E/C.18/2020/CRP.2

Distr.: General
8 May 2020

Original: English

Committee of Experts on International Cooperation in Tax Matters
Twentieth session
[Dates and location of the session TBC]
Item 3(f) of the provisional agenda
Dispute avoidance and resolution

Chapter 5 on MAP Arbitration of the Handbook on Avoidance and Resolution of Tax Disputes

Note by the Subcommittee on Dispute Avoidance and Resolution

Summary

This note is presented FOR DISCUSSION AND APPROVAL at the twentieth session of the Committee

The note includes the final version of Chapter 5 (MAP Arbitration) of the proposed *United Nations Handbook on Avoidance and Resolution of Tax Disputes,* which was finalized by the Subcommittee on Dispute Avoidance and Resolution at its last meeting in The Hague on 12-14 February 2020.

At its twentieth session, the Committee is invited to discuss and approve the attached final version of Chapter 5 for inclusion in the proposed Handbook.

1. At its nineteenth session (Geneva, 15-18 October 2019), the Committee examined a first draft of Chapter 5 on MAP Arbitration of the proposed *United Nations Handbook on Avoidance and Resolution of Tax Disputes.* It was then noted that a few written comments made by participants in the Subcommittee on Dispute Avoidance and Resolution remained to be discussed at the February 2020 meeting of the Subcommittee. There were no other interventions on that draft chapter and Committee members and country observers were invited to send written comments on the draft before 29 November 2019.

2. Each of the written comments previously received on the draft were discussed at the meeting of the Subcommittee held in The Hague, the Netherlands, on 12-14 February 2020, when the Subcommittee approved the attached revised version of the Chapter.

3. At its twentieth session, the Committee is invited to approve the attached version of Chapter 5 for inclusion in the *United Nations Handbook on Avoidance and Resolution of Tax Disputes*.

Chapter 5

MAP Arbitration

Table of Contents

5.1 Introduction

1. The previous chapter, which provided a description of the mutual agreement procedure (MAP), did not address the provisions of paragraph 5 of Article 25 (Alternative B) of the UN Model and of Article 25 of the OECD Model, which provide for the mandatory[1] arbitration of issues arising from a MAP request presented under Art. 25(1) that competent authorities are unable to resolve within a certain period of time.

2. This chapter examines the use of arbitration as part of the MAP, an approach for which countries are showing increasing interest. The chapter first explains how MAP arbitration works in practice, then examines the different positions that have been put forward concerning its use and finally sets out some design considerations for countries that want to move in this direction.

5.2 Legal Basis

5.2.1 Concept of MAP arbitration

3. Although MAP has generally been successful in resolving the majority of cases brought in countries with an active MAP program,[2] some countries have decided to include a mandatory arbitration mechanism in the MAP process.

4. This is done through the adoption of treaty provisions that allow issues that prevent the resolution of MAP cases within a certain period of time to be submitted to one or more independent persons for a decision that both countries are bound to follow. This process is referred to as "MAP arbitration" throughout this Chapter.

5. It is important to note that MAP arbitration is fundamentally different from commercial arbitration. While commercial arbitration is an alternative dispute resolution mechanism through which business disputes can independently be resolved, MAP arbitration is merely an extension of the MAP process described in the previous chapter and may be used only where one or more issues arising in a MAP case cannot be resolved by the competent authorities within a prescribed period of time (usually 2 or 3 years).

6. Further, unlike an arbitration award in commercial arbitration that requires enforcement through a court system, MAP arbitration results in a decision that must be implemented by the

1 This chapter does not deal with the non-mandatory arbitration provisions that were included in some older bilateral tax treaties and that allowed the use of arbitration on a case-by-case basis if the competent authorities agreed to do so. There are no reported cases where arbitration was used pursuant to such provisions.

2 See OECD, MAP Statistics 2018, available at https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.

competent authorities themselves. In fact, competent authorities may even be given the discretion to arrive at an agreement different from the decision resulting from the arbitration.[3]

7. Finally, whether initiated by the taxpayer or the competent authorities (depending on the tax treaty provision), arbitration results in a State-State procedure and does not usually directly involve the taxpayer, as in the case of investment arbitration.

