
**Committee of Experts on International
Cooperation in Tax Matters**

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Item 3 (g) of the provisional agenda

Dispute avoidance and resolution

**Preliminary Draft of the Chapter on Domestic Dispute Resolution
Mechanisms**

Note by the Subcommittee on Dispute Avoidance and Resolution

Summary

This note is presented FOR DISCUSSION (and not for approval) at the eighteenth session of the Committee to be held in New York on 23-26 April 2019.

The note includes a preliminary draft of Chapter 3 (Domestic Dispute Resolution Mechanisms) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution* on which the Subcommittee on Dispute Avoidance and Resolution is currently working. This draft was prepared on the basis of the discussion of a previous draft at the last meeting of the Subcommittee held in London on 13-15 March 2019.

At its eighteenth session on 23-26 April 2019, the Committee is first invited to confirm its agreement with the Subcommittee's decisions concerning the scope of the Handbook and of Chapter 3. It is then invited to discuss the attached preliminary draft of Chapter 3, focusing primarily on the table of contents.

Based on the discussion of this note at the Committee's meeting and on subsequent written comments, the Subcommittee intends to revise and complete the draft Chapter at its meeting scheduled for 1-3 July 2019 and to send it in advance of the Committee's next meeting, when it would be presented for discussion with a view to its approval for inclusion in the *UN Handbook on Dispute Avoidance and Resolution*.

1. Paragraphs 8 and 9 of note [E/C.18/2018/CRP.13](#), which was presented at the seventeenth session of the Committee (Geneva, 16-20 October 2018), described the next steps leading to the finalization of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*.

2. In accordance with the timetable outlined in these paragraphs, the Subcommittee on Dispute Avoidance and Resolution, at its meeting of 13-15 March 2019, finalized the contents of Chapter 5 on Mutual Agreement Procedure (which is presented to the Committee for approval as separate note [E/C.18/2019/CRP.3](#)) and discussed a first draft of Chapter 3 on Domestic Dispute Resolution Mechanisms.

3. During that meeting, the Subcommittee first examined general comments related to the structure and contents of Chapter 3. It was then decided that:

- The Chapter and the whole Handbook should focus on civil (i.e. not criminal) disputes related to income/corporate taxes even though the guidance included therein may, in some countries, be relevant in the case of disputes arising with respect to other taxes. This should be expressly indicated in the Introduction to the Handbook.
- The Introduction to the Handbook should also indicate that the Handbook focuses primarily on cross-border issues, even if that is not the case for Chapter 3. It should similarly mention that the Handbook deals with disputes concerning tax payable by individual taxpayers as opposed to disputes concerning changes to tax laws or policies or to general administrative practices which may be opposed by a number of taxpayers.
- While Chapters 6 and 7 will deal with mediation and arbitration, they will do so in relation to the resolution of MAP cases. For that reason, the use of mediation and arbitration for the purposes of domestic dispute resolution should be addressed in Chapter 3.
- Chapter 3 should focus on common issues and best practices that can help developing countries with the resolution of disputes.
- Chapter 3 should deal with mechanisms for resolving disputes that relate to taxes that have been assessed or reassessed. This means that rulings, letter rulings and any mechanisms, such as pre-assessment mediation, which may be applicable during the audit process are outside the scope of Chapter 3.
- Chapter 3 should deal with disputes concerning the determination of taxes payable and should not, therefore, deal with disputes concerning the exercise, by the tax administration, of its enforcement and collection powers (including disputes concerning information exchanges and documentation requirements).

4. This note includes the preliminary draft of Chapter 3 that resulted from the discussion at the Subcommittee meeting. As indicated in the annotations included in the draft as a result of the discussion by the Subcommittee, many parts of the Chapter need to be revised or completed.

5. At its eighteenth session on 23-26 April 2019, the Committee is first invited to confirm its agreement with the Subcommittee's decisions, described in paragraph 3 above, concerning the scope of the Handbook and of Chapter 3. It is then invited to discuss the attached preliminary draft of Chapter 3, focusing primarily on the table of contents on page 1 of the attached draft in order to identify additional issues that could usefully be addressed in the chapter. The Committee is also invited to ask Committee members and country observers

wishing to send written comments on this preliminary draft to do so by email to the Secretariat at taxcommittee@un.org before 31 May 2019.

Next steps

6. Based on the discussion of this note at the Committee's meeting and on the written comments that will be received after the meeting, the Subcommittee intends to revise and complete the draft Chapter at its meeting scheduled for 1-3 July 2019 and to send it in advance of the Committee's next meeting, when it would be presented for discussion with a view to its approval for inclusion in the UN Handbook on Dispute Avoidance and Resolution.

7. The following is the expected timetable for the presentation to the Committee of the remaining parts of the *Handbook*:

- *October 2019 meeting of the Committee*: Final discussion of Chapter 3 (Domestic Dispute Resolution Mechanisms); first discussion of Chapter 6 (Non-binding dispute resolution) and Chapter 7 (Mandatory dispute settlement).
- *April 2020 meeting of the Committee*: Final discussion of Chapter 6 (Non-binding dispute resolution) and Chapter 7 (Mandatory dispute settlement); first discussion of Chapter 2 (Dispute avoidance mechanisms).
- *October 2020 meeting of the Committee*: Final discussion of Chapter 2 (Dispute avoidance mechanisms); first discussion of Chapter 1 (Introduction and overview, which will include remaining parts of what was initially intended to be Chapter 4 on Special issues faced by developing countries) and the Conclusion.
- *April 2021 meeting of the Committee*: Final discussion of Chapter 1 (Introduction and overview) and the Conclusion; approval of the consolidated version of the *Handbook on Dispute Avoidance and Resolution* (subject to changes made to Chapter 1 and the Conclusion during the meeting).

Chapter 3

Domestic Dispute Resolution Mechanisms

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3.1 Introduction

3.1.1 Overview

1. This chapter explores the mechanisms that are generally available to resolve disputes that can arise between tax administrations and taxpayers with respect to income taxes.¹ Whilst the primary function of the tax administration is to confirm that taxpayers are complying with the law and paying the correct amount of tax, tax administrations should recognize that disputes with taxpayers are inevitable. Therefore, it is of critical importance that mechanisms be available to resolve disputes in as efficient and timely manner as possible, and that these mechanisms be consistent with the legal framework of the country in which they are implemented.

2. These disputes can originate in a number of different ways, although they commonly arise from an enforcement action undertaken by the tax administration with which the affected taxpayer does not agree. While definitive statistics regarding the number of disputes between tax administrations and taxpayers are not available, the increased frequency of enforcement actions taken by tax administrations to, for example, examine or audit filed tax returns or impose collection measures likely also translate into an increase in the frequency of disputes with the impacted taxpayers.

3. The goal of this chapter is to provide practical guidance to countries that wish to improve certain aspects of their domestic dispute resolution mechanisms. These include both mechanisms that are created within, and thus as part of, the tax administration, as well as mechanisms that operate independently of the tax administration. Practice has shown that countries around the world have often chosen to adopt several different dispute resolution mechanisms instead of just relying on one. Countries should therefore determine which of the mechanisms described best suit their circumstances, the nature of the tax disputes that typically arise for their tax administration and their own legal framework.

3.1.2 Disputes covered by this chapter

4. This chapter deals with mechanisms for resolving disputes between that relate to taxes that have been assessed or reassessed. It therefore excludes, for instance, dispute resolution mechanisms, such as certain forms of mediation, that may be available in some countries to resolve disputes that may arise during the audit process, i.e. before the audit results in a reassessment or demand to pay tax. Some of these mechanisms are discussed in Chapter 2.

5. Also, this chapter does not deal with disputes concerning the exercise, by the tax administration, of its enforcement and collection powers including disputes concerning information exchanges and documentation requirements. These types of disputes do not relate

1 Including corporate taxes.

to issues related to the determination of taxes payable and typically involve the application of dispute resolution mechanisms set up to oversee governmental actions.

