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Committee of Experts on International Cooperation in Tax Matters
Fourteenth Session

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Item 5 (c) (v) of the provisional agenda*
The Mutual Agreement Procedure

MUTUAL AGREEMENT PROCEDURE—DISPUTE AVOIDANCE AND RESOLUTION

Introduction

The Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure—Dispute Avoidance and Resolution (E/C.18/2017/CRP.4) (the April paper) was presented to the 14th session of the Committee in April 2017. It gave an update of the work of the Subcommittee before the Subcommittee term came to an end at the end of June 2017 (as with all other Subcommittees). The Subcommittee was formed by the Committee in 2015 and its mandate was as follows:

> The Subcommittee is to consider and report back to the Committee on dispute avoidance and resolution aspects relating to the Mutual Agreement Procedure, with a view to reviewing, reporting on and, as appropriate, considering possible text for the UN Model and its Commentaries, as well as related guidance, on issues such as, in particular:
>
> - Options for ensuring the MAP procedure under Article 25 (in either of its alternatives in the UN Model) functions as effectively and efficiently as possible;
> - Other possible options for improving or supplementing the MAP procedure, including the use of non-binding (such as mediation) forms of dispute resolution;
> - Explore issues associated with agreeing to arbitration clauses between developed and developing countries;
> - Means of dispute avoidance, such as Advance Pricing Agreements (APAs), while recognizing the primary role of the Subcommittee on Article 9 (Associated Enterprises) and the UN Practical Manual on Transfer Pricing for Developing Countries in addressing APAs; and
> - The need or otherwise for any updates or improvements to, the Guide to the Mutual Agreement Procedure under Tax Treaties approved by the Committee at its Annual Session in 2012.

* E/C.18/2017/4

> The Subcommittee is to focus especially on issues affecting developing countries, possible means of addressing them in a practical manner, and possibilities for improving guidance and building confidence in dealing with the issues in this area. It is mandated to provide its final report to the Committee at the April session in 2017, particularly addressing, as its major priority, which improvements, if any, as are most likely to be accepted by the Committee for inclusion in the next version of the UN Model. It was also agreed at the twelfth and thirteenth sessions, that work on non-binding dispute resolution options should be a priority.

Overview of the Subcommittee work

The Subcommittee worked on a number of key issues to improve both the efficiency of the MAP, and to clarify some of the terms and procedures used in the context of an alternative dispute resolution mechanism. These issues were outlines in four proposal papers, attached to the April paper. They were:

1. Non-Binding Dispute Resolution - Potential Changes to Article 25 of the UN Model;
2. Changes to the UN Model deriving from the final Report on BEPS Action Plan 14;
3. Proposed Outline for a UN Handbook on Dispute Resolution; and
4. Potential Improvements and proposed outline to the revised UN Guidance on the MAP (the GMAP).

Decisions for the 15th Session (April 2017)

The Report on the fourteenth session of the Committee (E/2017/45-E/C.18/2017/3) notes as follows:

> 89. Mr. Mensah, on behalf of the Coordinator of the Subcommittee on the Mutual Agreement Procedure — Dispute Avoidance and Resolution, Kim Jacinto-Henares, who could not be present at the session, presented the issues for final consideration by the Committee.
>
> *Changes to the United Nations Model Double Taxation Convention between Developed and Developing Countries*
>
> 90. Mr. Mensah introduced the first topic for consideration by the Committee: a proposal to add a sentence to paragraph 4 of article 25, alternatives A and B, to explicitly address the possibility of non-binding dispute resolution procedures, as well as a proposed new commentary on article 25 to explain the textual change. The proposal was the outcome of the meeting of the Subcommittee on the Mutual Agreement Procedure — Dispute Avoidance and Resolution held in February, in Brussels, with logistical support from the European Commission. Mr. Mensah thanked the European Commission for that support. 91. The change to the text of the Model Convention was rejected by the majority of the Committee members present and was not incorporated into the Model Convention itself. After some discussion, it was agreed to address that possibility in the commentary on article 25 in a new paragraph 41.1. The Committee approved the new revised language of the commentary.

Approval of the outline of the handbook on dispute resolution and of the outline of the revised version of the guide to the mutual agreement procedure

92. Mr. Mensah introduced the topic and requested Ms. Falcão to provide further input. She reminded the Committee that, during the thirteenth session, there had been wide support from the members of the Committee for a handbook and a guide, for emerging and developing countries in particular, on how to avoid and resolve cross-border tax disputes. This is an approach that the Committee had already adopted successfully in the area of transfer pricing and tax administration and was being asked to consider in the area of extractive industries. 93. The Secretary of the Committee noted that the main difference between the two products, as originally conceived, would be that the handbook on dispute resolution would be aimed at countries that did not yet have much experience with the mutual agreement procedure and other forms of dispute resolution, whereas the guide on the mutual agreement procedure would be directed at countries that already had such experience. 94. The Committee approved the outlines of the handbook and the guide, highlighting that such approval demonstrated that the Committee saw the need for those products to be concluded and approved the Subcommittee's line of work. It was noted that, since no text had yet been developed, further approval would need to be sought from the next membership of the Committee on the text and substance of the handbook and the guide and on how the two documents should best relate to each other.

Further work by the Subcommittee

95. It was suggested that some members of the Subcommittee might be asked to continue working, in their personal capacity, in a small group under the coordination of the International Tax Cooperation Unit of the secretariat, to further develop the handbook and the guide, for consideration at the fifteenth session by the next membership of the Committee. The Committee approved that approach and requested the secretariat to lead the work with a small group of lead authors drawn mostly from the Subcommittee. Once the Committee had agreed on the guidance documents, capacity development activities could follow in this area, on the basis of those documents.

Changes to the United Nations Model Convention derived from the final report on action 14 of the Group of 20/OECD Action Plan

96. Mr. Mensah asked a representative of OECD, Jacques Sasseville, to explain the proposed changes to the United Nations Model Convention following the changes made to the OECD Model Convention derived from action 14 of the Group of 20/OECD Action Plan. Mr. Sasseville recalled that the proposed changes to the United Nations Model Convention had been originally suggested in 2016 and that the changes to the OECD Model might be relevant for the United Nations Model Convention and provide useful clarifications or

additional explanations. He presented a paper on changes to the United Nations Model Convention derived from the final report on action 14 of the Group of 20/OECD Action Plan, highlighting that the paper was divided into four parts. Part 1 refers to the recommendations of the Subcommittee for changes to the commentary on the United Nations Model Convention, which should substantially change the commentaries; part 2 relates to changes that could either be made to the commentaries on the United Nations Model Convention or incorporated into the guide on the mutual agreement procedure; part 3 refers to the changes that the Subcommittee recommended be incorporated into the guide, which would therefore mean that further changes in the United Nations Model Convention would not be required; and part 4 refers to changes that the Subcommittee did not consider to be relevant for the United Nations Model Convention or the guide. Mr. Sasseville led the discussion on parts 1 and 2 of the paper. Parts 3 and 4 were not put to the Committee's consideration because they would not lead to substantive modifications to the commentary on the United Nations Model Convention. Those parts could be considered within the context of the guide, at a later stage, or not at all.

Changes to the commentary

97. The Committee approved the following changes to the commentary on the United Nations Model Convention:

(a) The first part of paragraph 9 of the commentary on article 25 was amended;

(b) The quotation of paragraph 26 of the OECD Model Convention (with adaptations) that is currently found in paragraph 9 of the commentary on article 25 of the United Nations Model Convention was amended so that, in the last sentence of that paragraph, "should be made clear" would now read "must be made clear";

(c) Changes were made with respect to the treatment of interest and penalties in a mutual agreement procedure in order to reflect legal interpretations and policy considerations that are equally relevant for the United Nations Model Convention and for the OECD Model Convention, in which they will also be reflected. The Committee approved the new language proposed in the discussion paper as follows:

(i) Replacing the quotation of paragraph 4 of the OECD Model Convention with the new version of the paragraph that will be included in the OECD Model Convention. This paragraph is to be included in paragraph 4 of the commentary on article 2 of the United Nations Model Convention;

(ii) Replacing the quotation of paragraph 49 of the OECD Model Convention that is currently included in paragraph 9 of the commentary on article 25 of the United Nations Model Convention with the new paragraphs 49 to 49.3 that will be included in the OECD Model Convention;

(d) The incorporation of new paragraphs 6.1 to 6.3 of the changes to the commentary on the OECD Model Convention proposed in November 2016, even

though it was recognized that the final version of those paragraphs, which are expected to be introduced in the OECD Model, is not yet available;

(e) The incorporation of paragraphs 47 and 48, which are proposed to be incorporated into the OECD Model Convention, in the commentary of the United Nations Model Convention to deal with the policy considerations related to the suspension of collection of taxes;

(f) The Committee approved the amendment to paragraph 9 of the commentary on article 25 of the United Nations Model Convention, which entails:

(i) Adding the new paragraphs 37.1 to 37.5 immediately after paragraph 37 to address the issue of multilateral mutual agreement procedures and advance pricing agreements;

(ii) Amending paragraph 9 of the commentary on article 25 by replacing paragraph 52 with a new paragraph;

(iii) Amending paragraph 9 of the commentary on article 25 by replacing paragraph 55 with paragraphs 55 to 55.2.

98. Mr. Mensah thanked the Subcommittee for its work and encouraged the relevant members to continue working on the development of the handbook and the guide, under the coordination of the secretariat, until the next session of the Committee.

Updated work for the 15th session

As indicated above, the Committee agreed at the 14th session in April 2017 on an outline for the UN Handbook on Dispute Avoidance and Resolution, and that the Secretariat should continue working on this leading up to the October 2017 15th session in Geneva. This document attaches the extended outline as the result of that ongoing work. It focuses on the following chapters: Chapter 2, 3, 4, 5, 6 and 8 of the outline. The draft chapters remain a work in progress, subject to the Committee decision on the work. They do not necessarily reflect the views of all members of the Subcommittee.

The draft chapters are submitted to the new membership of the Committee so that they are in a better position to evaluate the work that has been done to date, to make decisions as to any future work, and to provide guidance on how the work should develop. The Committee will also be asked to consider the composition of the Subcommittee and, should a Subcommittee be formed, to agree that it can accept an offer on the part of Mexico, to host its first meeting in Mexico City on the 22-23rd January 2018.

Matters for consideration

It is up for this new membership of the Committee to approve the continuation of the work of the former Subcommittee. This would entail a decision as to whether the work should be continued, and then a decision about the mandate of the re-formed subcommittee. Finally, a Subcommittee Coordinator should be chosen who would decide on the membership of the Subcommittee and take the work forward.

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PROPOSED UN HANDBOOK ON DISPUTE AVOIDANCE AND RESOLUTION: PREPARATION OF MORE ELABORATED OUTLINE FOR CONSIDERATION BY UN TAX COMMITTEE IN OCTOBER

Overall Coordination – UN Secretariat

Advisory Steering Group:

Eric Mensah (Ghana), Jeffrey Owens (WU), Cym Lowell (ICC)

1. General Background

Chapter	Proposed Chapter Facilitators	Proposed Additional Drafting Group Members
	Ignatius Mvula (Zambia)	Pragya Saksena (India)
	Stig Sollund (Norway)	Kim Jacinto Henares (Independent)
	Jorge Rachid (Brazil)	Juliane Gröper (Subcommittee)
		Mukesh Butani (BMR Legal)
		Sriram Govind (WU)
		Clement Migai (WU)

[Draft not yet available]

2. Dispute Resolution: Domestic Procedures

Chapter	Proposed Chapter Facilitators	Proposed Additional Drafting Group Members
	Sol Piccioto (Subcommittee)	**Shreya Rao (Rao Law Chambers)**
	Pragya Saksena (India)	**Mirna Screpante (WU)**
	Henry Louie (USA)	**German Saldivar Osorio (Subcommittee member, Mexican Ombudsman)**

Draft received: _____√_20.09.2017_____

2 Domestic Tax Procedures

Draft provided by PROCURADURIA DE LA DEFENSA DEL CONTRIBUYENTE, PRODECON, MEXICO – Chapter 2

The current section of this handbook was elaborated taking into consideration the legal framework of Mexico. In addition, certain aspects of this section have also taken into account the legal framework of the United States and international tax law jurisprudence.

2.1 Tax Audit Process

The Tax Authorities should have the powers to verify that taxpayers have complied with the tax provisions and to assess tax deficiencies or unpaid contributions, as well as to determine if any tax offenses have been committed and provide information to other tax authorities.

Audit procedures that the Tax Authorities use to control the fulfillment of tax obligations are normally one of the following: field audits, desk audits and electronic reviews.

Taxpayers that are being audited should be entitled to file with the Tax Ombudsman a request to obtain a conclusive agreement (pre-determination settlement) in order to stop the audit and try to resolve their tax situation when they have a different appreciation of the facts or omissions observed by the Tax Authorities in the tax audit.

Field Audits

Tax Authorities should exercise their powers to verify the compliance of tax laws with field audits; such audits, should be initiated with a field audit order which must meet the requirements of tax legality which are: i) the order should be issued in writing or a digital document; ii) the issuing authority must be indicated in the document; iii) the place and date of issuance must be indicated in the order; iv) the legal basis and the reasons for the audit must be stated and the measures taken must be indicated in the document, along with the objective or purpose in question; v) the written signature or the digital signature of the official issuing the order; and vi) the name(s) of the person(s) for whom the notification is intended must appear on the order (when the name of the person for whom the notification is intended is not known, sufficient information to identify him should be given); vii) the location or locations where the field audit is to take place; and viii) the name(s) and number of the field auditor(s).

The procedure of a field audit should be established in the relevant tax law, normally in the tax code of the jurisdiction. The field audit should be conducted at the location or locations indicated in the field audit order which should normally be the tax domicile of the taxpayer. When the field auditors arrive at the location where the proceeding is to take place, if the person to be audited or his representative is not present, the field auditors should leave a summons with whoever is at the location giving instructions to the person who is to be audited to wait for the field auditors at a given time on the next day in order to receive the field audit order; if the taxpayer subject to the audit is not at the location at the indicated time, the field audit should begin with whoever is at the location. In addition, at the beginning of a field audit at a tax domicile, the field auditors who will take part in the audit must identify themselves to the person in whose presence the proceeding is to be carried out, and will instruct said person to appoint two witnesses; if these appointments are not made, or the persons who are appointed do not agree to act as witnesses, the field auditors should appoint two witnesses, and they should record this fact in the corresponding report.

Field audits at a taxpayer's tax domicile should follow procedures set in the applicable tax laws. Whenever a field audit is conducted at a tax domicile, a report should be prepared detailing the facts or omissions found by the field auditors. Facts or omissions recorded by the field auditors in reports would serve as evidence of the existence of facts or omissions that were found for the purposes of any contributions payable by the taxpayer subject to the audit in the period under review. If during the field audit the Tax Authorities become aware of facts or omissions that may constitute a failure to comply with tax provisions, they should detail such facts or omissions in preliminary audit reports.

The officials of the Tax Authorities realizing the audit should provide taxpayers with a final preliminary report where a preliminary determination should be set with regards to the compliance with the tax laws for the period under review. Between the final preliminary report and the final audit report, a period of at least twenty days must elapse, during which the taxpayer should be able to submit documents, books, or records that rebut the existence of facts or omissions, as well as to provide taxpayers with the possibility of correcting their tax related irregularities. In the case that

the taxpayer does not file a response to the preliminary results of the audit, the taxpayer will be deemed to have accepted the facts recorded in the preliminary final report.

A final audit report should be issued by the Tax Authorities in order to notify the taxpayer of the results of the audit. If at the conclusion of the final audit report the taxpayer subject to the audit or his representatives are absent, a summons should be left at the tax domicile instructing the taxpayer that he should be present at a given hour of the following day. If the taxpayer fails to arrive to the tax domicile at the determined hour, the final audit report should be prepared in the presence of whoever is at the location of the audit. The final reported should be signed by any of the field auditors involved in the audit, the taxpayer subject to the audit or his representative, and two witnesses. A copy of the final report should be provided to the taxpayer in order for him to know the tax situation that has been determined by the field auditors with regard to his compliance of the tax laws for the audited period.

Once the field audit at the tax domicile has concluded, to begin another field audit of the same person a new order should be issued. If the review authorities refer to the same taxes and periods, a new review may only be conducted when facts other than those already reviewed have been detected.

The Tax Authorities should conclude a field audit conducted at a taxpayer's tax domicile within a maximum term of twelve months as of when the taxpayer received notification of the beginning of the review by the Tax Authorities.

When, in conducting field audits, the Tax Authorities become aware of facts or omissions implying the failure to comply with tax provisions, they will assess the unpaid taxes in a ruling of which personal notification should be given to the taxpayer within a maximum term of six months as of the date on which the final field audit report was prepared.

Desk Audits

The Tax Authorities have the power to conduct desk audits within the premises of their offices by requesting taxpayers, parties jointly and severally liable with them, or third parties submit reports, data or documents or ask that accounting records or a portion thereof be submitted for the exercise of their review powers unrelated to a field audit within the offices of the Tax Authorities.

Desk audits should follow a determined procedure set by in the tax law and should have a maximum time length of twelve months. They should be initiated by notifying a request to the taxpayer at their tax domicile or wherever the tax laws authorize them to do so, including the place where such taxpayers are located in the case they are individuals. The request should indicate the location where the reports or documents should be submitted to, as well as the term for doing so. In addition, it is important to mention that in order for the obligation to be met, the reports, books or documents in question should be submitted by the person to whom the request was addressed or by his representative.

After reviewing the reports, data, documents or accounting records requested from taxpayers, parties jointly and severally liable with them, or third parties, the tax authorities should prepare a preliminary desk audit report detailing the facts or omissions detected that would constitute a failure to comply with tax provisions by the taxpayers or the parties jointly and severally liable with them.

In the case that the Tax Authorities do not have observations regarding the compliance of the taxpayer with his tax obligations, they will notify taxpayers or the party jointly and severally liable with them, through an official letter, of the conclusion of the desk audit of the documents that were submitted by the taxpayer.

Once the preliminary desk audit report is issued by the Tax Authorities, it should be notified to the taxpayer or its jointly and severally liable parties and they will have a term of twenty days to submit documents, books or records that rebut the facts or omissions reported therein, as well as to elect to correct their tax related irregularities. The taxpayer will be deemed to have accepted the facts or omissions recorded in the preliminary desk audit report if he fails to submit documentation rebutting such facts or omissions during the period granted to file such documentation.

If the taxpayer fails to rebut the determinations in the preliminary desk audit report made by the Tax Authorities or self-correct his tax situation, a final desk audit report should be issued determining the unpaid taxes that the taxpayer has incurred. Within a period of a maximum of six months after the final desk audit report is issued a tax liability ruling should be issued by the Tax Authority which should be notified to the taxpayer in order for him to know his tax situation.

Electronic Reviews

Tax Authorities are entitled to conduct electronic reviews of taxpayers based on the information and documentation that they have within their archives and they should last at most six months. The Tax Authorities will let taxpayers know the facts that are derived from the omission of the payment of their taxes or in the unfulfillment of their tax obligations, through a provisional ruling which may be accompanied by a predetermination of a tax debt.

The provisional ruling will request the taxpayer, its jointly or severally liable parties, or third parties, to submit within a period of fifteen days after the notification of the provisional ruling, a response with its arguments and attached information and documentation, that seeks to disprove the irregularities or prove the payment of taxes contained in the provisional ruling. The taxpayer can also accept the determinations established in the provisional ruling and proceed to self-correct his tax situation.

In the case that there is no response to the provisional ruling the facts and omissions contained in the provisional ruling will be considered a final ruling. On the other hand, if the taxpayer files a

response to the provisional ruling, his arguments, information and documentation should be analyzed by the Tax Authorities.

Tax Authorities should have a maximum term of forty days to issue and notify the ruling based on the information and documentation that they have access to in their archives after the taxpayer has not submitted a response in the legal term of fifteen days after the provisional ruling is notified to him, once the response presented by the taxpayer has been received, or once the time has lapsed on an additional term of ten days that can be granted to the taxpayer to provide further documentation.

2.2 Litigation Process

Taxpayers can challenge federal tax resolutions issued by the Tax Authorities via administrative appeals or administrative lawsuits. The difference in the aforementioned remedies is that the administrative appeal is filed with the Tax Authorities, whereas the administrative lawsuit is filed with the Administrative Court. In addition, administrative appeals are optional since a resolution issued by the Tax Authorities may be challenged first by an administrative appeal and once this remedy is resolved, the taxpayer may challenge the new resolution of the Tax Authorities with the Administrative Court. On the other hand, once the administrative lawsuit is filed there is no opportunity to file an administrative appeal with the Tax Authorities.

An issue that normally concerns taxpayers is the importance of guaranteeing the tax liability determined against them by the Tax Authorities. If a taxpayer seeks to challenge a tax determination issued against him by the Tax Authorities he will not be required to guarantee the tax liability if he challenges it via the administrative appeal. On the other hand, if he decides to challenge the resolution with an administrative lawsuit filed with the Administrative Court he will normally be required to guarantee the tax liability, unless he files his lawsuit under the recently enacted tax substance trial which is only available to large taxpayers for tax liabilities of large amounts beyond approximately 310,000 USD approximately[1].

In addition, taxpayers may request assistance to the Tax Ombudsman to challenge tax liabilities determined against them. The two main remedies the Tax Ombudsman can provide taxpayers in order to litigate their tax liabilities are conclusive agreements (pre-determination settlements) and the complaint procedure. Both these remedies provided by the Tax Ombudsman are alternative dispute resolution procedures that seek to defend taxpayers from the determination of tax liabilities against them. A great advantage provided by conclusive agreements is that they stop tax audits that are being performed by the Tax Authorities in order to try and get to an alternative resolution of the tax controversy between the Tax Authorities and the taxpayers.

Finally, it is also important to mention that the judgement issued by the Administrative Court can be challenged by a constitutional proceeding called *Amparo Directo* where the legality of the resolution of the Administrative Court may be challenged and resolved by Federal Circuit Courts of Appeals.

[1] http://www.banxico.org.mx/portal-mercado-cambiario/, August 14, 2017.

Administrative Appeal

The first remedy a taxpayer has access to is the administrative appeal which is presented with the Tax Authorities in order to challenge a tax liability determined against him. This appeal will provide the taxpayer the opportunity to refute the facts and omissions stated in the tax determination issued by the Tax Authorities. The administrative appeal has some clear advantages. First, there is no necessity to guarantee the tax liability during the process in which a resolution is issued by the Tax Authorities. Second, the procedure is simple and the ruling is issued quickly since the Tax Authorities are required to resolve the matter in a period of 3 months or else there will be a presumption that the appeal is resolved in a negative manner and the taxpayer will have the possibility of challenging the resolution via an administrative lawsuit upon the Administrative Court. Third, the taxpayer has the possibility of submitting evidence supporting the lawsuit in uncertified photocopies and can request the Tax Authority to obtain the evidence contained in the file on which the resolution is based and is in the power of the Tax Authority. Fourth, this remedy provides the taxpayer an opportunity to provide information and evidence that was not provided during the audit and that would be inadmissible in a future administrative trial.

On December 14, 2016, a new type of administrative appeal called the tax substance administrative appeal was enacted into law as part of a modification to the Federal Fiscal Code of Mexico. This new procedure is similar to the one that already existed with 2 principal distinctive characteristics. First, the tax substance administrative appeal is a new procedure that makes a strong emphasis on orality and celerity to resolve the substance of a tax case instead of paying attention to the formalities of a challenged resolution. Second, the resolution that is challenged through this procedure should have a determination of a tax liability of at least 310,000 USD approximately.[2]

Administrative Lawsuit

An administrative lawsuit should be filed with the Administrative Court in order to challenge a tax liability determined by the Tax Authorities and can be filed after the administrative appeal is resolved or it can be filed directly without the need of filing an administrative appeal. The administrative lawsuit is a more specialized remedy than the administrative appeal and it requires that original or certified copies of the documentation that supports the lawsuit be filed with it. In addition, there is a great advantage in filing an administrative lawsuit since this remedy provides the taxpayer with provisional remedies such as a suspension of the execution of the challenged resolution. Also, taxpayers will have their case resolved by an independent body in contrast with the administrative appeal that is resolved by the Tax Authorities, even though the Administrative Court has been considered part of the Executive Branch of Government and not part of the Judicial Branch, according to a legislative reform of 2016 the Administrative Court is now considered autonomous and not part of the Executive Branch anymore.

[2] Idem.

Filing an administrative lawsuit can lead the way to four types of procedures where a resolution issued by the Tax Authorities is challenged: i) the lawsuit in writing via the traditional proceeding, ii) the online lawsuit; iii) the summary judgement lawsuit (low amount tax liability resolutions of a maximum amount of 23,000 USD approximately[3]) or the tax substance trial (high amount tax liability resolutions of a minimum amount of 310,000 USD approximately[4]).

All the procedures ignited by the administrative lawsuit, except the tax substance trial, must examine the causes that may lead to the declaration of plain nullity of the challenged resolution. Normally, the Administrative Court seeks to nullify the resolutions of the tax authorities for the omission of formal requirements or for flaws in the procedure, without the need to study the substance of the case presented upon it which would require a more detailed and specialized analysis. This situation may bring a faster annulment but it may also carry the disadvantage of producing a judgement that declares the nullity of the resolution in order to replace the procedure or oblige the tax authorities to issue a new resolution which may bring about a new resolution by the tax authorities that can eventually be challenged once again. On the other hand, the tax substance trial seeks to solve the core of the tax controversy by analyzing the substance of the case and not the plain lack of formalities of the challenged resolution and avoid the necessity of challenging a new resolution issued by the Tax Authorities.

It is important to mention, that the tax substance trial which is a new type of administrative lawsuit as previously stated, was enacted into law on December 14, 2016. This new procedure is a great innovation in the impartition of justice in Mexico due to its emphasis on orality and celerity to resolve the substance of a tax case instead of paying attention to formalities of a challenged resolution. The tax substance trial is a response to the actions of tax authorities that normally make observations with regards to the unfulfillment of formalities in the tax obligations of taxpayers, and based on this, regularly, determine tax deficiencies based on disproportional tax bases that do not take into account the principal tax obligation of the audited taxpayer or his economic reality.

Conclusive Agreements (Pre-Determination Settlements)

The laws and regulations that govern the Tax Ombudsman should provide for an alternative dispute resolution procedure called conclusive agreements (pre-determination settlements) that would enable taxpayers which are being subjected to an audit to reach a negotiated agreement with the Tax Authority in order to settle the tax controversy. The disagreement should be regarding the facts or omissions stated by the Tax Authority in a legal document before the tax debt is determined by the Tax Authority. This procedure is original of Mexico and was designed by PRODECON jointly with the Mexican Tax Authorities, it is very similar to a settlement between a taxpayer and the Tax Authority with the difference that it is a binding contract between the parties with the intervention of a third independent party mediator, the Tax Ombudsman, in which the parties get to an agreement regarding the tax controversy with the help of a public organism that is specialized in tax matters.

[3] Idem.
[4] Ibidem.

A great incentive that the Mexican Federal Tax Code provides is that taxpayers are entitled to a decrease of a 100% of the penalties for the unfulfillment of their tax obligations on the first occasion a Conclusive Agreement is signed and on further occasions the taxpayer could be entitled to a decrease in fines that could reach 80% of the applicable penalties.

The objective of this innovative instrument is to provide taxpayers with an alternative dispute resolution procedure that is designed to promote, facilitate and make transparent a reachable, timely and consensual solution of tax disputes, avoiding further litigation that may arise between taxpayers and Tax Authorities during the exercise of their audit powers.

Conclusive Agreements are developed in a procedure that has at its fundamental issue the qualification or assessment which the Tax Authority makes of the facts or omissions found during an audit and can be related to the interpretation of laws as well as to the assessment of taxpayer´s evidence.[5] If the taxpayer that is being subjected to an audit disagrees on the characterization of the facts or omissions determined by the Tax Authority during the audit, it can seek the intervention of the Tax Ombudsman, in order to try to negotiate an objective determination of the issues at hand during the audit in accordance with the law to solve the tax dispute.

The objective of Conclusive Agreements is to reach a consensus between the Tax Authority and the taxpayer on the qualification of the facts or omissions being analyzed in the audit. Conclusive Agreements are instruments that seek to end the audit by reaching an agreement on the possible tax debt that would be incurred by the taxpayer or in the lack of it. This instrument seeks to bring a practical and executable solution to the tax controversy.

Complaint Procedure

The Tax Ombudsman Law should provide for a complaint procedure. In Mexico, the Organic Law of PRODECON establishes that any individual may file complaints to report alleged illegal acts against his/her tax rights, and appear before the Tax Ombudsman´s Office to such effect, be it personally or represented by legal counsel. Complaints should be filed in writing by any means available, they can even be presented via email or through the webpage of the Tax Ombudsman, and in exceptional cases, the Tax Ombudsman may authorize any other means communication to file such complaints.

The complaint procedure should not be a judicial process, it should be designed to defend taxpayers in an informal and simple manner to reach easier, effective and timely solutions for the affected taxpayers. The process should be easily accessible for ordinary taxpayers and it should be characterized as a procedure that lacks formalities to allow taxpayers to find a practical solution to the conflicts that arise between taxpayers and Tax Authorities.

[5] Bernal Ladron de Guevara, Diana. *Taxpayers' Rights in a Transparent and Global Society – The Mexican's Ombudsman experience,* Prodecon – Procuraduria de la Defensa del Contribuyente. Mexico, 2017. Page 85.

Such procedure should be seen as a public alternative mean to solve disputes between the tax administration and taxpayers, rather than an instrument to develop or endorse a tax dispute.[6] The Tax Ombudsman should take a role of a third party mediator that seeks to resolve the conflict between the parties providing its expert knowledge on tax matters. It should be provided that the main objective of the complaint procedure is to reach the best possible solution to the disagreement between the taxpayers and the Tax Authorities and to avoid litigation in the courts.

The objective of the complaint procedure should be to find solutions which will be convenient not only for the taxpayer but also for the Tax Authority. Mediation by the Tax Ombudsman, as is the case in Mexico of PRODECON, can ensure that there are agreements that resolve the substance of controversy between the Tax Authority and a taxpayer in a transparent and institutional manner.

Tax disputes may be resolved by the complaint procedure when public officials appointed to the Tax Ombudsman´s Office request information on the case a taxpayer is dealing with and will seek to engage the Tax Authority and negotiate on behalf of the taxpayer for the best solution affordable in accordance to law. In the case the Tax Authority sees its actions are not in conformity with the applicable laws and regulations, the Tax Authority may revoke its acts. On the other hand, if the Tax Authority reaffirms its position disregarding the content of the tax law, the Tax Ombudsman´s Office may issue a recommendation that will make the Tax Authority answer in accordance to law why it has not paid attention to the request of the Tax Ombudsman to revoke its acts.

2.3 Special Tax Chambers / Tribunals

The legal system of a country should be required to have a specialized court that would be responsible to deal with tax issues due to their high complexity and because judges that deal with this types of cases need to be specialized in tax matters to issue their judgements. These specialized courts are normally referred to as Tax Courts, Special Tax Chambers or Administrative Courts. These types of courts usually deal with tax deficiencies determined against taxpayers which are being challenged in order to see if they are issued in accordance to the tax law.

In Mexico, the Administrative Court (formerly known as the Tax Court) is a jurisdictional body with autonomy to issue its own decisions and it has full jurisdiction. The Administrative Court is a legal entity that is part of the Executive Branch of Government. It is composed of a Superior Chamber, Regional Chambers and the Board of Government and Administration. The Administrative Court, besides dealing with tax issues, has specialized chambers that deal with specific matters such as intellectual property, environmental issues, foreign commerce and administrative responsibility of government officials.