8. Therefore, the availability of arbitration encourages competent authorities to resolve cases through MAP negotiations and, thereby, to avoid having to move into arbitration.[4]

5.2.2 The UN Model Position

9. Article 25 (MAP) of the UN Model Convention contains two alternative versions. Alternative A provides only for MAP as described in Chapter 4 of this Handbook. Alternative B, however, includes an additional paragraph 5 according to which issues that are unresolved through MAP may be submitted to arbitration.

10. Per this provision, where the competent authorities of two countries 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.[5]

11. However, under the UN Model Convention, issues that have been finally decided by 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.

12. Further, the competent authorities may agree on a different decision within six months of the decision. However, the taxpayer may choose not to accept the decision. Following the 6-month period and acceptance of the taxpayer, the decision would be binding on both competent authorities to implement through MAP, irrespective of domestic time-limits.

13. 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 countries may choose to follow, specifically through a "sample mutual agreement" that countries 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,

---

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

4 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.

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

costs, procedural and evidentiary rules, sharing of information and confidentiality rules and implementation/enforcement related rules.

14. The Commentaries also provide additional guidance on the relationship between the arbitration process and domestic remedies.[6] Given that issues that have already been decided by a Court or Tribunal in either country may not be submitted to arbitration, the taxpayer may have to suspend its right to domestic law remedies on the concerned issue in order to pursue arbitration. Most countries consider it impractical to allow parallel pursuit of arbitration and domestic law remedies.

15. Therefore, countries may require that if a taxpayer has made use of domestic remedies and a decision has not yet been reached by the courts or administrative tribunals, it has to put the procedure on hold until the arbitration has been completed in order to prevent an abrupt termination of proceedings due to the issuance of the court decision. Although some countries have raised constitutional or other legal restrictions in this regard, in other countries, it may be possible to require the taxpayer to renounce the right to a domestic law remedy.

16. In countries where the competent authorities can deviate from a final Court decision, it is not necessary to force the taxpayer to choose between domestic and treaty remedies.[7]

5.2.3 The OECD and MLI Positions

17. Article 25(5) of the OECD Model Convention is largely similar to Article 25(5) in Alternative B of Article 25 of the UN Model Convention.

18. However, there are some significant differences. First, the OECD Model Convention does not contain two alternatives – the Model generally prescribes the inclusion of arbitration provisions. Second, the OECD Model Convention allows for arbitration when a case is unresolved through MAP for 2 years (from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities) rather than the 3-year period (from the presentation of the case to the competent authority of the other Contracting State) in the UN Model Convention. Third, the OECD Model Convention allows for the arbitration request to be made by the affected taxpayer and 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 decision within 6 months.[8] Guidance on the 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 Commentary on Article 25.

---

6 Under MAP arbitration, the decision of the arbitrators is implemented through the conclusion of a mutual agreement, which means that the explanations provided in section 5.4.2.7 of Chapter 4 concerning the relationship between the mutual agreement procedure and domestic law are also relevant.

7 See paragraph 7 of the Commentary on Article 25 of the UN Model.

8 However, the possibility to do this is highlighted in the Commentary (see paragraph 84 of the Commentary on Article 25 of the OECD Model Convention).

19. The treaty-based changes proposed by the BEPS project may be implemented bilaterally or through the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI).[9]

20. The MLI contains an option for mandatory binding arbitration in Part VI. This option is more detailed than the provisions in the Model Conventions since 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.[10]

5.3 Different views on the appropriateness of arbitration

21. Countries hold different views on the need for arbitration in the context of MAP, partly reflecting their own economic, social, and legal environment and partly reflecting their experience with existing economic dispute resolution mechanisms in tax and non-tax agreements. The views of countries, which may evolve over time, are also influenced by the capacity to engage in what is sometimes perceived as a complex process. This section sets out the views that have been expressed on the need and desirability of arbitration in the context of MAP.