3.1.3 Importance of resolving disputes

6. Tax administrations around the world have the power to verify that their taxpayers have complied with the letter and spirit of the tax law. A tax administration's review of the accuracy of the tax paid and/or the return that is filed may conclude with a determination of an underpayment of tax, followed by the assessment and collection of the determined tax deficiency. The tax administration may also conclude that a taxpayer is not paying the taxes owed in a timely manner, and may assess interest and/or penalties and enforce collection actions. Given this relationship, it is inevitable that disagreements between the tax administration and taxpayers will arise.

7. It is of critical importance to the best interests of both the tax administration and taxpayers that disputes, when they arise, are addressed and resolved as quickly and efficiently as possible. Ensuring effective resolution of disputes will contribute to and enhance public confidence and the integrity of the tax administration in its role as collecting tax revenues for the government. In this regard, it is also important that tax administrations also provide avenues to air disputes with taxpayers regarding certain matters of a general nature, such as concerns by taxpayers over the adoption of new audit or collection policies or the issuance of new tax forms, as doing so will contribute to the public confidence of the tax administration.

8. From the point of view of the taxpayer, access to recourse to resolve disputes should be available to ensure the action giving rise to the dispute, such as an assessment of additional taxes owed, was accurately determined and does not result in an over calculation of the tax liability owed.

9. It is beneficial to both the tax administration and taxpayers to be able to resolve disputes as early, quickly and efficiently as possible. For example, the administrative mediation procedure described in section 3.4.3 below may sometimes be initiated by the taxpayer while its case before the tax administration is still in the examination stage, and thus potentially avoid a dispute before it formally arises. Moreover, procedures such as those providing for an independent review of statement of audit position (section 3.4.2), administrative appeals (section 3.4.1) and facilitation by a so-called "tax ombudsman" (section 3.5.3) can potentially avoid costly and protracted judicial procedures (described in section 3.5.1).

3.2 Overview of the main types of disputes and of domestic dispute resolution mechanisms covered by this chapter

3.2.1 Main types of disputes

10. Disputes may arise where, after an audit or examination, the tax administration concludes that additional taxes should be payable and issues an assessment or reassessment or demand of payment of tax. Some examples of findings from an audit or examination that lead to disputes regarding the amount of tax liability include:

- disagreements regarding the amount of taxable income calculated by the taxpayer,
- disagreements regarding the taxpayer’s choice of transfer pricing method used to value transactions between the taxpayer and its associated enterprises,
- disagreement concerning that availability or computation of foreign tax credits,
- [ADDITIONAL EXAMPLES TO BE ADDED].

11. Disputes between the tax administration and taxpayers relating to the amount of tax liability may involve disagreements as to the facts on which the tax liability is based, disagreement on the interpretation of the relevant tax legislation or disagreements on questions that are both factual and legal. In some countries, certain dispute resolution mechanisms are restricted to disputes concerning facts while disputes concerning the interpretation or application of the law must be dealt by courts.

3.2.2 Main types of domestic dispute resolution mechanisms

12. While there are considerable differences in the structure and legal form of the different types of dispute resolution mechanisms that countries have adopted to deal with income tax disputes, these fall within a few general categories. Some of the mechanisms, such as the administrative appeals procedure, reside within the tax administration. Other mechanisms, such as recourses before courts, exist separately from and outside of the tax administration.

13. The first type of dispute resolution mechanism discussed (section 3.4.1) allows for a taxpayer that disputes an action or actions of the tax administration to request a review of the action in question by an independent appeals body within the tax administration. An administrative appeal may be requested to review the conclusions of an exam or audit that potentially affects the amount of tax liability owed. Similarly, it is common that an appeal may be requested to review actions of a purely enforcement nature, such as a collection measure. An essential aspect of the administrative appeals procedure is that while it resides within the tax administration, it must have the ability to operate and conduct its review independently from the office that imposed the action being appealed. Additionally, where after an evaluation the administrative appeals officers disagree with the original decision or action taken by the tax administration, he should be authorized to modify the decision or action accordingly, and in doing so may contribute to the resolution of the dispute.

14. The second type of dispute resolution mechanism discussed (section 3.4.2) is the procedure that allows for an independent review of the position that the tax administration has taken with respect to a taxpayer’s tax liabilities after conducting an audit. This procedure is similar to the administrative appeals procedure, although narrower in scope in that only disputes regarding the amount of tax liability determined after audit are available for independent review. Further, in cases where the review officer disagrees with the original audit findings by the tax administration, it is authorized only to refer the case to more senior officials for further review, and is not empowered itself to modify or reduce the initial judgment.

15. The third type of dispute resolution mechanism discussed (section 3.4.3) can be referred to as “administrative mediation” and is a procedure in which officials of the tax administration trained in dispute resolution techniques facilitate the dialogue between the relevant officials in the tax administration and the taxpayer with the aim of helping to resolve the dispute. Whereas under the procedures for administrative appeals and independent reviews of audit position the intervening parties provide their own analysis of the action or actions taken by the tax administration that led to the dispute, the role of mediation is merely to enhance the communication between the disputing parties. Through such facilitation, the mediators could assist the parties in clarifying and understanding each other’s positions or forming a mutually acceptable compromise.

16. The remaining dispute resolution procedures discussed in this chapter (section 3.5) involve parties independent of the tax administration. First, resolution of a tax dispute through the judicial system is allowed under the legal framework of most countries. The parties in dispute will often first attempt to resolve a dispute through other means such as through administrative appeals, because those options can resolve the dispute in a more timely manner and avoid the financial costs of a litigation. Nevertheless, a dispute can typically be challenged in the courts or tribunals at any stage of the process. Subject to appeal rights, the decisions of a court or tribunal are binding on both parties to the dispute.

17. While it is less common, some countries have established, as an alternative to the civil courts, specialized courts or tribunals that deliberate only on matters related to taxation. These specialized courts or tribunals can have advantages over using ordinary civil courts to adjudicate tax matters. First, the narrower scope of a tax court or tribunal could allow for the design of a more streamlined and time-efficient process for hearing cases. The narrower scope could also allow a more targeted staffing with members that have prior expertise in and knowledge of taxation. This would facilitate a member’s ability to deliberate on tax disputes, which can often be highly technical in nature.

18. The dispute resolution mechanism discussed in section 3.5.3 is the establishment of a body that is commonly referred to as a “tax ombudsman”. Tax ombudsmen are most commonly established independently from the tax administration but they could also be constituted within the administration. The function of a tax ombudsman bears some similarities to other described dispute resolution mechanisms in that it can serve as mediator to facilitate the resolution of taxpayer-specific disputes, but tax ombudsmen can also serve as a vehicle through which taxpayers that are concerned about general administrative issues or practices of the tax administration may express their views.

19. Section 3.5.4 briefly discusses the independent mediation mechanism, a function that is sometimes offered by a tax ombudsman service.

20. The final type of dispute resolution mechanism mentioned in section 3.5.6 provides for arbitration of disagreements between the tax administration and the taxpayer. That section briefly describes the structure and operation of an arbitration procedure, including explanations of how a purely domestic arbitration procedure differs from the arbitration procedure found in

some bilateral income tax treaties. A more detailed description of arbitration is provided in Chapter 7.

3.3 Common issues for domestic dispute resolution mechanisms

21. While the various domestic dispute resolution mechanisms described in this Chapter operate differently, a number of common issues present themselves with most of these alternatives. Countries should be aware of these issues when designing any mechanism to facilitate the resolution of disputes between the tax administration and a taxpayer.

3.3.1 *Negotiated settlements*

22. Tax settlements are widely used by tax administrations around the world to solve tax disputes at the administrative or judicial level. They provide an effective and efficient mechanism to solve disputes between taxpayers and the tax authority without the need to resort to a judicial decision.