The Mexican Administrative Court hears cases that are filed against definitive resolutions, administrative acts and procedures such as: a) decrees or accords of a general nature; b) tax deficiencies; c) tax refunds; d) fines; e) tax resolutions that affect taxpayers; f) pension denials or reductions; g) resolutions regarding public contracts and tenders; h) damage denial resolutions

[6] Op. Cit, Page 53.

issued by the Government; i) resolutions related to guarantees granted to the Government; j) foreign commerce resolutions; k) administrative resolutions that end a procedure; l) resolutions that resolve an administrative appeal; m) tax treaty benefit denials; n) constructive denial resolutions; o) penalties issued by the Superior Auditing Authority; p) private ruling annulation procedures and q) resolutions that impose administrative responsibility of government officials and administrative appeal resolutions that decide this types of cases.

In the United States, the Tax Court is a court of limited jurisdiction and it hears income, estate and gift, and certain excise tax claims involving deficiencies. In general, in order to file a case with the Tax Court there must be a determination of deficiency, a valid notice of deficiency and a timely filed petition. In addition, the Tax Court has expanded its jurisdiction to cases that do not involve deficiencies such as cases that include actions for redetermination of employment status, actions for relief from determination of joint and several liability, claims for litigation and administrative costs, actions to redetermine interest on a deficiency or an overpayment and tax refunds.

2.4 Tax Ombudsman

Administrative Body

Under Constitutional decree or under the mandate of the superior law in the hierarchy of a legal system a Tax Ombudsman should be established in a jurisdiction to protect taxpayers´ rights to counterbalance the power with which Tax Authorities act within a country. In the case of Mexico, Article 102, Letter B, establishes that the Federal Congress and the legislatures of local states, must establish organisms to protect human rights recognized by Mexican Law. One of such organisms, the Tax Ombudsman, should been granted powers to issue public recommendations (in the case of Mexico they are non-binding recommendations) and be entrusted to file petitions or complaints on behalf of taxpayers; the commented recommendations should oblige public officials to answer them in order to avoid leaving taxpayers in a constant situation of legal insecurity.

A law that seeks to implement the creation of the Tax Ombudsman should be issued by the legislative branch of a government (be it national o state) in order to create the Tax Ombudsman. In Mexico, such legislation is the Organic Law of the *Procuraduría de la Defensa del Contribuyente* (PRODECON) which creates a decentralized entity, non-sectored, with its own legal capacity and patrimony, as well as technical, functional and managerial autonomy. It is important to mention, that PRODECON reports its action directly to the President and is not dependent of a specific ministry. Dependency of PRODECON, the Mexican Tax Ombudsman, from the Ministry of Finance or Tax Administration Service would inhibit its action due to its adversarial nature with such entities since its main objective is the defense of taxpayers. Also, the organic law of the Tax Ombudsman should establish that the budget assigned to it will under no event be lower than the budget assigned to it during the immediately prior year; this should be set as a safeguard in order to avoid repercussions to the Tax Ombudsman for protecting the rights of taxpayers in detriment of the interests of the revenue authorities.

The law that regulates the activity of the Tax Ombudsman (as in the case of the PRODECON) should establish a legal obligation for the Tax Authority to provide information to the Tax Ombudsman upon request with regards to the matters it deals with, hold periodic meetings with the Tax Ombudsman when this entity requests it, and provide information related to in-house criteria for the fulfillment of tax obligations of taxpayers, criteria set with regards to petitions of taxpayers, as to the forms and how to fill them out, and in general, any piece of information required by the Tax Ombudsman for the fulfillment of its purpose.

The non-compliance by the Tax Authority or public officers with the obligations set in the organic law of the Tax Ombudsman should be punished with monetary penalties and administrative accountability measures for public officers who do not comply with the recommendations or requests of the Tax Ombudsman.

Powers

An organism in charge of the protection of taxpayer´s rights should have the sufficient powers to defend taxpayers against the auditing powers of the Tax Authorities which are normally exercised through field audits, in-house audits via the summons of tax documentation or electronic audits. In the case of Mexico, PRODECON has sufficient powers to defend taxpayers in the aforementioned review methods.

The Tax Ombudsman should have sufficient powers to act in the defense of taxpayers that are listed as follows: 1) counsel and advice taxpayers facing authorities´ actions; 2) attend legal defense in courts when the tax debt quantity does not exceed a certain limit; 3) receive any sort of complaints against Tax Authorities´ acts; 4) solve tax legal and specialized consultation; 5) investigate and identify the systematic problems of the taxpayers and to propose to the Tax Authority suggestions for their better solution; 6) issue its opinion about the sense and interpretation of tax regulations at the request of the Tax Authority; 7) propose to the Tax Authority the proper amendments to its internal strategies; 8) call high tax officials to hold meetings with taxpayers´ organizations in order to discuss and propose different kinds of solutions to their main problems; 9) propose before the Tax Legislative Committee of the correspondent Congress or Legislature amendments to tax regulations; and 10) act as an intermediary between taxpayers and Tax Authorities when an audit is taking place, even as a public witness in settlement procedures (Conclusive Agreement Procedures in Mexico) in order to settle, in an alternative way, the tax conflicts that may arise between audited taxpayers and the Tax Authorities.

Advice and Consultation

The Tax Ombudsman should be relied upon by taxpayers for advice and consultation regarding tax matters. A fundamental chore of the Tax Ombudsman should be to attend and resolve any advisory and consultation requests submitted by taxpayers in relation to acts done by Tax Authorities; attending such petitions by providing them with alternatives to resolve the tax problems taxpayers are facing and explain the legal consequences to the acts they are being subjected to.

Taxpayers should be able to contact the Tax Ombudsman to seek opinions regarding situations that are related to actions realized by the Tax Authorities. In Mexico, PRODECON issues a report after analyzing the matter presented to it and such report should provide an interpretation of the tax laws involved in the actions of the Tax Authority that affect taxpayers.

Legal Representation and Defense

A fundamental chore of the Tax Ombudsman should be to represent taxpayers before the Tax Authorities and file any judicial or administrative lawsuits or appeals in order to challenge the determination of tax liabilities issued by the Tax Authorities. Representation of taxpayers should be provided at all levels be it procedures filed with Tax Authorities, the Tax Court, District Courts, Courts of Appeals or the Supreme Court of Justice. In addition, such service should be gratuitous in order to avoid excluding taxpayers that cannot afford private legal counsel. Legal representation by the Tax Ombudsman should be provided until the complete resolution of the case in which aid has been requested by the taxpayer.

In Mexico, legal services provided by PRODECON are limited to cases where the determination of the tax liability is not higher than 43,500 USD approximately.

Issue Proposals to Amend Legislation and Regulations

The defense of taxpayer´s rights by the Tax Ombudsman should comprise the possibility of amending laws or regulations that affect taxpayers. The Tax Ombudsman should seek to create tax laws that are certain, simple and avoid burdens to taxpayers.

PRODECON, Mexico´s Tax Ombudsman, has the capacity to propose legislative amendments to Congress, especially in cases where it has found that the tax law violates the human rights of citizens. Also, PRODECON has the power to issue recommendations regarding the internal regulations of the Tax Administration Service of Mexico in order to ensure a more peaceful coexistence between taxpayers and the Tax Authority and to preserve the rule of law.

Identify Systemic Shortcomings

The Tax Ombudsman should identify any systemic issues causing harm to taxpayers and propose solutions to such shortcomings to the Tax Authorities. Such actions should comprise the study and analysis of systemic problems related to the tax system, which result in the violation of taxpayer rights or create legal uncertainty within the legal system.

Complaint Procedure

The Tax Ombudsman Law should provide for a complaint procedure. In Mexico, the Organic Law of PRODECON establishes that any individual may file complaints to report alleged illegal acts against his/her tax rights, and appear before the Tax Ombudsman´s Office to such effect, be it personally or represented by legal counsel. Complaints should be filed in writing by any means

available, they can even be presented via email or through the webpage of the Tax Ombudsman, and in exceptional cases, the Tax Ombudsman may authorize any other means communication to file such complaints.

The complaint procedure should not be a judicial process, it should be designed to defend taxpayers in an informal and simple manner to reach easier, effective and timely solutions for the affected taxpayers. The process should be easily accessible for ordinary taxpayers and it should be characterized as a procedure that lacks formalities to allow taxpayers to find a practical solution to the conflicts that arise between taxpayers and Tax Authorities.

Such procedure should be seen as a public alternative mean to solve disputes between the tax administration and taxpayers, rather than an instrument to develop or endorse a tax dispute. The Tax Ombudsman should take a role of a third party mediator that seeks to resolve the conflict between the parties providing its expert knowledge on tax matters. It should be provided that the main objective of the complaint procedure is to reach the best possible solution to the disagreement between the taxpayers and the Tax Authorities and to avoid litigation in the courts.

The objective of the complaint procedure should be to find solutions which will be convenient not only for the taxpayer but also for the Tax Authority. Mediation by the Tax Ombudsman, as is the case in Mexico of PRODECON, can ensure that there are agreements that resolve the substance of controversy between the Tax Authority and a taxpayer in a transparent and institutional manner.

Tax disputes may be resolved by the complaint procedure when public officials appointed to the Tax Ombudsman´s Office request information on the case a taxpayer is dealing with and will seek to engage the Tax Authority and negotiate on behalf of the taxpayer for the best solution affordable in accordance to law. In the case the Tax Authority sees its actions are not in conformity with the applicable laws and regulations, the Tax Authority may revoke its acts. On the other hand, if the Tax Authority reaffirms its position disregarding the content of the tax law, the Tax Ombudsman´s Office may issue a recommendation that will make the Tax Authority answer in accordance to law why it has not paid attention to the request of the Tax Ombudsman to revoke its acts.

Conclusive Agreements (Pre-Determination Settlements)

The laws and regulations that govern the Tax Ombudsman should provide for an alternative dispute resolution procedure called conclusive agreements (pre-determination settlements) that would enable taxpayers which are being subjected to an audit to reach a negotiated agreement with the Tax Authority in order to settle the tax controversy. The disagreement should be regarding the facts or omissions stated by the Tax Authority in a legal document before the tax debt is determined by the Tax Authority. This procedure is original of Mexico and was designed by PRODECON jointly with the Mexican Tax Authorities, it is very similar to a settlement between a taxpayer and the Tax Authority with the difference that it is a binding contract between the parties with the intervention of a third independent party mediator, the Tax Ombudsman, in which the parties get to an agreement regarding the tax controversy with the help of a public organism that is specialized in tax matters.

A great incentive that the Mexican Federal Tax Code provides is that taxpayers are entitled to a decrease of a 100% of the penalties for the unfulfillment of their tax obligations on the first occasion a conclusive agreement is signed and on further occasions the taxpayer could be entitled to a decrease in fines that could reach 80% of the applicable penalties.

The objective of this innovative instrument is to provide taxpayers with an alternative dispute resolution procedure that is designed to promote, facilitate and make transparent a reachable, timely and consensual solution of tax disputes, avoiding further litigation that may arise between taxpayers and Tax Authorities during the exercise of their audit powers.

Conclusive agreements are developed in a procedure that has at its fundamental issue the qualification or assessment which the Tax Authority makes of the facts or omissions found during an audit and can be related to the interpretation of laws as well as to the assessment of taxpayer´s evidence. If the taxpayer that is being subjected to an audit disagrees on the characterization of the facts or omissions determined by the Tax Authority during the audit, it can seek the intervention of the Tax Ombudsman, in order to try to negotiate an objective determination of the issues at hand during the audit in accordance with the law to solve the tax dispute.

The objective of conclusive agreements is to reach a consensus between the Tax Authority and the taxpayer on the qualification of the facts or omissions being analyzed in the audit. Conclusive agreements are instruments that seek to end the audit by reaching an agreement on the possible tax debt that would be incurred by the taxpayer or in the lack of it. This instrument seeks to bring a practical and executable solution to the tax controversy.

Issue Interpretation Opinions to the Tax Authorities

The Tax Ombudsman, which has a tax expertise in the service of taxpayers, should be able to issue opinions on tax and customs provisions when the Tax Authorities request them. The Tax Ombudsman should also be able to provide guidance on how the Tax Authorities should proceed in certain cases in order to preserve taxpayers´ rights.

Imposition of Fines

In order for the actions, recommendations or opinions issued by the Tax Ombudsman to be respected by the Tax Authorities, the Tax Ombudsman should have the power to impose fines on public servants of the Tax Authorities who do not attend the requests or recommendations issued by it.

In Mexico, PRODECON has the power to impose fines to public servants of the Tax Authorities who fail to submit a case report in the complaint procedure, fail to report the acceptance of recommendations issued by PRODECON or refuse to perform direct recommendations.

2.5 Advance Rulings/Settlements

Taxpayers should have the right to access advance rulings issued by the Tax Authorities in order to have legal certainty of their tax situation and transactions; in addition, the legal framework of a country should provide the possibility of resolving tax issues with the Tax Authorities through settlements to avoid litigation or administrative appeals.

Advance Rulings

It is essential for taxpayers to have the right to obtain advance rulings so they can obtain certainty regarding their tax status and calculate the tax effects of their possible transactions. Jurisdictions should try to accompany the tax rulings issued by the Tax Authorities with a binding authority in order for taxpayers to have tax certainty. In addition, some jurisdictions may grant taxpayers the right to litigate such advance rulings in the case they consider they are not in accordance to the tax law.

Advance rulings have developed as a consequence of a change in the mentality within Tax Authorities in order to bring about incentives for tax compliance and economic investments, and in attention to the requests of taxpayers to obtain tax certainty.[7] These instruments develop a sense of trust and foreseeable reliance in taxpayers with respect to their future actions and the actions of the Tax Authorities in order to create a better business environment in the jurisdiction.

The definition of advance rulings encloses a wide variety of tax arrangements between the Tax Authorities and taxpayers. Advance rulings may occur in the form of and advance tax ruling or an advance pricing arrangement. An advance tax ruling can be characterized as a statement provided by the Tax Authorities regarding the tax treatment of a taxpayer with respect to his current tax status or his future transactions and on which he is entitled to rely to a certain extent. Advance pricing agreements can be defined as an instrument that determines, in accordance with the tax law and the OECD Transfer Pricing Guidelines, in advance if the transfer price between two related parties within a group is at arm's length compared to the transfer price with an unrelated party.

Advance rulings should have a binding effect on the Tax Authorities under the provisions of domestic tax legislation with regards to advance tax rulings and advance pricing agreements or on the basis of the principle of legitimate expectations, but the force an advance ruling will have will depend on certain conditions such as that there is no modification on the applicable tax laws, validity is subject to the current fiscal year or three year in the case of transfer pricing arrangements, no modifications with regards to the facts under which the ruling was issued, or that they are no issued against the law.

Tax Authorities should be provided with the right of combating advance rulings by seeking their nullification in the corresponding Tax Court of the jurisdiction in case they believe they were not issued following the letter of the tax law or they believe that public finances are at risk with the

[7] http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/563447/IPOL_IDA(2015)563447_EN.pdf

existence of such rulings. This practice is common when a tax ruling was issued by a previous administration and the new administration seeks to change the criteria that would be applicable to the Tax Authority due to the binding effect of the issued resolutions.

In some jurisdictions, taxpayers may request an advance tax ruling from the tax authorities regarding specific and actual situations with regards to the taxpayer. The Tax Authorities will be bound to apply the criteria set by the ruling if: a) the antecedents and circumstances are expressly provided in the request; b) the antecedents and circumstances have not changed; and c) the request should be submitted before the Tax Authorities exercise their review powers regarding specific and actual situations referred in the inquiry. The Federal Fiscal Code in Mexico provides that the Tax Authorities will not be bound by their replies to taxpayers' inquiries when the explanation given in the inquiry does not coincide with the actual facts or with the data that was consulted or when the relevant laws change. Also, the advance tax rulings are not binding for taxpayers since they may elect to apply them or not, but they may challenge the resolutions to their inquiries once an audit regarding that situation has been finished and a tax deficiency has been determined. In essence, advance tax rulings are a good mechanism to controvert what can be established in an audit, but they will not preclude a taxpayer from an audit.

With regards to advanced pricing agreements, some jurisdictions establish that taxpayers may request them and that taxpayers must submit information, data and documentation to support the transfer pricing methodology utilized by the taxpayer. The period for which advanced pricing agreements can be applicable will be the previous tax year, the current tax year and up to three tax years after the tax year in which the advance pricing agreement was made.

Settlements

Taxpayers should be granted the right to settle their disputes with the Tax Authorities using alternative dispute resolutions, specifically, via settlement agreements. Settlement agreements are not always possible since some legal frameworks do not permit them as is the case of the Mexican Legal Framework; on the other hand, settlements are common in the United States where taxpayers and Tax Authorities agree on the terms of the settlements.

Settlements will be done when the Tax Authorities have already issued the tax deficiency against the taxpayer and are normally realized after the administrative appeal has been resolved. Thus, once the administrative appeal has reached a conclusion, the taxpayer and the Tax Authorities may reach an agreement, and it may be finalized in any of four forms, depending on the type of agreement reached. These forms are: a) a waiver of restrictions on assessment and collection, b) a waiver of restrictions on assessment and collection of tax deficiency and to accept an overassessment; c) closing agreements; and d) collateral agreements.

A taxpayer has the right to file a waiver of restrictions on assessment and collection at any time, whether or not a notice of deficiency has been issued. If the taxpayer pays the corresponding tax before a deficiency notice is mailed, the payment of the tax operates as a waiver of the restrictions on assessment and collection. Otherwise, the taxpayer may waive the restrictions by singing a form.

The form for the waiver of restrictions on assessment and collection of deficiency in tax and acceptance of overassessment does not preclude the taxpayer from suing for a refund, nor does it preclude the Tax Authorities from asserting a further deficiency. In essence, a waiver of restrictions on assessment and collection is a self-correction of the tax status of the taxpayer.

A waiver of restrictions on an assessment and collection of tax deficiency and to accept overassessment reflects an agreement between taxpayers and the Tax Authorities made as a result of mutual compromise and concession. Such agreement becomes effective only when a specified form is accepted by or on behalf of the Tax Authorities. Under the language of the form, the taxpayer promises that no claim of refund will be filed and the Tax Authorities promise that the case will not be reopened absent the occurrence of certain specified conditions.

Taxpayers should also have access to closing agreements which are binding for the parties. Once a closing agreement is executed, the Tax Authorities may not reopen the case without a showing of fraud, malfeasance or misrepresentation of a material fact, nor may the taxpayer rescind the agreement or challenge it in any legal proceeding.[8] Closing agreements apply only to the matters expressly stated within the agreement itself and are valid only when accepted and signed by the Tax Authorities.

There are two types of closing agreements: a) closing agreement as to final determination of tax liability and b) closing agreement on final determination covering specific matters. A closing agreement as to final determination of tax liability is used when the tax liability and type of tax for the period in question have been finally determined. On the other hand, a closing agreement on final determination covering specific matters is used when parties have been unable to agree on an unqualified tax liability figure and instead agree on separate issues affecting tax liability, such as the determination of taxable income, basis, or depreciation. Since closing agreements on final determination covering specific matters normally do not fully resolve all the inherent tax issues that may have an effect on the taxable year at issue or another taxable year, the Tax Authorities also use a combined closing agreement that establish the parties' understanding with respect to both tax liability and separate issues.

Collateral agreements are non-binding agreements executed to resolve a matter that is not directly in issue but is related to the disposition of the case, such as a valuation for purposes of depreciation.[9] Collateral agreements may be used as additional consideration for the acceptance of an offer in compromise, because the agreements may provide for different types of agreements such as for payments of future income; gain or loss for tax purposes, reduction in basis of assets for calculating depreciation, waiver of net operating losses, and waiver of bad debt loss or other deductions.

[8] Watson, Camilla E. and Billman, Brookes D., Jr. *Federal Tax Practice and Procedure – Cases, Materials and Problems,* Thomson West, USA, 2005, page 314.
[9] Op. Cit., page 315.

2.3 Special Tax Chambers/ Tribunals

Draft provided by Shreya Rao[10](Chapter 2.3)

2.3.1 Introduction

Special tax chambers/ tribunals ("**special tax courts**") are dedicated judicial or quasi-judicial mechanisms which may coexist with traditional courts and assist in adjudication of tax disputes.

The jurisdiction/ functions of these courts may be limited to a particular category of tax matters such as "international tax disputes", or may extend to a wide variety of direct and indirect tax matters. Their powers may be created by statute (as in the case of tax tribunals) or by administrative decision (as in the case of specialised tax benches/ chambers set up within constitutionally appointed courts). This chapter restricts itself to the issue of special tax courts created by statute, on the basis that their creation involves structural choices. In comparison, if a traditional court wishes to carve out a specialized tax bench or appoint selected judges to exclusively adjudicate tax matters, its ability to do so would depend on administrative concerns (such as whether there is sufficient case volume for the dedicated bench, whether there are suitably qualified judges within the court, whether the court allocation system allows for the diversion of tax matters only to the relevant judges etc.).

Parallel adjudicatory mechanisms created by statute involve more complex considerations, and any discussion on them should first begin with an evaluation of why they may be set up. Therefore, section A will first evaluate the reasons informing the choice of setup of such special courts. We will then examine issues of feasibility (constitutional, financial and operational) in section B and explore structural features of the court and their implications in section C.

2.3.2 Why may Special Tax Courts be set up?

High case volumes have been a compelling factor in the setting up of special tax courts.[11] The experience of several countries demonstrates that special tax courts may ease the workload of traditional adjudicatory mechanisms and resolve tax disputes more efficiently

[10] Dipti Janardhana & Shweta Mallya assisted with research on this note.
[11] This has been one of the primary reasons for setting up special tax courts in countries such as Denmark, India, the United States of America and Brazil.

by a) providing a specialised final forum for evaluation of facts[12] b) limiting access to traditional courts to specified instances of appeal[13] c) enabling/ encouraging settlements at an early stage[14] and/or d) appointing suitably qualified experts to aid in speedy disposition of cases[15].

Developing countries in particularly may benefit more from a more speedy and efficient disposal of tax cases, as this is likely to minimize costs and demands on the limited resources of tax administrations. Such efficiency and speed would also encourage trust amongst taxpayers and improve the overall investment climate. This thinking was a primary consideration during the establishment of the Authority for Advance Rulings in India, a special tax tribunal that is dedicated to the resolution of cross-border tax issues.

Special tax courts enable adjudication by suitably qualified experts. Traditional courts may be impaired by having to rely on judges who have expertise only in the law. Special tax courts allow other relevant experts such as chartered accountants, economists etc. to participate in an adjudicatory capacity rather than merely as expert witnesses. Alternative dispute resolution mechanisms have benefitted hugely from the induction of such experts in technical areas, and tax adjudication may also benefit from such induction, particularly in

[12] For example, in Germany, the Federal Fiscal Court participates in the investigation and fact-finding process. Similarly, the Malaysian Court of Appeal has held that the determination of facts by the Special Commissioner of Income Tax (an independent tribunal) will be unassailable on appeal and cannot be overruled or supplemented except in certain circumstances. *Syarikat Ibraco- Peremba SDN BHD* v. *Ketua Pengarah Hasil Dalam Negeri* (Civil Appeal W-01-177-04/2013)

[13] For example, in Australia, if a taxpayer decides to appeal to the Administrative Appellate Tribunal, any further appeal to the Federal Court can only be on a matter of law. In India, rulings of the Authority for Advance Rulings are non-appealable and may only approach higher courts through writ jurisdiction. France has a dual court system where disputes concerning certain kinds of taxes including income tax, corporation tax and so on can only be appealed against in the administrative courts, and disputes involving wealth tax, stamp and excise duties and so on may only be appealed against in the civil courts.

[14] The jurisdiction of the Tax Court of Canada has been steadily widened over the years, to become completely independent of the government and have exclusive original jurisdiction to hear appeals in certain cases. Historically, Canada only had a tax board with no definite powers regarding fact finding and hearing appeals. Therefore, most cases went to the exchequer's court to be heard again. This was one of the major reasons for setting up the special tax court. The special tax court's jurisdiction was also accordingly widened to be independent, enable settlements and hear various appeals.

[15] In India, matters before the Income Tax Appellate Tribunal are typically heard by a bench comprising of one accountant member and one judicial member. In Germany, the Special Tax Courts consist of a vast number of judges at the trial level and at the appellate level, all of whom are tax specialists.

areas such as transfer pricing. However, please refer to section C below regarding considerations involved in the composition of special tax courts.[16]

Special tax courts may aid in reducing the public mistrust that arises when a single authority assesses tax and then adjudicates disputes arising from such assessment. It is common for the tax department in several countries to carry out administrative and investigative functions to assess tax, as well as perform a first level of adjudicatory function when the tax order is appealed. This conflation of assessment and adjudicatory functions creates mistrust.[17] At the same time, the volume and fact-specific nature of several appeals makes it difficult for all appeals to be directly addressed by traditional adjudicatory frameworks.

Countries have responded to this problem of mistrust in different ways, not just to ensure that the process is fair and efficient but that it is seen to be so. The independence of the persons evaluating first appeals is paramount – therefore, countries often bifurcate functions within the tax administration to ensure that the assessing officers are not the officers adjudicating appeals. Accordingly, the Israeli Tax Law states that the officer who makes an assessment is not eligible to hear an objection against it.[18] It is also best practice to appoint a quasi-independent appeals office within the tax administration body, which would assist in settlement of cases at the administrative level.[19] Brazil's Administrative Court of Tax Appeals (CARF) is a successful example of such a body. China, India as well as certain other countries have also introduced such administrative appeal offices.[20]

However, if such administrative appeal offices/ panels continue to be composed of people from within the tax department, there may be a reluctance to overturn an assessment order by

[16] It is also possible that generalist judges qualified in law may sometimes be more suitable for the task. For example, France has a dual court system with civil courts that takes care of litigation arising from wealth tax, stamp and excise duty etc. and administrative courts that deal with other taxes. The dual system is justified as it is argued that the civil judges are more competent than administrative judges to deal with questions of civil law which certain type of taxation raises.

[17] One of the primary reasons for setting up the United States Tax Courts was the taxpayers' concern that the revenue services were not auditing cases in good faith. Harold Dubroff & Brant J. Hellwig, The United States Tax Court- A Historical Analysis Part I (2nd Ed., Government Printing Office) (2015).

[18] Income Tax Ordinance (New Version) 5721-1961, Section 150A.

[19] Tax appeals in Brazil are primarily heard and resolved by the Brazilian Administrative Council of Tax Appeals (CARF) at the administrative level. Similarly, the Administrative Reconsideration Law of PRC,1999 in China allows for the setting up of administrative reconsideration organs to hear appeals against specific administrative acts before the cases are referred to a regular court.

[20] See generally Victor Thuronyi, Comparative Tax Law, 218 (Kluwer Law International 2003)

another officer from the same department[21], or perceptional issues where the order is fair but the taxpayer mistrusts it due to the nexus between assessing and adjudicating officers. In such a case, an independent body such as a special tax court is likely to be more impartial and be perceived to be more trustworthy by the taxpayer.

Special tax courts could resolve the issue of excessive litigation costs. As discussed above, they may do this by enabling speedy disposition of cases, and by allowing a postponement/ reduction of amounts required to be deposited at the time of appeal.[22] For example, special tax courts in some countries do not require the taxpayers to pay court costs and warranties while filing an appeal.[23] Whether a country wishes to implement such a system would depend on whether the special tax court has a narrow/ broad jurisdiction, what the likely monetary consequences of such a waiver would be and whether there are perceived long term benefits to allowing such a waiver.

Special tax courts are sometimes set up as it is believed that they may reduce the inconsistency that results from the interpretation of tax statutes by regular courts. However, there is conflicting evidence on whether this is indeed the case. The consistency of judgments is likely to also be influenced by the structure of the special tax court, whether it has exclusive jurisdiction on tax matters and its correlation with other adjudicatory mechanisms. For example, in the United States, tax cases may be heard by three separate courts including a specialized Tax Court, which creates inconsistency across rulings. Similarly, taxpayers appealing to a higher tax authority in Russia are allowed to file an appeal with a regular court at the same time, which may lead to more than one authority adjudicating the same matter.[24] In larger countries, multiple special tax courts/ branches of special tax courts may be set up. If such practices are followed, consistency may be difficult to ensure.

[21] For example, in India, 50% of the cases made to the commissioner requesting an appeal to the high court were rejected on account that it was a based on the question of fact and not law. This led to the need for the setting up of an independent authority to address tax disputes, paving the way for the ITAT. Income Tax Appellate Tribunal- An Insight, Part III available at: http://119.226.207.84/itat/files/uploads/categoryImage/1453531986-AboutITAT.pdf

[22] The Australian Administrative Appellate Tribunal (AAT) can hear appeals on tax disputes among other administrative disputes. The purpose of restructuring the AAT, was with the idea that the tribunals dealing with administrative law must be 'simple, affordable, timely and fair'.

[23] The Brazilian Administrative Court of Tax Appeal (CARF) does not require taxpayers to pay court costs and warranties as is required for judicial proceedings in regular courts

[24] The Tax Code of Russian Federation Part I, 1998, Federal Law No. 146-FZ, Article 138

In certain cases, where the extent of powers of the administrative appeal system has not been clearly specified, the appeal system itself has become redundant. In these situations, it has been perceived that the ambiguity in the administrative appeal system's authority in the sphere of fact finding and ability to hear appeals, has invariably led to the subsequent tax litigation procedures (in regular courts) become laden with duplication of cases and high costs.[25] This gave rise to the need for the setting up of special tax courts that are independent of the government and which are bestowed with sufficient judicial powers so as to have exclusive jurisdiction.[26]

2.3.3 Feasibility of Special Tax Courts

The constitutional & legal feasibility of the special tax court will evaluate whether the regime applicable in a relevant country permits the establishment of a parallel adjudicatory mechanism in the form that is contemplated. In most cases these courts should be possible to set up. However, as detailed in the next section, the prevailing legal and constitutional regime may influence the final form of the special tax court and responses to critical issues of interaction with traditional courts, permissible jurisdiction, payment of remuneration to functionaries, appointment of functionaries etc.

The financial feasibility of a special tax court will depend on the volume and complexity of cases anticipated to be shifted into the jurisdiction of the special tax court. Ultimately, the set-up of a parallel adjudicatory system must make financial sense and constitute a prudent allocation of resources by the developing country. The specialized nature of adjudication may make it possible to divert costs from traditional mechanisms and apply the funds to more efficient uses in the special tax court. However, it cannot be denied that running a parallel process will result in some replication of administrative efforts, appeals etc. which could increase costs. Special tax courts with a more limited jurisdiction will need to evaluate issues of financial feasibility more seriously.

The operational feasibility of a special tax court will depend on the availability of sufficient skilled judges/ experts to adjudicate matters. Developing countries may not always find it easy to find a pool of suitably qualified people, particularly if the special tax court is required to co-exist with traditional courts. One way of addressing this issue is to consider other suitable experts who may co-adjudicate with judges qualified in law. This may also improve the ability of the special tax court to adjudicate more technical matters, although care must be applied to ensure that adjudicators are sufficiently trained in the basics of legal reasoning. Technology and process improvements can also ensure that the time of the judges

[25] Ian Mcgregor et al., The Development of the Tax Court of Canada: Status, Jurisdiction and Stature, 58 Canadian Tax Journal, 87-100 (2010).

[26] The Tax Court of Canada was set up to resolve issues caused by the ineffectiveness of the administrative appeals wing (Tax Appeal Board). As the Tax Appeal Board had limited powers, cases invariably made their way to the regular court system for duplicate hearings.

is utilized for adjudication rather than administrative activities which are often required in such fora.

2.3.4 Implementation Considerations

Whether special tax courts have a judicial/ quasi-judicial function: The constitutional scheme of the relevant country will determine the judicial / quasi-judicial nature of the special tax court. Where these courts are created by statute, they are likely to be quasi-judicial in nature and subject to accompanying checks under administrative law. The nature of the special tax court may have implications on issues regarding the system of appointment of judges, salaries and promotions under the relevant legal system.

The supervision structure: Special tax courts may either be supervised by the Finance Ministry as in the case of the Brazilian Administrative Court of Tax Appeals (CARF)[27], or by the Law Ministry, as in the case of the Income Tax Appellate Tribunal of India (**"ITAT"**), which was initially under the Indian Finance Ministry and later transferred to the Law Ministry in order to secure the independence of the tribunal.[28] In some countries, special tax courts are under the general supervision of councils set up to review the constitution and procedures of tribunals.[29] For example, in England, tribunals were previously under the general supervision of the council on tribunals. This has been replaced with an Administrative Justice and Tribunals Council[30] which supervises the procedure and working of First-tier Tribunal and Upper Tribunal in the UK.