5.3.1 The perceived concerns

22. Several concerns raised primarily by developing countries during discussions at the Committee level have been recorded in the UN Model Commentaries.[11] These include concerns about:

- Possible sovereignty and constitutionality impediments;
- Costs and lack of resources;
- Lack of experience and familiarity with MAP and arbitration;
- Even-handedness, and
- Transparency.[12]

---

9 http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

10 There are also rules for arbitration in tax treaty matters within the European Union. The EU *Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises* (see https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41990A0436&from=en, as subsequently amended) provides for arbitration. A directive to govern cross-border dispute resolution through instruments such as the Arbitration Convention and tax treaties has also been adopted in the EU in 2017 (see Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, available at https://eur-lex.europa.eu/eli/dir/2017/1852/oj).

11 Paragraph 4 of the Commentary on Article 25 of the UN Model.

12 Commentary on Article 25 UN Model, paragraphs 4 and 5; 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.

Possible sovereignty and constitutionality impediments

23. These countries are of the view that arbitration in tax treaty disputes affects their sovereignty. Some countries consider the inclusion of arbitration of a tax dispute "unconstitutional". Some other countries consider that the inclusion of arbitration, whilst constitutional, may create other constitutional obligations such as extension of such remedies in domestic cases. Other countries that do not have the above concerns have raised the issue of shifting of decision-making power from the State to members of an arbitration panel. On the other hand, other countries have taken the view that legal and constitutional concerns should not arise in arbitration since sovereignty is legally ceded to the extent of the tax treaty and the dispute resolution mechanism in a treaty merely enforces such provisions. Some countries also rely on their experience with arbitration and mandatory dispute settlement in treaties in other areas such as trade and investment to argue that sovereignty concerns should not arise.

Costs and lack of resources

24. Some countries have also raised concerns as regards costs. Arbitration necessarily entails costs in terms of fees for the arbitrators and may entail costs for facilities and additional fees for counsel/representation. Also, developing countries may be concerned that these fees could be payable in a foreign currency on a scale that is not proportional to the resources available to them. There may also be concerns by developing countries that they may need to hire outside experts to assist them in a MAP arbitration process, although previous MAP arbitration cases suggest that this would not be necessary. On the other hand, other countries believe that the costs associated with arbitration may be lower than expected owing to the limited number of cases that may go to arbitration and the ability to structure an efficient arbitration process and to put a cap on the compensation of arbitrators (e.g. as is sometimes done with the last-best-offer form of arbitration).

Lack of experience and familiarity with MAP and arbitration

25. Several developing countries have also raised concerns as regards their perceived lack of experience in arbitration as compared to developed countries. This may put undue pressure on the competent authorities of developing countries. Some developed countries, however, have claimed that impartial decisions by arbitrators from all backgrounds, including from developing countries, may help overcome lack of experience of developing countries.

26. A number of officials from developing countries do not rule out an eventual recourse to MAP arbitration but consider that they are not yet ready for such a mechanism, especially given the negative experience of some developing countries with the application to tax measures of the arbitration provisions of bilateral investment agreements. They also note that, in the current environment, most MAP arbitration cases that would involve developing countries would focus on tax collected by these countries' as opposed to tax collected by developed countries.

Even-handedness

27. Some countries believe that arbitration may also lead to concerns of even-handedness. They consider that, as of today, there is only a small pool of possible arbitrators 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, these countries claim that their thought process and understanding of international taxation may be tuned to the developed world and might not be familiar with concerns of developing countries. There are also concerns that few potential arbitrators would be fluent with the official languages of some developing countries, which might make it difficult for these arbitrators to fully understand the position of the competent authorities of these countries.

Transparency

28. Some countries are of the view that tax treaty arbitration may also raise concerns of transparency, although such concerns would seem to be applicable to all MAP cases, whether or not they involve arbitration. Like other parts of the MAP process, MAP arbitration proceedings are generally considered confidential and opinions are not published. Further, in mandatory binding arbitration in tax treaties, decisions are considered binding on the competent authorities (even though they have no precedential value for other cases).

