential – is intended to influence future outcomes.

There is nothing about short-form arbitration that prevents a country from changing its view in response to losing one or more cases. Further, if the countries involved wish, in the interest of efficiency, to agree to a common interpretation of their treaty after the resolution of one or more cases pursuant to short-form arbitration, they have the power to do so under paragraph 3 of Article 25,[2] and such an agreement could (and should) be published. Countries do not make enough use of this power, and business encourages categorical resolution of issues and publication of such resolution, if that is achievable. However, business is concerned that the possibility of arbitral decisions that are considered precedential in practice, if not by law, may discourage some countries from entering into agreements to arbitrate, and we view short-form arbitration as a sensible response to those concerns.

Short-form arbitration should also reduce the risk that the arbitrators could seek to expand their jurisdiction and address issues not related to the fundamental questions of concern to the treaty partner. That is, the arbitrators would be forced to address the issue in question and only the issue in question.[3]

[2] OECD Model Convention on Income and on Capital.

[3] The terms of reference of long-form arbitration would typically limit the arbitrators to specific questions. Concerns have been expressed, however, that arbitrators sometimes reach issues that may be beyond those terms of reference -- a form of "dicta" – which are not relevant to the issue at hand, but may have influence outside of the scope of the arbitral decision.

Conclusion

For the reasons stated above, USCIB strongly supports the adoption of mandatory, binding arbitration in general and would prefer the generic treaty provision to be accompanied by a sample implementing agreement which uses short-form as its preferred format. Short-form arbitration would benefit not only the business community, but also the countries agreeing to it, as more certainty and efficiency in tax administration would attract and incentivize business investment. Thus, widespread adoption of a mandatory, binding arbitration provision such as that found at Article 25(5) of the OECD Model Tax Convention or Article 25(5) Alternative B of the UN Model Tax Convention, preferably accompanied by implementing agreements based upon a short-form arbitration model, would be a major step in the right direction for dispute resolution.

Sincerely,

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