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[27] While it is common for "Tax Boards" to be set up under the supervision of the Ministry of Finance (the Singaporean Income Tax Board of Review and the South African Tax Board being examples), such a practice is not recommended for "special tax courts". This is because, the Finance Ministry is also responsible for the tax collection function and is perceived to not be sufficiently impartial by taxpayers. Therefore, some countries assign the supervision of special tax courts to the Law Ministry or an independent body.

[28] G. Krishna Murthy, Past and Present of ITAT available at: http://119.226.207.84/itat/files/uploads/categoryImage/1453541183-CHGKM.pdf

[29] The Report of the Committee on Administrative Tribunals and Enquiries Cmnd. 218 (1957). In England, this proposal led to the Tribunals and Inquiries Act 1958 under which the Council on Tribunals was given powers in respect of many, but not all, tribunals. This Act was replaced by the Tribunals and Inquiries Act 1992. By the end of the century the focus had changed again. The terms of reference to the inquiry led by Sir Andrew Leggatt, which reported in 2001, accepted statutory tribunals as judicial bodies and directed attention to issues of efficiency and effectiveness.

[30] The Administrative Justice and Tribunals Council is a non-departmental public body created by the Tribunals, Courts and Enforcement Act, 2007.

Scope of review allowed of higher courts, vis-à-vis the judgments of special tax courts: While there is generally agreement that constitutional issues should always be open to scrutiny,[31] questions surrounding construction and application of the domestic tax acts are more debatable.[32] The constitutional scheme of the relevant country may also have an impact on the review required to be allowed to higher courts. In some countries, it will not be possible to grant trial and appellate jurisdiction to a specialized court in a manner that strips existing courts of their appellate authority. In other situations, writ jurisdiction may evolve into an appellate avenue even where the order of the special court itself are non-appealable.[33] Yet in others, the scope of an appellate court's review will be limited by the determination of whether the point of appeal pertains to law or facts. Generally, the scope of review allowed of higher courts against the decision of special tax courts is restricted to matters of law[34] and mixed questions of fact and law.[35]

Jurisdiction of special tax courts: If special tax courts are not allowed exclusive jurisdiction over the relevant subject, it is likely to promote forum shopping amongst litigants and inconsistency amongst courts.[36] However, there is relative flexibility in determining the extent of such jurisdiction i.e. whether the tax court should adjudicate income tax matters in general, international tax matters specifically, or an even more restricted area such as transfer pricing matters. The key criterion would be whether the volume of relevant matters is sufficient to keep the tax court occupied and prudent upon a cost benefit analysis.

[31] In Germany, there is no appeal from decisions of the Federal Tax Court (*Bundesfinanzhof*), the only exception being that appeals based on constitutional grounds may be filed with the constitutional courts.

[32] In most systems, regulatory decisions cannot be challenged in court as such (the taxpayer may challenge them only in the context of an assessment), but in France decrees, regulations, instructions, and circulars may be challenged on the grounds of being ultra vires, including because they conflict with treaties or European Community law.

[33] This is the case in India, where the writ jurisdiction of High Courts and Supreme Courts is often invoked to accomplish an appeal even where tribunals such as the Advance Ruling Authority emphasize that orders are non-appealable.

[34] In Australia, if a taxpayer chooses to appeal to the AAT (Administrative Appeals Tribunal) against the assessment made by the ATO (Australian Tax Office), any further appeal to the Federal Court can only be on matters of law.

[35] An adverse judgement of the Tax Court of Canada may be appealed to the Federal Court of Appeal and the Supreme Court (final appeal) only on questions of law or mixed questions of fact and law.

[36] In the United States, tax disputes can be resolved by United States district courts, tax courts and the court of claims. This has been said to promote *"diverse interpretation and application of tax laws, delay in the resolution of conflicts, encourages forum shopping and contributes significantly to the strain on the system"* Report of the Senate Judiciary Committee to the 91st Congress

Composition of special tax court benches: Benches of special tax courts tend to consist of both legal and accountant members. Though this is not always the case.[37] It is advisable that members of special tax courts do not include members from the revenue agency as this could adversely impact the standard of impartiality required of tribunals and result in pro-administration decisions. Earlier, specialist administrative tribunals or boards of review in Australia were constituted by three members- one from the Australian Tax Office (ATO), one accountant and one lawyer. However, the influence of the ATO in appointments resulted in pro-tax administration decisions. Therefore, the present Administrative Appeals Tribunal in Australia does not include members from the ATO and consists of judges of the Federal Court/Family Court, lawyers of least five years' stand and skilled/accountant members. In India, appeals before the ITAT are generally heard by a division bench comprising of one legal member and one accountant member. The South African Special Income Tax Court consists of a judge of the high court assisted by an accountant (of not less than ten years standing) and a representative of the business community

Requirement of payment of tax pending appeal: In most OECD countries, tax is not required to be paid by the taxpayer either automatically[38] or under certain conditions,[39] pending appeal. However, developing countries with poor tax administrations often mandate that tax should be paid prior to an appeal, to prevent abuse of process via frivolous appeals.[40]

Standard of openness: One of the questions special tax courts need to resolve is regarding transparency of proceedings and knowledge of the essential reasoning underlying the decisions.[41] For example, in Canada appeals are heard by the Tax Court of Canada, under either a general procedure or an informal procedure (available at the option of the taxpayer subject to the prescribed threshold).[42] Under the informal procedure, there are no formal rules

[37] In Germany, the Lower Tax Courts generally consist of three professional judges and two laypersons, while the Federal Tax Court in Munich sits with 11 chambers (*Senate*), consisting of five judges. In Brazil, members of the Brazilian Administrative Council of Tax Appeals (CARF) are counsellors appointed by the department of federal revenue (RFB) and by entities representing the taxpayers (unions, national associations, etc.). Six counsellors form each panel, three appointed by the RFB and three appointed by the taxpayers. The mandate of each counsellor is four years and can be renewed multiple times

[38] Payment of tax by the tax payer pending appeal is automatically suspended in Netherlands, Canada, United States, Finland, Switzerland, Belgium, etc.

[39] Payment of tax by the tax payer pending appeal may be suspended under certain conditions in Germany, UK, Sweden, Spain, France, etc.

[40] Victor Thuronyi, Comparative Tax Law, 218 (Kluwer Law International 2003).

[41] The Report of the Committee on Administrative Tribunals and Enquiries Cmnd. 218 (1957), para 42.

[42] There is no appeal as of right from an informal procedure decision, although decisions are subject to judicial review and such review is not uncommon.

of evidence and taxpayers need not be represented by counsel. The general procedure before the Canadian Tax Court is a formal trial with both sides represented by legal counsel.

On the one hand, allowing publication and transparency regarding reasoning processes limits the possibility of arbitrary decision making. On the other, taxpayers may have confidentiality concerns with a fact-finding tribunal publishing detailed descriptions of case proceedings. Countries respond to this issue in different ways. For example, in Germany the publication of particular decisions of the Federal Tax Court (*Bundesfinanzhof*)[43] in the Federal Tax Gazette or in the administrative tax regulations is an indicator that the tax authorities have agreed to extend the *ratio decidendi* to similar cases.[44] In the United States, written opinions are delivered by all courts resolving tax disputes (including a specialised tax court) and are available to the public. However, the sitting of certain special tax courts such as the South African Tax Court is not public.[45]

2.5. Advance Rulings and Settlements

Draft provided by Mirna Solange Screpante, LL.M.

Tax disputes between taxpayers and tax authorities may take years to conclude which represents significant resources expenditure in the course of resolving issues, thus avoiding lengthy and costly future controversies becomes a necessity. Therefore, alternative dispute resolution mechanisms must be provided in domestic tax systems, which may provide a speedy resolution of tax disputes. In this regard, advance rulings became an effective tool to prevent lengthy controversies, and at the same time it gives certainty since a taxpayer has the opportunity to work collaboratively with the tax authority. Furthermore, domestic law may also provide other remedies to avoid litigation or administrative appeals. In this regard, tax settlements constitute a tool for taxpayers which gives them an opportunity to settle their tax debts.

[43] In Germany, decisions of the Federal Tax Court (*Bundesfinanzhof*) provide ample legal reasoning and carry great persuasive weight, though they are binding only for the parties in a specific case.
[44] Tax authorities release a decree of non-application regarding a particular decision, which may compel tax payers to seek recourse to the courts again.
[45] Section 124 of the Tax Administration Act, 2011

2.5.1. Advance Rulings

2.5.1.1. General: What is an Advance Ruling?

The definition of advance rulings encloses a wide variety of tax arrangements between the Tax Authorities and taxpayers which serves as a tool to prevent disputes with the tax authority. An "advance ruling" means "a statement issued, upon request, to a (potential) taxpayer indicating the administration's view of the tax treatment of a particular set of facts and circumstances contemplated [or] in the process of completion …".[46]

Besides, providing certainty to taxpayers in a particular situation where a tax provision is not clear, it promotes the standardization of applicable decisive criteria. As a result, it provides potential investors with certain predictability on their investments, reducing and preventing future tax disputes as long as the transactions are carried out within the given framework in the advance tax ruling.

Generally, two types of advance rulings can be found in domestic legal orders, Advance Tax Rulings or "letter rulings" or Advance Pricing Agreements, so called APAs. There is a third type, pre-filling ruling, which is not technically an advanced ruling because the transaction under consultation has already occurred, but gives certainty to the taxpayer in regard to compliance issues which could be related with a tax ruling or a APA. This type of ruling could start gaining more presence due to the focus on transparency, more specifically, on revised standards for transfer pricing documentation.[47]

2.5.1.2. What are the different types of Rulings?

2.5.1.2.1. Tax rulings or "letter rulings"

2.5.1.2.1.1. General: What is tax ruling or "letter ruling"?

An advance tax ruling is a one-sided statement provided by the Tax Authorities regarding the tax treatment of a taxpayer with respect to his current tax status or his future transactions and on which he is entitled to rely to a certain extent. The advance tax ruling enables taxpayers upon request to consult on the application, scope and correct understanding of a specific applicable provision in connection with one or various transactions, or its compliance with the currently applicable tax regulations. For this reason, they are called advance tax ruling because they are usually issued before the taxpayer enters into the transaction or a series of specified

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[46] See Triplett, Charles and Cabell Chinnis, Chapter United States, *The International Guide to Advance Rulings* (Amsterdam: IBFD Publications, loose-leaf) at ix (1997)

[47] OECD (2015), *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. *http://dx.doi.org/10.1787/9789264241480-en*

transactions, but advance tax rulings could also refer to a past event but before filling the tax return. [48]

2.5.1.2.1.2. Tax Ruling or "letter rulings": Request and Procedure

The ruling application of a tax ruling or "letter ruling" could be compressed into three stages. Firstly, the procedure starts with an informal prefilling and consultation meeting, a formal filing meeting after the written application or only a written procedure. Secondly, the taxpayer, who applies for a ruling, has to hand over all the necessary information spontaneously or it could be that the information provided by the taxpayer is not sufficient and there is a further requirement by the tax administration. It is only in this stage when the taxpayer actively participates in the advance ruling procedure. Thirdly, the evaluation period commences. Finally, the tax authority issues the ruling which is binding for the tax authority but not for the taxpayer. Although the taxpayer might not be seen as a party in the procedure, the acceptance of the taxpayer is y requisite.

2.5.1.2.2. Unilateral APAs

2.5.1.2.2.1. General: What is a unilateral APA?

The unilateral APA is an agreement between the taxpayer and the tax administration of the country where the taxpayer is a resident and subject to taxation as regards the appropriate transfer pricing methodology for a set of transactions over a fixed period of time mainly to prospectively resolve real or potential transfer pricing issues between related parties in cross-border situations.[49] APAs are designed to help taxpayers, on the one hand, to avoid potential transfer pricing disputes and to reduce future adjustments, and on the other hand, to provide certainty, as the taxation methods will have already been defined. However, it does not preclude taxpayers from tax audits.

The most significant features of an APA are:

a) *The specification of the transactions covered by the APA*
b) *Transfer pricing methodology applicable*
c) *APA term*
d) *Appropriate adjustments<*
e) *Critical assumptions regarding future events*
f) *Operational and compliance provisions*

[48] See C. Romano, Advance Tax Rulings and Principles of Law, Towards a European Tax Rulings System - Volume 4 in the Doctoral Series, at 78; Commission staff working document, SWD (2015) 60 final, http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015 _60.pdf, 6.
[49] See V.T. Patel & Y.D. Pradhan, *Advance Pricing Agreement Programme*, 20 Intl. Transfer Pricing J. 1 (2013), Journals IBFD, at 21

2.5.1.2.2.2. Unilateral APA: Request and Procedure

For a unilateral APAs to be obtained certain general steps must be followed:

a) **Phase 1: Pre- filling consultation and meeting**

The APA request should be filed by the taxpayer who will present the request to the tax authorities for binding advice. The letter of willingness of APA should contain a brief summary of the related transactions. The tax authorities will evaluate the request and consider all facts and circumstances linked with the transactions or activities for which certainty in advance is requested. Furthermore, taxpayers may request preliminary meetings with the tax authority to indicate their interest in submitting an APA proposal. Furthermore, the discussion during the pre-filling meeting is not binding on either the tax payer or the tax authorities.

b) **Phase 2: Formal application**

The filling of an application is carried out by submitting the information required under the domestic regulatory instructions. The tax authority will acknowledge in writing acceptance or not of the formal APA application within certain period from its receipt. The acceptance of the APA application at this phase does not suggest with certainty that the tax authority and the taxpayer will conclude an APA[50].

c) **Phase 3: Evaluation**

If the formal application is accepted, within a certain fixed period, the tax authority carries out a critical analysis of the application. During this phase, the competent authority may undertake further analysis, for example it may request additional information, meet with the taxpayer and discuss special issues, undertake a research and site visits to inspect the taxpayer's operations, etc.

d) **Phase 4: Negotiation**

[50] For example, the Peruvian APA Program contemplates preliminary meetings. See F. Tori, *Peru Branch Report*, in Dispute resolution procedures in international tax matters (IFA Cahiers vol. 101A, 2016), Online Books IBFD, at 549

After concluding the relevant internal analysis, tax authorities shall inform the taxpayer their decision about the request. In case of differences between the respective positions, the taxpayer shall submit in written form its arguments in relation to the proposed transfer pricing method and other criteria proposed. If differences still persist, the tax authority will enable the taxpayer to discuss the issues raised in a formal meeting with the aim of reaching an agreement.

e) **Phase 5: Resolution and Agreement**

The tax authority may determine that: the proposal is approved; or an alternative proposal is approved, in agreement with the taxpayer. In any of both cases, tax authorities draft the final version with technical opinion of the APA and sends it to the taxpayer for signature and execution. The taxpayer sends back to the tax authorities signed within a certain time period. If the proposal is rejected, it cannot be challenged.

f) **Phase 6: Post compliance obligations**

After the agreement phase, an annual report demonstrating compliance with the agreement must be submitted by the taxpayer, along with the transfer pricing return.

2.5.1.3. Modification, cancellation and Revocation of rulings issued

Notwithstanding the certainty of Advance Tax Ruling, it could happen that under certain exceptional circumstances the ruling could be revised, cancelled, revoked or renewed.

a) Modification of an advance tax ruling: if there is a material change in the implementation of the domestic rules;

b) Cancellation of an advance tax ruling: if there has been a misrepresentation, mistake or omission made by the taxpayer during the application, negotiation or when complying with reporting and compliance requirements but such failure was not attributable to neglect, carelessness or willful default of the taxpayer; the taxpayer has failed to comply with one or more provisions of the APA; there is a material change to one or more critical assumptions; a revision of the APA was possible but could not be agreed and concluded within given period of time. The cancellation of an APA is effective from and including the tax year in which the event (that led to cancellation) occurred.

c) Revocation of an advance tax ruling: if there has been a distortion, error, or omission which is the result of negligence, carelessness, or intentional evasion of the taxpayer when completing the application, during negotiations. The effect of such revocation is the same as no tax ruling has ever existed.

d) Renewal of an advance tax ruling: In case of renewal of an agreement, all the procedures other than the prefilling procedures will be followed by the applicant. If the circumstances do not change materially, the APA could be renewed without further complications. On the contrary, if the circumstances have significantly changed or any of the critical assumptions has been modified so new terms depending on the facts of the case must be analyzed.

2.5.2. Pre-filling agreement

Although a pre-filing agreement is technically not an advance ruling because it involves transactions that have already occurred, the program is significant because it provides taxpayers with an opportunity to resolve reporting issues before their tax return is filed, thus avoiding any subsequent disputes.

The purpose of a pre-filing agreement is to permit a taxpayer to resolve, prior to the filing of its tax return, the tax treatment of an issue that is likely to be disputed in a post-filing audit[51]. In general, it be will considered for entering into a Pre-Filling Agreement on issues that involve either (1) a factual determination or (2) an application of well settled legal principles to agreed-upon facts[52]. Unlike an Advances Tax Ruling or "letter ruling", the issues involved in a Pre-Filling Agreement arise from completed transactions.

2.5.3. Tax Settlements

2.5.3.1. General: What is a Tax Settlement?

A tax settlement constitutes an arrangement between a taxpayer and the tax authorities that allows a taxpayer to retire an outstanding tax debt for less than the original amount owed. The tax authorities are authorized to

[51] The Pre-Filling Agreement (PFA) was implemented as part of a successful pilot program carried out by the IRS in February 2001. The IRS found that it facilitated the speedy resolution of potential disputes and generated cost savings for both taxpayers and the IRS. The issues resolved through this program are final and conclusive for the taxable period covered by the PFA, and the PFA is binding on the taxpayer and the government. Rev. Proc. 2001-22, 2001-9 *I.R.B.* 745, sets forth the procedures for seeking a PFA. For guidance see https://www.irs.gov/businesses/pre-filing-agreement-program-orientation-guide

[52] Charles S. Triplett and Jennifer C. Maloney, Advance Rulings in the United States, Bull. Int. Tax. 2001 (Volume 55), No. 9, at 408

settle, or "compromise" tax liabilities by accepting less than the full payment under certain circumstances, such as where there is doubt as to liability, doubt as to collectability or in the interests of effective tax administration.

2.5.3.2. Who is eligible to apply for a Tax Settlement?

A tax settlement is normally offered to taxpayers that are struggling with their tax debts or have valid reasons to abate their penalties. The eligibility should be restrictive and only for taxpayers in certain financial circumstances determined by the law. Tax settlements could cover liabilities subject to prior installment programs as well as liabilities subject to administrative or judicial proceedings[53].

2.5.3.3. Forms of tax settlement agreement

Settlements will be done when the Tax Authorities have already issued the tax deficiency against the taxpayer and are normally realized after the administrative appeal has been resolved. Thus, once the administrative appeal has reached a conclusion, the taxpayer and the Tax Authorities may reach an agreement, and it may be finalized in any of four forms, depending on the type of agreement reached. These forms are: a) a waiver of restrictions on assessment and collection, b) a waiver of restrictions on assessment and collection of tax deficiency and to accept an overassessment; c) closing agreements; and d) collateral agreements.

A taxpayer has the right to file a waiver of restrictions on assessment and collection at any time, whether or not a notice of deficiency has been issued. If the taxpayer pays the corresponding tax before a deficiency notice is mailed, the payment of the tax operates as a waiver of the restrictions on assessment and collection. Otherwise, the taxpayer may waive the restrictions by singing a form. The form for the waiver of restrictions on assessment and collection of deficiency in tax and acceptance of overassessment does not preclude the taxpayer from suing for a refund, nor does it preclude the Tax Authorities from asserting a further deficiency. In essence, a waiver of restrictions on assessment and collection is a self-correction of the tax status of the taxpayer.

A waiver of restrictions on an assessment and collection of tax deficiency and to accept overassessment reflects an agreement between taxpayers and the Tax Authorities made as a result of mutual compromise and concession. Such agreement becomes effective only when a specified form is accepted by or on behalf of the

[53] For example, the Tax Settlement launched by Brazil on January 5, 2017, published Provisional Measure 766/2017 (PM 766) in the Official Gazette. PM 766 introduces a tax regularization program (PTR in Portuguese) to incentivize companies to settle their federal tax debts in Brazil.

Tax Authorities. Under the language of the form, the taxpayer promises that no claim of refund will be filed and the Tax Authorities promise that the case will not be reopened absent the occurrence of certain specified conditions.

Taxpayers should also have access to closing agreements which are binding for the parties. Once a closing agreement is executed, the Tax Authorities may not reopen the case without a showing of fraud, malfeasance or misrepresentation of a material fact, nor may the taxpayer rescind the agreement or challenge it in any legal proceeding.[54] Closing agreements apply only to the matters expressly stated within the agreement itself and are valid only when accepted and signed by the Tax Authorities.

There are two types of closing agreements: a) closing agreement as to final determination of tax liability and b) closing agreement on final determination covering specific matters. A closing agreement as to final determination of tax liability is used when the tax liability and type of tax for the period in question have been finally determined. On the other hand, a closing agreement on final determination covering specific matters is used when parties have been unable to agree on an unqualified tax liability figure and instead agree on separate issues affecting tax liability, such as the determination of taxable income, basis, or depreciation. Since closing agreements on final determination covering specific matters normally do not fully resolve all the inherent tax issues that may have an effect on the taxable year at issue or another taxable year, the Tax Authorities also use a combined closing agreement that establish the parties' understanding with respect to both tax liability and separate issues.

Collateral agreements are non-binding agreements executed to resolve a matter that is not directly in issue but is related to the disposition of the case, such as a valuation for purposes of depreciation.[55] Collateral agreements may be used as additional consideration for the acceptance of an offer in compromise, because the agreements may provide for different types of agreements such as for payments of future income; gain or loss for tax purposes, reduction in basis of assets for calculating depreciation, waiver of net operating losses, and waiver of bad debt loss or other deductions.

[54] Watson, Camilla E. and Billman, Brookes D., Jr. *Federal Tax Practice and Procedure – Cases, Materials and Problems,* Thomson West, USA, 2005, page 314.
[55] Ibidem, page 315.

3. Special issues faced by developing countries (and LDCs in particular)

Draft provided by Norbert Roller

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3.1 Issues developing countries are facing with regards to disputes

Tax disputes require the allocation of scarce resources and hence are expensive. Solving cases of international tax controversy necessitate highly specialized personal which is usually scarce. It needs time and effort to gain the respective theoretical and practical knowledge, and the demand for those skills in the private sector is high. Hence, especially in developing countries, only a view people in a tax administration have the required skills, and those who have them will often be tempted to leave for higher salaries in the private sector. Additionally, international tax disputes often take a long time, which makes them even more expensive, and usually require extraordinary expenditures such as for traveling. Looking at the availability of resources and costs, many developing countries will also likely favor using their capacity for income generating functions, considering that deploying them in dispute resolution could lead to a shortfall in functions like TP audit. Certainly, resolving international disputes is not only costly for developing countries, but those are likely hit harder in comparison to their richer peers[56], looking at their financial capabilities.

Box or Paragraph:

Problems developing countries are facing in the domestic treatment of international cases recur during tax controversy, e.g. the lack of comparable data in TP cases. During a tax dispute, the responsible authority has to reassess the case at hand. Accordingly, whenever the first instance of a tax

[56] Gibt es Vergleiche für Ausgaben für die Steuerverwaltung?

administration had to face challenges, that are typical for developing countries, those problems will resurface in the dispute procedure. *E.g. A subsidiary of a multinational enterprise is situated in a developing country. The audit division of this country adjusts the respective profits using, in the absence of data on publicly available third party transactions, a domestic safe harbor or secret comparables.* In a later tax controversy, the competent authority of the adjustment making country will have to cope with the same challenges as the first instance did, but will not be able to rely on purely domestic solutions.

Case numbers in developing countries are significantly lower. Unfortunately**,** a detailed and comprehensive analysis of case numbers is currently not possible, since only a limited number of countries publish statistics. Only for OECD[57] and EU[58] countries such data is available for the past years. Indeed, those statistics reveal that OECD and EU countries with low GDP/capita ration report significantly fewer cases than their peers. Nevertheless, the availability of data for developing countries will likely change in the coming years because of the BEPS minimum standard on dispute resolution[59]. This standard foresees the obligatory publication of statistics[60], and countries[61] of the Inclusive Framework (IF) are committed to implementing it.

Figure 1:

[57] OECD MAP Statistics (http://www.oecd.org/tax/dispute/map-statistics-2015.htm)
[58] Statistics published by the EU Joint Transfer Pricing Forum on cases under the EU Arbitration Convention (http://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en)
[59] OECD. 2015. Making Dispute Resolution More Effective – Final Report
[60] OECD. 2016. Making Dispute Resolution More Effective - Peer Review Documents (MAP Statistics Reporting Framework)
[61] Regularly updated list provided by OECD under http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf - June 2017, 99 countries

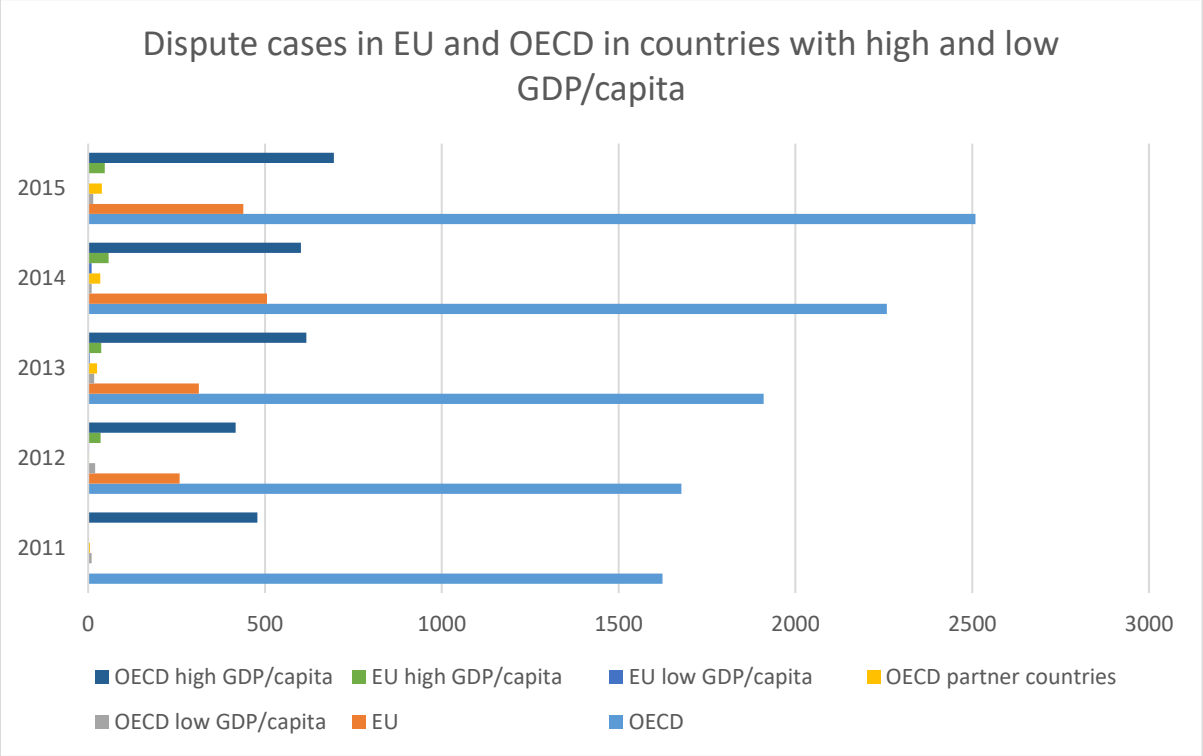

Figure 1 compares case numbers in the 5 countries with highest GDP/capita in the EU and the OECD with those with the lowest GDP/capita, based on the statistics published by OECD and EU, and with overall numbers.

The fewer cases may be explained by less demand from taxpayers or less supply of the necessary institutional framework by tax administrations. Less demand, meaning in particular that taxpayers do not apply for MAP, for example because they are not facing any issues concerning international tax law, because they do not know that MAP is available, because they do not trust in the capability of this procedure to solve such issues, or, in rare cases, because they are politically pressured to abstain. Less supply, meaning that tax administrations do not process applications, for example, because they lack the capacity to do so, or because of a deliberate political decision. This issue will be dealt with in more detail below.

Some indicators point towards increasing cases of tax controversy in the near future. Those are i.a.: (i) increasing awareness of matters of international taxation[62], in particular, transfer pricing (TP), in many developing countries, including newly established capacity in many tax administrations[63], (ii) ascending numbers of multinational enterprises that are active or are even headquartered in developing countries resulting in numerous cross border transactions[64], and (iii) businesses demand tax certainty and the

[62] In so far the work of the UN Tax Committee and its Subcommittees and the Inclusive Framework has to be mentioned here since both are open to the participation of a very broad range of countries, including in particular developing countries.

[63] Insert either country example or summary of a capacity building effort OECD/UN/WB

[64] IMF? – Zahlen sind vorhanden, gelesen in der Zeit

application of existing procedures[65]. Indeed, for a jurisdictions specific policy regarding international dispute resolution, it is import to anticipate future case numbers in order to be able diligently plan resource commitments.

Taxpayers are concerned about reliability and predictability of procedures. In a recently published report of OECD/IMF[66] on tax certainty the importance of this matter for taxpayers has been pointed out. According to this report concerns over the inconsistent approaches of different tax authorities towards the application of international tax standards ranked in third place among sources of uncertainty identified by businesses[67] and unpredictable and inconsistent treatment by courts also ranked high in this regard[68]. While this applies to all countries, it might be particularly relevant for countries with no track record of past cases, like many developing countries.

Countries which concluded DTCs including a provision on dispute resolution are legally obliged to conduct MAPs. This applies even though the respective provisions usually do not foresee the obligation to solve a case at hand. Additionally, it could be argued that those provisions implicitly create the obligation to set up an institutional framework, independent of case numbers, to be theoretically able to conduct MAP[69]. Such framework would require equipping a competent authority with the necessary legal powers to conclude and implement decisions found during MAP, and to have respective human capacity available. Countries will be well advised to consider those obligations already during treaty negotiations

3.2 What are the reasons that have led developing countries not to engage in MAP

Reasons can be rooted in the behavior of tax payers or in the behavior of tax administrations. The fact alone that a taxpayer or a tax administration decides not to engage in dispute resolution is neither good or bad, in fact, there are several valid reasons for not engaging in MAP or other mechanisms for dispute resolution.

The most obvious reason for developing countries not to engage in MAP is the lack of applications from taxpayers. MAP is a state-state procedure but whenever a specific case is dealt with under Article 25/1 OECD and UN MC a taxpayer has to initiate the procedure by transmitting an application to the competent authority of its residence state[70]. Only MAP under Article 25/3 OECD and UN MC, for clarification of general questions of interpretation, is triggered by competent authorities themselves. A taxpayer will not use MAP for three reasons: (i) because there are not issues concerning cross border transactions, (ii) MAP is not offered in a certain country or the taxpayer does not know that MAP is offered, and (iii) because, although there are issues and MAP is available, the taxpayer still does not trust in the procedure, including political pressure to abstain.

[65] OECD/IMF. 2016. G20 Tax Certainty Report Appendix B - Business Survey
[66] OECD/IMF. 2016. G20 Tax Certainty Report
[67] OECD/IMF. 2016. G20 Tax Certainty Report p 25
[68] OECD/IMF. 2016. G20 Tax Certainty Report. Appendix B – Business Report Table 17.B
[69] also Rule of law – good faith behavior?
[70]. The BEPS minimum broadens this provision and allows for application in both states – BEPS minimum standard on action 14 paragraph 3.1.