23. Taxpayers may usually settle their disputes with the tax authority through settlement agreements. Settlement agreements are not always available since some jurisdictions do not permit them as is the case of Peru; on the other hand, settlements are common in the U.S. where taxpayers and tax authorities can settle a tax dispute at the administrative appeal stage or even after litigation has been undertaken.

24. Settlements are commonly available once the tax authority has issued a notice of deficiency or tax assessment to the taxpayer as a result of the audit stage.² A settlement process between taxpayers and tax authorities should consider “the hazards of litigation,” i.e., the costs and likelihood of success should the case be decided by a judge. Jurisdictions with a legal framework that permits them to reach a settlement during the secondary administrative review or appeal process overwhelmingly resolve matters at this level without the need for litigation.

25. As a general rule, once the case is assigned to the officer overseeing the potential settlement a meeting or conference call is scheduled. In most jurisdictions where settlements are available, both the taxpayer and the examiner are included in the meeting or conference so that both parties may present their case. In the U.S., it was the prevailing practice for many years for the conference to only include the taxpayer and the officer overseeing the potential settlement, referred to as an Appeals Officer (in the case of a settlement occurring during the administrative appeal stage). The officer responsible for the settlement process would typically be empowered to ask questions of the participating parties and if necessary request additional support or supplemental explanations of the parties’ position. After considering all relevant facts and authorities, the reviewing officer would seek to enter into negotiations with the taxpayer on behalf of the government. This negotiation would typically not be an “all or

2 A slightly different process is followed in Norway. If a taxpayer disagrees with the proposed adjustment, a conference is held with the taxpayer, the examiner, and a senior revenue officer who acts as a mediator. If, after that conference, the revenue officer and the taxpayer still disagree, each party would file a statement of position with the Office of the Chief Tax Counsel which adjudicates the matter. [Is the OCTC part of the administrative body? Not clear from the language.]

nothing” discussion, the reviewing officer being allowed to settle the matter for a portion of the total tax claim. This would allow for the prompt resolution of the dispute without the need for litigation. There are of course instances where a full concession by either the government or taxpayer is warranted and a settlement should not be reached simply for the sake of reaching a settlement.

[THIS SECTION WOULD NEED A DISCUSSION OF SETTLEMENTS REACHED DURING LITIGATION (COURT OR TRIBUNAL), ARBITRATION, TAX OMBUDSMAN AND MEDIATION]

[THIS SECTION SHOULD ALSO EXPLAIN THE PROS AND CONS OF SETTLEMENTS IN DEVELOPING COUNTRIES, INCLUDING RISKS OF ALLEGED CORRUPTION]

3.3.2 Time limits

26. Countries commonly provide in their domestic laws and/or their administrative practices time limitations for the tax administration or taxpayers to take certain actions. As an example of statutory time limits, once a tax return has been correctly submitted, the tax administration may only be allowed a certain period to review and assess additional tax regarding the taxable period corresponding to the return. Similarly, a taxpayer may be time limited in its ability to amend a return that had been previously submitted.

27. Time limits such as these can create issues when implementing a domestic dispute resolution mechanism. The following basic example illustrates the difficulty: assume that in 2018 the tax administration of State A audits a return for the year 2014 that was correctly submitted by the taxpayer in 2015. As a result of the audit, the tax administration assesses additional tax of 100, and issues a notice of deficiency to the taxpayer. The taxpayer disagrees with the assessment and seeks recourse through the procedure of administrative appeals that is provided by the tax administration. The appeals procedure continues into 2019. In appeals, the amount of additional tax assessed by the tax administration is reduced from 100 to 25. The taxpayer accepts the reduced assessment.

28. Under the domestic law of State A, the tax administration may only modify a tax assessment after a period of three years following the proper filing of the return by the taxpayer. In this example, while the preliminary assessment of 100 of additional tax was within the statute of limitations, the reduction in the assessment to 25 as a result of the administrative appeal is technically time-barred under the statute of limitations.

29. This example demonstrates the importance of adjusting domestic time limits to ensure the proper implementation of a dispute resolution mechanism. A common way of addressing the issue is to suspend the time limitation for the period during which the dispute resolution mechanism is taking place. To the extent that the domestic time limits in question are based on domestic law, it is possible that the suspension of the time limitation so as to permit the dispute resolution mechanism to run its course could require legislative changes.

30. In some jurisdictions, with the agreement of the taxpayer, tax authorities may be able to extend the time period for assessment of additional tax. Such an extension may be requested during an examination of the taxpayer's return, where the revenue authority has not yet finished its review. In some countries, taxpayers may be able to request that an extension of the time period be limited to certain issues, meaning that the revenue authority may assess additional tax only with respect to those issues.

31. Taxpayers who seek a refund of already paid tax are also often limited to a specific time period within which they may file a claim for refund. Depending on the jurisdiction, the time period may begin when tax is paid and/or when the relevant return is filed.

[THIS SECTION WOULD NEED A DISCUSSION OF TIME LIMITS TO INITIATE LITIGATION (COURT OR TRIBUNAL), ARBITRATION, RECOURSE TO TAX OMBUDSMAN AND MEDIATION AS WELL AS TIME LIMITS FOR IMPLEMENTING THE RESOLUTION ACHIEVED UNDER SUCH MECHANISMS]

3.3.3 Collection considerations

32. Once a tax liability, penalty, or interest is assessed (either by the taxpayer as a self-assessment or by the tax authority), the tax must then be collected. Revenue authorities will have a specific mechanism to collect tax from taxpayers who fail to remit the appropriate tax liability.³ These "collection" divisions have various tools at their disposal to assist them in collecting the tax which is owed.

33. These tools may include imposing levies or liens on a taxpayer's bank accounts or other property. Where the taxpayer is unable to pay the liability, jurisdictions may permit a taxpayer to enter into a compromise with the tax authority to pay a lesser amount and/or pay the liability in instalments over a period of time. Once a tax liability, penalty, or interest is assessed (either by the taxpayer as a self-assessment or by the tax authority), the tax must then be collected. Revenue authorities will have a specific mechanism to collect tax from taxpayers who fail to remit the appropriate tax liability. Collection divisions have various tools at their disposal to assist them in collecting the tax which is owed.

34. These tools may include imposing levies or liens on a taxpayer's bank accounts or other property. Where the taxpayer is unable to pay the liability, jurisdictions may permit a taxpayer to enter into a compromise with the tax authority to pay a lesser amount and/or pay the liability in instalments over a period of time.

[THIS SECTION WOULD NEED A DISCUSSION OF HOW COLLECTION ACTIONS SHOULD BE SUSPENDED OR SHOULD PROCEED DURING RECOURSES UNDER ADMINISTRATIVE APPEAL, LITIGATION (COURT OR TRIBUNAL), ARBITRATION, TAX OMBUDSMAN AND MEDIATION]

3 Note that a number of countries have included in their tax treaties provisions similar to those of Article 27 of the UN and OECD models through which they agree to assist the other treaty country in collecting the taxes owed to that country.

3.3.4 Penalties and fines

35. To enhance voluntary compliance, countries with self-reporting tax systems often provide for penalties for non-compliance.

36. There are various types of penalties which may be asserted. Delinquency penalties may be asserted against taxpayers who either fail to pay a tax liability or file required tax forms. Accuracy-related penalties may be asserted where a taxpayer fails to report the correct amount of tax due and underpays the correct tax liability. Penalties may generally be based upon a taxpayer's negligence or careless, reckless or intentional disregard of the tax law. Penalties may also be asserted where the taxpayer has undertaken a transaction that is specifically designed to avoid tax and has no other business purpose.