5.3.2 The perceived benefits

29. Potential benefits of arbitration that were put forward during discussions at the Committee level have been recorded in the UN Model Commentaries. These include:

- Guarantees the resolution of MAP cases.
- Prophylactic effect.
- Increased certainty.
- Reduces reliance on unilateral domestic remedies.

Guarantees the resolution of MAP cases

30. Arbitration is the preferred approach of some countries which are concerned that there is no assurance that MAP will resolve all disputes and will do so in a timely fashion. These countries consider that including arbitration in their tax treaties to improve the MAP process would be a step forward in guaranteeing to the taxpayer relief from double taxation or taxation not in accordance with the treaty. Although there may only be a few cases that remain unresolved by MAP between the particular countries concerned, such countries emphasize the importance of resolving MAP issues in such cases as well.

Prophylactic effect

31. The most significant benefit perceived by some countries in adding arbitration to the MAP process is the “prophylactic effect”. Since the purpose of arbitration is not to replace the

MAP with an independent evaluation of the case by arbitration, but to supplement the current MAP process in those few cases where the competent authorities are unable to agree on a resolution in a timely manner, such countries claim that the inclusion of arbitration would encourage the conclusion of more cases in an efficient manner. In practice, this has been the experience under the Canada-United States tax treaty, which has included mandatory binding arbitration since 2010.

Increased certainty

32. Countries have also taken the view that arbitration in the context of MAP may provide more certainty to taxpayers. Since MAP may not guarantee a resolution, adding arbitration to the MAP process may increase the certainty that a taxpayer feels as regards conclusion of the MAP and eventual resolution of double taxation or taxation not in accordance with the treaty. These countries also believe that this will help encourage cross-border investment. It has also been suggested that the addition of arbitration to a tax treaty may make it easier for a developed country to agree to the addition of controversial provisions to the allocative rules of a tax treaty, especially when the practical application of such provisions is likely to create uncertainty.

Reduces reliance on unilateral domestic remedies

33. Some countries also stress that arbitration helps reinforce taxpayer faith in applying the MAP, thereby reducing reliance on sometimes inadequate unilateral domestic remedies. The alternative for the taxpayer to take the case to Court may not be the best solution for the tax administration either since it might be more cost efficient for the tax administration to go for arbitration as opposed to prolonged judicial processes.

5.4 Procedural guidelines for the implementation of arbitration by opting countries

5.4.1 General overview

34. In general, for countries opting for arbitration, the competent authorities are free to design procedural rules as regards conduct of proceedings under the arbitration clause. As endorsed by the model Conventions and the MLI, competent authorities may enter into, and will need to in order to practically implement arbitration, a competent authority agreement as regards such proceedings.[13] However, since procedural rules may not just directly impact the effectiveness of the provision, but also play a key role in alleviating the concerns described above as regards arbitration, a country should pay careful attention to the procedural rules prescribed in each of its treaties that allows for arbitration.

35. Although the need for flexibility explains the variations of treaty provisions related to arbitration, a country should seek to ensure that the rules governing arbitration in its different treaties are clear, are suitable for all cases where arbitration may be used and are fairly

13 Using, where appropriate, the provisions of the sample mutual agreements included in the Annex to the Commentary on Article 25 of the UN Model and OECD Model.

consistent in order to facilitate the understanding of these rules by taxpayers and facilitate the training of tax officials involved in the MAP process.

5.4.2 Initiation of arbitration

36. The Model Conventions differ as regards responsibility for initiating arbitration. While the UN Model Convention provides that the request for arbitration may be made by the competent authority of one of the Contracting States, the OECD Model Convention and the MLI allow the taxpayer to make the request directly. However, because of the costs involved, where arbitration is triggered by a competent authority, both competent authorities may wish to request the taxpayer's consent before engaging in arbitration, especially since the taxpayer may reject the tentative agreement that seeks to implement the arbitration decision.