BOX 1:

Silent adjustments – an illegitimate way to avoid double taxation without using MAP:

A multinational enterprise is headquartered in country A and has subsidiaries around the world, one of them, company X, is resident of country B. During a tax audit in country A profits of the headquarters are adjusted, because country As tax audit team assumes that services were rendered by the headquarters to company x in year 0, but not charged with an arm's length price. Instead of requesting a corresponding adjustment in country B, X includes a liability in the amount of the adjustment in its accounts, in order to avoid double taxation. Because accounts for the year 0 are already closed, X does so for the year 0+2, the last year open. The tax administration of country B has not been informed about the adjustments in country A, neither about the inclusion of the liability nor about the audit itself, and thus has no opportunity to defend its position unless it randomly selects X itself for a tax audit for the year 0+2.

Countries may make a deliberate policy decision to not conduct MAP. Such general approach would currently be likely criticized heavily by other states, MNEs and international organization, in the light of most tax treaties and in particular of BEPS minimum standard on action 14. Moreover, it would also increase the risk of defensive measures taken by those other stakeholders. Nevertheless, making such decision is the sovereign choice of every government. However, where it was made it should be aligned with obligations under international law, and where respective commitments have been made in tax treaties they should consequently be canceled.

Some countries will not be able to offer MAP to their taxpayers because they do not have enough resources available. Usually the resources in international tax law will be firstly allocated to income generating functions, like tax auditing, and only later to secondary functions, like dispute resolution or more broader the competent authority function[71]. Also, it has to be considered that those means will not only be needed to conduct cases but also to set up the institutional framework, like designing internal and external guidance and developing model processes. It can well be that in an early phase of work on international tax law, a country would actually want to conduct MAP but is not able to do so because of capacity constraints.

3.3 Need for effective dispute resolution in cross border disputes

Developing countries are confronted with international tax cases, as in particular TP cases. International transactions do not only occur between parts of a multinational enterprise located in developed countries but also with entities located in developing countries. And there is no reason to belief that in so far there is less potential of conflict. Recent publicly discussed cases show that in particular transfer pricing cases are common not only in highly industrialized countries. With those cases comes the need to implement

[71] According to the OECD and UN MC the competent authority, as defined in the specific convention, is responsible for MAP. The same applies for applying the article on Exchange of Information, hence, it is usefull to consider both responsibilities in designing the institutional framework for the competent authority function.

mechanisms to avoid double taxation in controversial cases to prevent obstacles to international trade and investment.

BOX 2:

The British foods (SAB Miller) case:

https://www.theguardian.com/business/2013/feb/09/british-sugar-giant-tax-scandal

http://taxjustice.blogspot.co.at/2010/11/how-sab-miller-escapes-tax-in.html

The rule of law is a globally acknowledged principle that is relevant for international tax dispute resolution. Having accessible remedies for the violation of rights and access to justice in more general is one aspects of the rule of law. Insofar opening mechanisms to resolve tax disputes and guaranteeing access for all legally eligible persons is covered by this principle. It should not matter in this regard, that international dispute resolution procedures are typically state to state procedures that are only initiated by taxpayers, since in their economic effects they are well comparable to domestic taxpayer-state remedies. The interrelation between the rule of law and international development is currently strongly emphasized by the United Nations[72].

Effective resolution of tax disputes is also needed for guaranteeing tax certainty. Tax certainty is essential for a good business climate. Well-functioning processes increase investors trust in a jurisdiction and accordingly have positive effects on their openness to invest in a specific country. Two levels of tax certainty have to be observed. Firstly, tax certainty according to the application of dispute resolution mechanisms such as MAP, and secondly certainty on the consistent application of the covered material tax law.

International tax disputes can be solved by way of domestic remedies and not only through international procedures. However, domestic solutions usually cannot be enforced in the other involved country. Moreover, the same dispute can be subject to a domestic procedure in this other country without any binding effect of the first countries decision. Hence, resulting in incoherent solutions including the risk of double taxation. Additionally, domestic courts might be biased towards their own tax authorities, although currently no empirical evidence supports this view.

In order to be effective in dispute resolution performance has to be measured. This is in particular important for developing countries to justify spending of narrow resources, and not only to assure the quality of the work done. In so far tax administrations should be cautious in using indicators that rely on financial

[72] https://www.un.org/ruleoflaw/rule-of-law-and-development/

aspects of specific cases only, since this could result in ill-motivated administrations and overly long procedures. Insofar, in the BEPS final report on dispute resolution it is explicitly stated, as part of the minimum standard, that tax administrations should abstain from using protected adjustments as a relevant indicator[73]. Useful indicators will usually build on the number of cases solved and the time needed for those solutions[74]. Additionally, taxpayer input could also be used in evaluation the effectiveness of dispute resolution mechanisms, as foreseen in the Inclusive Frameworks peer review process on dispute resolution[75].

3.4 Response of the OECD

OECD did not create binding law. OECD worked continuously on matters of dispute resolution for many years. However, it has to be considered that the ability of the OECD to create binding law is limited[76]. Hence, the materials produced so far can be classified as soft law. Only, when states commit themselves via other instruments to adhere to OECD materials they can become in fact binding[77].

During most of the OECDs work on dispute resolution developing countries where only marginally represented. OECD is an organization of 35[78] mostly highly industrialized countries. Hence, its work reflects primarily the interests of those countries. However, during the last years OECD adopted a more inclusive approach in establishing the Forum of Tax Administrations or the Inclusive Framework, where a broader set of countries is invited to become member and to contribute to the work.

The OECD Commentary on Article 25 OECD MC is perhaps the best starting point in any analysis of OECD stances in this field. Contrary to other OECD materials, the OECD Council formally recommends its member states to follow the Commentary in the interpretation of their DTCs that are based on the OECD MC. In fact, the Commentary does not at all speak about specific concerns of developing countries such as capacity constraints, in the contrary major parts deal with the specifics of arbitration, a procedure that is very rarely used by developing countries.

OECD Transfer Pricing Guidelines (TPG) 2010. Like the OECD Commentary the OECD transfer pricing guidelines do not specifically focus on the needs of developing countries, however they define probably the most broadly followed principle in transfer pricing and could be considered as a lowest common denominator. The OECD transfer pricing guidelines dedicate a subchapter[79] to the mutual agreement procedure and its interrelation with corresponding adjustments according to Article 9 OECD and UN MC. It focuses on general concerns with that MAP such as taxpayer participation, duration and time limits and transparency of procedures.

In 2007 OECD published its Manual on Effective Mutual Agreement Procedures (MEMAP). It is conceived as a practical guidance with the definition of 25 best practices at its core. MEMAP is certainly

[73] OECD/G20. 2015. Making Dispute Resolution More Effective. Final Report. Minimum Standard 2.4.
[74] OECD/G20. 2015. Making Dispute Resolution more Effective. Final Report. Para 28
[75] OECD. 2016. BEPS Action 14 – Peer Review Documents
[76] Convention on the Organsiation for Economic Cooperation and Development, Article 5
[77] As it has been done regarding the BEPS minimum standards (IF?)
[78] List of member states: http://www.oecd.org/about/membersandpartners/
[79] OECD Transfer Pricing Guidelines, Chapter IV Subchapter C.2

not designed specifically for developing countries, nevertheless the best practices mostly are designed to be used independent of the specific level of experience with MAP and thus can be well used by developing countries. Generally, MEMAP has a quite liberal approach to MAP tending to open the procedure for a wide range of cases, this manifests among others in best practice no 9 on the liberal interpretation of time limits and advising of treaty rights, no 12 on the elimination of exceptions to MAP or no 19 on avoiding the blocking of MAP access via audit settlements or unilateral APAs.

BEPS final report on Action 14[80] aims at the improvement of MAP. It is conceived as one of the 4 minimum standards resulting from the BEPS project. Although the OECD MC, at the time of publication of the final report, included arbitration already, arbitration is not part of the minimum standard. Beyond the minimum standard the report formulates best practices as well. The minimum standard has three dimensions: (i) Treaty obligations related to the mutual agreement procedure should be fully implemented in good faith and MAP cases are resolved in timely manner; (ii) Administrative processes promoting the prevention and timely resolution of treaty related disputes should be ensured, and (iii) Taxpayers that meet the requirements of paragraph 1 Article 25 should be able to access the mutual agreement procedure. Contrary to previous work of OECD the standard designed in the final report was conceived to have a stronger legal character, which is achieved through the inclusive framework, where all members have to commit themselves to implementing the BEPS minimum standards and agree to a peer review process.

3.5 Response of the UN

Like OECD the UN does not create binding law on dispute resolution. UN work in this field is conducted under the umbrella of the UN tax committee[81]. This institution has no means to create law that is binding on the UN member states. The major difference between work done by the UN and OECD is driven by the different needs of countries that are represented in those organizations. In so far work of the UN, such as GMAP, generally focusses more on the needs of countries with only limited experience in international tax controversy.

The Commentary on Art 25 UN MC provides Guidance on the mutual agreement procedure.

In 2012 the UN Committee on Experts on International Tax Matters approved a Guide to the Mutual Agreement Procedure under Tax Treaties (GMAP). The intention of this guidance is to primarily focus on the specific needs and concerns of developing countries and countries in transition. GMAP speaks both to taxpayers and tax administrations recognizing the often limited experiences they might have. In no case is GMAP binding either to taxpayers nor tax administrations but only formulates recommendations based on international practice and experience. Clearly, GMAP has not the legal quality to override what has been

[80] OECD/G20. 2015. Making Dispute Resolution More Effective. Final Report

[81] http://www.un.org/esa/ffd/ffd-follow-up/tax-committee.html The Committee of Experts on International Cooperation in Tax Matters is a subsidiary body of the Economic and Social Council is responsible for keeping under review and update, as necessary, the United Nations Model Double Taxation Convention between Developed and Developing Countries and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries

agreed upon in a tax treaty or on the UN Commentaries, and does neither intend to contradict those materials. Currently, GMAP is under revision, in particular in the light of the BEPS outcomes

The latest version of the UN Transfer Pricing manual for developing countries includes a chapter on dispute resolution.

This handbook on dispute resolution tries to deal with international tax controversy comprehensively, including mechanisms of dispute avoidance. It builds on the recent work conducted in the course of the BEPS initiative and particularly focuses on the needs of developing countries.

UN Handbook – Extended Outline Chapter 3

-Norbert Roller- update on 20.9

-Draft Chapter 3 - Special Issues faced by LDCs-

Issues developing countries are facing with regards to disputes

Tax disputes require the allocation of scarce resources and hence are expensive. Solving cases of international tax controversy necessitate highly specialized personal which is usually scarce. It needs time and effort to gain the respective theoretical and practical knowledge.

Problems developing countries are facing in the domestic treatment of international cases recur during tax controversy, e.g. the lack of comparable data in TP cases. Whenever the first instance of a tax administration had to face challenges, that are typical for developing countries, those problems will resurface in the dispute procedure.

Case numbers in developing countries are significantly lower. However, the availability of data for developing countries will likely change in the coming years because of the BEPS minimum standard on dispute resolution[82].

Figure 1:

Figure 1 compares case numbers in the 5 countries with highest GDP/capita in the EU and the OECD with those with the lowest GDP/capita, based on the statistics published by OECD and EU, and with overall numbers.

[82] OECD. 2015. Making Dispute Resolution More Effective – Final Report

The fewer cases may be explained by less demand from taxpayers or less supply of the necessary institutional framework by tax administrations. Less demand, meaning in particular that taxpayers do not apply for MAP. Less supply, meaning that tax administrations do not process applications.

Some indicators point towards increasing cases of tax controversy in the near future. Those are i.a.: (i) increasing awareness of matters of international taxation[83], in particular, transfer pricing, in many developing countries, including newly established capacity in many tax administrations[84], (ii) ascending numbers of multinational enterprises that are active or are even headquartered in developing countries resulting in numerous cross border transactions[85], and (iii) businesses' demand for tax certainty and the application of existing procedures[86].

Taxpayers are concerned about reliability and predictability of procedures. In a recently published report of OECD/IMF[87] on tax certainty the importance of this matter for taxpayers has been pointed out.

Countries which concluded DTCs including a provision on dispute resolution are legally obliged to conduct MAPs. This applies even though the respective provisions usually do not foresee the obligation to solve a case at hand.

What are the reasons that have led developing countries not to engage in MAP

The most obvious reason for developing countries not to engage in MAP is the lack of applications from taxpayers. A taxpayer will not use MAP for three reasons: (i) because there are not issues concerning cross border transactions, (ii) MAP is not offered in a certain country or the taxpayer does not know that MAP is offered, and (iii) because, although there are issues and MAP is available, the taxpayer still does not trust in the procedure (and instead uses occasionally silent adjustments), including political pressure to abstain.

BOX 1:

Silent adjustments – an illegitimate way to avoid double taxation without using MAP:

Countries may make a deliberate policy decision to not conduct MAP. Such general approach would currently be likely criticized heavily by other states, MNEs and international organization.

[83] In so far the work of the UN Tax Committee and its Subcommittees and the Inclusive Framework has to be mentioned here since both are open to the participation of a very broad range of countries, including in particular developing countries.

[84] Insert either country example or summary of a capacity building effort OECD/UN/WB

[85] IMF? – Zahlen sind vorhanden, gelesen in der Zeit

[86] OECD/IMF. 2016. G20 Tax Certainty Report Appendix B - Business Survey

[87] OECD/IMF. 2016. G20 Tax Certainty Report

Some countries will not be able to offer MAP to their taxpayers because they do not have enough resources available. Usually the resources in international tax law will be firstly allocated to income generating functions, like tax auditing, and only later to secondary functions, like dispute resolution or more broader the competent authority function[88].

Need for effective dispute resolution in cross border disputes

Developing countries are confronted with international tax cases, as in particular TP cases. International transactions do not only occur between parts of a multinational enterprise located in developed countries but also with entities located in developing countries.

BOX 2:

The British foods (SAB Miller) case:

https://www.theguardian.com/business/2013/feb/09/british-sugar-giant-tax-scandal

http://taxjustice.blogspot.co.at/2010/11/how-sab-miller-escapes-tax-in.html

The rule of law is a globally acknowledged principle that is relevant for international tax dispute resolution. Having accessible remedies for the violation of rights and access to justice in more general is one aspects of the rule of law.

Effective resolution of tax disputes is also needed for guaranteeing tax certainty and such enhancing business climate. Well-functioning processes increase investors' trust in a jurisdiction and accordingly have positive effects on their openness to invest in a specific country.

International tax disputes can be solved by way of domestic remedies and not only through international procedures. However, domestic solutions usually cannot be enforced in the other involved country.

In order to be effective in dispute resolution, performance has to be measured. This is in particular important for developing countries to justify spending of narrow resources, and not only to assure the quality of the work done.

[88] According to the OECD and UN MC the competent authority, as defined in the specific convention, is responsible for MAP. The same applies for applying the article on Exchange of Information, hence, it is usefull to consider both responsibilities in designing the institutional framework for the competent authority function.

Response of the OECD

OECD did not create binding law.[89].

During most of the OECDs work on dispute resolution developing countries where only marginally represented.

The OECD Commentary on Article 25 OECD MC

In 2007 OECD published its Manual on Effective Mutual Agreement Procedures (MEMAP).

OECD Transfer Pricing Guidelines (TPG) 2010 and 2017.

BEPS final report on Action 14[90] aims at the improvement of MAP.

Response of the UN

Like OECD the UN does not create binding law on dispute resolution.

The Commentary on Art 25 UN MC provides guidance on the mutual agreement procedure.

In 2012 the UN Committee of Experts on International Tax Matters approved a Guide to the Mutual Agreement Procedure under Tax Treaties (GMAP).

The UN Transfer Pricing manual for developing countries.

4. Current Mechanisms to minimize cross-border tax disputes

[89] As it has been done regarding the BEPS minimum standards (IF?)
[90] OECD/G20. 2015. Making Dispute Resolution More Effective. Final Report

4.2.1 **APAs and other approaches to rulings**

Chapter	Proposed Chapter Facilitators	Proposed Additional Drafting Group Members
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Draft received: _____√_20.09.2017_____

4.1 On a domestic level

4.1.3 Cooperative Compliance

Draft provided by Alicja Majdanska (Contribution to Chapter 4.1.3)

Cooperative compliance is a tax compliance program addressing large business taxpayers. It moves away from a retrospective control based on a comprehensive tax audit and, instead, relies on a cooperative relationship between tax administrations and large business taxpayers. It enables the tax administration to focus on assuring the integrity of the control processes in the enterprise of the large business taxpayer and to examine only substantive issues. It involves the discussion of the tax treatment in real-time or even prospectively. In the consequence, it is expected to result in the increased number of tax disputes, improved efficiency and effectiveness of the tax administration and greater (often even earlier) tax certainty for taxpayers.

In many respects cooperative compliance can be seen as a similar instrument to advance pricing agreements (see section …). Both cooperative compliance and advance pricing agreements are voluntary tax compliance instruments that improve tax certainty. However, cooperative compliance has much broader scope and cover all operations of the taxpayer. It is also more flexible because it is up to continuous changes along the discussions the tax administration holds with the taxpayer. It is also usually not limited to a fixed period of time.

The FTA formulated six essential features that define cooperative compliance by description of capabilities required from the tax administrations and the taxpayers willing to be involved. The tax administration needs to be responsive, have a good commercial awareness, operate impartially, proportionally, and be open and transparent with respect to treatment of tax risks. The program needs to fit the tax compliance strategy adopted by the tax administration. It should contribute directly to the overall mission and operational targets of the tax administration. In addition, it also needs to be underpinned by a robust governance framework that prevent the program misapplication. The adoption of integrity rules and core values, a rotation system, the implementation of standard working programs and operating systems are just some examples suggested by the FTA and also implemented by some countries in their programs.[91]

[91] OECD, "Co-Operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance" (Paris: OECD Publishing, 2013), 69, doi:10.1787/9789264200852-en.

The taxpayers involved in cooperative compliance are expected to offer full disclosure and transparency with respect to their tax position. In that context disclosure means that the taxpayer has to provide the tax administration with all the information relevant for the purpose of fully informed risk assessment of the tax issues arising from a tax return, whereas transparency refers to the framework within which these individual acts of disclosure take place. For that purpose, the taxpayer needs to set up a tax control framework.

The tax control framework is core of cooperative compliance. [92] It provides empirical evidence that a tax return provided by the taxpayer within cooperative compliance can be relied upon, in terms of both its accuracy and completeness. [93] The FTA identified six principles that are recommended in tax control framework design.[94] The tax control framework should have the following features:

- include **tax strategy** covering, among others, tax risks, risk tolerance, extent and scope of enterprise's appetite for involvement in aggressive tax planning arrangements, Board's degree of engagement with tax planning decisions, reporting, filling and payment.
- be **comprehensive** and cover all policies, procedures and process in respect of relevant taxes.
- assign **responsibility** and set out who in the enterprise is in charge of tax function. The tax control framework should be developed by the senior management and approved by the CFO or the Board.
- be underpinned by documented **governance** that would describe the mechanisms, processes and relations by which any tax relevant actions are controlled and directed.
- subject to **testing**: it should be subject to regular testing, monitoring and maintenance.
- provide **assurance**: it should provide assurance to all stakeholders, including the tax administration, that the taxpayer has an internal effective system which enables to control all tax risks and issue reliable tax outputs whereas any departures from the established framework are identified and mitigated or eliminated.

Specific program design differs from country to country and often depends on existing legal and institutional framework. Some programs are introduced by legislators by the means of statutes (e.g. the Italian cooperative compliance) and some by tax administrations by the means of administrative provisions with their discretionary power to organize and manage administration of the tax system (e.g. the Dutch horizontal monitoring). Differences refer not only to the way how programs are implemented but also to the eligibility criteria, program benefits and termination conditions.[95] Some involve tax rulings.

Table

[92] Ibid., 53.

[93] Ibid., 58.

[94] OECD, "Co-Operative Tax Compliance: Building Better Tax Control Frameworks" (Paris, 2016), doi:10.1787/9789264253384-en.

[95] See: Jonathan Leigh Pemberton and Alicja Majdanska, "Can Cooperative Compliance Help Developing Countries Address the Challenges of the OECD/G20 Base Erosion and Profit Shifting Initiative?," *Bulletin for International Taxation*, no. 10 (2016); Rita Szudoczky and Alicja Majdanska, "Designing Co-Operative Compliance Programmes: Lessons from the EU State Aid Rules for Tax Administrations," *British Tax Review*, no. 2 (2017).

Features/Country	*United Kingdom*	*Italy*
Name of the program	Framework for Co-operative Compliance	Regime di adempimento collaborative
Legal means of implementation	Legislative act	Legislative act
Eligibility criteria	- all large business taxpayers	- large business taxpayers with a turnover that exceeds EUR 10 billion, - taxpayers who execute an investment tax ruling that realizes investments in excess of EUR 30 million as a result of a spontaneously initiated ruling procedure[96], - taxpayers that have participated in the pilot project on co-operative compliance may remain with the programme
Benefits	- no tax audits for low risk taxpayers over the period of three years.	- decreased penalties for non-compliance in case a tax risk has been disclosed by the taxpayer before a tax return has been filed, - faster tax rulings procedure,

[96] The taxpayers that are eligible are those who request for a tax ruling available for companies that intend to invest in Italy. The new system is aimed at providing them with certainty about the income tax and indirect tax consequences arising from their investment plan. The investor, either resident or non-resident, must file a business plan, detailing the amount of the investment, the industry, the timing and implementation phases and the expected number of new hires. The ruling may include, among other aspects, the likelihood of application of abuse of law or other anti-avoidance measures, tax profiles of reorganizations and whether certain asset purchases will amount to a going concern. The procedure applies to investments of not less than euro 30 million. Tax Authorities should provide the investor with a written answer in 120 days, binding as long as the facts and circumstances set out in the application do not change. The procedure was implemented by Article 2 of Legislative Decree No. 147 of September 14, 2015 and the implementation rules were set out in a decree by the Ministry of Economics and Finance. Whereas Circular No. 38/E providing clarifications with respect to this group of taxpayers and confirmed that may elect to participate in the program independently from the amount of their accounting revenues or turnover. See also: http://taxinsights.ey.com/archive/archive-news/italy--cooperative-compliance-program---clarifications-issued.aspx. Last viewed: 07.12.2016.

Tax rulings	no	yes
Termination criteria	- the taxpayer does not meet expectations for low risk behaviour or directly engages in behaviour which in HMRC's opinion is high risk and also does not cooperate with the customer relationship manager.	- if the taxpayer's tax control framework does not meet requirement as stipulated in the law, - if the taxpayer fails to comply with any of tasks as required from the taxpayer within the programme and stipulated in the law.

Cooperative compliance has a number of benefits it may offer to different stakeholders: tax administrations, taxpayers, policymakers, wider society.

From the perspective of the tax administration, cooperative compliance is mainly seen as a way to improve tax compliance by making compliance easier to those who are willing to be compliant. It also improves capabilities of the tax administration with respect to its commercial awareness. It helps develop better understanding of how multinationals manage their business and the control systems. Thanks to cooperative compliance the tax administration can better manage its scarce resources and better target specific issues for the purpose of audit.

From the perspective of taxpayers, cooperative compliance accounts for earlier certainty about their tax liabilities and that is commercially valuable. They reduce the need to make provisions for uncertain tax positions and unexpected tax liabilities. It should potentially lead to lower compliance costs.

From the wider society and policy making perspective, cooperative compliance may contribute to designing better tax policy through more open dialogue between government and business. Cooperative compliance is about building trust, mutual understanding, openness and transparency into the relationship between the tax administration and taxpayers. These are the pillars of good governance.

Among different benefits offered to different stakeholders, cooperative compliance also **has a potential to reduce a number of tax disputes and also to quicker resolution of existing disputes.** There are many reasons for that.

The cooperative nature of the program has **a self-limited effect on the number of disputes**. Taxpayers participating in cooperative compliance are usually willing to be tax compliant and seek tax certainty. Cooperative compliance provides a platform for discussion on treatment of a tax position adopted by the taxpayer. In this way, even before a dispute arises both the tax administration and the taxpayer can discuss technical issues, the relevance of the case to business operations and adopted tax standpoints, and finally they can reach the agreement on the tax law interpretation.

This is supported by **early disclosure of tax risks**.[97] It is usually thanks to the tax control framework adopted by the taxpayer that helps reveal any tax risks in advance. As a result, the taxpayer can discuss those risks with the tax administration in advance, before the tax return is filled. It can contribute to swift resolution of any issues.

It does not mean that the participation in cooperative compliance excludes tax disputes. Taxpayers may disagree with the tax administration. The advantage of disputes within cooperative compliance is that they

[97] OECD, "Co-Operative Compliance: A Framework: From Enhanced Relationship to Co-Operative Compliance," 33.

are typically easier to manage. They are resolved quickly. By discussing and resolving cases earlier, abortive inquiries and costly, time-consuming litigation can usually be avoided. The tax administration can save the resources and direct them to higher-risk cases. Any disputes that do arise are more likely to be focused on legal construction, since the facts should already be agreed upon.[98]

In case of those taxpayers who persistently take up a series of positions that conflict with the view of the tax administration, they are likely to change their tax strategy, if they lose most or all of the cases in the court. Either they decide to follow tax assessment provided by the tax administration or they leave the program.

Resolution of legacy issues

For instance, in the Netherlands, resolution of legacy issues is one of steps leading to entering into the conclusion of the cooperative compliance agreement. The Dutch tax administration and the taxpayer draw up the summary of the current issues and decide on priority to their settlement. Both parties discuss issues and reveal their opinions. The Dutch tax administration, acting within its discretionary power, so-called *freies Ermessen* – values the facts and estimates the uncertainties. General outcome of reached agreements has to be compatible with the legislation, regulations and case law. Not all issues have to be resolved. If the Dutch tax administration and the taxpayer are not able to resolve all legacy issues, both parties are expected to reach agreement on facts so when the case is submitted to court, it can be completed as smoothly as possible.

In addition, the design of some programs on cooperative compliance provides for **resolution of legacy issues yet before entering into cooperative compliance** arrangement. That clears a way to working in real time. In addition, the tax administration gains a valuable insight into the manner of whether and how the taxpayer is willing to cooperate.

The concept of cooperative compliance was developed by the FTA based on countries experiences. So far the concept has been adopted only in a few developing countries.[99] However, there can be recognized a growing interest. From the perspective of developing countries, cooperative compliance may offer a number of advantages. It may help improve tax administration's capacity management. The tax administration could focus its resources on substantive issues, rather than routine, but costly, traditional assurance activities in the form of audits and investigations. It could work as a procedural tax incentive that does not affect the tax base but provides an improved tax certainty. In this way, it could attract reasonable investments.[100]

In terms of the implementation of cooperative compliance the existing research shows the need to tailor the design to domestic legal and institutional framework and also to some international commitments, e.g. State aid rules.[101] At the domestic level, in particular, the principles of legality, equality

[98] Majdanska A. Leigh-Pemberton J., "Changing the Relationship between Tax Administrations and Taxpayers," *Tax Notes International* 81, no. 3 (2016): 247–55.

[99] Among BRICS, Russia introduced a cooperative compliance program in 2016. Azerbaijan, Ghana and Kazakhstan run pilot programs on cooperative compliance. See: Arzu Hajiyeva, "Azerbaijan," in *Improving Tax Compliance in a Globalized World. Rust (Burgenland, Austria) from June 30 to July 2, 2016*, 2016; Xeniya Yeroshenko and Tomas Balco, "Kazakhstan," in *Improving Tax Compliance in a Globalized World*, ed. Michael Lang et al. (IBFD, 2016).

[100] See also: Leigh Pemberton and Majdanska, "Can Cooperative Compliance Help Developing Countries Address the Challenges of the OECD/G20 Base Erosion and Profit Shifting Initiative?"

[101] Szudoczky and Majdanska, "Designing Co-Operative Compliance Programmes: Lessons from the EU State Aid Rules for Tax Administrations"; Alicja Majdanska and Jonathan Leigh Pemberton, "Different Treatment, Same Outcome: Reconciling Cooperative Compliance with the Principle of Legal Equality," Unpublished, 2017; Leigh Pemberton and

and certainty may have an impact on the scope of taxpayers eligible and type of benefits provided by a specific program.[102] In terms of institutional framework, it may be also worth to take into account whether the tax administration is familiar with tax strategies addressing a specific segment of taxpayers, specifically whether there already exists a segment for large business taxpayers.

There are a number of challenges that the implementation of cooperative compliance may imply. Given the novelty of the concept, **the pilot approach to its implementation**, both in case of developed and developing countries, seems to be so far the right way to follow. It may allow to test the concept in the context of existing relationship between the tax administration and large business taxpayers.

Similar to any new tax compliance strategy, the implementation of cooperative compliance requires **commitment from the top level management in the tax administration and staff buy-in at lower levels of the tax administration**. The tax administration needs to be ready to support cooperative compliance with the necessary resources and to exemplify the behaviours expected of a tax administration that accepts the principles of cooperative compliance. Cooperative compliance is an addition to the toolkit available to the tax administration that allows it to respond positively to taxpayers who have demonstrated a willingness to comply and **it does not remove the need to employ repressive measures in other cases**. There needs to be a shared understanding between the taxpayer and the tax administration of what the program objectives are, how the process will work, how the tax administration will obtain assurance about the tax control framework and how this should be documented.

To play its role, **the pilot program should be subject to evaluation**. Evidence from the pilot programme may inform tax policy making, improve program operations and shape opinion of wider stakeholders. The pilot program should provide foundation for greater accountability in administration of the tax system, trigger innovation and enhance learning.

Some specific recommendations with respect to steps in the pilot program are described in the box xx.

Majdanska, "Can Cooperative Compliance Help Developing Countries Address the Challenges of the OECD/G20 Base Erosion and Profit Shifting Initiative?"

[102] Alicja Majdanska, *The Concept of a Co-Operative Compliance Programme in the Legal and Institutional Framework. The Potential for Less Developed Countries.* (Working Draft. Unpublished, 2016).

Steps in the implementation of a pilot program on cooperative compliance

In the detailed pilot project's design countries may want to consider the following few steps:

(1) Strategic fit

The pilot program should have "strategic fit". This refers not only to the broader tax compliance strategy (its consistency with existing plans and commitments, including operational targets) but also to the legal and institutional framework (e.g. required resources in terms of type and number.

(2) Scope and type of a pilot program

This step takes into account decisions on the following issues:

- which and how many taxpayers can be invited to take part in the pilot program.
- which taxes are included and which types of case.
- what model for cooperative compliance is going to be chosen:
    - a post-return filling model which focuses on the examination of an already filed tax return,
    - a pre-return but post-transaction model that examines transaction after they have taken place but prior to the tax return being filed or
    - a model including pre-transaction rulings when the tax administration and the taxpayer work and discuss tax risks that are anticipated in relation to transactions that are planned but not yet executed. This model of a cooperative compliance program may involve tax rulings or advanced pricing agreements in transfer pricing cases.

(3) Legacy issues

The pilot design needs to acknowledge how legacy issues should be treated. There are various options how to manage legacy issues. They may be managed separately along traditional lines, set on one side while the pilot program runs or included in the scope of the pilot program.

(4) Assurance on the TCF and materiality of tax risks

For the purposes of assessing and testing the TCF, the design of a pilot program should define materiality of tax risks. Materiality may be defined by reference to qualitative and/or quantitative aspects of tax compliance. In case of qualitative materiality, the intention is to assess the significance of any misstatement from a compliance perspective; i.e. the degree of culpability. Quantitative materiality is determined by reference to the amount involved, which could be stated as a percentage of turnover or as an amount in cash terms. The decision about materiality drives decisions about the volume and intensity of testing and monitoring of the TCF.

(5) Duration and measure of success

The pilot program should be subject to evaluation. For that purpose it should be run for at least one full return cycle. It should define and prioritize expected outcomes as well as how to measure and report them.

(6) Documentation

The pilot program should be based on a program plan setting out key dates and milestones. Details of measures of success and the process for capturing lessons learnt should also be described.

(7) Communication

The pilot program should be communicated both internally to the staff of the tax administration and externally to wider stakeholders.