37. A revenue authority may consider waiving or removing a penalty if the taxpayer can prove that it had cause for its failure to comply with the various obligations. For example, penalties may be inappropriate if circumstances leading to non-compliance were beyond the taxpayer's control, or where the taxpayer properly relied upon the advice of the revenue authority, a tax professional, or legal precedent such as court decisions.⁴

38. Some jurisdictions may also impose penalties upon tax return preparers who are negligent or willfully disregard their own obligations to represent taxpayers with a high level of diligence.

39. The UAE recently established its Federal Tax Authority ("FTA"),⁵ which is empowered to issue tax assessments and issue administrative penalties for acts including a taxpayer's failure to submit a tax return, failure to settle payable tax, underpayment of tax as the result of tax evasion, the deliberate failure to settle payable tax or penalty amount, the deliberate understatement of value, and tax evasion or conspiracy to commit tax evasion. Penalty amounts are at least AED 500, but no more than three times the amount of unpaid tax, unless the taxpayer's actions were deliberate, in which case penalties of up to five times the amount of unpaid tax may be applied.

[THIS SECTION WOULD NEED A DISCUSSION OF THE EXTENT TO WHICH PENALTIES MAY BE REDUCED OR WAIVED THROUGH RECOURSES UNDER ADMINISTRATIVE APPEAL, LITIGATION (COURT OR TRIBUNAL), ARBITRATION, TAX OMBUDSMAN AND MEDIATION]

3.3.5 Jurisdictional issues

40. For policy reasons, certain dispute resolution mechanisms do not apply to particular types of tax disputes and the question will sometimes arise as to whether a particular dispute may be dealt with under a specific domestic dispute resolution procedure. For example, it has been the practice of some tax administrations to restrict access to administrative appeals for certain

4 The U.S. and the U.K. provide for this concept of "reasonable cause."

5 [NEEDS FORMAL CITE]

classes of tax disputes. Those include cases that are docketed in a domestic court, cases containing issues with no legal precedent; or cases containing issues for which domestic courts in different jurisdictions have rendered conflicting decisions. As another example, some countries do not allow tribunals or arbitrators to decide issues related to the constitutionality or legality of tax legislation or tax regulations. A further example is provided by cases where the availability of a particular dispute resolution mechanism depends on the amount of tax in dispute.

41. Issues may arise as to whether such restrictions are applicable in specific cases and it is often necessary to provide specific mechanisms through which such jurisdictional issues may be addressed. For instance, where domestic arbitration of tax cases is allowed, it will be necessary to determine whether an arbitrator has jurisdiction to determine his own jurisdiction in a specific case and whether any such decision may be subject to judicial review.

42. Ideally, any restriction to the jurisdictional scope of a particular dispute resolution mechanism would be disclosed in publicly-available guidance so that taxpayers seeking recourse to resolve a tax dispute are aware of which mechanisms are at their disposal.

[THIS SECTION SHOULD BE EXPANDED TO COVER QUESTIONS OF JURISDICTION OVER DISPUTES CONCERNING DUE PROCESS AND HUMAN RIGHTS AS WELL AS QUESTIONS OF JURISDICTIONS OVER DISPUTES RELATED TO QUESTIONS OF LAW AND QUESTION OF FACTS]

3.3.6 Coordination with other dispute resolution mechanisms

43. In the event that a country makes available more than one mechanism for resolving tax disputes, the tax administration will need to ensure that the various mechanisms are properly coordinated. It may be the case that certain dispute resolution mechanisms could and in fact are intended to apply simultaneously with regard to a particular dispute. In other cases, it would be more appropriate to allow certain mechanisms to apply alternatively or sequentially.

44. The mediation procedure described in section (3.2.4) below is intended to serve as a complement to other dispute resolution mechanisms. The role of a mediator is to facilitate communications between the two disputing parties to help them reach a mutually satisfactory settlement. It follows that mediation is intended to be invoked even while a case is in appeals, or in independent review to facilitate communications during those two processes.

45. Under the legal framework of most countries, the taxpayer may challenge a dispute with the tax administration in the civil courts at the time of its choosing. However, as is noted above, the time and financial costs of pursuing litigation can be high, and as a result, taxpayers will commonly try to exhaust other methods, such as administrative appeals, before resorting to a challenge in the courts.

46. In some cases, in particular when cross-border transactions are involved, a tax dispute may include a disagreement between the taxpayer and the administration regarding the interpretation and/or application of a bilateral income tax treaty. As is explained in detail in

Chapter 5, almost all modern bilateral tax treaties contain provisions on “mutual; agreement procedure” that allow taxpayers who believe they have been taxed in a manner not in accordance with the terms of the tax treaty to request assistance from the two tax authorities to resolve the issue. It is important to know how the availability of domestic dispute resolution mechanisms is coordinated with the he availability of the mutual agreement procedure. Guidance on this issue is provided in Chapter 5.

3.3.7 Admissibility of additional documents, evidence or arguments

[THIS SECTION WILL ADDRESS ISSUES RELATED TO THE EXTENT TO WHICH PERSONS IN CHARGE OF RESOLVING DISPUTES MAY CONSIDER ADDITIONAL DOCUMENTS, EVIDENCE OR ALTERNATIVE ARGUMENTS THAT WERE NOT PREVIOUSLY PUT FORWARD BY THE TAXPAYER OR TAX ADMINISTRATION]

3.3.8 Confidentiality

[THIS SECTION WILL ADDRESS ISSUES RELATED TO CONFIDENTIALITY AND DATA PROTECTION. IT SHOULD ALSO STRESS THE IMPORTANCE OF PUBLISHING STATISTICS ON THE OUTCOME OF CASES ADDRESSED THROUGH EACH DISPUTE RESOLUTION MECHANISM]

3.3.9 Tax expertise of individuals in charge of resolving tax disputes

[THIS SECTION WILL ADDRESS THE ISSUES THAT ARISE WHEN INDIVIDUALS WITH INSUFFICIENT TAX EXPERTISE ARE ASKED TO RESOLVE TAX DISPUTES, WHICH MAY BE MORE AN ISSUE WITH RESPECT TO LITIGATION (COURT OR TRIBUNAL) BUT MAY ALSO BE AN ISSUE IN THE CASE OF ADMINISITRATIVE APPEALS, ARBITRATION AND MEDIATION]

3.3.10 Reliance on precedents

[THIS SECTION WILL ADDRESS THE EXTENT TO WHICH EACH MAIN TYPE OF DISPUTE RESOLUTION MECHANISM RELIES (OR SHOULD RELY) ON DECISIONS RENDERED IN SIMILAR CASES. IT WILL ALSO EXAMINE HOW THESE PRECEDENTS ARE TYPICALLY MADE AVAILABLE TO THE PERSONS IN CHARGE OF RESOLVING TAX DISPUTES]

3.3.11 Formalistic versus equity-based approaches

[THIS SECTION WILL ADDRESS THE ISSUES THAT MAY ARISE WHEN PERSONS IN CHARGE OF RESOLVING TAX DISPUTES ADOPT EITHER A FORMALISTIC APPROACH OR AN APPROACH THAT FAVOUR PURPOSES OR EQUITY CONSIDERATIONS OVER THE WORDING OF LEGISLATION. IT WILL DISCUSS THE EXTENT TO WHICH SUCH APPROACHES MAY BE LINKED TO THE LEGAL TRADITION OF EACH COUNTRY]

3.4 Mechanisms through which dispute resolution is provided by the tax administration

47. This section describes a number of dispute resolution mechanisms that operate within and as part of the tax administration. These procedures are typically administered through an office within the administration that is separate and independent from the audit, exam and collection functions.

3.4.1 Administrative appeals procedure

[THIS SECTION SHOULD BETTER EXPLAIN THE CONCEPT OF “ADMINISTRATIVE APPEAL”, WHICH IS BASICALLY A REVIEW BY THE TAX ADMINISTRATION ITSELF. IN DOING SO, IT SHOULD EXPLAIN THE “OBJECTION” PROCESS USED BY SOME COUNTRIES AND EXPLAIN HOW IT IS AN ADMINISTRATIVE APPEAL REQUEST]

48. The purpose of the administrative appeals procedure is to provide taxpayers that disagree with certain actions of the tax administration the ability to request a review of the action at the root of the dispute. The most crucial aspect of a successful administrative appeals program is that it operates independently from the exam, audit and collections functions of the administration.