37. Certain rules as regards the arbitration request should be prescribed in the competent authority agreement. Ideally, the request for initiating an arbitration process should be made in writing and should contain all information that is necessary to clearly identify the case. Where a competent authority is allowed to and wishes to initiate arbitration, it must communicate the same to the other competent authority and to the person who has presented the MAP case. Where a taxpayer is allowed to and wishes to initiate arbitration, the competent authority receiving the request should, within a specified period of time, also share such request with the other competent authority to formally initiate the process.

38. Where there is a limitation as to the cases that may be submitted to arbitration, such as where arbitration is restricted to certain types of cases or where issues that have been decided by a Court are excluded from arbitration, the taxpayer may be asked to provide a declaration stating that the case falls within the accepted criteria.

39. While Art. 25(5) Alternative B of the UN Model provides that arbitration must be requested by one of the competent authorities, paragraph 17 of the Commentary on that paragraph provides that countries may agree that arbitration may be requested by the person who presented the MAP case. Where the taxpayer is allowed to make the request, it would seem possible to present that request to either competent authority, although the countries may require that the request be presented to the competent authority of the State to which the MAP case was initially presented under Art. 25(1). Such a requirement should be clearly stated in the applicable treaty or the agreement setting up the arbitration process.

40. Under the MLI and the UN and OECD sample mutual agreements, if information required by either competent authority pursuant to its published MAP procedures has not been provided by the taxpayer in a timely manner, this delays the start time of the two-year or three-year period during which the case is not eligible for arbitration.

5.4.3 Terms of Reference

41. "Terms of Reference" refers to the questions that must be decided by the arbitration panel in a specific case submitted to arbitration. Although the "arbitration" provisions in the Model Conventions are silent as regards "Terms of Reference", it may be important to refer to

them in a competent authority agreement. Following the UN sample mutual agreement, within three months from receipt of the arbitration request by the second competent authority (as determined by agreement), the competent authorities may decide the "Terms of Reference". This time period is reduced to 60 days in the Commentary on Article 25 of the OECD Model.

42. The "Terms of Reference" would determine the jurisdictional basis of a particular case that is subject to arbitration. Where competent authorities make the request, they could determine whether to restrict the process to certain issues. However, where the taxpayer makes the request, the main issues dealt with in the request should ideally be covered in the "Terms of Reference".

43. However, the agreement regarding scope should ideally be reflected in the convention or an accompanying agreement so as to prevent an impasse between the competent authorities in this regard.

44. Separate rules may be laid out for failure to communicate the terms of reference as well. If the Terms of Reference have not been agreed by the competent authorities and communicated to the person who has presented the case within three months, the competent authority agreement may allow each competent authority to, within one month after the end of the three month period, communicate in writing to each other a list of issues to be resolved by the arbitration, which may then constitute the tentative Terms of Reference. Within one month after all the arbitrators have been appointed, the arbitrators may then communicate to the competent authorities and the person who presented the case a revised version of the tentative Terms of Reference, which shall become final. Within another one month period, the competent authorities may also be provided the possibility to agree on different Terms of Reference and to communicate them in writing to the arbitrators and the person who presented the case, which shall become final.

5.4.4 Selection of the arbitration panel

45. The arbitration panel must be chosen prudently by countries opting for arbitration. It is of paramount importance that countries carefully select the persons on the Panel both with respect to their experience and qualifications and with respect to their independence and freedom from bias.

46. Rules with regard to selection of the arbitration panel may be included either in the arbitration provision in the tax treaty directly or in the competent authority agreement. Countries have several options as regards the design of such rules.

47. The UN sample mutual agreement suggests a structure for a 3-member panel. This provision suggests that within either a) 3 months from notification of the taxpayer of the Terms of Reference or b) 4 months from when the other competent authority receives the arbitration request filed by one competent authority where Terms of Reference have not been finalized, 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". A similar approach is followed in the OECD sample mutual agreement.