4.2 APAs and other approaches to rulings

Draft provided by Norbert Roller (Contribution to Chapter 4.2)

An APA is an arrangement between a taxpayer and a tax authority or between two tax authorities to lock in transfer prices for a fixed period of time. It is defined in the OECD TPG as "an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables, an appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations"[103]. An APA can be concluded unilaterally and bi- or multilaterally as questions on transfer pricing issues occur between a taxpayer and the tax administration of its residence, and between tax administrations of different jurisdictions[104]. Legally, unilateral APAs are based on domestic procedural tax law. Whereas bi- or multilateral APAs have to be founded on provisions in international treaties such as DTCs, where usually provisions implementing Article 25[105] of OECD or UN MC on MAP can serve as the basis for such agreements.

Many developing countries are reluctant to introduce APA programs, despite their positive effects on tax certainty and dispute avoidance. Lack of transfer pricing experience and knowledge, as well as the lack of trust in such cooperative procedure, might cause such caution. Additionally, asymmetries in the capacities and skill and training level between the tax administration and taxpayers or between different tax administrations could increase a countries reluctance. Whenever there are significant discrepancies between the parties' resources this will likely influence the outcomes favoring the resource-rich side. Nonetheless, it has to be mentioned that asymmetries, as described above, will also occur in other situation like audits or MAPs and are therefore not an exclusive problem of APAs.

APAs have significant direct and indirect costs. Firstly, skilled persons have to be deployed, and their expenses, e.g. for traveling, have to be covered, thus resulting in increased direct costs. Secondly, for countries with limited availability of those resources, allocating them to the APA function will result in a lack of capacity in other functions such as auditing and thus can result in significant losses in revenue.

A strong and stable institutional framework is a precondition for a successful APA program. Including the availability of well-trained staff as well as model processes, which define decision making authority and legally binding effects. In particular, where the institutional framework is missing there is a risk of wasting scarce resources to a procedure, that cannot provide legal certainty

[103] OECD TPG Para 4.123

[104] Guidance of these topics has been provided within the OECD TPG para 4.129 and 4.130, the UN TPM Chapter 3.10, and the World Banks Handbook (Transfer Pricing and Developing Countries, A Handbook for Policy Makers and Practitioners) Chapter 7, p319.

[105] Reference to OECD (and UN) Commentary

due to those deficits. Often the APA function is part of or at least connected with the competent authority function in more general.

Other rulings might be available that focus more on legal than on factual questions. An APA is a specific ruling that deals with matters of transfer pricing. In those cases, the facts and circumstances are typically of particular importance and their comprehensive and conclusive description will be essential in the taxpayers' request as well as the decision of the tax authority. However, many domestic procedural rules additionally foresee general ruling procedures as well, which are not limited to questions of transfer pricing or generally the international tax law. Domestic procedures for such general rulings depend on the respective national law. In some countries, those rulings are rendered on a local level by regional tax authorities. Nevertheless, those countries are well advised to keep a central registry to guarantee consistency in the application of the law.

APAs have dispute avoiding effects, however, they have their limits. APAs are often described as instruments for the avoidance of international tax disputes, because of their cooperative character. Depending on their specific form, as either unilateral or bi- or multilateral APAs, their effectiveness will, however, be limited to those parties, who participated in the respective decisions. Additionally, questions that might lead to disputes during an audit might as well lead to discussions during an APA procedure. Hence the dispute occurs only at an earlier time but is not completely avoided. Nonetheless, it can be assumed that those earlier disputes are solved more easily than when taxpayers still have the opportunity to adapt their behavior to the tax administrations thinking.

5. Tax Treaty Mechanisms to Resolve Cross Border Tax Disputes: The Mutual Agreement Procedure[106]

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Draft received: _____√_20.09.2017_____

5.1 General issues in MAP

5.1.1 Legal basis for MAP

Since bilateral tax treaties are incomplete contracts as they do not expressly cover in advance all potential double taxation situations, the interjurisdictional disputes stemming therefrom might be resolved either by amending them ex post, or by laying out a procedure (i.e. the MAP) to be followed should a dispute arise.

MAP is included in the equivalent to article 25 of almost every DTC following the OECD or UN Model. Article 25 guidance for the development of a process between tax administrations to eliminate double taxation. The MAP can be used to eliminate economic or juridical double taxation.

Under article 25, three different types of procedures are envisioned.

[106] The contributions made by Mr. Janos Pasztor from Wolf Theiss to this outline are gratefully acknowledged

First, article 25(1) of the OECD Model (MAP in a "narrower sense") provides for relief of double taxation not in accordance with the double tax convention. Only the taxpayer may initiate this type of proceedings, if he believes that taxation is not or will not be in accordance with the tax treaty. **This is the most common type of procedure.**

The taxpayer-initiated MAP under the OECD Model is divided into two stages. Pursuant to article 25(1), a taxpayer may submit a request to the competent authority in his residence state if he considers that the actions of one or both contracting states have resulted in taxation not in accordance with the provisions of the convention.

This constitutes the first stage of the MAP and takes place exclusively between the taxpayer and the requested competent authority. The competent authority is obliged to take the objection into consideration and, if it is justified, to take action. If the taxation not in accordance with the convention is due entirely to its actions, then it must remove the grounds for objection by granting an adjustment or relief.

Should the competent authority not be able to arrive at a satisfactory solution on its own, because the issue is caused, at least in part, by the actions of the other contracting state, then it must initiate the second stage of the proceedings, the MAP proper, as soon as possible. The second stage of MAP takes place exclusively between the competent authorities of the contracting states.

Second, article 25(3), first sentence, can be used for removing difficulties regarding the interpretation or application of the DTC. The competent authorities are free to initiate proceedings in order to eliminate difficulties concerning the interpretation and application of the treaty as well as double taxation. This applies to legal as well as factual matters of a general nature that concern a category of taxpayers. More precisely, it allows the competent authorities to complete or clarify the definition of a term in the convention, settle difficulties arising from changes in national law and determine the conditions under which interest may be treated as dividends as a result of domestic thin cap rules. This type of MAP is fairly rare in practice, but such agreements on interpretation between the competent authorities are often published, thus affecting the application of a tax treaty significantly.

Third, article 25(3), second sentence, allows tax authorities to consult together in cases of double taxation not provided for in the convention. This category does not deal with the interpretation or application of the convention. Some countries exclude this type of MAP from their bilateral tax treaties because of incompatibilities with domestic law. The second and third types of

MAP are usually related to issues of a general nature and may be initiated by the competent authorities. As is the case for a taxpayer-initiated MAP, the agreements reached under article 25(3) are binding.

5.1.2 Purpose and importance of MAP

The importance of the MAP stems from the fact that it provides taxpayers with an alternative to tax litigation, which can be cumbersome and uncertain, especially since it needs to be taken up in both of the contracting states in order to provide an effective relief for double taxation. It also entails a timing advantage, since the taxpayer is not obliged to wait until the taxation has been charged or notified to him in order to set the procedure in motion. It is sufficient if he establishes that the actions of one or both contracting states will probably result in taxation not in accordance with the convention.

5.1.3 Typical variety of cases dealt with in MAP

As previously mentioned, the vast majority of MAPs requested and concluded in practice are MAPs under Article 25, initiated by the taxpayer in a specific case. Such disputes often arise from the differing interpretation of the provisions of a treaty by the jurisdictions being party to it.

There are several common categories of MAP cases, the incidence of which in a country's inventory depends on the nature of its economic relations with other countries and of its domestic economy.

One very well-known type of MAPs are the transfer pricing cases, concerning the correct allocation of profits between permanent establishments and their head office or between separate entities.

Another common type of case are residency cases where each contracting state considers the taxpayer a resident of its own, both under the treaty and under domestic law, and thus taxes the world-wide income of the taxpayer.

A third common type of case are cases concerning cross-border employment situations.

5.1.3.1 *Bona fide taxpayer initiated adjustments*

Under the laws of some states, the taxpayer may be permitted under appropriate circumstances to amend a previously filed tax return to adjust the price for a controlled transaction between associated enterprises, or to adjust the profits attributable to a permanent establishment, in order to reflect a result in accordance (in the view of the taxpayer) with the arm's length principle.

A taxpayer-initiated adjustment is any action permitted under the domestic laws of a treaty partner and undertaken at the initiative of the taxpayer to adjust the previously reported results of controlled transactions, or the attribution of profits to a permanent establishment, in order to reflect an arm's length result.

A taxpayer-initiated foreign adjustment should be considered bona fide where it reflects the good faith effort of the taxpayer to report correctly the taxable income from a controlled transaction or the profits attributable to a permanent establishment and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the tax laws of the two Contracting States.[107]

Since such an adjustment would normally take place after the initial tax assessment in the contracting states involved, it will in most cases lead to double taxation. In order to ensure that competent authorities may resolve the double taxation that can arise in the case of a bona fide taxpayer-initiated foreign adjustment, taxpayers would need to be allowed to access the MAP in such cases.

Action 14 of the BEPS Action Plan recommends requires that access to the MAP be granted in such cases and that this be made explicit in countries' MAP guidance. The UN Tax Committee has not yet taken a stance in this regard.

Possible benefits of allowing such adjustments are that they reflect the true financial situation of the enterprises involved. Taxpayers would thus have more incentive to truthfully report arm's length prices for transactions if they do not result in the economic burden of double taxation.

However, given the capacity constraints of competent authorities, MAP cases resulting from taxpayer-initiated adjustments would put an additional (perhaps significant) strain on their resources and may prevent or at the very least encumber the resolution of MAP cases pertaining to adjustments made by the tax administrations. At the same time, taxpayers have an obligation to file their year-end tax reports accurately and on time. It can be argued that a breach of these obligations should not negatively impact the competent authorities, but the taxpayer, who is responsible.

[107] OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241633-en; p. 35.

5.1.4 Co-existence of MAP with domestic remedies

Article 25(1) stipulates that access to MAP is available "irrespective of the remedies provided by domestic law". This means that taxpayers are allowed to initiate a MAP and domestic remedies simultaneously.

However, most countries adopt a practical approach pursuant to which the MAP and domestic remedies cannot be pursued simultaneously. In other words, either the MAP or the domestic remedies must be pursued first. Most often, this is achieved by putting either the MAP or the domestic procedures on hold.

Many countries require that if the domestic procedures are still available, the taxpayer must first exhaust them or agree to waive his right to them before entering into the MAP. If the domestic remedies are pursued first, then a MAP can only be pursued in order to obtain relief in the other state if the competent authorities are bound to the decisions of the domestic courts. This greatly restricts the scope of application of the MAP and its attractiveness.

5.1.4.1 *Domestic audit settlements and access to MAP*

Audit settlement is a method used by many tax administrations to close audit files through an agreement with the taxpayer. Because they represent the result of a negotiation process, audit settlements typically involve concessions by both the tax administration and the taxpayer. However, an "audit settlement" **does not include** the settlement of a treaty dispute that is the result of an administrative or statutory dispute settlement/resolution process **that is independent from the audit and examination functions** and that can only be accessed through a request by the taxpayer.

Countries should inform their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

In order to ensure that an audit settlement represents a final resolution, one of the **concessions** sometimes sought by tax administrations is to include a **limitation on further recourses by the taxpayer**, especially recourses to domestic remedies, but also recourse to the MAP.

In **some jurisdictions** where the taxpayer has obtained procedural advantages or concessions from a tax administration upon audit settlement that would reduce the competent authority's ability to defend its case in a MAP discussion, then those jurisdictions often **impose the policy that the affected issues cannot be reversed or overturned in MAP proceedings.** The reasoning is that

the audit settlement is opted for by a taxpayer after informed decision factoring potential risk of tax consequences in the other jurisdiction. **In such case, for the sake of certainty, the tax authority should make that policy public.**[108]

Some countries consider that taxpayers and tax administrations should avoid the inclusion of a waiver of the right to access the MAP in audit settlements, especially where the case involves an activity or transaction with potential tax consequences in more than one jurisdiction. In such circumstances, they are of the view that it is inappropriate to have two parties (the taxpayer and one tax administration) not include the other involved party (the other tax administration) in the final resolution of the case.

In other jurisdictions, the taxpayer cannot forfeit its right to access MAP, regardless of the term of the audit settlement. **Still, even if this right is explicit in these countries, taxpayers may be unwilling to test it if they have already agreed not to seek the assistance of MAP.** This may be especially true in cases where the taxpayer will encounter the same tax administration office and auditor in the next audit cycle.[109] In addition, sometimes taxpayers offer to settle and not to go to MAP, since they had not planned to go anyway. In these cases, taxpayers often see a larger risk in exposing themselves to the other tax administration, where they have not yet been audited. Cautious taxpayers are often concerned that exposure in the MAP process could potentially lead to an audit referral.[110]

On the other hand, the tax administration that entered into the settlement may be precluded from resolving any double taxation situation that may result from the settlement via MAP. An audit settlement is generally binding on the tax administration that entered into it. Otherwise it could not be effective. This binding effect also extends to any discussions with the other tax administration during a MAP. As a result, by entering into an audit settlement, the possible outcomes of any ensuing MAP are severely limited. The tax administration entering into the settlement is barred by domestic law from accepting any deviating proposal made by the other tax administration. At the same time, it is extremely unlikely that the other tax administration(s) involved would agree to exactly the same resolution reached as part of the audit settlement. Therefore, the MAP will most likely fail. In addition, the domestic law of the other Contracting State may also prevent its tax administration from providing any double tax relief to the taxpayer with respect to the tax paid to the first Contracting State upon settlement of the audit.

[108] Guide to the Mutual Agreement Procedure under Tax Treaties as agreed by the Committee of Experts in their annual meeting in 2012, http://www.un.org/esa/ffd/tax/gmap/index.htm; p. 15.
[109] United Nations Guide to the Mutual Agreement Procedure under Tax Treaties as agreed by the Committee of Experts in their annual meeting in 2012; http://www.un.org/esa/ffd/tax/gmap/index.htm (UN MAP Guide), p. 15.
[110] OECD (2007), Manual on Effective Mutual Agreement Procedures, p. 35.

It must be understood that the question of providing access to MAP in a case in which a taxpayer has reached an audit settlement with the tax authorities is distinct from the question of whether MAP arbitration is available (where the relevant treaty contains an arbitration provision).[111]

The recommendations of Action 14 with regard to audit settlements

According to the OECD Action 14 Report and the Peer Review Documents, **audit settlements between the tax authorities and taxpayers should not preclude access to the mutual agreement procedure** (and this should be made clear in countries' MAP programme guidance) **for the following reasons:**[112]

First of all, taxpayers may not realize the potential implications of double taxation and the fact that an adjustment by the other tax administration may complicate the issue. Secondly, tax administrations should consider the issues of cooperation and reciprocity as well as the fact that one-sided settlements will not serve tax administrations well in the long run.[113]

The recommendations of Action 14 with regard to audit settlements have not been discussed by the UN Tax Committee.

5.1.5 The competent authority (CA) function

[to be added]

5.1.6 MAP and bi- or multilateral APAs

Details as regards APAs and possible merits and issues that countries should consider have been discussed in Chapter 3. However, a couple of points that are relevant to their relations with MAP are highlighted below

[111] OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241633-en; p. 19.
[112] OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264241633-en; p. 19.
[113] OECD (2007), Manual on Effective Mutual Agreement Procedures; p. 35.

1. An APA can be concluded unilaterally and bi- or multilaterally, as Questions of transfer prices can occur on different levels. While the legal basis for unilateral APAs can be found in the respective domestic tax law, either in legislation on transfer pricing, in specific legislation or in general procedural rules, legal basis for bi- or multilateral APAs can be found in international treaties such as double taxation treaties (DTCs), where usually provisions implementing Article 25 of OECD or UN model treaties on the Mutual Agreement Procedure (MAP) serve as basis for APAs. While some countries consider such international treaty provision alone as sufficient basis for a bi- or multilateral APA others require more specific domestic and international legislation for the conclusion of those arrangements.

2. Bi- and multilateral APAs allow for a higher degree of tax certainty but are more expensive. Every transfer pricing case involves eventually at least two jurisdictions and hence only when all of them are party to an APA tax certainty for the specific case is guaranteed. However, bi- or multilateral approaches usually take more time and result in higher costs for tax administrations[114] as well as the taxpayer, caused not only by more work hours needed but also by expenses for traveling that might be necessary. Those costs and benefits have to be carefully balanced by a tax administration wishing to introduce an APA program. Generally, bi and multilateral APAs are often preferred in literature[115] because they avoid the risk of being used by taxpayers as an instrument in tax arbitrage.

5.2 Procedural issues in MAP

5.2.1 Who can request MAP

[to be added]

5.2.1.1 *Positive - who is eligible*

[to be added]

5.2.1.2 *Negative – who should not have access*

[114] To buffer such (traveling) costs tax administrations could require taxpayers to bear that financial burden, Canada did so in its APA program.
[115] See also best practices BEPS final report

[to be added]

5.2.2 The role of the taxpayer in MAP

5.2.2.1 *The MAP initiation*

The taxpayer initiates the specific case MAP under Article 25 (1) by filing a MAP request with the competent authority of his state of residence. But afterwards the taxpayer does not have an active role in the procedure between the competent authorities. It should be noted, however, that BEPS Action Plan 14, and accordingly, the MLI, has allowed taxpayers to file such requests to either competent authority as a 'minimum standard' (or at least initiate a bilateral notification process). The MAP provisions in many existing treaties may, therefore, be modified to this extent. However, please note that the UN Model Convention has not been modified in this regard, even though a reference to this option are proposed to be added to the Commentaries.

The taxpayer's primary role in the MAP, and especially in the initiation phase, **is to provide the competent authority of its state of residence with complete and accurate information and documentation in a timely manner.** The taxpayer should promptly advise its competent authority of any material changes in the facts and circumstances relevant to its case, as well as any new facts and information that emerge subsequent to the taxpayer's prior submissions. The taxpayer should similarly provide complete and timely responses to any competent authority requests for additional information.[116] This is essential because the taxpayer is the only party who has a direct access to all relevant facts that may be determinative of the outcome of the procedure.

Beyond this, neither the OECD Model Convention nor the UN Model Convention explicitly mandate any minimum level of the taxpayer's involvement in the procedure. In practice, domestic law (or guidelines) in the taxpayer's country of residence usually outline his role in the MAP. Taxpayer participation may be useful, but it is not a given. Taxpayer involvement can take several different forms:

(i) the competent authorities' efforts to keep the taxpayer posted on the status of the MAP,
(ii) the taxpayer's input to the procedure by supplying factual information,
(iii) the taxpayer's right to give a joint, verbal presentation to both competent authorities and
(iv) the taxpayer's active participation in the MAP negotiations.

[116] Subcommittee on Dispute Resolution: Background Note on "Resolving issues that prevent a mutual agreement: Supplementary mechanisms for dispute resolution" - Addendum A Guide to the Mutual Agreement Procedure under the United Nations Model Double Taxation Convention between Developed and Developing Countries (2008); p. 29. http://www.un.org/esa/ffd/tax/documents/bgrd_model_dr.htm

Under many domestic laws, the taxpayer has a right to be kept appraised of the status of the MAP. As the bilateral phase of the MAP can often take a very long time and the taxpayer has a high stake in the proceedings, it is advisable to briefly inform the taxpayer of important steps in the procedures, without, of course, providing substantive details.

Such an information policy can also help prevent delays. If, for instance, the slow response of one competent authority is due to the fact that a related party of the taxpayer has not provided the necessary information, the taxpayer can exert influence on this party and thus speed up the proceedings if it is informed of the reasons for the delay. This scenario can commonly occur in transfer pricing cases.

The other 3 aspects of taxpayer participation are discussed in more detail in section 2.2.4.

5.2.2.2 *The right to withdraw a request*

A taxpayer has the right to end a MAP initiated at his request at any time before agreement was reached by withdrawing said request. This is not explicitly stated in the Models, but takes place quite often in practice.

Most often, such a withdrawal is due to the fact that the **double taxation challenged by the taxpayer has already been resolved by one or both competent authorities through domestic means.** While competent authorities are required to examine the possibility of granting relief domestically in the unilateral phase of the MAP, sometimes bilateral discussions between the competent authorities can result in an agreement that this is the best way to resolve the case.

Alternatively, it is possible that the taxpayer had initiated court proceedings in parallel with the MAP and that these proceedings result in a judgment leading to the elimination of double taxation.

Neither the Models and their Commentaries, nor the MAP Guides of the OECD and UN contain any formal requirements for such a withdrawal. Domestic MAP guidance may contain indications. Commonly, the withdrawal should be issued in the same form as the initial request. It need not contain any additional information or explanation of the reasons for the withdrawal.

5.2.2.3*The right to refuse an agreement*

Taxpayers have the right to request MAP assistance, but they are generally not bound by the mutual agreement between the two competent authorities if, and when, this is reached. Although neither the OECD Model Convention nor the UN Model Convention states this explicitly, it can probably be inferred from Article 25(1), which says that the MAP and the domestic remedies

are not tied to each other. Moreover, both the OECD Commentary and the UN Commentary[117] point to this conclusion.

The OECD Commentary addresses the issue in examining the scenario of a mutual agreement that is concluded with regard to a taxpayer who is still litigating the same case in the courts of either Contracting State. The OECD Commentary states that there is no ground for rejecting a MAP request made by a taxpayer on the basis that he is allowed to disregard the solution agreed upon as a result of the MAP until the court had delivered its judgment in that suit. This makes it clear that the OECD Commentary does not consider the mutual agreement to be binding on the taxpayer.

The UN Commentary also recognizes that the general practice is that taxpayers are not bound by the mutual agreement.

Embarking on a MAP without the certainty that the taxpayer will accept its outcome may represent a serious waste of resources that many developing countries may barely afford. In addition, the competent authorities will want to avoid any inconsistency between the mutually agreed solution and the outcome of a court proceeding There are different possible approaches to address this issue.

One possibility is to make the implementation of the mutual agreement contingent on (i) the taxpayer's acceptance of the mutual agreement and (ii) the taxpayer's renunciation of domestic remedies with respect to those points settled in the mutual agreement. This method ensures that the agreement will not subsequently be challenged. It cannot, however, prevent the taxpayer from rejecting the agreement outright. Nevertheless, if such a rejection should occur, it frees the competent authorities of the burden of implementing the agreement.

Another possible approach is for the competent authorities to make the access to MAP itself conditional upon the taxpayer's waiver of domestic legal remedies. However, this would not be in line with the intent of the MAP itself and even less with the objective of Action 14 to guarantee access to MAP, which has (broadly) been endorsed by the UN Tax Committee. Therefore, such an approach is not recommended. Moreover, should this approach be considered, then it should be implemented in the treaty itself to guarantee legal certainty.[118] A MAP provision in a bilateral treaty which is fully in line with Article 25 (1) of the UN Model Convention could not be interpreted as being subject to this restriction.

[117] Commentaries on the United Nations Model Double Taxation Convention between Developed and Developing Countries, http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf

[118] Cesare Silvani, Dispute Resolution Procedures in International Tax Matters, IFA Research Paper #5 (2014); pp. 41-42.

5.2.2.4 *Other ways to involve the taxpayer in the MAP*

Taxpayers can support administrations in the conduct of MAP. MAP is a state to state procedure, hence taxpayers have only limited rights in this procedure. However, the taxpayer is a stakeholder in the procedure and he will often have strong opinions on preferable outcomes of it. Indeed, taxpayers will frequently be willing to voluntarily contribute significantly to the procedure in order to support their own standpoints. While the taxpayer might not have a right to contribute directly to the procedure such contributions could, nevertheless, be highly appreciated by competent authorities. For example, the presentation of the facts and circumstances of a case to both competent authorities may be for the benefit of the better understanding of economic circumstances for both tax authorities and should be considered in particular in fact intensive cases such as transfer pricing cases[119]. Indeed, Article 25 does not restrict voluntary cooperation beyond legal requirements of the taxpayer with one or both involved competent authorities.

Taxpayers can make presentations on facts and circumstance of the case, they can as well explain their legal thinking and they could go as far as preparing drafts for position papers or final agreements. The form of such involvement can vary. In fact, taxpayers do not have to be neutral in MAP but can decide to support the positions of one or another competent authority. However, this does certainly not relieve them from any obligation to cooperate with the competent authority not supporting their views. In particular, both authorities should have access to the same information on the facts and circumstances of the case and should not receive conflicting information from the taxpayer[120].

Tax administration who rely heavily on the support of taxpayers in MAP need to be cautious about losing control of the procedure. This risk is particularly relevant for jurisdictions with limited own capacities in conducting MAP since they will be the ones who are more tempted to use taxpayer resources and, additionally, controlling a case is, due to their lack of resources, more difficult in the first place.

An active participation of the taxpayer may also carry other risks. For example, if the taxpayer were present at the discussion table together with the competent authorities, they would need to refrain from referring to previous MAP cases that they have examined and take additional precautions to ensure **confidentiality and tax secrecy**.[121] Hence, benefits and risks of close cooperation have the be carefully balanced.

[119] Best Practice #13 MEMAP

[120] MEMAP 3.3.1.

[121] Cesare Silvani, Dispute Resolution Procedures in International Tax Matters, IFA Research Paper #5 (2014) IFA; p. 39.

Taxpayers may also avail of alternative dispute resolution mechanisms, like mediation, conciliation or an expert witnesses – competent authorities agreement provided. When MAP cases are deadlocked, are at risk to fail, and binding arbitration is not foreseen alternative dispute resolution mechanisms, like mediation, conciliation or expert witnesses, are introduced in different materials[122] as one way to overcome such situation. However, those mechanisms can be costly and hence, their use can be restricted for purely financial reasons. In such cases, taxpayers might consider contributing to MAP by financing those mechanisms and it will be up to the competent authorities to accept such contribution or not.

Whenever enhanced taxpayer involvement is considered matters of data protection have to be considered. As mentioned above, information exchanged between competent authorities in MAP is covered by the same confidentiality requirements as with all other forms of exchange of information under Article 26 OECD and UN MC, therefore, sharing confidential information with taxpayers will need the consent of the other tax administration.

Any jurisdiction fostering enhanced taxpayer involvement in MAP should consider framing this into specific guidelines.

Cooperation among all stakeholders involved in the MAP process is crucial to a responsive and well-functioning MAP program. The provision of information and assistance when requested will promote transparency and consistency. Thus, cooperation amongst these stakeholders or parties (taxpayers and competent authorities) to the MAP process is paramount. In particular, the duration of MAP depends on such good cooperation[123].

5.2.3 Time-limits in MAP

There is no overall time limit for the MAP, either in the UN or in the OECD Model Conventions, unless the MAP article includes an arbitration clause. In case an arbitration clause is included, then the time-limit for concluding a successful mutual agreement is determined by the wording of the arbitration clause. Under the OECD Model Convention, the arbitration can be requested after two years, while under the UN Model Convention, the time-frame for the MAP is 3 years.

While there is no overall time limit, the UN Guide to MAP provides an ideal timeline for carrying out the MAP (see section 3).

[122] as many refs as possible
[123] MEMAP 3.3.3.

On the other hand, there is a very important time limit in the MAP process: the deadline initiating the MAP. This is identical in both Models and is *"within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention"*. While this may seem like a clear and easy-to-verify requirement, in practice there are significant difficulties in correctly determining and applying this deadline both for the taxpayer and for the competent authorities.

One type of situation which causes such difficulties are self-assessment cases. In self-assessment cases, there will usually be some notification effecting that assessment (such as a notice of a liability or of denial or adjustment of a claim for refund), and generally the time of notification, rather than the time when the taxpayer lodges the self-assessed return, would be a starting point for the three year period to run as stipulated in Article 25(1) of the OECD Model Convention.

Where a taxpayer pays additional tax in connection with the filing of an amended return reflecting a bona fide taxpayer-initiated adjustment, the starting point of the three year time limit would generally be the notice of assessment or liability resulting from the amended return, rather than the time when the additional tax was paid.

There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of "notification" would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention. This could, for example, be when information recording the transfer of funds is first made available to a taxpayer, such as in a bank balance or statement.

The time begins to run whether or not the taxpayer actually regards the taxation, at that stage, as contrary to the Convention, provided that a reasonably prudent person in the taxpayer's position would have been able to conclude at that stage that the taxation was not in accordance with the Convention. In such cases, notification of the fact of taxation to the taxpayer is enough. Where, however, it is only the combination of the self-assessment with some other circumstance that would cause a reasonably prudent person in the taxpayer's position to conclude that the taxation was contrary to the Convention (such as a judicial decision determining the imposition of tax in a case similar to the taxpayer's to be contrary to the provisions of the Convention), the time begins to run only when the latter circumstance materialises.[124]

[124] Draft Contents of the 2017 Update to the OECD Model Tax Convention http://www.oecd.org/ctp/treaties/oecd-releases-draft-contents-2017-update-model-tax-convention.htm; p. 132.

5.2.4 Completion of MAP

[to be added]

5.2.4.1 *Agreement*

[to be added]

5.2.4.2 *No agreement*

[to be added]

5.2.4.3 *Implementation and enforcement of an agreement*

[to be added]

5.2.5 Interrelation between MAP and domestic law remedies

[to be discussed how this can be differentiated from 1.4]

5.2.5.1 *Administrative or judicial remedies*

[to be added]

5.2.5.2 *Suspension of tax collection*

[to be added]

5.3 Practical aspects of MAP

Before going into practical considerations on the MAP process, it is important to have a clear picture of the different steps of the procedure. The following table provides an overview of the entire MAP procedure and its ideal timeline under Art 25 (1) of the UN Model.

Action	

Taxpayer	**State A Competent Authority (Taxpayer's State of Residence)**	**State B Competent Authority**	**Target Time Frame or Deadline**
Initiation of the MAP			
• Submit MAP request to State A Competent Authority (CA). • If a transfer pricing case, Taxpayer (or associated enterprise in State B) is encouraged to contact State B CA and provide it with the relevant details of MAP request.			Under Article 25(1) of the UN Model: "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention"
	• Confirm receipt of MAP request.		Within one month of Taxpayer's submission of MAP request to State A CA.
	• In transfer pricing cases, Advise State B CA of MAP request.		Within three months of Taxpayer's submission of the MAP request to State A CA.
	• Preliminary review of MAP request. • Where necessary, request additional information from Taxpayer. • Determine whether MAP request will be accepted. • If case accepted, the unilateral phase of the MAP begins.		Within four months of Taxpayer's submission of the MAP request to State A CA.
Unilateral stage			

	• Determine whether unilateral relief is possible and appropriate. • Notify Taxpayer whether MAP request will be accepted and whether unilateral relief is possible and appropriate. • In transfer pricing cases, inform State B CA that MAP request is accepted and whether unilateral relief is possible and appropriate.		Within three months of Taxpayer's submission of all information required by State A CA to determine whether the MAP request will be accepted and whether unilateral relief is possible and appropriate.
Bilateral stage			
	• If no unilateral relief possible, propose to State B CA to initiate MAP discussions - issue opening letter to State B CA and communicate all relevant information in order to allow State B CA to examine the case.		Within three month of the notification to the taxpayer that MAP request is accepted and unilateral relief is not possible and appropriate.
		• Confirm receipt of State A CA request to initiate MAP discussions. • Preliminary review of MAP request. • Where necessary, request that State A CA obtain additional information from Taxpayer.	Within one months of State B CA's receipt of State A CA's opening letter.
		• Notify State A CA whether request to initiate MAP discussions is accepted.	Within three months of State B CA's confirmation

	If State B CA agrees to MAP discussions, the CA of the Contracting State that initiated the adjustment or, in the absence of an adjustment, of the Contracting State the taxation of which is considered not in accordance with the Convention (whether State A CA or State B CA) analyses and evaluates the MAP case and prepares a position paper for the other CA.		Within six months of State B CA's agreement to enter into MAP discussions.
	• Review of MAP case by the other CA. • Where necessary, the other CA may request that the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention, provide additional information or explanation. • Determination by the other CA whether unilateral relief is possible and appropriate. • Where appropriate, preparation of rebuttal paper or other response to the position paper by the other CA.		Within six months of the other CA's receipt of the position paper prepared by the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention.
	Negotiation between State A CA and State B CA.		
Conclusion of the MAP			
	• MAP agreement between State A CA and State B CA. • Memorialise MAP agreement in summary record.		
	• Notify Taxpayer that MAP agreement has been reached and explain its terms. • Where relevant, request that Taxpayer indicate whether it accepts MAP agreement.		
Notify State A CA whether it accepts the MAP agreement.			Within one month of notification of the MAP agreement.