49. If the taxpayer and examiner cannot agree on the proposed adjustment at the conclusion of the examination process, taxpayers are typically afforded the right to challenge the examiner’s determination at the administrative level prior to filing a lawsuit. While some jurisdictions (e.g., Brazil and Angola) do not allow for an administrative review of the examiner’s findings, most do. Resolution through administrative review (and not litigation) is much less costly from both a financial and resource perspective, and it is generally more cost efficient for both the government and the taxpayer. Most jurisdictions do not require taxpayers to pay any potential tax due prior to filing an administrative appeal. Moreover, an administrative review function that can resolve disputes prior to litigation not only saves taxpayers and the revenue authority time and money, but it also alleviates the potential burden on the court system, which would otherwise experience a potentially unmanageable increase in the influx of tax cases. *[THIS SECTION SHOULD BETTER EXPLAIN THE PROS AND CONS OF AN INDEPENDENT ADMINISTRATIVE REVIEW OF TAX ASSESSMENT IN DEVELOPING COUNTRIES, INCLUDING RISKS OF ALLEGED CORRUPTION. IT SHOULD ALSO RECOMMEND THE PUBLICATION OF STATISTICS ON DECISIONS REACHED THROUGH THE ADMINISTRATIVE APPEAL PROCESS]*

50. The office reviewing the taxpayer’s appeal should be independent of the examination function and seek to resolve tax disputes in a fair and impartial manner, with the goal of resolving cases without requiring the taxpayer to file a lawsuit. As such, the administrative review body should consider all facts present in the file and all relevant legal authorities when determining the appropriate resolution of a tax dispute.

51. Other countries have provided different alternatives to taxpayers with respect to the filing of administrative appeals. In 2016 Mexico implemented a new type of administrative appeal

called the “Tax Substance Administrative Appeal” as part of a modification to the Federal Fiscal Code of Mexico. This new procedure is similar to the existing administrative appeal process, but focuses exclusively in solving the substance of the case with an emphasis on oral arguments instead of focusing on the formalities of the examination process. The appeal is only available when the tax liability at issue is at least (approximately) 310,000 USD.

3.4.1.1 Function of the office in charge of administrative appeals

52. While it resides as an office within the tax administration, it is critical that the office in charge of appeals operate separately and independently from the functions of the tax administration whose actions could lead to controversies with taxpayers, such as the exam, audit and collection functions. An administrative appeals review should be conducted in an objective, and impartial fashion.

53. In order to maintain the independence from the rest of the tax administration, the office in charge of appeals should be precluded from engaging in any prior communication with other offices, in particular the offices responsible for the exam, audit and collection functions. [*THIS PARAGRAPH SHOULD BE REVIEWED BECAUSE IN SOME COUNTRIES, THE OFFICE IN CHARGE OF APPEALS MAY BE ALLOWED TO CONSULT WITH THE TAX OFFICIALS WHO MADE THE DECISION GIVING RISE TO THE DISPUTE IN ORDER TO BETTER UNDERSTAND THE REASONS AND ANALYSIS UNDERLYING THE DECISION.*]

54. The function of the office in charge of appeals is to provide a *de novo* evaluation, at the request of the taxpayer, of an exam, audit or collection action taken by the tax administration with which the affected taxpayer disagrees, with a view to resolving the disagreement. In order to fulfil its objective, it is important that the office in charge of appeals have the ability to arrive at its own independent conclusions concerning the tax administration’s actions, and where it deems appropriate, either uphold or reduce the taxes owed as a result of the administration’s original decision. For example, if after reviewing the results of an exam of a tax return that resulted in an assessment of additional tax of 100, the office in charge of appeals determines that the appropriate amount of additional tax that should have been assessed was only 80, the administration should be obligated to reduce the amount of the assessment accordingly, if the taxpayer accepts the revised amount. In doing so, if the taxpayer accepts the reduced amount, the dispute would be resolved.

55. The administrative appeals function is intended to be beneficial to taxpayers. Accordingly, it is customary that while the office in charge of appeals has the authority to either justify or reduce an initial decision against a taxpayer, it does not have the authority to increase the initial decision in favour of the administration.

56. The specifics of the administrative appeal process vary from one jurisdiction to another. Consistent differences arise between countries with legal systems that are based on common law and countries that are not based on such legal system. In the United States, for example, the administrative review officers are authorized to negotiate and conclude a final settlement

on behalf of the government during the administrative appeal process. In other countries like Peru the possibility of reaching a legal settlement at this stage does not even exist.

57. In countries where settlements are not available at the administrative appeal stage, the procedure is limited to the analysis of the appeal/rebuttal and evidence filed by both parties (taxpayer and tax authority that performed the audit) and the appeal process finalizes with the issuance of a ruling that can be favorable to the taxpayer, partially favorable or that can confirm the initial assessment, all of these alternatives based on the legal arguments and evidence presented by both parties. *[THIS PARAGRAPH SHOULD BETTER EXPLAIN THE EFFECT OF THAT RULING.]*

3.4.1.2 The administrative appeal request

58. The tax administration should make publicly available instructions regarding how to request an administrative appeal. This should include, importantly, any time limits for making such a request. For example, the appeals program may require that the taxpayer submit any requests for an appeal within 30 days of the taxpayer's receipt of the notice of the action giving rise to the dispute, such as a letter of assessment of additional tax after the conclusion of an audit or exam.

59. The tax administration can take a flexible approach as to the form that a request for an administrative appeal may take. However, the content of the request would typically include the following information:

- the taxpayer's name, address and tax identification number;
- a copy of the notice or correspondence from the administration setting forth the issue at the heart of the dispute (such as a notice of assessment of additional tax, or a notice of intent to impose a levy on the taxpayer's bank account);
- the taxable periods or years at issue;
- a list of each item disputed by the taxpayer and the reasons why the taxpayer disagrees with each, [including citations to any relevant laws or authority supporting the taxpayer's position] *[IS THE LAST TYPE OF INFORMATION TYPICALLY REQUIRED, ESPECIALLY IN THE CASE OF INDIVIDUAL TAXPAYERS?]*; and
- statements signed by the taxpayer affirmatively requesting an administrative review and confirming that the information submitted in the request is complete and accurate.

60. The taxpayer may submit any additional information that could be useful to the appeals official. However, if any such additional information was withheld from the official or officials that took the action that led to the dispute, the appeals official may choose to remand the case back to the original officials for further consideration.

3.4.2 Independent review of statement of audit position

61. The independent review of the statement of audit position (“independent review”) bears some similarities to an administrative appeal, but is significantly narrower in its scope and powers. The overall objective of the independent review procedure is to allow eligible taxpayers that have been the subject of an audit to request a review of the findings of the audit by an official of the tax administration that works independently and separately from the audit function. Whereas under the administrative appeals procedure, the office in charge of appeals is empowered to either uphold or reduce the decision against the taxpayer, the independent review described in this section attempts to facilitate the resolution of disputes by either providing greater clarity and explanation to the taxpayer of the positions taken by the administration in the audit, or by elevating the review of the matters at dispute to more senior officials who may be empowered to engage with the audit function to modify the initial positions that were taken in audit.

62. Countries interested in establishing an independent review procedure in their tax administration should create a division that works independently and separately from the audit function. As is the case with the administrative appeals procedure, the independent and impartial operation of this function is critical to its success. Such a division would be dedicated to providing dispute resolution facilitation and should be staffed with officials with sufficient expertise in substantive tax matters that will allow them to fully perform a review of the audit position.