48. However, the Model Commentaries differ in situations where there is no appointment, either by the competent authorities for the first two arbitrators or by the arbitrators for the third arbitrator. The Commentary on the UN Model provides that 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. The power of appointment in case of default is provided instead to the highest ranking official of the OECD Centre for Tax Policy and Administration that is not a national of either State involved. The MLI provision follows the same format as the OECD Model Commentaries.

49. Countries are free to depart from these rules to create customized arbitration panels. For instance, a single arbitrator or a five member panel may also be prescribed. However, countries are urged to use an odd number of members in the arbitration panel to avoid having a tie of votes. Countries may also wish to have different rules to address cases where there is a failure to appoint one or more arbitrators (for instance, where one country wishes to follow the approach suggested in the Commentary on the OECD Model while the other prefers the approach put forward in the Commentary on the UN Model).

50. Countries may also consider other approaches based on their own policy goals when devising such rules. For instance, paragraph 15 of the Annex to the Commentary on Article 25 UN Model considers the creation of a list of suitable potential arbitrators by the UN Committee of Experts on International Co-operation in Tax Matters.[14] Countries may accordingly agree on a list of potential arbitrators from which arbitrators may be chosen for each arbitration case arising out of their tax treaty.

51. Specific rules may also be created with respect to replacement of arbitrators. Such a process may be initiated in cases of incapacity, disqualification or resignation. However, in order to avoid undue delay, countries may consider allowing replacement of only arbitrators who have been found to be compromised, retaining the rest of the Panel. Ideally, replacement of arbitrators should be made by the remaining members of the Panel by unanimous decision. The replacement of arbitrators may also lead to extension of any timelines that are prescribed for the completion of the process in the treaty provision or the competent authority agreement.

52. Each arbitrator must be qualified to serve in such position. The arbitration provision or agreement may stipulate that arbitrators should be persons with recognized competence in the fields of international tax law who may be relied upon to exercise independent judgment in the

14 Similarly, the approach adopted under the EU Arbitration Convention and the EU Dispute Resolution Directive (see note 10) involves the maintenance of a panel of "independent persons" as well as detailed rules regarding the selection of the Chair.

area of tax treaty disputes.[15] Countries may also consider selecting multiple potential arbitrators and agreeing on a list of arbitrators that may be called upon in respect of each treaty.

53. Each arbitrator must be independent. The UN sample mutual agreement suggests that any person including government officials of either State involved may be an arbitrator unless that person was involved in the particular case beforehand. The Commentary of the OECD Model includes a similar provision. However, the Commentary of the UN Model also suggests that the arbitrator provide a written statement (or an affidavit) stating the arbitrator's impartiality or neutrality.

54. 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 that status throughout the arbitral process and for a reasonable time thereafter.

55. Countries may consider these options and agree on independence and transparency rules as regards the arbitrators. Countries may consider using the following format for the written statement referred to in paragraph 53 above:

DECLARATION BY ARBITRATOR

"To the best of my knowledge there is no reason why I should not serve on the arbitration panel constituted by [____] with respect to a dispute between _____ and _____, due to conflict of interest arising from any previous relation with either of the parties or jurisdictions involved. I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any decision delivered by the Panel. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as allowed by the law and Rules made pursuant thereto. I shall also not indulge in any *ex parte* discussions with any of the parties as regards the matter and all questions that I make to the competent authorities shall be in writing with copies shared simultaneously with the other parties.

Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify both parties of any such relationship or circumstance that subsequently arises during this proceeding."

(source: Rule 6(2), ICSID Rules of Procedure for Arbitration Proceedings)

56. Either competent authority may propose disqualification of an arbitrator if the above conditions are not fulfilled. If such request is made by a competent authority, the other members of the panel should, after giving an opportunity of hearing to the impugned member, decide on

15 Adapted from Section 14(1), ICSID.

this issue by unanimous decision (in case of three member panels) or majority vote (in case of larger panels). If the Panel disqualifies the arbitrator, the procedure applicable to replacement discussed above should be activated.