	If Taxpayer accepts the MAP agreement, State A CA and State B CA confirm and formalise MAP agreement through exchange of letters.		Within one month of the Taxpayer's acceptance of the MAP agreement.
	Implementation of the MAP agreement.		No later than three months after the exchange of letters formalising the MAP agreement.

Source: G-MAP pp. 34-37. The names of the different stages and their starting points have been altered for clarity.

5.3.1 The MAP request

5.3.1.1 *Minimum content*

The presentation of a case to the tax administration by a taxpayer is the starting point of MAP[125]. According to Article 25 para 1 and 2, a case is presented by a taxpayer to the tax administration of his residence[126], or, in cases of Article 24 OECD and UN MC, his nationality. Although DTCs do not define the circumstances of this presentation in detail, there is a broad understanding of how this MAP request should look like, as will be described below. Nevertheless, as noted in paragraphs 45 and 46 of the Commentary on the UN Model, each competent authority may prescribe whatever special procedures it feels are appropriate or necessary[127].

The request usually needs to be submitted in writing, which will include the electronic transmission. Countries have found that the use of MAP may be encouraged where the process of making a MAP request is transparent and free of unnecessary formalities[128]. However, the written form is required, which will include the electronic transmission[129]. This does not prevent the taxpayer to approach the respective tax administration before actually filing the written request to discuss his specific situation. In such pre-filing situation, taxpayers may learn from tax administrations about procedural aspects of MAP and international dispute resolution in more general. Indeed, at this stage, the tax administration might learn as well from previous experiences of the taxpayer (in other countries). Nevertheless, taxpayers have to be cautious during such pre-filing phase to not overlook time limits, as defined in the respective DTC, for formal requests.

[125] This is not meant in a formal way, formally the starting point of MAP is the acceptance of the competent authority – re-check!

[126] In the case of economic double taxation two separate requests can be submitted to the competent authorities of each affected taxpayer. In such case, this will certainly lead to only one MAP case (see GMAP para 88). As noted earlier, requests may be made to the other State as well in treaty provisions modified as per the MLI.

[127] GMAP para 90

[128] GMAP para 92

[129] MEMAP BB#6 and GMAP para 97

The application of general principles of legal reasoning is typically needed in making a conclusive request. In the absence of clear rules on the format of the request general principles of legal writing should be adhered to. Often, a legal letter is structured following the IRAC (Issue, Rule, Application, and Conclusion)[130] rule, which helps to clearly structure the request. However, IRAC is not the only way how to properly structure, and other models could be used as well. In fact, it is only important that the request follows a logical structure that is comprehensible to its addressee, the competent authority. The exact form is insofar only of secondary importance. In transfer pricing cases it is also useful to consider the structure of a common set of substantive rules or guidelines, such as the UN manual on transfer pricing or the OECD transfer pricing guidelines[131], in the request, and to conceive the request reflecting the structure of those documents.

The need to distill substantive and decisive elements of the case and include them in the request is essential. The formal request of MAP is often the result of long lasting and extensive audit process and a subsequent adjustment. During such process typically large pieces of documentation will have been produced, which may include evidence that is irrelevant to the MAP. Hence, it is essential for taxpayers to distill substantive and decisive elements of the case and include them in the request. In doing so taxpayers should also be aware that employees of the competent authority are often not as familiar with complex business structures, as for example tax auditors are, and therefore try to keep the request as simple as possible. This will particularly apply to complex transfer pricing cases. Taxpayers who succeed in focusing on only decisive elements of the facts and reproducing them in a simple manner will likely be able to benefit from a shorter duration.

However, taxpayers are obliged to only provide accurate and consistent information to the involved competent authorities. The misrepresentation of facts and other material information may even result in the denial of competent authority assistance under a jurisdictions domestic law[132].

A List of typical contents of a MAP request is depicted in the box below. In the context in which a competent authority has not developed a prescribed format for the presentation of a MAP request in detail, a taxpayer should check whether the request contains the following items (see also paragraphs 22ff of the Commentary on Article 25)[133], some of the items listed below, such as for example the detailed transfer pricing documentation, may only be added to the request in an appendix to allow for a clear structuring:

[130] The principle is also sometimes referred to as ICRA (Jensen, Legal Writing Coach). However, the most important purpose of this principle is to help clearly structuring a document, which can be certainly achieved in both ways.
[131] In particular the description of a typical comparability analysis, as done in the OECD. 2010. TPG para 3.4. could be useful in this regard
[132] GMAP para 100
[133] GMAP para 94 also MEMAP in subchapter 2.2.1. includes a list of 17 elements that should be included in a request which slightly deviates from the list quoted above

BOX x:

1) The name, address and any taxpayer identification number of the taxpayer;

2) The name, address and any taxpayer identification number of the related foreign taxpayer(s) involved (for transfer pricing cases):

3) The foreign tax administration involved and, if relevant, the regional or local tax administration office that has made, or is proposing to make, the adjustment(s);

4) The tax treaty article that the taxpayer asserts is not being correctly applied, and the taxpayer's explanation of how it believes the article should be interpreted and/or applied;

5) The taxation years or periods involved;

6) A summary of the facts, including the structure, terms, and timing of all relevant transactions and the relationships between related parties (the taxpayer should advise the competent authority of how the facts may have changed during or after the relevant taxable period, and of any additional facts that come to light after the submission of the MAP request);

7) An analysis of the issues for which competent authority assistance is requested and the relevant legal rules, guidelines or other authorities (including any authorities that may be contrary to the conclusions of the taxpayer's analysis). The analysis should address all specific issues raised by either tax administration as well as the amounts related to the adjustment(s) (in both currencies and supported by calculations, if applicable);

8) For transfer pricing cases, any documentation required to be prepared under the domestic legislation of the taxpayer's State of residence (where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable) and a detailed description of the companies involved, including an analysis of their functions and risks, to the extent relevant;

9) A copy of any other relevant MAP request and the associated documents filed, or to be filed, with the competent authority of the other Contracting State, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the tax administration of the other Contracting State (translations of relevant documents may be helpful, and, where documentation is voluminous, a competent authority may determine that a description or summary of such documentation may be acceptable);

10) A statement indicating whether the taxpayer or a predecessor has made a prior request to the competent authority of either Contracting State with respect to the same or a related issue or issues;

11) A schedule of the relevant time limits and statutes of limitation in each jurisdiction (whether imposed by domestic law or the tax treaty) with respect to the taxable periods for which MAP relief is sought (in cases of multiple taxpayers, a schedule for each taxpayer);

12) A statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or any other comparable document in either of the relevant jurisdictions;

13) A statement indicating whether the taxpayer's request for MAP assistance involves issues that are currently or were previously considered by the tax authorities of either Contracting State as part of an advance pricing arrangement, ruling, or similar proceedings;

14) A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);

Source: GMAP paragraph 94

In some countries, specific guidelines on the format of a MAP exist and should certainly be followed diligently. Taxpayers who are not clear about the existence of such rules could either directly seek for guidance from the respective competent authority or consult the MAP country profiles published by OECD[134]. For tax administrations, it is important in developing such rules to carefully balance their need for information with the taxpayer's administrative burden[135].

A MAP request may include classified information. Hence it is important that the secrecy of such information is sufficiently protected. The communication between tax administration, which is usually based on the respective provision on exchange of information in the applicable DTC, guarantees treatment of exchanged information as secret[136]. The principle of secrecy including the final agreement is one of the most substantive deviations from domestic judicial procedures which usually lead to a published decision.

5.3.1.2 *Improving insufficient requests*

[to be added]

5.3.2 The position paper

The position paper is the written document reflecting a jurisdictions position in a MAP. It is prepared by one competent authority and submitted to the other jurisdictions competent authority. Taxpayers are not directly involved in the writing of this letter, however, some competent authorities will allow them to assist in the preparation, a practice that is certainly not in contradiction to the concept of MAP as a state to state procedure and neither to the wording of Article 25 OECD and UN MC. However, whenever documents are shared between the competent authority and the taxpayer potential infringements of data protection rules have to be observed. Preparing a position paper is an essential step in MAP for a jurisdiction because it reflects the core of its position in the procedure and once a position was taken in this document it will hardly be possible to deviate from such stance.

The position paper is usually written by the tax administration who caused the action that is considered to be resulting in the taxation not in accordance with the Convention[137]. The matter is independent of which competent authority has firstly received a request by a taxpayer. This is not a legal binding rule on the burden of proof[138] but the principle is deducted from logical reasoning since the tax administration who set the action will likely be able to reason it more easily.

[134] Is this for all IF or FTA countries?
[135] GMAP para 93
[136] GMAP para 101 a 102
[137] GMAP para 169
[138] OECD. 2017. TPG para 4.17

In most cases, a tax administration receiving a position paper will reply in the same format formulating its own position in a rebuttable or response paper. However, there will be cases in which such formal response will not be necessary, e.g. if face to face meetings are impending or the receiving competent authority agrees to the standpoint taken in the position paper. In case a competent authority needs further clarification on specific points of the other competent authorities position it is certainly allowed to request such.

The position paper does not have any exactly defined legal format. Hence it is up to the respective competent authority to structure it. Like with the request for MAP, principles of structuring in legal writing, such as the IRAC (Issue, Rule, Application, and Conclusion) could be used as guidance. By all means, a clearly structured position paper that describes a countries standpoint simply but comprehensively will support a timely and satisfactory solution of the case at hand. Time invested in the diligent preparation of the position paper may help to shorten the overall duration of MAP. A list of typical elements of a position paper is depicted in the box below.

Box x:

1) The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;

2) Contact information for the competent authority official in charge of the MAP case;

3) A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;

4) The taxation years or periods involved;

5) The amount of income and the relevant tax for each taxable year, if applicable;

6) A complete description of the issue(s) presented, the relevant tax administration actions and adjustments, and the relevant domestic laws and treaty articles;

7) To the extent relevant and appropriate, calculations and supporting data (which may include financial and economic data and reports relied upon by the tax administration, as well as relevant taxpayer documents and records);

8) For transfer pricing cases
   a) An analysis of characteristics of property or services, of functions and risks, of contractual terms, of economic circumstances and of business strategies;
   b) An outline of comparable transactions and methods of adjusting for differences, if relevant;
   c) A description of the methodology used to make the adjustment(s); and
   d) An explanation of the choice of the methodology used to make the adjustment(s), including why the tax administration believes the methodology chosen is best-suited to achieve an arm's length result; identification of the tested party, if applicable; and an

Source: UN GMAP paragraph x

5.3.3 Means of communication during MAP

Communication between CAs can use various channels. It can take the form of personal face to face meetings, of classically written correspondence and of all forms of digital communication, such as email, telephone or video conferences. Article 25 does not define the means of communication between competent authorities, but merely states that they can communicate directly without using diplomatic channels, hence a limitation of specific ways of communications can in no way be read into this provision[139]. Accordingly, without legal limitations, the most efficient ways of communication should be selected, certainly also considering the specific costs. Practice shows that often personal meetings are most effective.[140] However, they are also most expensive and therefore usually only used reluctantly. Nevertheless, at least one face to face meeting usually takes place, where both CAs can present and defend their positions and they engage in the negotiation of a solution. Often face to face meetings are prepared by other forms of communication, allowing for a focused discussion, and thus reducing unnecessary costs.

When using different types of communication, the documentation of that correspondence should not be overlooked. While this is easy for written correspondence it necessitates special effort in the case of telephone or video conferences. Without diligent documentation of all forms of correspondence the risk of duplicative and repetitive discussions is high, in particular when considering personal fluctuations in the competent authorities, cost-saving effects of formless communication could thus be undermined.

Asymmetries can occur in the communication where one competent authority is more experienced than another one. This will often be the case if developing countries conduct MAPs with developed countries, considering the asymmetries in past case-loads as described above. In such case more experienced competent authorities should not use such advantages inappropriately to leverage their own position but support the less experienced competent authority in a cooperative manner.

5.3.4 The use of technology

In the context of constantly evolving technology, the question arises of whether some of these new technologies could be used to facilitate a quicker resolution of disputes or to cut the costs of the process. For developing and least developed countries, resource constraints still pose the greatest challenge. They lack capacities, databases and funds. If dispute settlement mechanisms are to become more widespread, there is a need to find tailored solutions for them.

There are several possible uses for such technical tools:

1. **Facilitating the contacts and sharing of information between the parties to a dispute**
2. **Fulfilling documentation and filing requirements**

[139] Insofar also all major international materials are unanimous.

[140] Several countries have found it efficient to meet for MAP discussions during international organization meetings such as during UN, EU and OECD obligations, where applicable.

3. Setting up databases containing information concerning the disputes

These possibilities shall be discussed in more detail in the following.

Technology now offers a range of tools that can be used to facilitate the contacts between the parties in a way which makes such exchanges more secure, structured and low cost by creating a common platform. The common platform may be via use of private clouds (i.e. shared platforms that are secure and with controlled access) or shared software (the same software deployed in multiple locations that are able to securely communicate with each other). Either would make it possible to deliver this sort of capability at much lower costs than in the past. As a shared resource, the financial burden on individual countries will be much reduced. However, when using these tools, careful consideration should be placed on the topic of securing the information shared in the tools (e.g. in the private clouds or in the shared software). Without a secure system, users would be hesitant (or, even, restrained by laws or regulations in their jurisdiction) to share sensitive information. In the context of dispute resolution, information from multiple sources (the competent authorities, tax payers, experts and others) needs to be shared with multiple parties (the competent authorities, the panel members and, if appropriate, also the taxpayer). Moreover, this information can be extremely sensitive (e.g. the taxpayer's trade secrets). As a result, the use of such platforms could help ease the administrative burden of the dispute resolution process, but adequate security measures are essential. An access control system must be in place to provide adequate permissions to all of these parties. Namely, not only a simple yes or no to access various pieces of information, but also what actions are allowed to be performed upon the information (read, edit, archive, delete).

One possible approach would be to set up a dropbox in the cloud for the relevant dispute, to which the taxpayer and the competent authorities could upload all relevant documents. The access to the documents would be restricted depending on the folder they were in. For instance, the taxpayer could have access to, and edit and update its documents, as could the competent authorities for their documentation, but the taxpayer would not have access to the competent authority documents. The panel members would have access to all relevant documents.

Such a system would have multiple benefits. Firstly, it would be more secure than sending the sensitive information by email. Secondly, the panel members or mediator (if the dispute reaches those stages) would have instant access to them at all times and from any location. Therefore, the costs of the dispute could be reduced (no postal charges, for instance), there would be less need for all the parties involved to meet face to face and the resolution of the dispute would be quicker, since the panel could start working on the documents immediately as they are uploaded and continue working on them from abroad.

The security of such a system and its proper functioning would depend on a pre-determined number of persons receiving individual log-in data and the corresponding authorizations for access. Different access levels could be attributed to the username and password combinations for each of the parties involved: panel members would have the broadest access, followed by competent authorities and then finally taxpayers. The security of the passwords could be ensured by the issuance of perpetually changing access codes, which would be updated every minute. These would be combined with a secret password set by the

authorized persons to form a secure password. Such a multi-point authentication process is complex and costly. However, the security benefits should outweigh the costs.

Technology might also help in setting feasible time schedules and deadlines as well as organizing the workflow of steps and approvals required, which can enable timely solutions of the MAPs.

Meeting deadlines is especially important in dispute resolution procedures, as failure to do so can result in an automatic escalation of the dispute or other unwanted consequences. The strict deadlines imposed on the parties to the dispute serve an important role in increasing the efficiency of the resolution and minimizing costs. The deadlines are also relevant for panel members, who have to present their determination on time, and taxpayers wishing to stay informed on, and perhaps participate in, the proceedings. Additionally, the dispute resolution process may require a high number of face-to-face meetings of a number of people from different institutions and countries. Therefore, it becomes all the more important for all parties involved to have good scheduling capabilities.

While a simple scheduling tool such as an email program would be appropriate for most other occasions, **a scheduling tool specifically designed for dispute resolution processes would offer many advantages.** Firstly, default deadlines, e.g. the two-year MAP deadline, could be pre-programmed and displayed. Secondly, pre-programmed ideal time-frames could be set, which could help the competent authorities deal with very heavy caseloads by suggesting deadlines for a series of predetermined steps such as: reading the documentation in the case, demanding additional documentation from the taxpayer, confirming the information with the other competent authority and asking for its opinion etc. The same would be true for the members of the arbitration panel.

In addition, a scheduling tool, perhaps patterned after doodle, with the contact information of the relevant counterparties already programmed in, could help the parties involved to schedule their meetings more efficiently, by synchronizing with their other schedules, sending timely reminders of meetings etc. Finally, specially designed software could make the review process more efficient. Most of the activities of the competent authority representatives will normally be reviewed by their superiors. A built-in electronic approval system would allow the reviewer to release the relevant documents after review with the click of a mouse button. This review system would be integrated with the file sharing tool in the cloud, so that only approved and reviewed documents would be visible to other parties.

Technology could provide simpler access for all taxpayers to MAPs as well as provide transparency to them around where their issue resides in the stages of processing. Of course, the taxpayer party to a specific dispute will not have access to the confidential documents prepared by the tax authorities involved in that dispute, however, they will be entitled to review the written position papers and responses. The competent authorities may of course agree to provide the taxpayer with access to additional information.

However, the question of access does not only concern the availability of existing information, but also the submission of new information and even the requests for the commencement of the procedure itself. For

example, the requests for MAPs can be dealt with electronically and without a high cost for the requesting parties and notifications as key stages are reached could be provided back to the taxpayer. The approval or denial of the request could take place at the click of a button and the electronic system could be pre-programmed to set in motion a series of actions pursuant to this decision, for instance automatic notification of the taxpayer and/or the other competent authority, depending on the decision. The introduction of an automated process of launching a MAP would not only help cut costs, but also significantly reduce the workload of already understaffed and overloaded administrations, thus enabling them to devote more resources to the subsequent conduct and timely conclusion of the MAPs already under way.

A common platform may help to ensure that relevant data is structured and presented in a consistent way, easing the process of analysis. This could, for instance be achieved by standardizing the fields to be completed when entering disputes into the database, thus ensuring the standardization in the reported disputes of every country.

In transfer pricing disputes the lack of data about comparables is a common problem in less developed countries. It would help if there was more data to draw on and technology can be of help (see the suggestion of a virtual companies house in Chapter 8 of the FTA report Dealing Effectively with the Challenges of Transfer Pricing: http://www.oecd.org/tax/forum-on-tax-administration/49428070.pdf). The suggestions of shared access to existing comparables data services or the creation of a regional set of comparables database are both feasible with a shared platform in place.

A common shared platform might help, on the one hand, taxpayers to comply with the transfer pricing documentation requirements (including CbCR) and, on the other hand, tax administrations to share the information in a consistent, secure and easy to use manner among themselves.

Similarly, the documentation required to file a request for MAP would also be provided online, by upload to the cloud. This way, it could easily be updated and reviewed by the competent authority. Ideally, the electronic uploading tool would include pre-programmed information concerning the type of document necessary and a separate upload of each document type would be possible. The taxpayer would simply tick a box selecting from the pre-programmed types of documents to match each file to the correct document type. The uploading tool would then automatically assess whether additional information is necessary to file the request by comparing the types of documents selected and uploaded by the taxpayer against its pre-programmed list of necessary documents. If it found the documentation incomplete, the taxpayer would receive an automatic request indicating the missing documentation, coupled with a deadline for providing it. Once the documentation is complete, the program would issue a notification of the submission of the request to the relevant competent authority and would automatically start the countdown to the two-year MAP deadline.

5.4 Improvements to MAP

5.4.1 Capacity building

[to be added]

5.4.2 Framework agreements

[to be added]

5.4.3 Reduction of costs (e.g. through the use of technology)

[to be added]

6. Non-Binding Dispute Resolution (NBDR) Mechanisms

Draft provided by German Saldivar Osario and revised by Cym Lowell (Contribution to Chapter 6)

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In recent years, tax administrations around the globe have become more active in challenging tax planning strategies of MNEs, which has led to an increase in disputes.[141] With the implementation of Country-by-Country reporting in a wide range of countries, as well as the many other actions that are currently contemplated or about to be initiated pursuant to various international projects

[141] See ¶ 1.5 and Appendix II.

(BEPS and unilateral actions by specific countries), it is likely that the range and intensity of cross-border tax disputes will further increase.

The traditional means of resolving these disputes include negotiation via a treaty-sanctioned MAP procedures.[142] While MAP is widely viewed as a useful tool, it is essentially non-existent in many countries and/or partly inefficient, due to lack of capacities, lack of domestic law support, inability of administrations to always reach mutual agreements, or otherwise.[143] If such processes are not successful or cannot be implemented, "unilateral" means of dispute resolution at the domestic level are the only means of addressing the dispute.[144] However, trying to resolve a dispute at domestic level instead of resolving it at the inter-State level frequently results in double taxation, due to a lack of effective coordination between the taxing jurisdictions.

Following recent amendments to both the UN Model (2011) and the OECD Model (2008), countries, especially those with long experience with MAP, have undertaken to resolve "stalled" MAP cases through mandatory dispute settlement ("MDS") before international arbitration panels.[145] Formally, these arbitration procedures are embedded into the MAP process as a "tie-breaker" and only take place in cases in which negotiations between Competent Authorities ("CA") have been unsuccessful.

A large number of countries, including countries which put into question the appropriateness of MDS for resolving tax disputes, would like to explore whether mediation and other forms of Non-Binding Dispute Resolution ("NBDR") could become an alternative, or a precursory step, to MDS. They also seek guidance as regards the measures that could or should be envisaged in order to ensure a level playing field for NBDR and to support requisite capacity-building.

Indeed, the UN Model Treaty Commentary to Article 25 recognizes the potential benefits of consultation with outside experts:

> 41. It is recognized that, for some countries, the process of agreement might well be facilitated if competent authorities, when faced with an extremely difficult case or an impasse, could call, either informally or formally, upon outside experts to give an advisory opinion or otherwise assist in the resolution of the matter. Such experts could be persons currently or previously associated with other tax administrations and possessing the requisite experience in this field. In essence, it would largely be the personal experience of these experts that would be significant. This resort to outside assistance could be useful even where the competent authorities are not operating under the standard of an "agreement to agree", since the outside assistance, by providing a fresh point of view, may help to resolve an impasse.

In 2017, it was determined to expand the Commentary to recognize the potential benefits of NBDR:

> 41.1 The possibility for such assistance may include the utilization of non-binding methods of dispute resolution, such as mediation. For countries that wish to use such

[142] See Chapter 5.
[143] See ¶ 1.5.
[144] See Chapter 2.
[145] See Chapter 8.

procedures, there are several non-binding methods that can be used to resolve disputes between parties at an early or later stage of the competent authority process. Such non-binding means of dispute resolution could range from facilitating the relational aspects of the competent authority process to providing insights or views on the substantive tax matters at hand in the dispute. Such methods are presently used for the resolution of tax disputes under the domestic laws of a number of countries. These procedures should, however, be utilized with due regard to issues such as the timing and duration of the procedures, the mechanism and criteria for selection of the mediator or other such appointed person and, the treatment of confidential information.

In broad terms, disputes can be resolved by agreement of the parties themselves or by submitting the dispute to an independent third person or institution (judge, arbitrator, adjudicator etc.) who decides the dispute for the parties. In either situation, the binding nature is derived from a sovereign decision of the parties. In the former situation, the parties must agree with the individual case outcome; whereas in the latter, the parties give their consent to accept the outcome before they actually know the content of the decision.

Dispute resolution by agreement can also occur with the help of a third person or institution (such as a mediator, conciliator, or expert) who does not decide the case for the parties. These forms of dispute resolution can be called "non-binding" because, in the absence of an agreement between the parties, the intervention of the third person does not entail a binding outcome.

Non-binding forms of dispute resolution give some parties more comfort because they feel they can preserve control over the outcome of the dispute. If successful, NBDR is more efficient than binding dispute settlement, because it generally requires less resources and leads to a higher satisfaction of the parties (thus increasing acceptance of the outcome and smoothening its implementation). Yet, if no agreement is found, the dispute remains unresolved. In that latter sense, NBDR are less efficient than binding dispute resolution.

It is possible to combine non-binding and binding forms of dispute resolution in a multi-tiered **process**. In international treaties and in commercial contracts alike, a widespread form of multi-tiered dispute resolution is to give the parties a certain timeframe for reaching agreement through negotiation, then with the help of a mediator and finally, if these "non-binding" attempts are not successful within the fixed timeframe, the dispute can (or must) be escalated to binding dispute settlement (e.g. arbitration). The underlying objectives of a multi-tiered process are that

(a) The dispute should be resolved ideally by negotiation using the minimum third party intervention necessary;

(b) Accordingly the formality, cost and time commitment required from the parties and the level of third party intervention increases from tier to tier; and

(c) The final tier provides for a final and binding decision (such as an arbitral award).

A potential downside of multi-tiered processes is that they can sometimes take longer than directly submitting the case to binding dispute settlement - depending on the timeframes fixed for non-binding dispute settlement.[146] Yet the advantage of a multi-tiered process is that it provides the parties higher

[146] See the issues to be addressed in structuring NBDR processes at ¶ 6.6 below.

incentives to reach a mutual agreement on their own, thus increasing the efficiency of the non-binding stages of the process.

The purpose of this chapter is to provide guidance on forms of NBDR that could be useful for resolving cross-border tax disputes, including practical experience with such procedures.

6.1 Mediation

Mediation is a form of process-related assistance that involves the use of a mediator or facilitator to aid in providing a perspective on the discussions, identify issues that avoid the resolution of a conflict, and may bring a problem solving focus to the negotiating table. The degree of activity of the mediator can range from a rather passive to a more active role, depending on the needs of the parties and the nature of the dispute. It can include

- Monitoring the process or administrating the case
- Guiding the discussions
- Requesting information
- Focusing the debate on key issues
- Discussing (and potentially actively evaluating) with the parties the strengths and weaknesses of their respective arguments
- Making process-related suggestions (e.g. commissioning of an expert; agreeing on common / objective criteria, meeting with taxpayer, or otherwise)
- If the parties so wish, recommending concrete solutions to the dispute
- Formally "authenticating" or acknowledging the outcome, especially if an agreement is reached[147]

This mechanism is very frequently used to resolve various types of disputes since it is a flexible process, conducted in confidentiality, in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference.[148] In many cases, the very existence of an independent third person helps the parties formulate their respective positions more rationally and more objectively, thereby enhancing the chances of an agreement. Thus, the use of mediation generally makes negotiations more efficient and helps the parties avoid the waste of time and resources resulting from stalemate or from litigation or arbitration proceedings. It is a well-known phenomenon that this increase of efficiency is usually underestimated by disputing parties.

[147] In international diplomacy, mediation is sometimes called "good offices." The United Nations has a long history of providing "good offices" and being an effective mediator in international disputes. Sometimes mediation is distinguished from conciliation proceedings, discussed in ¶ 6.2 below, in which the parties request the neutral third to make final recommendations which the parties are then required to seriously consider. While distinctions between these different forms of dispute resolution can be blurred, given the non-binding nature of these procedures, it is not always necessary to strictly distinguish these variations. Thus, even a "mediator" could sometimes, formally or informally, make recommendations to the parties. Sometimes "mediation" and "conciliation" are used interchangeably. In this paper, the term "mediation" should be understood broadly, potentially covering conciliation and good offices.

[148] See http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf

Mediation could be the ideal process when a matter is complex or likely to be lengthy and the parties want to keep the dispute confidential. Even though this is also a fact for a number of advanced dispute resolution mechanisms, mediation depends especially on the willingness of parties to be part of the negotiation. In cases where the issue being put under consideration deals with more than two parties and commercial considerations are vital, mediation can provide a resolution to the conflict.

It is important to mention that mediation also permits extra-legal aspects to play a role in resolving the dispute, so, for example, when an apology, concession, or explanation from one party could further resolution or when otherwise flexible options beyond the reach of a judgment need to be explored.

The role of the mediator may offer an opportunity for the competent authorities to view a specific case, or the MAP process itself, from a different perspective. Such perspective could be acquired through the mediator's restatement of the positions or of the critical issues, which could highlight elements of a case or of the MAP process that are not possible to be recognized when seen from the perspective of a tax administration defending its taxing rights, adjustments or the provision of relief from double taxation; or from the perspective of a MNE seeking to protect its own interests. Mediation may be the key in finding a solution for some of the more systemic issues of a MAP negotiation.

In some countries, a tax ombudsman may play a crucial role in the MAP by participating as a mediator representing the interest of the taxpayer that is being subjected to double taxation. The mediation procedure would look to reach a consensus between the parties in the dispute, be it the taxpayer and the foreign jurisdiction or the tax administrations.[149]

Mediation may promote, facilitate, and make transparent a reachable, timely, and consensual solution to tax disputes, thereby avoiding further litigation or treaty procedures between the parties.

Mediation is not recommended when: (i) there is no ability to negotiate or the conflict has escalated too far ; (ii) mediation has failed previously; or (iii) there is an impending lapse of a periof of limitation from a formal legal perspective.[150] In jurisdictions where mediation is part of the procedural code, the applicable law will set out referral criteria for eligibility for mediation such as the level of contention in dispute, the need for finality of the decision, and whether a matter is of public interest in principle.

[149] For example, in Mexico, its domestic Tax Ombudsman called PRODECON, has created innovative mediation procedures that have been very successful in order to obtain agreements between the Tax Authorities and the taxpayers. Such mediation procedures are called the Complaint Procedure and Conclusive Agreements. See de Guevara, "Taxpayers' Rights in a Transparent and Global Society: The Mexican's Ombudsman Experience."

[150] http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf. Experience has shown that the effectiveness of a mediator depends on certain key qualifications and skills: questioning, clarifying and summarizing techniques, so-called "active listening" techniques, ability to frame or "reframe" the dispute, techniques for structuring the proceedings in a useful way, empathy, a very good sense for procedural fairness and balancing of power in communication, psychological skills and procedural experience. Perhaps most importantly, a mediator must not take sides, or be perceived as biased. The success of a mediator depends first and foremost on the **trust** of both sides in him as being an "honest broker". Knowledge of the underlying issues is to a certain extent required to understand the dispute and be able to engage the parties in developing solutions. However, a technical expert does in many respects not make an ideal mediator because an expert may have a firm view on certain issues and the parties may feel overwhelmed by his expertise.

Special importance should be given to the role of the mediator who normally acts as a facilitator to aid parties to overcome their differences, providing them guidance in identifying issues, engaging in joint problem-solving, and exploring creative settlement alternatives. Depending on the nature of the dispute, parties may require the mediator to go beyond this role and act as an evaluative mediator, providing factual and even legal evaluation of the case; yet, parties retain the full control of the decision to settle the dispute specify the terms of the resolution.[151]

Due to the interest-based nature of mediation, manifested in the settlement agreement, it makes enforcement in most cases unnecessary. Since the parties have agreed on an outcome, they are more likely to abide by the terms of their agreement. If a party does refuse to comply with the terms of the settlement, there are three ways to enforce a mediation agreement: (i) a settlement could be legally a contract, thus any party can file a motion in court to make the other party perform its duties under this contract; (ii) if mediation took place upon a court referral, the referring court can turn the settlement into a court order, which can be enforced directly through the court; or (iii) a law that guarantees enforceability.

