



Business and Industry Advisory Committee to the OECD

Comité Consultatif Economique et Industriel Auprès de l'OCDE

Comments of the Business and Industry Advisory Committee (BIAC) to the OECD on the OECD Public Discussion Draft:

"Improving the Process for Resolving International Tax Disputes"

25 October 2004

BIAC appreciates the opportunity to submit the following comments and suggestions regarding the OECD Discussion Draft "*Improving the Process for Resolving International Tax Disputes*" (Discussion Draft) released for public comment in mid-October 2004. BIAC representatives will be pleased to explain our position and to give more information at the public consultation on 7 December 2004 in Paris.

1. BIAC welcomes OECD's efforts to improve dispute resolution

As mentioned in our submissions of 18 February and 31 October 2003 and explained by our representatives at the public consultation of 17 December 2003, the international business community has a strong interest in **practical, fair and reliable procedures to resolve international double taxation disputes**. The dramatic growth of international trade and investments in the last years has considerably increased the risk of such conflicts, in particular for Multinational Enterprises (MNEs) for which intra-group transactions and transfer pricing issues are becoming more and more important.

BIAC has carefully studied the proposals made by the OECD Joint Working Group (JWG) and is pleased to see that the OECD shares, to a large extent, the views of the international business community on the weaknesses of the existing procedures and proposes substantial improvements. We are impressed by the **constructive reaction of the JWG** on the complaints voiced by the international business community and appreciate that the OECD is prepared to intensely pursue its efforts in this field in close cooperation with the business community.

We would like to comment on the OECD proposals following the structure of the Discussion Draft.

2. Improving effectiveness of the MAP process (Part II)

BIAC has previously submitted a **list of reasons** why the MAP is not used more often in practice and mentioned some basic shortcomings in the MAP as it is currently designed and applied in practice. We have also complained that the procedure is sometimes perceived as a kind of “**black box**” where it is uncertain, whether and how a conflict can be resolved.

When we looked through the list of proposals made by the JWG, we found that most of our concerns have been addressed and have resulted in **proposals which will help taxpayers to resort to the MAP more easily and will substantially improve the process**. Most of the proposals are addressed to the tax administrations and - if implemented - would be an important step forward in making dispute resolution more effective and practicable.

At the same time adoption of the proposals would, in our opinion, be a clear **signal to taxpayers** that the competent authorities are willing to enter into an open and fair process whenever a problem of double taxation arises under a tax convention. On the other hand the tax authorities themselves would probably become more aware of their obligation to find a satisfactory solution in case of such a dispute.

We can wholeheartedly **support the proposals** made regarding the improvement of current requirements and practices and would like to stress in particular the following two points:

- **Improving access to the MAP:** Transparency of the rules (proposal 1), Country profiles, in particular also for non-OECD countries (proposals 2 and 3), review of time frames, resources and structure of the current MAP and implementation process (proposals 5 to 7) are very important steps which should be implemented as soon as possible.
- **Improving the process of the MAP:** We agree in principle with the proposals regarding the time frame (Annex 2) and contents of the position papers (Annex 3), but suggest a more in-depth discussion of these two proposals would be useful.

3. Proposals for future work and study

We only comment on those proposals where we think that further work is urgent and can lead to useful results:

- **Development of a Manual to the MAP** (proposal 1): We agree that further guidance, e.g. in the form of a “manual”, is helpful, but would like to discuss the contents and form with the JWP. The basic principles and procedural rules should also be mentioned in the Commentary.
- **Time limitations** (proposal 2): This is an important issue since country practice is not always clear and consistent. We highly recommend further steps to find satisfactory solutions.

- **Denial of access to the MAP and obstacle in domestic law or practices** (proposals 4 and 5): These are also important subjects where more guidance is necessary in order to bring cases to the MAP.
- **Suspension of collection of taxes and question of interest and penalties** (proposal 6 and 7): These questions are of a high practical importance and a harmonization/coordination of country practices could be beneficial to all parties involved in the process.
- **Bilateral MAP agreements** (proposal 8): This is an interesting proposal that should be further developed. It could help to improve the bilateral MAP process especially with countries where MAPs are frequently needed.
- **MAP and corresponding adjustments** (proposal 9): For the business community it is very important that corresponding adjustments are really possible in practice. We support further study of these problems.
- **Role of taxpayer in MAP** (proposal 13): For the business community it is very important that the taxpayer has a full opportunity to present the facts and circumstance as well as its views regarding the application of the convention to the competent authorities in all the critical phases of the procedure (including new findings and evidence), and that he is regularly informed on the status of the ongoing procedure. We are satisfied to learn that countries have no intention to charge a fee to process MAP requests and that the information requested from the taxpayer shall not be excessive.
- **Improvement of the MAP decision-making process** (proposals 12 and 14): Business often complains about the long duration of the MAP in certain cases and welcomes all efforts to speed-up the procedure and make it more efficient.
- **Consistency, competitiveness and non-discrimination** (proposal 3 of list of points for further study): Taxpayers have an interest in an open and transparent MAP, and we therefore support the idea of further analysing country practices with regard to the decision-making process, the effect of a decision for subsequent years and the question whether an agreement found in a given case should have, and under which conditions, a precedential effect for other cases.