57. All official communications amongst the Panel and between the Panel and competent authorities and/or the taxpayer should ensure confidentiality. For instance, competent authorities should be mindful of confidentiality requirements when disclosing information concerning the identity of the taxpayers involved for the purposes of allowing prospective arbitrators and the organizations to which they belong to identify any potential conflict of interest. One possible approach would be to obtain the taxpayer's consent to disclose such information for the limited purpose of selecting the arbitration panel.

5.4.5 The arbitration process

58. Countries opting for arbitration may also decide on the type of arbitration process that should be followed in either the provision itself or the competent authority agreement. Arbitration may be done in different ways such as "independent opinion" arbitration, where the arbitrators are asked to produce a reasoned decision that includes their conclusions as regards the facts, the evidence and the legal arguments, and "last best offer" or "baseball" arbitration where each competent authority submits its most reasonable solution to the case and the arbitral panel is asked to decide which of these proposed solutions will prevail based on their views on the facts and arguments presented in each solution proposed.

59. The "sample" mutual agreement in both the UN and OECD Model Commentaries endorses the use of the "last best offer" or "baseball" arbitration approach. Within 2 months from the appointment of all arbitrators, each competent authority should present its proposed resolution and a decision shall be delivered by the panel within 3 months from thereon.[16]

60. The MLI allows jurisdictions the option to choose one of these two approaches for all cases or to decide on a default approach with the possibility of using another approach if both competent authorities agree to do so in a specific case.

61. Specific rules may be required as regards the "last best offer" approach. The proposed resolution should ideally be limited to a disposition of specific monetary amounts or the maximum tax rate applicable, depending on the transaction. Where substantive issues are pending as well (for example, whether a permanent establishment exists), the competent authorities may give alternative proposed resolutions for either result. Competent authorities may also provide supporting position papers to which replies may be provided by the other competent authority. However, page limits may be set for the proposed resolutions, position papers and replies to ensure that this method works in an efficient and time-sensitive manner.[17]

16 Annex to the Commentary on Article 25 of the UN Model.

17 Rule 9, Memorandum of Understanding Between the Competent Authorities of Canada and the United States of America.

62. Similarly, specific rules may be prescribed as regards the "independent opinion" approach as well. Within a reasonable time period agreed to by both countries, each competent authority should provide the Panel with a description of the facts and of the unresolved issues to be decided together with the position of the competent authority concerning these issues and the arguments supporting that position. Competent authorities may also restrict the Panel from considering arguments that were not placed before it by them.

63. Where one competent authority fails to submit a proposed resolution or a position paper, the arbitration decision would follow the other side's proposal. Countries may also prescribe strict time-limits within which each step of this process should be completed.

64. Countries should obviously weigh the pros and cons of each approach before choosing the applicable arbitration process. At this point in time, however, there is not enough experience with MAP arbitration to identify clear benefits and disadvantages of each approach with respect to issues such as costs, duration and creation of precedents. Given the fundamental differences between MAP arbitration and arbitration under commercial contracts or investment/trade treaties (which often involves very high costs), the experience with these latter forms of arbitration does not provide useful guidance as to the design of MAP arbitration. Such guidance may be developed in the future as a result of the experience gained by countries that adopt MAP arbitration.

65. Countries may also prescribe rules related to the conduct of the arbitration proceedings. The treaty provision or the competent authority agreement may require the Panel to meet within a reasonable time from its creation and may require further meetings within particular time periods. The meetings of the Panel may be done by video-conference or tele-conference as well. Rules may be prescribed as regards the language to be used in such proceedings as well.