Issues frequently dealt with in different institutional frameworks (e.g. ICC Mediation Rules,[152] ICSID Conciliation Rules, [153] UNCITRAL Conciliation Rules, [154] Energy Charter Guide on Investment Mediation[155]) include:

- selection and appointment process of mediators
- role of mediators (are they allowed to have separate discussions with the parties? Should they be able to make recommendations? etc.)
- duties of mediators (e.g. in terms of impartiality, independence and availability disclosing potential conflicts of interests; prohibitions of representing one party in related proceedings etc.)
- conduct of the mediation (potential ways to structure the proceedings, evidence etc.)[156],
- confidentiality obligations of the parties and the mediators
- admissibility of evidence in other proceedings
- definition when mediation is deemed to have commenced and terminated
- logistics of the mediation (place, language, and so on)
- form of the outcome of the proceedings and ways to enforce agreements,
- sharing of costs

These principles could be adapted to the MAP process in specific situations. As noted below, mediation could be especially useful in the context of competent authority matters between countries with different levels of experience. As discussed above, it is a simple reality of the current world of cross-border tax dispute that many countries, especially LDCs, have limited experience in the MAP process. Mediation and

[151] http://www.cedr.com/CEDR_Solve/services/mediation.php
[152] [to be added] **Arno** – can you get this link?
[153] See https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Conciliation-Rules.aspx
[154] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html
[155] See http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf
[156] It should be noted that there are generally no detailed rules on the conduct of mediation and conciliation proceedings. Party autonomy and flexibility prevail over formalism, which is in line with the non-binding and non-adversarial nature of these proceedings.

other forms of NBDR discussed below can be helpful in building confidence and experience in the handling of such disputes to protect the tax base of the respective countries.[157]

6.2 Conciliation

Conciliation is a cooperative, non-adversarial dispute resolution process which seeks to clarify the issues in a dispute between the parties and endeavor to bring about agreements on mutually acceptable terms.[158] The main difference between conciliation and mediation is that the third party (conciliator) can play a less active role in seeking to find mutual grounds of resolution between the parties to a dispute.

Before the conciliation proceedings take place, a party would typically send the other party a written invitation to conciliate under certain rules. Conciliation formally starts when the other party accepts the invitation to conciliate; if acceptance is made orally, it is advisable that it be confirmed in writing.[159] In addition, it is possible that both parties have provided within a legal document such as a contract that in case that there is a dispute between the parties, both parties shall settle the dispute through conciliation.

The function of the conciliator is to assist the parties in an independent and impartial manner in reaching an amicable settlement of their dispute. The conciliator is required to be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

Under the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules, the conciliator, upon appointment, requests each party to submit a brief written statement describing the general nature of the dispute and the points at issue. Each party in the dispute is required to send a copy of his statement to the other party.

The conciliator may request each party to submit a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate.[160] It is imperative that each party send a copy of its statement to the other party for the conciliation process to function.

A conciliator may request relevant documents, hear witnesses, make site visits and issue recommendations to assist the parties in reaching mutually acceptable terms to resolve their dispute. In order for the conciliation process to work, the parties to conciliation proceedings are expected to cooperate in good faith with the conciliator and seriously consider its recommendations.[161] In addition, the conciliator has the possibility of making proposals for the settlement of the dispute at any time of the proceedings. Notwithstanding the aforementioned, it important to emphasize that the conciliator does not have the authority to impose upon the parties a solution to the dispute.[162]

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[157] See ¶ 6.4.

[158] https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx

[159] https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

[160] Idem.

[161] https://icsid.worldbank.org/en/Pages/process/ICSID-Convention-Conciliation.aspx

[162] http://www.sloarbitration.eu/Portals/en-EN/UNCITRAL-LAC/Work%20of%20UNCITRAL%20in%20the%20field%20of%20mediation%20and%20conciliation_Jae%20Sung%20LEE.pdf

After the position papers of each party are presented, hearings can take place amongst the conciliator which normally have a private and secret character in order to avoid obstacles that may arise if such hearings are made public.[163]

During the hearings, each party should have the possibility of presenting witnesses and experts whose evidence is considered important by any of the parties but such hearings should be subject to time limitations within which such hearings should take place. Such witnesses and experts are normally examined by the parties under the control of the conciliator. Also, there should be the possibility for the procedure to allow written depositions or let examinations be held elsewhere besides the venue where the hearings normally take place.

It is important to mention that during the conciliation process, the parties should avoid initiating any arbitral or judicial proceedings with respect to the dispute in question, except that a party may initiate arbitral or judicial proceedings where such proceedings are required for preserving pertinent rights. The conciliator may also request parties to refrain from specific acts that might aggravate the dispute.

When the conciliator considers that there exist elements of a settlement which would be acceptable to the parties, he can formulate the terms of the possible settlement and submits them to the parties for their observations. Once the observations from the parties are received by the conciliator, he may reformulate the terms of the possible settlement in the light of such observations.

If the parties reach agreement, they or the conciliator will draw up and sign a written settlement agreement.[164] Once the settlement agreement is elaborated, the parties should sign and execute it to put an end to the dispute and be bound by the agreement. In addition, the parties may want to contemplate including in the settlement agreement a clause that establishes that any dispute arising out of or relating to the settlement agreement will be submitted to arbitration.

With regards to the enforcement of settlement agreements, the UNCITRAL has established that it is a common understanding that settlement agreements are contractual in nature, and thus binding on the parties that enter into them and susceptible to enforcement.[165]

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[163] According to the Rules of Procedure for Conciliation Proceedings of the International Centre for Settlement of Investment Disputes (ICSID), in order to clarify the issues in dispute between the parties, the conciliator shall hear the parties and shall endeavor to obtain any information that might serve this end and it is expected that the parties be associated with its work as closely as possible.. See http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partE-chap04.htm

[164] Idem.

[165] http://www.sloarbitration.eu/Portals/en-EN/UNCITRAL-LAC/Work%20of%20UNCITRAL%20in%20the%20field%20of%20mediation%20and%20conciliation_Jae%20Sung%20LEE.pdf. The UNCITRAL Conciliation Convention stipulates that the conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

The conciliation process can be an effective form of resolving disputes since each party may, on his own initiative or at the invitation of the conciliator, submits to the conciliator suggestions for the settlement of the dispute, giving the process a more dynamic procedure.[166]

It is certainly possible for conciliation to be adapted as part of a MAP process, by the competent authorities of each jurisdiction engaging in the process to reach a mutually acceptable resolution.[167] Finally, it is important to mention that a conciliation procedure may not be binding and thus may not bring about a resolution to an international tax dispute in which competent authorities of certain jurisdictions are involved. On the other hand, due to the possible lack of binding authority of a conciliation procedure report, it may be easier for jurisdictions to use such procedure to seek mutually acceptable grounds of resolution.

6.3 Expert Evaluation

Expert evaluation or expert determination is a NBDR mechanism which consists in a technical expert reviewing evidence presented by the parties.[168] This procedure would involve an independent third party acting as an expert and rendering advice, in contrast to a judge or arbitrator appointed to decide a dispute. In such a procedure, the determination made by the expert would be advisory in nature and could or could not be final and binding on the parties with respect to the issue in question, as the parties determine to be appropriate.[169] Expert determination or evaluation is especially applicable to disputes of valuation or those of a purely technical nature across a range of commercial or business sectors.[170] It is also beneficial in cases involving special sectors of the economy or certain subjects such as financial services, hydrocarbons, environmental issues, water resources or renewable energy sources.[171]

This non-binding dispute resolution mechanism should be explored in more detail since the dispute in question could be resolved by an expert who dominates the subject matter where a dispute has arisen. The expert may provide the parties with information they do not have or that they do not know exists, and thus provide them feedback so they can arrive to a solution of the dispute. In the MAP context, expert evaluation could involve engagement, by one or both tax administrations, of a lawyer or other professional with experience in the technical, procedural or other issue that the parties are unable to resolve. For

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.See https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

[166] https://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

[167] See ¶ 6.4.

[168] http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf

[169] Idem.

[170] Ibidem.

[171] Expert evaluation should be distinguished from early neutral evaluation which consists of a preliminary assessment of facts, evidence or legal merits where parties agree on the nature and impact of an issue and would like to see an independent evaluation . Such a process can be designed to serve as a basis for further and fuller negotiations, or at the very least, to help parties avoid further unnecessary stages in litigation.[171] Early neutral evaluation does not require the presence of the parties when it deals with the analysis of documentation. This procedure is normally realized by a retired judge or senior lawyer, who expresses an opinion on the merits of the issues specified by the parties. Even though the opinion derived is non-binding, it provides an unbiased evaluation of the relative positions and guidance as to the likely outcome should the case be heard in court.

example, expert determination could occur when a tax administration concludes that its position in a potential transfer pricing or other matter would benefit from review by an independent person. This could take place before or during a competent authority proceeding. If a competent authority process is pending, such consultation could also involve one or both tax authorities on a non-binding basis. A case study is presented below:

Case Example of Use of Expert Determination

GasCo is based in Country A with operations in many countries, including Country B through a wholly owned subsidiary ("FCo"). The business conducted by GasCo and FCo produced a combined income of €100 in Year 1, of which €5 is reported in Country B and €95 in Country A for corporate income tax purposes. The transfer pricing results in both countries are reflected in appropriate documentation, in both cases using a one-sided TNMM methodology.[172] The Country B tax authority examines FCo and, after reviewing the combined income information, believes that the FCo income should be €50. It has discussed this position informally with FCo, which has presented the report of an expert confirming the FCo documentation supporting the as-reported result of €5.

In such a situation, the Country B tax authority may decide that it would benefit from an independent analysis of its position and that of FCo. Accordingly, it could engage an expert for this purpose. The engagement could be limited to factual or legal matters, or both (and would presumably not address procedural matters). The expert could be engaged to review documents only, or meetings could be scheduled. It could also result in an oral or written report, as may be appropriate to the Country B tax authority. In such an informal process, the expert advice should be delivered in an efficient, timely manner. Costs would be those of the tax authority.

From Country B's standpoint, such a process provides an external check on its internal determination. The external analysis could also be helpful in any future discussions with the taxpayer, a domestic appeals or litigation process, or a Competent Authority proceeding.

The same type of expert determination process could be undertaken on a collegial basis between the Country B tax authority and FCo. If a competent authority proceeding were commenced, such a process could also be followed by both tax authorities. In such a situation, the determination could be binding or advisory. Costs could be borne as determined by the parties.

Such a process is used in some countries. For example, in the United Kingdom, the competent authority (HMRC) allows an ADR process in which a specialist is brought into the proceedings to facilitate the negotiations.[173] The specialist is not necessarily an expert in taxation, but in ADR. The competent authority maintains responsibility for resolution (sovereignty) as negotiations proceed with the independent party. The proceedings may also be more efficient and,

[172] See UN "Practical Transfer Pricing Manual ¶ 6.3.2. (2013).
[173] See HM Revenue and Customs, Tax Disputes: Alternative Dispute Resolution (ADR) 2014, http://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr.

consequently, less costly. Further, the taxpayer's right to appeal is maintained. According to HMRC, the benefits of such ADR include:

- The impetus towards resolution via a fresh approach
- Issues can be "unpacked" and alternatives explored on a confidential basis, with a potential lasting benefit beyond the discussions on the dispute itself
- Even if the dispute is not resolved, respective positions can be sharpened possibly, prepared more effectively for litigation

HMRC reports that most such ADR events have been concluded in one day and the average elapsed time from application to resolution was twenty-four weeks in large or complex cases and sixty-one days in small and medium-sized enterprise cases, which is a significant contrast with the multi-day hearings and seventy week average of the process of appeal for such cases.[174]

In short, an expert determination process can be flexible, efficient, and timely. As compared with arbitration, there is little chance of "jurisdictional creep"(i.e., the scope expanding beyond the initial issues). It could also be a useful first step in a process that might otherwise become more formal and confrontational.

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6.4 Interaction between NBDR and the MAP

With regards to NBDR mechanisms and the MAP process, alternative methods other than the traditional MAP process could be considered and tried. Mediation, arbitration, and the use of experts may bring substantial improvements to the MAP process. Expertise in a specific area of the taxpayer's business (e.g. petrol drilling, pharmaceuticals, financial services, etc.), in tax law, economics, or otherwise can provide clarity to situations and aid in identifying important information and concepts in order to reach a solution to the dispute (as in the Case Example above).

Depending on the type of case different alternatives could be used such as the use of experts, informal mechanisms to take into consideration in order to resolve complicated cases, or mediation. NBDR may lead the way to avoid rigid arbitration procedures.
The procedural roles of mediators and experts are to a certain extent complementary. Whereas the mediator relies on an ability to steer and frame the discussions between the parties and engage them in the exploration of potential solutions, the expert provides the parties with highly specialized technical expertise (in tax cases, one could for instance think of advice on comparable market prices at "arms-length").

There are ways to combine the skill-sets of mediators and experts in order to enjoy the benefits of each of these procedures. Three possibilities shall be outlined below.

> One way is for a mediator to help the parties find an agreement on methods and criteria, before the dispute is submitted to an expert. In fact, most successful mediations include a phase in which the parties discuss and agree on underlying principles, methods or criteria in order to resolve their dispute. In most disputes, there is more than one "objective" method and thus more than one "reasonable" perspective – and it is this very plurality of perspectives which often is the root of

[174] See Lloyd & Dennis, Tax Journal "Q&A: How Is ADR Working for Large Businesses?" (Feb. 5, 2015).

disagreement. Acknowledging, reconciling or combining the underlying rationales of the parties is crucial for reaching an agreement between the parties. Once the parties have agreed on a common methodology, an expert can carry out his operations more easily and an agreement may be at reach. In this way, mediation can effectively prepare expert evaluation (or expert determination).

Another way is to conduct mediation on the basis of an already existing expert report. In this scenario, the mediator would discuss the results of the expert investigations with the parties and, potentially, the expert. This can be particularly useful in cases in which the parties have a different interpretation of the expert report or in which one party contests the methodology of the expert. It shall be noted that an earlier appointment of the mediator often helps to avoid such difficulties before they arise (as in the first possibility noted above). Once differences of view on the methodology applied by the expert have arisen, it may often be difficult to solve these through non-binding mechanisms of dispute resolution.

A third way of combining these means of dispute resolution is to embed expertise into mediation, while the mediator and expert are working in parallel. The mediator would have a more procedural role and be responsible for moderating the overall discussions, whereas the expert – usually under the "direction" of the mediator – would inject valuable expertise and provide guidance for the discussions between the parties. The expert's work can be made useful either through a single written expert report or oral expert testimony, or on a continuing basis throughout the discussions. In certain circumstances, it may also be useful to allow the mediator to have separate discussions with the expert, if the mediator feels that he needs more information in order to better orientate the discussions.

Combining mediation and expert evaluation allows for much flexibility. Engaging both a mediator and an expert at the same time is certainly costlier than engaging either one of these: Yet, the costs of a lingering dispute or of submitting the dispute to binding dispute resolution (such as arbitration) will in most cases be higher.

6.4.1. Potential Benefits of Enriching MAP with Mediation and/or Expert Evaluation

Using mediation and/or expert evaluation for tax treaty disputes could provide significant benefits, both when compared to classical MAP and MAP with an arbitration extension. Some of these benefits are summarized in the table below:

NBDR compared to classical MAP	- A neutral third party increases the efficiency of the process - More level playing field, as the inclusion of a neutral third party increases the objectivity of the debate and decreases the effect of "inequality of arms" - More principled decisions - More predictability in the long run, if extracts from agreements are published - Helps MAP negotiators justify their « concessions » within their own administration

NBDR compared to tax treaty arbitration	- Amicable solutions are more acceptable and more sustainable than "win-lose" outcomes - Preservation of fiscal sovereignty - Less costly than arbitration

6.4.2. NBDR as an Alternative or a Precursor to Arbitration

NBDR could be envisaged either as an alternative to arbitration[175] or as a supplementary means of dispute resolution, preceding arbitration.

Designing NBDR as an alternative to arbitration would accommodate the concerns of tax administrations attached to their fiscal sovereignty. This may be a useful tool, especially for competent authorities having currently little experience with both MAP negotiations and tax treaty arbitration, or for countries which feel that an independent third party could help them level the playing field. It would allow them to gain experience and confidence in an international dispute resolution system.

On the other hand, some countries may find it more useful to provide for a binding form of dispute resolution -- e.g. arbitration or binding expert determination, as a follow-up to NBDR. In this scenario, NBDR would be an intermediate tier in a multi-tiered procedure. In such a multi-tiered approach, binding dispute resolution would serve as an *ultima ratio*, a tiebreaker in cases of stalemate. It would, indirectly, increase the efficiency of NBDR as CA's usually prefer to avoid binding dispute resolution.

Providing for binding dispute resolution as a measure of last resort would further the effectiveness of the tax treaty provisions because it gives competent authorities an additional incentive to apply the tax treaty consistently. At the same time, a multi-tiered approach including NBDR would ensure that cases are, as a rule, solved by mutual agreement rather than by the decision of arbitrators.

Further, NBDR as a precursory step to arbitration can increase the efficiency of an arbitration, notably because the debate can more easily be focused on the key issues ("terms of reference"). If, during the NBDR phase, an independent expert has carried out specific fact-finding tasks or economic evaluations, the parties may agree that the expert report is used during an ensuing arbitration.

In multi-tiered procedures it is, however, crucial that the sequence of stages does not delay the proceedings overall. This should be ensured by providing for strict (default) timelines, which the competent authorities can only extend jointly and not indefinitely. NBDR should be completed at the point in time when referral to arbitration would otherwise become mandatory, so that it does not extend the maximum duration of the proceedings by delaying the initiation of arbitration. As a consequence, a few months time will need to be reserved within the overall timeline for NBDR. This could be done, for example, by providing that NBDR should (either mandatorily, or on a voluntary *ad hoc* basis) be initiated or considered 12, 15 or 20 months after the initiation of MAP.

6.4.3. Questions About NBDR

[175] See Chapter 8.

While NBDR could be a useful tool for the resolution of tax treaty disputes, there are a variety of questions that have been raised in discussions with UN Member Countries, which are noted below together with comments:

1. **Is it possible to develop or revise the current Article 25 of the UN Model or its Commentary to make it more user-friendly for developing countries wishing to explore NBDR for tax treaty disputes?**

Comment: An approach could be to revise Article 25 of the UN Model Convention and its Commentary to identify a range of procedures and model clauses which countries could agree to utilize for the implementation of their tax treaty. It may be that this could be accomplished most efficiently by including references to and guidance on NBDR procedures (such as mediation/ conciliation and expert evaluation) into the Model and its Commentary. These could either be agreed upon by the Contracting States generally, in which case they would apply as a rule. In the alternative, it would be possible for the Contracting States to permit (and encourage) their competent authorities to apply NBDR on a case-by-case basis. This would allow them to gain practical experiences with NBDR before they commit to these procedures on a more general basis.

Illustration: For example, assuming a MAP dispute exists between Country A and Country B. Country A has little experience in MAP proceedings and is cautious about its position being respected by Country B. Accordingly, it seeks to take advantage of the NBDR procedures offered under the amended UN Model (assuming this to be the case) and a sample NBDR agreement provided for in the Commentary (assuming this to be the case). Accordingly, the competent authorities of Countries A and B take the sample procedural agreement as a basis and enter into a memorandum of understanding ("MOU") in order to engage in an expert evaluation process for a 6 month period, the results of which are confidential and will have no binding effect on the parties.

Alternatively, Countries A and B could also agree, at the outset of their MAP, to have recourse to a non-binding procedure (such as mediation) if the respective case is not solved within, for example, 18 months.

If Countries A and B feel sufficiently comfortable with the experiences they have made on a case-by-case basis, they could translate their usual individual agreements into a more general agreement applying to an undefined number of cases.

The procedures, and the respective sample agreements and model clauses, should be evolutionary in nature so that countries can develop confidence in the processes they have agreed to.

2. **How can a CA lacking experience in MAP ascertain whether it has authority under domestic law to undertake NBDR, whether related to a MAP proceeding or otherwise?**

For example, in the illustration in the *Response to Question 1*, above (the *Illustration*), the competent authority of Country A has little experience in MAP. Before undertaking an

expert evaluation process by way of a MOU, the CA of Country A may wonder whether it needs to confirm that its domestic law allows it to undertake such a process.

Comment: It is unlikely that a country which has committed to MAP has a serious domestic law issue with NBDR since the contemplated processes are not binding. As a rule, if an authority has the capacity to enter into an agreement regarding a dispute, it also the has authority to commit to a process whose outcome is not binding upon it without its consent. There is extensive practical and legal experience in non-tax areas in most countries that can be consulted for guidance on such issues.

3. **Will it be possible to develop a common framework for UN Member Countries interested in NBDR?**

Comment: Yes. This could be done through (i) harmonized model clauses for the treaties itself, (ii) harmonized sample agreements, (iii) multilateralized institutional support for capacity building or assistance with case management or even (iv) through a multilateral agreement on procedural issues.

4. **What would be the procedures to initiate NBDR between member countries or parties to a tax treaty?**

Comment: An update of Article 25 of the UN Model and its Commentary could provide for broad flexibility and various approaches in this respect. For example, the MOU procedure suggested in the *Illustration* (above), would be a flexible and informal means of allowing Countries A and B to develop experience and confidence in the process at their own pace. It would certainly be possible for the UN to provide model forms of such MOUs.

5. **What would be the legal effect of a decision arrived at after NBDR?**

Comment: Unlike for binding arbitration or expert determination, the outcome of NBDR would not have any legal effect. Only if the parties arrive at a mutual agreement after NBDR, this would be binding upon them to the same extent as a mutual agreement reached through classical MAP.

It could, however, be explored whether countries could make use of additional enforcement mechanisms, e.g. by providing in their treaty that any mutual agreement reached between their competent authorities should be implemented into domestic law and have the same value as a domestic court judgment of last instance.[176] Or countries could draw inspiration from the current UNCITRAL

[176] See the wording of article 54 (1) of the Washington Convention of 18 March 1965: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state." (http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965).

discussions on the preparation of an "*instrument on enforcement of international commercial settlement agreements resulting from conciliation*".[177]

6. **Can NBDR processes be formulated to achieve the following elements:**

a. Countries retain the final decision-making authority (so that full sovereignty is not compromised)?

Comment: Yes, under NBDR countries retain the final decision-making authority. As compared to mandatory dispute settlement, there should be no sovereignty concerns for participating countries.

b. Countries have control of costs?

Comment: Yes, in formulating the process, determining the mission and agreeing on conditions of engagement of the neutral expert or mediator is appropriate and customary. It could also be provided that disputes whose value does not exceed a certain threshold are not eligible for NBDR (de minimis rule). Including time-limits and using modern technology (e.g. video-conferencing; electronic means of communication and case administration) can further help to control costs.

c. If a one competent authority party to a dispute seeks to engage an expert unilaterally to assess the merits of its position, can this be arranged without the knowledge of the other competent authority?

Comment: Yes. This is not a form of NBDR which needs to be formally included in the treaty or be subject to an agreement between the parties. However, in practice, having the possibility to obtain the views of an independent expert on a "unilateral" basis can be very useful for resolving a dispute. The UN could provide assistance by identifying, publishing and/or proposing suitable candidates for such expert operations (e.g. former members of the UN Committee of Experts).

d. How can the independence of mediators and other experts be assured?

Comment: There is experience in international dispute resolution institutions in developing lists of specialists and vetting procedures, aiming to assess the independence and impartiality of such specialists. Moreover, there is extensive guidance on how conflicts of interest can be identified, classified and dealt with.[178]

An element of a successful UN program on NBDR would need to include developing lists of NBDS specialists and experts as well as a process for training procedures so that every Member country has the possibility to promote its own experts. These will be essential elements of an effective and trusted procedural framework.

[177] See https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/040/09/PDF/V1604009.pdf?OpenElement

[178] See for example the voluminous IBA Guidelines on Conflicts of Interest in International Arbitration (http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

e. Can the results of any NBDR process be kept confidential?

Comment: Yes, as with any other treaty or MAP-related information. However, countries should contemplate to what extent transparency principles should apply to MAP proceedings (including NBDR) in order not to jeopardize trust of the civil society in the international tax framework, without disclosing sensitive information (e.g. business secrets). In this regard, investment and trade lawyers have carried out intense debates and developed significant principles.

The UN could provide guidance with respect to transparency in tax treaty dispute resolution, as it has done for investment arbitration.[179]

f. Is it possible to develop a means of publishing information from NBDR cases to facilitate the development of a data base of experience?

Comment: There is vast experience in non-tax areas regarding the redacting and publication of extracts from specific cases (including the outcome framed in a manner to preserve confidentiality). Likewise, the UN could perform monitoring tasks in this respect and provide redacted extracts from mutual agreements following NBDR or aggregated statistical data.

g. Is it possible for the MNE taxpayer to participate in the NBDR process?

Comment: While engaging in NBDR to improve the MAP process, the participation of the taxpayer should be encouraged due to the fact that the MAP process is normally a tax administration to tax administration procedure directed at obtaining a consistent application of the tax treaty. Due to the structured framework of a regular MAP process, the taxpayer's rights to participate in the process are limited. The MAP process should enable taxpayers to present their case in writing to the mediator or arbitrator as it should have in the regular MAP process. The taxpayer should have the same rights as in the MAP process, including the ability to reject the outcome of the MAP process.

h. Would it be possible to utilize an institutional framework for NBDR, which could facilitate comfort of countries with little experience in either MAP or such NBDR processes?

Comment: Yes, there are models that could be evolved, as appropriuate.

7. **Have such NBDR processes been used in the tax area by some UN Countries?**

Comment: Yes, but to our knowledge only on the domestic level. For example, in the U.K. as noted above. In addition, Mexico has developed a successful program. The process in Mexico includes the following characteristics:

[179] See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

- Tax authority must attend if requested by the taxpayer
- Mediators have expertise and autonomy
- Amicable environment
- Discussions are not binding or precedential
- Flexible process
- Partial resolution is acceptableIf the process does not achieve resolution, it will at least achieve a clarification of the issues to be addressed

Similarly, a NBDR process is authorized for certain tax disputes in France and the Netherlands, among others.

8. **In case NBDR turns out to be useless, can competent authorities terminate the procedure or will they be stuck in a process which would just come down to a waste of resources?**

Comment: In general, no party to a dispute can be forced to remain within NBDR, if the latter has no prospects of success.

In commercial contracts, it sometimes happens that parties commit themselves to meet at least once or several times for amicable discussions or to wait for a certain period of time before any one of them can seize a court or arbitral tribunal. Such agreements aim at increasing the incentives for the parties to attempt amicable settlement. However, it is difficult in practice to enforce such obligations and to sanction breaches. Further, parties can obviously get rid of such obligations by mutual consent.

It is submitted that the suspension or termination of NBDR of tax disputes should always be possible if at least one competent authority, after serious consideration, comes to the conclusion that NBDR will not be effective. Flexibility should prevail over formalism, given in particular that competent authorities have already demonstrated their good will to find an amicable solution through the participation in a MAP.

6.4.4. Positives and Negatives of NBDR for Developing Countries

1. Potential Positives

- Establish a process to develop expertise, and confidence in dispute international tax dispute resolution under the UN Model in a manner consistent with each Country's comfort level

- Coordinate such confidence and experience with tax base defense processes, including examination and domestic dispute resolution processes

- Avoid the concerns that mandatory dispute ettlement provokes due to some countries' experiences with or perceptions of investment and some forms of commercial arbitration

- Use the experience, positive or negative, from investment or other form of commercial arbitration to design international tax dispute resolution processes to achieve the objectives of all participating Countries

- NBDR may shed light on the complicated issues between the Tax Authorities and lead the way for them to arrive in consensus to a MAP agreement

- Long-term support for tax administrations, international relations, and cross-border investment by having tax dispute resolution processes that are accepted by taxpayers and Countries alike

2. **Potential Negatives:**

- Cases may not be resolved since the NBDR input is not binding and it is up to the competent authorities to get top a solution of the case between themselves and the taxpayer

- Investment of time and expense in developing such NBDR processes

6.5 Issues to be Addressed With Respect to NBDR

Prior to agreeing to such process, competent authorities would have to consider:

- What kind of NBDR should exist, what are their potential benefits in specific circumstances and what are their limits?
- How can the suitability and appropriateness of specific forms of NBDR (e.g. mediation or expert evaluation) for specific types of disputes be assessed?
- What would be the scope of a submission to NBDR: default dispute resolution mechanism or supplementary option on a case-by-case basis?
- How, when and by whom would the NBDR process be initiated?
- How should independent persons, such as mediators or neutral experts, be selected?
- What are the duties of such independent third persons, e.g in terms of impartiality, disclosure of potential conflicts of interest etc.?
- How can the proceedings be structured (e.g. time frames, form of submissions, obtaining documentation and testimony of the taxpayer or other taxpayer involvement, rules ensuring the flexibility of the process etc.)?
- Where will the proceedings occur?
- What will be the work product of the third person and in what form will it be submitted (e.g. final expert report; non-binding proposals of a mediator for the resolution of the dispute; only oral testimony, etc.)?
- What rules and principles should be contemplated regarding the transparency and confidentiality of NBDR proceedings?
- In what form should CA's lay down their Mutual Agreement if they find one and what is its legal effect?

- How can such Mutual Agreement be enforced?

7. What can we learn from dispute settlement outside the tax field?

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[Draft not yet available]

8. Mandatory Dispute Settlement (MDS)

Chapter	Proposed Chapter Facilitators	Proposed Additional Drafting Group Members
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Draft provided by Sriram Govind

Draft received: _____√ 25.09.2017_____

8.1 Concept of MDS: The Current Approaches

Although MAP has been successful in several countries, in view of increasing volumes of unresolved cases[180], some States have shown a preference towards supplementing MAP with mandatory dispute settlement ("**MDS**") mechanisms such as 'arbitration'. Countries that seek to supplement MAP with MDS may include an additional paragraph in the MAP article (generally

[180] *See* OECD, Map Statistics, 2015.

Article 25) of their tax treaties that allow MAP cases that have been unresolved for a certain period of time to mandatorily be submitted to one or more independent persons for a determination or decision that may be, to a certain extent, binding for both States to follow. While this option may be referred to as 'expert determination' or 'arbitration', international tax experts have been referring to this process as 'tax treaty arbitration' owing to familiarity and for ease of reference.

It is important to note that MDS in tax treaties is entirely different from 'arbitration' in a legal and commercial sense. While commercial arbitration is an alternative dispute resolution mechanism through which disputes can independently be resolved by the parties involved, MDS is merely a supplementary remedy that may be used only in cases where a case is unresolved through MAP over a prescribed period of time. Further, unlike an arbitration award in commercial arbitration that requires enforcement through a Court system, MDS results in an 'opinion' that is to be implemented by the competent authorities. In fact, competent authorities may even be given the discretion to arrive at an agreement different from the opinion resulting from the MDS.[181] Finally, whether initiated by the taxpayer or the competent authorities (depending of the tax treaty provision), MDS results in a State-State procedure and does not involve the taxpayer, such as in the case of investment arbitration.[182]

Therefore, it is clear that MDS is 'prophylactic' in nature i.e. it aims to ensure that cases are resolved through MAP to avoid having to move into arbitration.[183] States that believe that competent authorities in their partner States would be more willing to arrive at an agreement under MAP within the prescribed timeline to avoid MDS may, therefore, consider including MDS to supplement MAP in their tax treaties.

8.1.1 The UN Model Position

Article 25 of the UN Model Convention (2011) dealing with dispute resolution contains two 'alternatives'. Alternative A provides only for MAP as described in Chapter 5 of this Handbook.