4. Supplementary Dispute Resolution Techniques (Part III)

Not surprisingly, the ideas of the JWG on supplementary dispute resolution techniques have been analysed with a special interest by the international business community. We would like to give here our first comments and are sure that this issue will be one of the most interesting **subjects for further discussion** at the 7 December meeting in Paris.

We share the view of the JWG that the MAP provides for a generally effective method of resolving international tax disputes. We also agree with the finding in the

report that one of the major weaknesses of the current MAP is the fact that **countries are not required to come to an agreement**. BIAC further agree with the idea that the MAP shall not be replaced, but shall be supplemented by another dispute resolution mechanism.

Mediation techniques, where an independent third party assists the disagreeing parties in reaching a decision, have certainly their merits. But it seems to us that such techniques are not the instrument of choice for international tax disputes. Based on our experience. There is in such disputes sometimes a lack of “good will” (for political or other reasons) to come to an agreement, although the facts are on the table and technical arguments have been exchanged extensively.

4.1 Arbitration as BIAC’s preferred supplementary mechanism

BIAC has a clear preference for an **arbitration type of supplemental dispute resolution mechanism**. As it is mentioned in the Discussion Draft, a number of decisions have to be made when such a mechanism is chosen. In a further step the procedural rules have to be laid down, in order to make the procedure work.

We share the conclusion of the JWP that **optional solutions**, where it is up to the two parties to decide in a given case whether a case shall be submitted to an arbitration procedure, do not really improve the situation.

As a minimum, submission of unresolved cases to the arbitration procedure must be mandatory (**mandatory submission**). Both parties are then under an increased pressure to find an agreement within a given time period. As the experience with the EU arbitration convention shows, this pressure helps in most cases to find solutions which are acceptable for the taxpayer.

4.2 Mandatory resolution

The JWG seems to be cautious when it comes to **mandatory resolution** of cases under an arbitration procedure. As it is mentioned in the Discussion Draft mandatory submission means implicitly that both parties are accepting the idea that a **third party will decide** in a given case.

A possibility which is **between the mandatory submission and the mandatory decision** by the arbiters is the one chosen in the EU arbitration convention for transfer pricing disputes. Under that procedure a case must be submitted to the arbitration body (Advisory Commission) and the arbiters have to propose a solution which avoids double taxation, but it is then up to the competent authorities to decide whether the proposed solution shall be implemented or whether the double taxation shall be avoided in another way. The role of the arbitration body is, in such a procedure, similar to that of a **mediator** (independent third party that would propose a possible solution). In BIAC’s view such a solution would be a minimum step, in particular since the large majority of the OECD members already have accepted such a solution in the EU arbitration convention

4.3 Implementation of the new procedure

The JWG suggests an approach which would **build on the existing wording of OECD model tax treaties** (article 25) and would complement the **Commentary** by suitable solutions providing 1) for a bilateral engagement of both parties to enter into an arbitration procedure in cases where the dispute cannot be resolved (mandatory submission), and 2) for procedural rules that would make the new procedure work.

As mentioned in the Discussion Draft such a solution has the disadvantage that there is **no obligation to resolve the disputes in all cases**, since the wording of existing tax treaties does **not “oblige”** the competent authorities to come to a solution (“shall endeavour”).

As compared to a **special arbitration clause in the treaty itself**, which provides for a mandatory resolution of the cases, such a solution is weaker. It has, however, the advantage that it could be implemented more easily.

BIAC is of the opinion that **multiple approaches should be followed** in the future work of the JWG. **First**, we share the view expressed in the Discussion Draft that those countries who wished to develop a **binding arbitration clause** for handling tax disputes in their bilateral relationship should be given guidance by a model for a new article and attendant Commentary. **Second**, countries who can, for practical, judicial or political reasons, not go so far should be offered in the Commentary wording for a **binding agreement** under the existing mutual agreement article and the necessary procedural rules. **Third**, consideration should be given, as a minimum step, that article 25 should be reworded as a **mandatory requirement** of the contracting states to reach an agreement to eliminate double taxation. This would signal the intention of the states to find an agreement in all cases submitted in a mutual agreement procedure.

4.4 Procedural rules

Concerning the envisaged **procedural rules**, BIAC would like to refer to the proposals made by the ICC and by the IFA (annex to the Discussion Draft), which offer solutions for most of the problems found in practice. Those proposals must of course be thoroughly discussed in order to find procedures which on the one hand work in practice and are, on the other hand, not too burdensome and costly for the parties involved.

5. Final remarks

Once again, BIAC would like to thank the OECD JWG for its constructive role in the ongoing efforts to improve the rules and procedures used to resolve international taxations conflicts. We are sure, that these efforts will be to the benefits of both the tax administrations and business community. We are also confident that it will be possible to develop reasonable procedures which can be applied in cases where the improved MAP does not result in a satisfactory result and which can really be used in

practice by interested taxpayers. In this respect we would encourage the JWG to envisage solutions in which a submission of unresolved cases is always possible for the taxpayer (mandatory submission), and by which it is made sure that double taxation will be eliminated. BIAC will be pleased to further discuss these issues and to assist in developing suitable procedural rules.