63. When the tax administration desires to provide dispute resolution recourse for its taxpayers, it must take into account its financial and human resources, which are often limited. As such, a new division dedicated to facilitating resolution of disputes by providing a service like an independent review may have a small number of employees. In such cases, the tax administration may need to limit the number and nature of cases that can be eligible for an independent review. For example, as an efficiency matter, it may be appropriate to provide access to the independent review procedure only for audits of large taxpayers, such as those with annual income in excess of an established amount. This would avoid having to devote scarce resources to resolve small-dollar disputes.

64. As mentioned above, the powers of the independent review function are somewhat more limited than that of the administrative review function. Whereas appeals officials have the authority to modify initial decisions, independent review officials do not have such authority. When the independent review officials are in agreement with the statement of audit position, their primary task will be to provide to the taxpayer greater clarity and explanations of the positions taken in the audit, with the aim of improving the taxpayer’s understanding of the issues in dispute.

65. In contrast, when the independent review officials do not agree with the statement of audit position, instead of themselves modifying the audit findings, they will refer the matters in dispute to more senior officials, such as the senior attorneys (or in the case of a transfer pricing audit, the senior transfer pricing economists) of the tax administration for further

review. Under an ideal independent review procedure, if these senior reviewing officials agree with the independent reviewer, recommendations will be made to the audit team to bring the audit in line with the independent review. *[THIS SECTION WILL NEED TO BE REVIEWED TO ENSURE THAT IT DEALS WITH A DISPUTE RESOLUTION MECHANISM APPLICABLE AFTER TAX HAS BEEN ASSESSED AS A RESULT OF AN AUDIT]*

3.4.3 Administrative mediation

66. The administrative mediation procedure described in this section operates differently from, and is complementary to, the administrative appeals and independent review procedures. It is also different from the independent mediation process described in section 3.5.4 since it involves a mediator who belongs to the tax administration as opposed to one who is independent. The purpose of the administrative mediation procedure is to facilitate communications between two parties to help resolve the dispute. Mediation officers from the tax administration can attempt to facilitate dialogue between parties by helping the parties identify the issue or issues at dispute, clarify each other's positions, and develop a range of possible options to arrive at a negotiated settlement.

67. The administrative mediation procedure by its nature complements, and thus can be invoked simultaneously with certain other dispute resolution mechanisms. For example, if the taxpayer has a dispute in appeals but feels that the appeals process is suffering from poor communications with the appeals officers, the taxpayer may request that mediators of the tax administration facilitate the discussion. Equally, the appeals officers may request the administrative mediation, although in all cases, mediation can only proceed if both parties to the dispute agree to participate.

68. Independence and impartiality are critically important to the success of the administrative mediation procedure. Therefore, just as is the case with administrative appeals and independent review, countries wishing to provide mediation within the tax administration should establish an office that is independent from the rest of the tax administration, in particular the audit, exam and collection functions. If an office in charge of appeals has already been established, the administrative mediation program could be administered from that same office and handled by appeals officers that have been specially trained in facilitation techniques.

69. The administrative mediation function does not involve *de novo* evaluation or potential modification of the original decision against the taxpayer. Therefore, officers performing the administrative mediation function do not require the authority to evaluate and possibly modify the original decision against the taxpayer, as is the case with officers performing the administration appeals function. Nevertheless, the mediation officers will need to have the authority to have access to confidential (e.g. taxpayer-specific) information in order to properly fulfil its function of facilitating communication. To the extent that the officers who conduct the administrative mediation also work as appeals officers, they should already be legally allowed to access confidential information.

70. An administrative mediation program should be structured in such a way that it could be initiated early in the appeals process. Given the potential benefits that could be gained from mediation before a decision is taken by the tax administration, mediation could even be made available while the matters in dispute are in the pre-appeals stage, such as in exam, audit or collections (see Chapter 2). Moreover, it is critical that both parties to the dispute agree to submit to the administrative mediation and express their desire to seek a resolution to the dispute. The administrative mediation is typically conducted by convening the two parties with the mediators in a meeting that will be facilitated by the mediator.

71. A flexible approach should be taken regarding the form and contents of a request for administrative mediation. Given the possibility that administrative mediation could take place at any of numerous stages of the dispute, it would not be appropriate to require that the request be accompanied by a copy of the decision against the taxpayer (such as a notice of assessment of additional tax), as such decision may still not have been issued when the mediation is requested. *[THIS PARAGRAPH WILL NEED TO BE REVIEWED TO ENSURE THAT IT DEALS WITH ADMINISTRATIVE MEDIATION APPLICABLE AFTER TAX HAS BEEN ASSESSED]*

3.5 Mechanisms through which dispute resolution is provided by independent parties

72. This section discusses domestic dispute resolution mechanisms that, with the potential exception of the tax ombudsman in some countries, operate outside the tax administration. Under the legal framework of most countries, taxpayers will have the option to attempt to resolve tax disputes through litigation in the civil courts, although practice has shown that taxpayers often seek recourse through other mechanisms before resorting to litigation so as to avoid incurring legal costs which can be substantial. Some countries have established a special tribunal for tax disputes. While the tax ombudsman is described in this section, countries may equally consider establishing a tax ombudsman within the tax administration, although in that case it will be critically important that the ombudsman enjoy complete autonomy and independence from the rest of the administration. Finally, the arbitration procedure through which one or more third parties are empowered to resolve the dispute is discussed at the end of this section.

3.5.1 Challenge in the civil court

[THIS SECTION NEED TO STRESS THAT A NUMBER OF JURISDICTIONS HAVE CREATED SPECIAL PROCEDURES FOR DISPUTES INVOLVING SMALL AMOUNTS]

73. As discussed earlier in this chapter, taxpayers are generally allowed to challenge in court a decision by the applicable tax authority.⁶

6 Note that in some jurisdictions, taxpayers may be required to first raise their challenge at the administrative appeals level before a court will hear the case. In other jurisdictions, however, filing a challenge in court precludes the taxpayer from bringing an administrative appeal. *[ADD COUNTRY EXAMPLES]*

74. The benefits of judicial resolution include securing a final determination of the taxpayer's tax liability, which cannot be re-examined by the tax authority or another court (except to the extent the jurisdiction provides for judicial appeals). In addition, judges and members of an independent tribunal may be perceived as more impartial and objective than representatives (administrative reviewers) from a tax authority. Further, cases decided in courts and tribunals are usually made public, thus providing other taxpayers with precedential value.

75. Taxpayers in most jurisdictions may raise challenges in different types of courts, such as "ordinary" civil courts (courts that hear all types of legal challenges), specific commercial courts (courts that hear business disputes), administrative courts or tribunals, or in special tax courts or tribunals where the case is heard and judged by specialized tax judges or experts.⁷

76. Some jurisdictions have pre-trial fact findings that may be formal or informal. Informal fact-finding, or "discovery," often means that the parties will stipulate to the facts in advance of a trial, which speeds up the litigation process and assists in settlement of many cases prior to trial. Formal discovery, on the other hand, may involve, for example, requests for documents from the opposing party and depositions of witnesses. The parties are not required to stipulate to any facts; instead, the facts are determined by the fact-finder – either a judge or a jury.⁸

77. Other jurisdictions however, do not have pre-trial fact findings. The facts and legal arguments are presented by the parties (taxpayer and tax authority) to the court at the moment the lawsuit is filed along with the information and evidence they were able to obtain. Litigation procedures may be imminently oral or written, it varies from one jurisdiction to another.

78. In some jurisdictions, the taxpayer is required to pay the tax liability prior to bringing a challenge in a particular judicial venue. The requirement that the taxpayer pay or guarantee the tax liability will often preclude taxpayers from availing themselves of these judicial venues. [WILL BE DISCUSSED IN SECTION 3.3]

79. Almost all jurisdictions provide the parties (both the taxpayer and the revenue authority) with the right to appeal a decision of a lower court. Some appellate level courts will review only the legal argument (i.e., the courts will not act as fact-finder), while other courts will review both the parties' legal arguments and findings of fact.