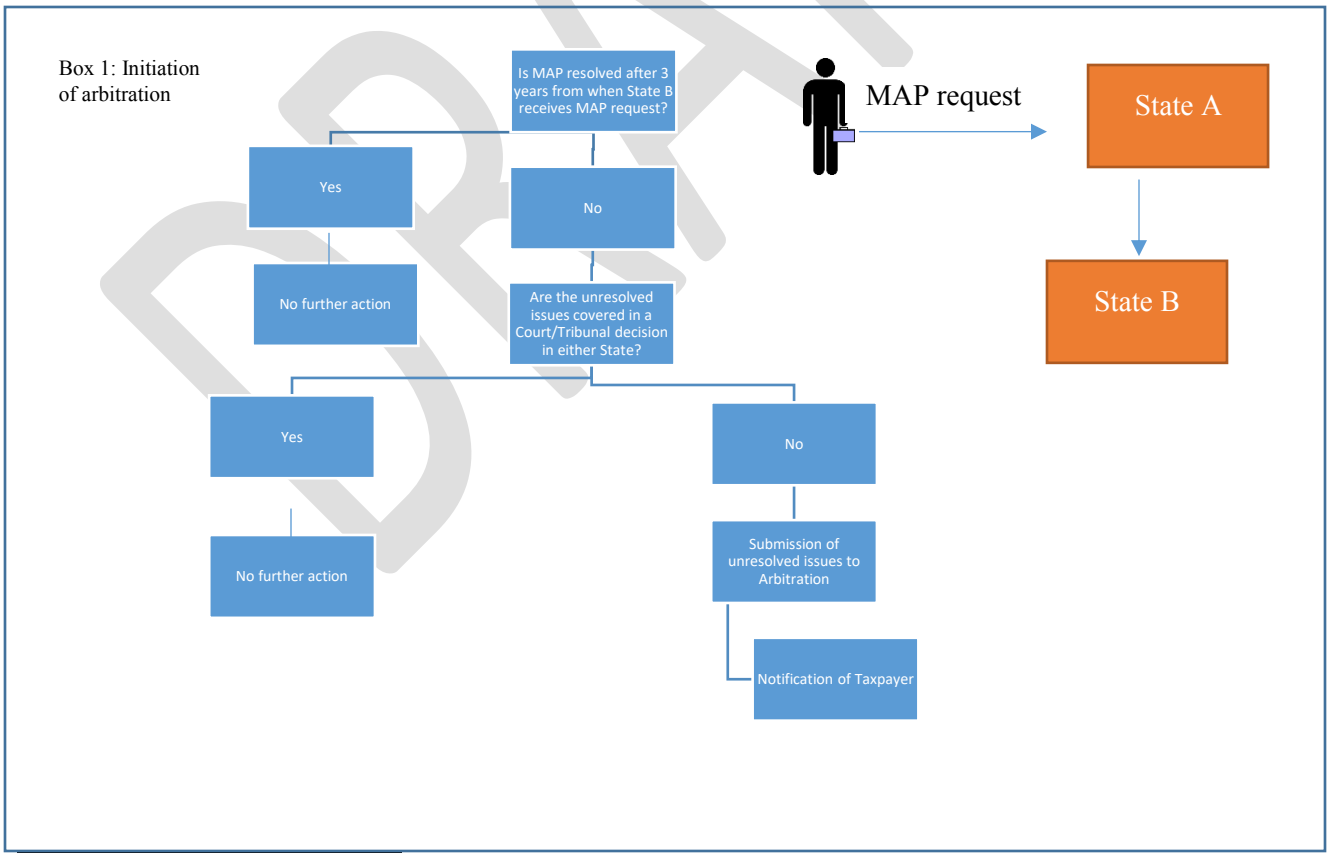
[181] *See* Alternative B, Article 25, UN Model Convention (2011); Para 84, Commentary to Article 25, OECD Model Convention (2014).

[182] S.P. Govind/S.Rao, 'Designing an inclusive and equitable model for International Tax Arbitration: An Indian perspective', Working Paper for the 4th Meeting of the Vienna Multi-Stakeholder Group on Dispute Resolution.

[183] Para 64, OECD Model Commentary on Article 25, referred to in the UN Model Commentary on Article 25; H.J. Ault & J. Sasseville, 2008 OECD Model : the new arbitration provision, 63 Bull. Intl. Taxn. 5 (2009), Journals IBFD; J. Kolmann & L. Turcan, Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges in M. Lang/J. Owens (eds.), 'International Arbitration in Tax Matters', Amsterdam, IBFD, referring to the EU Arbitration Convention (1990) possibly creating such an effect.

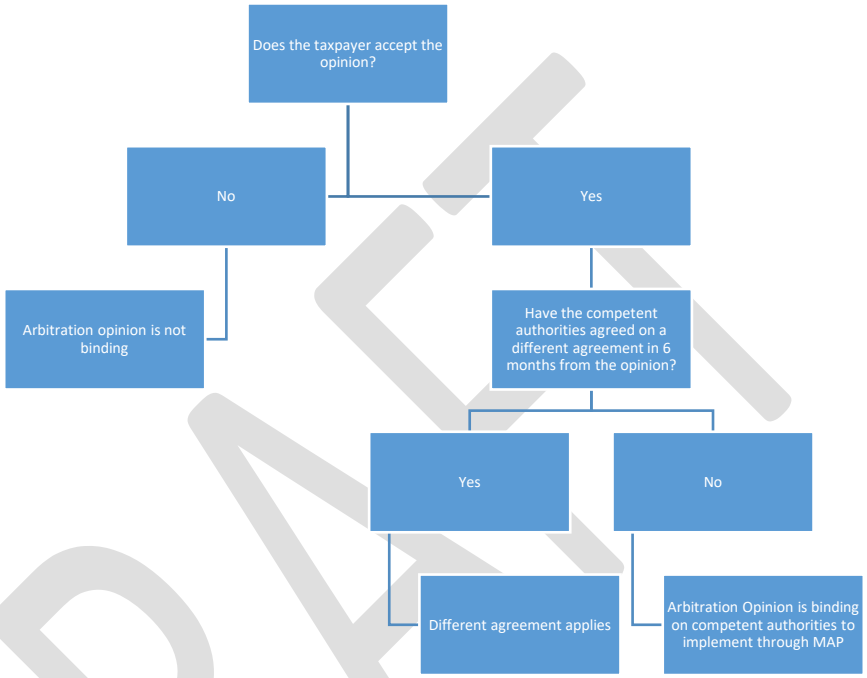
Alternative B, however, provides for MDS, termed 'arbitration'. An additional paragraph 5 is included in Alternative B of Article 25 where issues that are unresolved through MAP may be submitted to 'arbitration'.

Per this provision, where the competent authorities of two States are unable to reach an agreement to resolve a case through MAP within 3 years from the presentation of the MAP case to the competent authority of the other State following a MAP request, unresolved issues may be submitted to arbitration at the request of either competent authority.[184] However, issues that are already subject to the decision of a Court or Tribunal in either State cannot be submitted to arbitration. Once arbitration is initiated, the taxpayer involved in the MAP case should be notified. Once an opinion is obtained from the arbitral panel, the competent authorities have 6 months within which they can arrive at a different MAP agreement to resolve the case. Further, the taxpayer or affected parties may choose to not accept this opinion. However, following the 6 month period and acceptance of the taxpayer, the opinion would be binding on both competent authorities to implement through MAP, irrespective of domestic time-limits.



[184] However, Paragraph 17 of the UN Model Commentary on Article 25 allows States to draft this provision in such a way that the affected taxpayer and not the competent authorities may make this request for arbitration.

Box 2:
Conclusion of arbitration



The competent authorities have been given discretion as regards the procedure to adopt for arbitration under this provision. The UN Model Commentary on Article 25 gives some additional guidance that States may choose to follow, specifically through a 'sample' mutual agreement that States may use as a format to implement Article 25(5). This 'sample agreement' proposes comprehensive rules as regards the type of arbitration procedure, selection of arbitrators, independence and transparency rules, remuneration of arbitrators, costs, procedural and evidentiary rules, sharing of information and confidentiality rules and implementation/enforcement related rules.

The Commentaries also provide additional guidance on the relationship between the arbitration process and domestic remedies. In order to pursue arbitration, the taxpayer may have to renounce his right to domestic law remedies on the concerned issue. Moreover, in States where an arbitration opinion can deviate from a final Court decision, the provision may be modified to exclude such

exception. Further, where arbitration is only possible if there are no further domestic remedies per domestic law, the provision may be broadened as well.[185]

8.1.2 Other Models and Country Practices

8.1.2.1 *Developing country MDS provisions*

As of 2016, there were 178 MDS clauses in force of which treaties involving several developing countries are also included (a few of which have not come into effect owing to lack of exchange of diplomatic notes). 6 jurisdictions in Africa i.e. Congo Republic, Egypt, Ghana, Mauritius, Seychelles and Uganda; 6 jurisdictions in South America i.e. Curacao, Ecuador, Paraguay, Peru, Uruguay and Venezuela; 4 jurisdictions in North America i.e. Barbados, Bermuda, Quebec and St. Maarten; and 15 jurisdictions in Asia i.e. Armenia, Bahrain, Hong Kong, Indonesia, Jordan, Kazakhstan, Kuwait, Lebanon, Mongolia, Qatar, Russia, Singapore, Tajikistan, United Arab Emirates and Uzbekistan have adopted arbitration provisions in their tax treaties. It is interesting to note that out of the BRICS countries, only Russia has accepted an MDS provision as yet. It is also interesting to note that a vast majority of these provisions follow one criteria or another from the UN Model, most commonly, restriction of arbitration requests only to the competent authorities and not the taxpayers. [186]

[Statistics from old study; to be reviewed, discussed and updated]

8.1.2.2 *OECD Model and BEPS Position*

Article 25(5) of the OECD Model Convention (2014) is largely similar to Article 25(5) in Alternative B of Article 25 of the UN Model Convention. However, there are some significant differences. First, the OECD Model Convention does not contain two alternatives – but, the Model generally prescribes the use of arbitration. Second, the OECD Model Convention allows for arbitration when a case is unresolved through MAP for 2 years. Third, the OECD Model Convention allows for the arbitration request to be made by the affected taxpayer and the not one of the competent authorities. Fourth, the OECD Model Convention does not allow for competent authorities to adopt an agreement different from the arbitration opinion within 6 months.[187] Finally, since the OECD Model Convention does not have two alternatives, it includes a footnote that highlights that some countries may not be able to adopt this provision in their treaties due to legal

[185] *See* UN Model Commentaries on Article 25 (2011).
[186] *See* I. Vock, [to be updated]
[187] However, the possibility to do this is highlighted in the Commentaries. *See* Para 84, Commentary to Article 25 of the OECD Model Convention.

or constitutional constraints. Further, guidance on conduct of arbitration is provided for in the OECD Model Commentaries as well, a large part of which has been referred to in the UN Model Commentaries on Article 25.

However, the final report on BEPS Action Plan 14 prescribes as a minimum standard a requirement that all countries should disclose their position as regards mandatory binding arbitration and therefore, the abovementioned footnote is proposed to be removed in the 2017 update to the OECD Model Convention.

Further, the MLI also contains an option provision for mandatory binding arbitration that 26 jurisdictions have already signed up for and will remain optional for all MLI signatory jurisdictions to adopt. This provision is more detailed than the provisions in the Model Conventions since detailed rules have been added in the provision itself on access to arbitration, information requests and timelines, appointment of arbitrators and costs, mode of conduct of arbitration, independence, transparency and confidentiality rules.[188] The MLI arbitration provision also allows for flexibility in approach i.e. choice between baseball or independent opinion or other approach, open-ended reservations as regards the type of cases that each jurisdiction wants this procedure to apply to, options to substantively follow OECD or UN Model approach for arbitration (except for access directly to taxpayers) etc. Countries wishing to choose arbitration, but would want to see a detailed provision, while retaining the option to opt out or change several aspects within the provision may explore option for this provision in the MLI. It may be noted that some jurisdictions that have not yet fully implemented arbitration in its tax treaties such as Fiji, Mauritius and Singapore have chosen to apply this provision through the MLI.

Several country tax treaties models also prescribe arbitration provisions. Most significantly, the US Model Convention (2016) has proposed to include a detailed arbitration provision that relies on 'baseball arbitration'.

[To be discussed whether more details should be included re: the US Model provision]

[188] S.P. Govind/L. Turcan, 'The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive', *Bulletin for International Taxation*, 2017 (Volume 71), No. 3/4.

Countries may also draw inspiration from procedural rules adopted within the European Union for arbitration in tax matters. The EU Arbitration Convention[189] provided for arbitration that is triggered if MAP is unsuccessful for 2 years, much like under the OECD Model Convention. The Convention contains more detailed procedural rules (as in the MLI) for selection of arbitrators and rules of evidence, including a list of independent persons who are suitable to act as arbitrators along with detailed procedural rules for their selection and the selection of the Chair of the arbitral panel. The Convention also makes the decision of the arbitral panel time-bound, which may be a procedural device that countries may draw inspiration from.

A new directive to govern cross-border dispute resolution through instruments such as the Arbitration Convention and tax treaties has also been proposed in the EU[190], expected to be finalized soon. This proposed Directive may also contains procedural elements that countries may consider while designing supplementary arbitration within their tax treaties such as strict time-limits at every stage and access to domestic Courts for the taxpayer in case of inaction at any stage.[191]

8.2 When is Mandatory Dispute Settlement appropriate?

MDS is appropriate for countries where MAP has not resulted in concrete results till date and where there is a feeling that MAP not being time-bound has resulted in disputes not being resolved. The UN Model Commentaries, based on the discussions by the Committee, while weighing the pros and the cons involved, have noted the following benefits in relation to introduction of MDS to supplement MAP[192]:

"

- *despite the fact that only a small number of cases remain unresolved, each of these cases represents a situation where there is no resolution for a case where one competent authority considers that there is taxation not in accordance with the Convention and where there may be significant double taxation;*

[189] [To be filled]
[190] [To be filled]
[191] S.P. Govind/L. Turcan, *Ibid*.
[192] Paragraph 5, UN Model Commentaries on Article 25 (2011).

- *arbitration provides more certainty to taxpayers that their cases can be resolved under the mutual agreement procedure and contributes to cross-border investment;*
- *domestic remedies may not resolve adequately and rapidly disputes concerning the application of bilateral conventions (risks of inconsistent court decisions in both countries and of unilateral interpretation of the Convention based on domestic law);*
- *the obligation to submit unresolved cases to arbitration after a given period of time may facilitate the endeavours of the competent authorities to reach an agreement within that period of time;*
- *on the basis of the experience under the EU Arbitration Convention, the effective recourse to mandatory arbitration should be rather unusual and the costs relating to that mechanism should be low; moreover, as arbitration provides more certainty to the taxpayers, it reduces the number of costly "protective" appeals and uncertain domestic proceedings;*
- *arbitrators have to reach a well-founded and impartial decision; consequently, they can adjust for the levels of expertise of countries and overcome the possible lack of experience of some countries;*
- *skilled and impartial arbitrators do exist from various backgrounds (government officials, judges, academics and practitioners) and from various regions (including from developing countries);*
- *it is in the interest of a State to limit its sovereignty in tax matters through mandatory arbitration..*

“

These benefits may be taken into account by countries that are looking to incorporate MDS clauses in their tax treaties.

Countries that have large pendency of cross-border tax cases within their Court system or a judicial system that is not pro-active in tax matters may also consider adopting MDS clauses in tax treaties to provide for a

[More to be added post discussions]

8.3 How to initiate the process

While the UN Model Convention prescribes that either of the competent authorities has to make the request for arbitration, the OECD Model Convention and the MLI allow the taxpayer to directly make the request. Countries that wish to incorporate MDS within their tax treaties, but feel that allowing the taxpayer to trigger a third-party decision on a tax dispute directly could infringe their sovereignty may consider limiting access only to the competent authorities as prescribed in the UN Model Convention.

However, it must be taken into account that a taxpayer's feeling of certainty as regards cross-border tax disputes may be impacted by whether access is granted directly to the taxpayer or not in an MDS process.

8.4 The process

8.4.1 Approach: Independent opinion v. baseball

The 'sample' mutual agreement in the UN Model Commentaries (2011) endorses the use of the 'last best offer' or 'baseball' approach to arbitration where both competent authorities are required to propose their most reasonable solution to the case in their 'Terms of Reference' and the arbitral panel is bound to choose one of these 'Terms of Reference' as a solution to resolve the case. Within 2 months from the appointment of all arbitrators, each competent authority should present its 'Terms of Reference' and a decision with short reasons shall be delivered by the panel within 3 months from thereon.[193]

The 'sample' mutual agreement in the OECD Model Commentaries (2014) endorses the use of the 'independent opinion' approach where consideration of facts, appreciation of evidence and review of the legal position involved are expected from the arbitral panel before arriving at a reasoned decision.[194]

Interestingly, the MLI allows jurisdictions the option to choose either approach or to create customized rules for each dispute. However, the proposed 2017 update to the OECD Model Commentaries proposes shifting towards the 'baseball' approach as well, in line with the UN Model Commentaries.[195]

[193] Annex, UN Model Commentaries on Article 25 (2011).
[194] Annex, OECD Model Commentaries on Article 25 (2014).
[195] *See* Article 23 of the MLI.

Countries should weigh the pros and cons of each approach for making a choice. In general, the 'baseball' approach may be cost efficient, less time-consuming and simpler to implement for developing countries. However, countries that would want to provide the taxpayers more legal certainty or that would have to deal with constitutional limitations for taxing decisions to follow the principle of legality as regards consistency of decision making may choose the 'independent opinion' approach instead.

[More pros/cons and factors influencing choice to be added post discussions]

[Charts to be inserted showing procedure in each case]

8.4.2 Selection of Settlement Authority

The sample mutual agreement in the UN Model Commentaries suggests a structure for a 3-member arbitral panel. It states that within either a) 3 months from notification of the taxpayer of the arbitration or b) 4 months from when the other competent authority receives the arbitration request filed by one competent authority, each competent authority shall appoint one arbitrator. Within two months of the last appointment, the two appointed arbitrators shall appoint the third arbitrator, who shall act as the 'Chair'. If no appointment is made as per this process within the prescribed time-period, the chair of the UN Committee of Experts on International Cooperation in Tax Matters shall make the appointment within 10 days from a request. If such chair is a national of either State involved, the longest serving Committee member who is not a national shall make the appointment.

A similar approach is followed in the sample mutual agreement in the OECD Model Commentaries. However, the power of appointment in case of default is provided instead to the OECD Director of the OECD Centre for Tax Policy and Administration. The MLI provision follows the same format as the OECD Model approach.

Countries may choose from among these approaches or develop a new approach based on their policy goals[196], including with reference to approaches adopted in the EU Arbitration Convention and proposed Directive such as a panel of larger composition than 3 members, maintenance of a panel of 'independent' persons[197] and detailed rules regarding selection of the Chair. Developing

[196] For instance, the Austria-Germany tax treaty has prescribed the European Court of Justice as the arbitrator for supplementary arbitration where MAP is unsuccessful. On September 12, 2017, the Court delivered its first arbitral opinion under this provision in *Republic of Austria v Federal Republic of Germany* (Case C-648/15).

[197] Paragraph 15 of the Annex to the UN Model Commentaries on Article 25 also suggests the creation of a list of suitable persons for arbitration by the UN Committee of Experts on International Co-operation in Tax Matters.

countries may, however, want to design such rules in a manner which ensures that the constitution of the panel is representative of their tax policy goals as well.

[Charts to be inserted showing selection of arbitrators in each case]

8.4.3 Timelines involved

While the OECD Model as well as the EU options prescribe arbitration after MAP is unsuccessful for 2 years, the UN Model has extended this timeline to 3 years. The MLI, however, is flexible and allows for both approaches depending on the choice made by countries.[198] While the OECD and UN Model provisions till date have automatically triggered arbitration from the date when the case is shared with the other competent authority, the proposed 2017 OECD Model (in line with the MLI), has allowed extension until all information requested for is obtained.[199]

Neither the OECD nor the UN Model prescribes a specific timeline within which the arbitration process should be completed. However, the sample mutual agreements provide for timelines. While the OECD sample mutual agreement provides for 6 months (under the independent opinion approach), with the 'baseball' approach being proposed under the UN Model Commentaries, this time-limit is reduced to 3 months. However, the proposed 2017 OECD Model Commentaries, the time limit has been extended to 365 days. Countries may keep this in mind if they are looking at MDS that supplements MAP to be a 'speedy' solution.

Separately, the EU Arbitration Convention and proposed Directive directly provide for legally enforceable timelines within which an opinion is to be delivered by the panel and in the latter case, even make remedies available against inaction in domestic Courts. Countries may also draw reference from these practices if they find it in their interest.

[Chart to be inserted showing timeline of arbitration process under Models till decision]

8.4.4 8.4.4 Independence and transparency rules

The sample mutual agreement in the UN Model Commentaries suggests that any person including government officials of either State involved may be an arbitrator unless they were themselves involved in the particular case beforehand. The OECD Model Commentaries provide for the same. However, the UN Model Commentaries also suggest that the arbitrator provide a written statement

[198] The MLI may even allow this timeline to be extended indefinitely subject to notification of the taxpayer. *See* Article 19(1)(b) of the MLI; S. P. Govind/L. Turcan, *Supra*.
[199] Per the MLI, the timeline can also be extended by existing domestic proceedings on the same issue.

(or an affidavit) that states his impartiality or neutrality, which is not provided for in the OECD Model Commentaries.

The MLI provides that each arbitrator should be 'impartial' and 'independent' of the tax authorities, the competent authorities and the ministry of finance of each State and of all persons affected by the issue at the time of appointment and that they should maintain status quo throughout the arbitral process and for a reasonable time thereafter.

Countries may consider these options and select independence and transparency rules as regards the arbitrators. However, it may be in the interest of countries to require a written 'affidavit' as suggested in the UN Model Commentaries to ensure neutrality and independence.[200]

8.4.5 8.4.5 Location of proceedings

Countries should generally be free to mutually agree on a place where MDS proceedings may be conducted. However, countries entering into MDS clauses with developing countries should note that the location should be chosen that is least draining on the resources of such countries. Further, countries are free to explore the use of technology such as video conferencing for the conduct of arbitral proceedings which may be a speedy and cost-effective solution.

Further, the sample mutual agreements in both the UN and the OECD Model Commentaries suggest that the competent authority to which the case giving rise to the arbitration was initially presented should be responsible for the logistical arrangements for the meetings of the arbitral panel and will provide the administrative personnel necessary for the conduct of the arbitration process. Countries may consider adopting such a rule in relation to their MDS clauses as well.

8.4.6 Remuneration of arbitrators and costs involved

As per the UN Model Commentaries, in order to be cost-effective, the sample mutual agreement suggests paying the arbitrators a bilaterally agreed hourly fee which is restricted to 3 days of preparation, 2 meeting days (including video-conferencing) and necessary travel days. Reasonable expenses shall also be reimbursed per this model. The OECD Model Commentaries does not provide suggestions as regards remuneration.

As regards costs, both the OECD and UN Model Commentaries both prescribe the following guidelines:

[200] This mechanism is also used in ICSID as regards arbitrator independence.

- Each competent authority bears all costs, including travel costs, related to its own participation and in relation to the arbitrator appointed by it or on its behalf by someone else.
- Costs related to the meetings of the panel and the personnel necessary for the process will be borne by the competent authority to which the case giving rise to the arbitration was initially presented.[201]
- All costs in relation to other arbitrators and all other costs will be borne equally by the two States.

Further, the MLI requires a specific mutual agreement between the States on costs and if there is no agreement, each party bearing its own costs with shared costs being split equally.

Countries may take into account all of the above suggestions while deciding how to factor in costs in their MDS clauses. Developing countries may specifically refer to previous UN work and suggestions on how to make MDS more cost-efficient, referred to in Chapter 8.5 of this Handbook.[202]

8.4.7 Confidentiality

The sample mutual agreements in both the UN and the OECD Models provide that both jurisdictions involved should agree that arbitrators appointed would be deemed to be authorized representatives of the appointing parties as regards communications and the confidentiality of information provided.

The MLI adds another layer of protection by not just prescribing arbitrators as authorized representatives, but 3 staff members per arbitrator as well and also requires a written statement as regards confidentiality and non-disclosure obligations from each arbitrator and designated staff member.

Countries may draw reference to these practices and to ensure that confidentiality is maintained, follow the approach adopted in the MLI as a 'minimum standard' for protection.

[201] If presented in both States, the costs will be shared equally.
[202] UN, 'Secretariat Paper on Alternative Dispute Resolution in Taxation', E/C.18/2015/CRP.8, October 8, 2015, available at: http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf.

8.4.8 Taxpayer participation

Neither the UN Model Convention nor the OECD Model Convention specifically allow for taxpayer participation in the arbitration process. While the sample mutual agreement in the OECD Model Commentaries allows participation by the person requesting the arbitration process in writing to the extent allowed in MAP and orally if allowed by the panel, the UN Model Commentaries do not provide for this since arbitration may only be requested by the competent authorities in the UN Model Convention provision. The MLI, however, does not provide for taxpayer participation.

However, countries that wish to involve the taxpayer in the arbitral process may refer to the proposed EU dispute resolution directive which, allows for taxpayer participation directly in its wording if agreed to by the arbitral panel.

[Pros and cons of allowing taxpayer participation?]

8.4.9 Publication of opinions and precedential value

The sample mutual agreements in the UN Model Commentaries does not, in default, refer to the possibility of publication of decisions made through arbitration since the UN Model Convention follows the 'baseball' approach. However, it follows the approach adopted in the OECD Model Commentaries if the 'independent opinion' approach is chosen.

The sample mutual agreement in the OECD Model Convention allows publication if agreed to by the person making the request and both competent authorities with redacted details on the understanding that these decisions would carry no precedential value. A similar approach for redacted publication is allowed under the proposed EU directive as well, however, without the requirement for permission of the parties involved. However, the MLI does not allow the publication of decisions even in the 'independent opinion' approach.

As cited in the UN and OECD Model Commentaries, publication of decisions in the 'independent opinion' approach may add additional transparency and although there may be no precedential value, may serve as a guideline to avoid further disputes. Countries may take this into account while designing their MDS clauses.

8.4.10 Implementation and enforcement of opinion

Both the UN and OECD Model Conventions provide that the arbitral opinion shall be final and binding on the competent authorities to implement through a MAP agreement, unless the taxpayer

rejects the opinion. However, the UN Model Convention adds another layer of protection as described above and allows the competent authorities the chance to arrive at an agreement that is different to the opinion within 6 months before the opinion is made final.

As discussed above, countries that may have concerns of sovereignty in relation to providing binding decision making authority to a third party may adopt the UN Model approach so as to provide the competent authorities the power to reject the arbitration opinion through a separate agreement within 6 months after the opinion is delivered.

As regards implementation, within the existing Models, it is questionable as to whether a taxpayer may enforce an arbitration opinion and compel competent authorities to adopt the same. Domestic law provisions as regards enforcement of MAP agreements should apply in this regard.[203] However, previous UN work has engaged in richer discussions as regards implementation with reference to enforcement of arbitral opinions in other disciplines (explained in Chapter 8.5) and countries may refer to the same.

Countries that would want to extend domestic remedies of review or revision of arbitral opinions as mandated by their constitutional structure may also consider referring to the ICSID Convention that provides detailed provisions in this regard. The proposed EU directive also provides access to domestic Courts at every step of the arbitral proceedings, including enforcement.

[NTD: We had not included procedural or evidentiary rules; legal principles in the original outline that the Sub-Committee and the Committee approved to try and not make things too complex. However, I think that this may be a value-add and look forward to hearing your suggestions on whether we should incorporate brief sub-sections on these points as well]

8.5 Concerns of developing countries

Several concerns raised primarily by developing countries during discussions at the Committee level have been recorded in the UN Model Commentaries[204]:

“

[203] S.P. Govind/S. Rao, *Supra*.

[204] UN Model Double Taxation Convention Article 25 Commentary Paragraph 4 and 5

- *only a small number of cases are submitted to the mutual agreement procedure under paragraphs 1 and 2 of Article 25 and very few of them remain unresolved;*
- *domestic legal remedies can resolve the few cases that the competent authorities are not able to resolve through the mutual agreement procedure;*
- *due to the lack of expertise in many developing countries with mutual agreement procedures, arbitration would be unfair to those countries when the dispute occurs with more experienced countries;*
- *the interests of countries, which are so fundamental to their public policy, could hardly be safeguarded by private arbitrators in tax matters,; arbitrators cannot be expected to make up for the lack of expertise in many developing countries;*
- *the neutrality and independence of possible arbitrators appears difficult to guarantee;*
- *it is very difficult to find experienced arbitrators;*
- *mandatory arbitration is costly and therefore not suitable for developing countries and countries in transition;*
- *it is not in the interest of a State to limit its sovereignty in tax matters through mandatory arbitration.*

”

In light of the discussions on arbitration in the context of BEPS Action Plan 14, the UN Committee of Experts revisited this issue focusing on dispute resolution and avoidance in its agenda, to look at improving or modifying arbitration in the UN Model Convention. In relation to this mandate, the UN Secretariat produced a paper on this issue detailing the various issues involved in arbitration including concerns raised by developing countries against the inclusion of arbitration in their tax treaties.[205] These issues are:

a) Sovereignty and constitutionality concerns:

[205] UN, 'Secretariat Paper on Alternative Dispute Resolution in Taxation', E/C.18/2015/CRP.8, October 8, 2015, available at: http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf.

Some States consider the inclusion of arbitration of a tax dispute 'unconstitutional'. Some other States consider the inclusion of arbitration constitutional, but creating other constitutional obligations such as extension of such remedies in domestic cases as well. Other States that do not have the above concerns have raised the issue of shifting of decision making power from the State to an entity that they have no confidence in or experience with.

These discussions also consider the possibility of treaty shopping for treaties that contain an arbitration provision in case of a limited number of such treaties as is the case today and also considers whether the sovereignty concerns are strengthened or relieved by change from an 'independent opinion' approach to a 'baseball' approach in arbitration. The Report considers the possibility of a most-favoured nation clause to resolve this issue, but does not go much further.

b) Costs and lack of resources:

Arbitration would necessarily entail some costs in terms of fees for the arbitrators, facilities and additional fees for counsel/representation. Moreover, in terms of a developing country, these fees may be payable in a foreign currency in a scale that is not proportional to the resources available to them. Further, developing countries having limited experience in arbitration may also need to hire outside experts to familiarize their competent authority function with the process, which would increase the costs involved.

Several options are considered in this report including reliance on 'baseball' arbitration to reduce costs, clubbing of cases, taxpayer funding of arbitrations and other material solutions such as division according to prior agreement, division according to arbitrator discretion, the creation of an institutional framework by way of a 'blind fund' or other UN support for developing countries in funding.

c) Lack of experience and familiarity:

Several developing countries have raised concerns as regards their lack of experience in arbitration as compared to developed countries. This raises the suspicion that such countries would incur excessive costs and still, lose out in disputes leading to leakage of tax revenues. As in the case of costs, several suggestions are provided in the report to alleviate this concern including an

institutional framework for developing experience and a network of future arbitrators in developing countries and the possibility of including alternative dispute resolution in a domestic context to develop familiarity with processes.

d) Even-handedness:

As of today, there is only a small pool of possible arbitrators around the world who can deal with complex international tax and transfer pricing issues and most of them come from the developed world. Although this group may include academics and people having no affiliation with Governments or business, their thought process and understanding of international taxation may be tuned to the developed world and might not consider concerns of developing countries. The issue here is that there is a lack of arbitrators in the developing world at the moment.

The report considers solutions such as detailed impartiality requirements in the arbitration agreements and the training of tax specialists to be arbitrators in developing countries, including increasing awareness, either directly or through an Institutional framework or under the auspices of the UN.

e) Transparency in arbitration:

Arbitration proceedings are generally considered confidential and opinions are not published. However, in order to maintain consistency and to promote confidence in the system, publication of opinions with redacted details is also discussed in the report.

f) Reviewability and enforceability:

In mandatory binding arbitration in tax treaties, opinions are considered binding on the competent authorities. In some States, inherent powers granted to Courts under constitutional law may allow review of such opinions, either before or after they are implemented through mutual agreement. However, as per the report, in order to facilitate States that do not grant such powers to Courts, a mechanism may be developed as under the ICC rules[206] or the ICSID Convention[207] facilitating

[206] To be filled
[207] To be filled

review in certain situations or a full appeal process may be developed as in the case of the WTO agreements. Similarly, another concern that was raised in the report is as regards enforceability of arbitral awards without a specific mechanism for the same as in the case of commercial disputes[208] or investment treaty disputes[209].

Countries must take into account the concerns raised in this section and pay attention to ensure that MDS clauses in their tax treaties are designed in a fair and equitable manner.[210]

9. Conclusions

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[Draft not yet available]

10. Annexes

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[208] New York Convention, 1958.
[209] Washington Convention
[210] *See* S.P. Govind/S. Rao, *Supra*.

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[Draft not yet available]

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