80. In the U.S. taxpayers may bring suit in a specialized tax court, a federal district court (a court of general competency), or the federal Court of Claims (a specific forum to bring litigation against the government and its agencies). To bring a lawsuit in the latter two fora, taxpayers must first pay the tax, penalties, and interest that the revenue authority believes the taxpayer to owe and then file a formal claim for a refund of such tax with the revenue authority. If the revenue authority denies or otherwise fails to act on the taxpayer's claim, the taxpayer

7 Specialized tax courts and tribunal are discussed in more detail in the next section.

8 In jurisdictions that provide for jury trial, a taxpayer may prefer a jury if the taxpayer's facts are compelling but the legal basis for the taxpayer's position is not totally persuasive. In those cases, the taxpayer might want to select a forum in which it can lay out its facts in front of the jury, and not a forum in which facts must be stipulated or would be heard only by a judge. However, juries may not be able to comprehend complex tax laws, thus a case by case analysis must be performed.

may challenge that determination by bringing a suit for a refund of the tax paid in district court or the Court of Claims.⁹ [NEED TO REVIEW WHETHER THE EXAMPLES IN PARAGRAPHS 80 TO 85 ARE USEFUL]

81. To challenge the determination of the Brazil revenue authority, a taxpayer must first bring proceedings before an administrative court. Payment of the tax liability is not a prerequisite to filing an administrative proceeding. Only after a decision is rendered by the administrative court may the taxpayer file a lawsuit in the judicial courts. The court will most likely require the taxpayer to guarantee the amount of tax assessed prior to commencing litigation. Hearings are public unless the judge orders them confidential. Pre-trial discovery is mandated; the parties must exchange any documentary evidence that they plan to use at trial.

82. On the other hand, with respect to direct taxation, the role of civil courts in Luxembourg is limited to litigation regarding the recovery of overpaid taxes. However, civil courts do have jurisdiction over indirect tax litigation, including VAT taxes. Beyond civil courts, Luxembourg's legal system provides for administrative courts, which may hear direct tax cases related to assessment and liquidation of direct taxes, but only with respect to certain kinds of taxes. For disputes related to those taxes not heard in administrative courts, the taxpayer would be required to pay the tax due and bring its challenge in civil court instead. Hearings in both administrative and civil courts are public (although in limited cases, the public may be excluded from a hearing in civil court).

83. Under Luxembourg law there is no pre-trial exchange of documentary evidence, although a list of the evidence that will be used at trial is usually provided.

84. In China for example, if a dispute is not resolved at the administrative level, a taxpayer may request an administrative review or bring suit in the local "People's Court." Tax must be paid prior to commencing the administrative review or litigation.

85. Historically, China has not had much tax litigation as a result of its tax administration process, in which most disputes are resolved via consultation between the taxpayers and the tax authorities. However, in the past two years, China's local People's Courts have seen an increase in the number of tax disputes being decided through litigation. And in April 2017, the first tax case was heard by the Chinese Supreme People's Court, which was brought by a taxpayer against the Guangzhou Local Tax Bureau following earlier administrative review and hearings at local and provincial court levels.

3.5.2 Specialized tax courts and tribunals

86. As mentioned in the previous section, because of the complexity of tax law, a country's legal system may have a specialized court or tribunal that is responsible solely for tax issues.¹⁰

9 The same process is used where taxpayers claim refunds based on overpayment of tax not resulting from a deficiency assessment upon examination.

10 The jurisdiction of these courts may be limited to a particular category of tax matters such as international disputes or may extend to a wide variety of direct and indirect tax matters.

Judges or members who preside over these “tax courts” are experts in tax matters and are thus specifically suited to hearing cases dealing with tax assessment determined by tax authorities. Accordingly, special tax courts do not contemplate jury trials even if available in certain jurisdictions. Tax court judges are also independent, even in those countries where the tax tribunal is established within the revenue authority, thus promoting trust from taxpayers. *[NEED TO REVIEW WHETHER THE CHAPTER’S REFERENCE TO JURY TRIALS ARE USEFUL]*

87. In addition to the benefits of having experts adjudicate tax cases, tax courts are useful to ease the workload of a country’s traditional court system, and they encourage a faster, more efficient disposition of tax disputes than the traditional courts.

88. Tax courts in some jurisdictions can enable and encourage settlement at an early stage of the litigation process, to avoid the need for trial. However, as in the case of the administrative appeal process, other jurisdictions do not provide taxpayers and/or tax authorities the possibility of reaching a settlement once litigation has commenced.

89. Some countries require that a taxpayer exhaust all administrative remedies, including appealing within the tax authority, before bringing suit in tax court. Taxpayers will often be allowed to appeal the ruling of a tax court; however, appellate level courts are not typically tax experts.

90. In South Africa for example, the Special Income Tax Courts consist of a judge assisted by an accountant who has at least 10 years of experience and a representative of the business community. To file a petition with the Special Income Tax Court, the dispute with the South African Revenue Service must involve an assessment exceeding R100, 000. Tax disputes of less than R100, 000 are heard by the Tax Board, which is chaired by an attorney, advocate, or accountant who works in the private sector.

91. India’s Income Tax Appellate Tribunal (“ITAT”) is a quasi-judicial body that hears appeals of the India Revenue Department’s decisions. The ITAT consists of tax experts with a background in law and/or accounting. The ITAT’s decisions with respect to legal positions is binding on the Revenue Department. Appeals from the ITAT are brought before appellate level courts, but those courts may only review substantive points of law; the ITAT is the final arbiter on the facts.

92. Some jurisdictions offer different alternatives within the tax litigation process. Mexico, for example, through its Federal Court of Administrative and Tax Justice offers a “traditional” tax trial, an “on-line” tax trial, a “summary” tax trial and a “substance over form” tax trial. The alternative pursued by the taxpayer before the Court depends on the amount of the tax liability at stake, the reasons for the tax assessment or the physical proximity of the taxpayer with the Court. For example, if the tax authority’s assessment is based only in formalities, the taxpayer may choose to pursue the “substance over form” trial, as the Magistrates are empowered to overlook formalities and nullify tax debts if there is substance in the taxpayer’s position. *[THIS*

SECTION SHOULD CLARIFY THE DISTINCTION BETWEEN COURTS AND ADMINISTRATIVE TRIBUNALS]

3.5.3 “Tax Ombudsman”

93. The dispute resolution mechanism described in this section, often referred to as a “tax ombudsman,” shares certain similarities with the mediation procedure discussed in section (3.2.4) above, while at the same time it also addresses certain other matters of a more general nature, such as the safeguarding of taxpayer rights and ensuring that the administration is providing fair and adequate services to taxpayers by, for example, serving as an outlet for taxpayers to air service-related complaints. The tax ombudsman is a specialized version of the more general concept of ombudsman, which historically has referred to an institution that defends the people. The increasing establishment of tax ombudsman bodies may reflect a recognition across countries of the complexity of their respective tax systems and the importance of ensuring that the rights of taxpayers are respected, that the services of the tax administration are provided in an equitable and efficient manner, and that the government should facilitate the resolution of controversies between the tax administration and taxpayers.

94. While the tax ombudsman described in this section is an independent party, countries wishing to establish a tax ombudsman may also choose to form it within the tax administration, so long as the ombudsman is empowered to operate independently, including in particular, of the exam, audit and collection functions (see section 3.4.3 above). The practice of countries that have established a tax ombudsman body has followed both approaches, with positive results in both cases.

95. The creation of bodies that serve these functions has become more common in recent years, although the name of the body varies across countries. For example, one of the analogous bodies established by Australia is the Inspector General of Taxation as a body separate from the Australian Tax Office. In the United States, the Taxpayer Advocate Service is an independent organization within the Internal Revenue Service. Ombudsman bodies in Spanish speaking countries are commonly referred to as the Defender of the Taxpayer (*Defensoría del Contribuyente*).

96. The tax ombudsman may operate within the tax authority or as a separate independent body outside the tax authority. This independence may have significant influence in its ability to perform its functions since it may be complicated to handle issues with the tax authority while it is seen as part of that authority and not independent from it. The independence and specialization of a tax ombudsman will also provide the ability and experience to the institution to efficiently handle its various matters with the tax authority.

97. When the tax ombudsman is established within the tax administration, it will be critical that it stand independently and separately from all the other operating functions of the administration. This is especially true regarding the audit, exam and collection functions. Furthermore, unlike the other dispute resolution mechanisms described earlier in this chapter, because the tax ombudsman holds the additional roles of scrutinizing the tax administration’s

provision of services to taxpayers generally, it will also be important that the ombudsman operate independently from those offices that establish generally applicable administrative practices, such as audit or collection policies, the promulgation of regulations and other guidance, and the drafting of forms.

98. Countries wishing to organize the tax ombudsman as a body independent of the tax administration will need to ensure that it will have the legal authority to access taxpayer-specific and other confidential information. This will be especially true if one of its intended functions will be as mediator to facilitate communications between the administrations and taxpayer to resolve disputes.

99. The variety of functions that could be performed by the tax ombudsman make it difficult to describe a singular format and suggested content for a request for assistance from the tax ombudsman. For example, the manner in which a taxpayer requests mediation assistance to facilitate communications with the tax administration would be different from the format that a taxpayer would follow to submit a service-related complaint. Furthermore, the tax ombudsman may wish to follow yet another format for filing concerns related to a general administrative practices, such as the establishment of a new collection policy or creation and drafting of a new tax form.

100. In order to provide the widest possible access to the services of the tax ombudsman, it is recommended that any admissibility analysis or criteria to pre-select requests for assistance not be overly restrictive or narrow.

Box 1. Tax Ombudsman: the positive experience of Mexico

The *Procuraduría de la Defensa del Contribuyente* (PRODECON) was established in Mexico in 2011 as an agency independent of the tax administration that carries out the functions of a tax ombudsman. PRODECON has been granted powers under Mexico's domestic law that authorize it to address both taxpayer-specific matters as well as issues of general concern relating to the operation of the tax administration.

The taxpayer-specific dispute resolution remedies provided by PRODECON allow taxpayers to submit service-related complaints regarding actions taken by the tax administration. These complaints are dealt with under PRODECON's complaint procedures. In addition, taxpayers may request, through the conclusive agreements procedure, mediation assistance from PRODECON to facilitate communications in their dealing with the tax administration. Yet another taxpayer-specific service provided by PRODECON is the legal representation of certain taxpayers to assist them in their dealings with the tax administration.

PRODECON's complaint procedure

The complaint procedure allows PRODECON to investigate any action of the tax administration that may infringe or has infringed on the rights of a taxpayer. This procedure may be requested by any individual or legal entity that believes that its rights as taxpayer have been infringed, regardless of the amount of the tax liability at stake.

Under the complaint procedure, PRODEON reviews and analyzes the protest of the taxpayer, and gives the tax officer involved in the controversy a period of 72 hours to present his views

of the complaint in the form of a report. After reviewing the officer's report, if it determines that the complaint has merit, PRODECON will issue non-binding recommendations for modifying the position of the tax administration with a view to resolving the dispute. If the officer declines to follow the recommendations, PRODECON will make the recommendations publicly available.

Since PRODECON's establishment, the complaint procedure has been widely utilized by Mexican taxpayers. According to data provided by PRODECON, one hundred and thirty thousand requests for assistance have been submitted under the complaint procedure through 2017.

PRODECON's conclusive agreement procedure

The conclusive agreement procedure, established in 2014, was the first alternative dispute resolution mechanism for tax controversies in Mexico. Taxpayers under audit who do not agree with the position and findings of the tax authority have the right to appear before PRODECON to request its intervention as a mediator. The procedure provides a transparent and amicable forum for the taxpayer and the tax authority, with an impartial third party observer, to discuss the tax treatment or the tax law's interpretation that is being applied during the audit, with the objective of achieving consensus to solve the dispute.

According to data provided by PRODECON, more than 8,500 mediation requests have been processed by PRODECON, which facilitated resolution of the majority of the disputes involved. PRODECON reports that over one billion dollars of tax revenue was collected through the conclusive agreements. The procedure allows for the resolution of disputes without judicial recourses, thus saving litigation costs for both taxpayers and the government.

The conclusive agreement procedure acts as an alternative, and not a complement, to the administrative appeals process of the tax administration. Under the conclusive agreement procedure, PRODECON's primary function is not merely to facilitate communications between the administration and the taxpayer but also to resolve the dispute by facilitating the negotiation of a mutually agreeable settlement through the exchange of proposals between the disputing parties.

The conclusive agreement procedure is only available while a case is in audit or examination. Initiating the procedure suspends relevant domestic time limits, as well the audit and any collection procedures.

Although the aim of the conclusive agreement is to reach an agreement that resolves the entirety of tax controversy, partial resolutions are also permitted. In the case of a partial resolution, the tax administration may resume applicable audit and collection procedures on the remaining open issues.

If the conclusive agreement procedure does not successfully resolve the audit dispute, the taxpayer may seek recourse through the tax administration's administrative appeals program, or pursue litigation in the courts. Upon closing a failed conclusive agreement, PRODECON is empowered to issue an "infringement of rights" declaration if it determines that the tax administration has acted in an arbitrary manner in the relevant audit. While an infringement of rights declaration is non-binding, it may nevertheless be useful to the taxpayer if the dispute is elevated to appeals or litigation.

PRODECON's legal representation and defense service

Under this procedure, PRODECON provides legal representation to taxpayers to assist in their dealings with the tax administration. This service is generally offered to small taxpayers: it is available only to taxpayers when the amount of tax assessed by the tax administration in a particular year does not exceed 1 million pesos (approximately U.S. \$55,000.00), not counting fines, surcharges or inflationary adjustments.

3.5.4 Independent mediation

101. The conclusive agreement procedure offered by the PRODECON (see box 1) provides a good example of an independent mediation mechanism. While the aim and techniques of an independent mediation mechanism are somewhat similar to those of the administration mediation service described in section 3.4.3, a key difference is that the mediator does not belong to the tax administration and may therefore be perceived as more independent by the taxpayer. Chapter 6 provides more information regarding the operation and structure of such an independent mediation mechanism.

102. As indicated in paragraph 98, countries wishing to organize the tax ombudsman as a body independent of the tax administration will need to ensure that it will have the legal authority to access taxpayer-specific and other confidential information.

3.5.5 Expert advice

103. [THIS SECTION WILL EXPLAIN HOW SOME COUNTRIES ALLOW FOR EXPERT ADVICE DETERMINATIONS DURING THE LITIGATION PROCESS].

3.5.6 Arbitration

104. The arbitration procedure allows for the binding resolution of a dispute between the tax administration and the taxpayer by one or more independent parties acting outside a formal judiciary framework. Arbitration would typically be available as a second stage option, and used only after earlier attempts such as administrative appeals or an independent review of a statement of audit position failed to result in an agreement to resolve the issue. The scope of arbitration procedures is typically limited to disputes regarding factual issues.

105. Such a domestically provided arbitration procedure is distinct in several ways from the MAP-arbitration provisions sometimes found in bilateral tax treaties (or the MAP-arbitration provided by Part VI of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*). MAP-arbitration provisions are designed exclusively to resolve disputes between the two countries party to the treaty when disagreements regarding the application or interpretation of the treaty prevent the conclusion of a mutual agreement. Chapter 7 provides more information regarding the operation and structure of both forms of arbitration. [NEED TO EXPAND THIS SECTION ON DOMESTIC ARBITRATION]