66. Countries should keep timelines in mind if they are looking at MAP arbitration to be a "speedy" solution. Neither the OECD nor the UN Model Convention prescribes a specific timeline within which the arbitration process should be completed. However, the sample mutual agreements provide for timelines. The UN sample mutual agreement provides that the decision should be communicated to both competent authorities within three months from having received the last reply from the competent authorities under the baseball approach. Under the alternative independent opinion approach, the UN sample mutual agreement provides that the decision should be communicated within six months from the date on which the Chair notifies that necessary information has been received.[18] However, the OECD sample

18 Para 11 of the UN Sample Mutual Agreement also provides that: "If within two months from the date on which the last arbitrator was appointed, the Chair, with the consent of one of the competent authorities, notifies in writing the other competent authority and the person who presented the case that he has not received all the information necessary to begin consideration of the case, then

- if the Chair receives the necessary information within two months after the date on which that notice was sent, the arbitration decision must be communicated to the competent authorities and the person who presented the case within six months from the date on which the information was received by the Chair, and
- if the Chair has not received the necessary information within two months after the date on which that notice was sent, the arbitration decision must, unless the competent authorities agree otherwise, be reached without taking into account that information even if the Chair receives it

mutual agreement provides that the decision should be communicated to both competent authorities within 60 days after the reception by the arbitrators of the last reply submission or, if no reply submission has been submitted, within 150 days after the appointment of the Chair of the arbitration panel (under the baseball approach) and within 365 days from the appointment of the Chair (under the independent opinion approach). Countries may draw from that guidance and from the practices adopted by countries that have already dealt with these issues (e.g. default time limits, and the applicable remedies if these are not respected, are provided under the EU Directive and with respect to the arbitration provisions of some US treaties).

67. Countries should generally be free to mutually agree on a place where arbitration proceedings may be conducted. With baseball style arbitration, a physical meeting may not be necessary. Countries entering into arbitration clauses with developing countries should be cognizant of choosing a location that is cost-efficient. 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.

68. Further, the UN and OECD sample mutual agreements 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. However, if significantly more MAP cases are presented to the competent authority of one country, countries may consider adopting a rule to provide for alternating the responsibility for the logistical arrangements.

69. Neither the UN Model Convention nor the OECD Model Convention specifically allows for taxpayer participation in the arbitration process. While the OECD sample mutual agreement 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 issue is not addressed in the Commentary of the UN Model and in the MLI.

70. Countries may also agree to add any other procedural or evidentiary rules that they may deem fit. For example, countries may bilaterally agree on a list of documents that may be accepted as evidence by the Panel while making its decision.

5.4.6 Confidentiality

71. Since arbitration proceedings involve third parties receiving information, it is important to ensure the confidentiality of taxpayer information and the impartiality and independence of the procedure. The UN and OECD sample mutual agreements provide that both countries should agree that arbitrators appointed would be deemed to be authorized representatives (under Article 26) of the appointing parties as regards communications and the confidentiality of information provided. The MLI adds another layer of protection by increasing the number

later and the decision must be communicated to the competent authorities and the person who presented the case within eight months from the date on which the notice was sent."

of persons subject to confidentiality requirements: it provides that not only the arbitrators will constitute authorized representatives, but also their support staff (up to 3 staff members per arbitrator). It also requires a written statement as regards confidentiality and non-disclosure obligations from each arbitrator and designated staff member.

72. Countries should ensure that arbitrators (and prospective arbitrators, as indicated in paragraph 57 above) are bound by the relevant confidentiality provisions in the tax treaty and applicable domestic laws. This should also be done with respect to any staff members used for the Panel process. In doing so, countries should require arbitrators and staff members to destroy all information obtained by them once the arbitral process has concluded.

73. Countries should also put in necessary rules to ensure that all exchange of information between the competent authorities and the Panel are through secure, encrypted channels to ensure that confidential and sensitive taxpayer information remains protected.

5.4.7 Remuneration of arbitrators and costs involved

74. Countries must take into account the costs involved in the arbitration process and provide rules for allocating the same to ensure its efficient implementation. Arbitration would necessarily entail some costs in terms of fees for the arbitrators and, depending on the type of arbitration used, costs for meetings.

75. As regards costs, both the OECD and UN Model Commentaries provide the following guidelines:

- 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.[19]
- All costs in relation to other arbitrators and all other costs will be borne equally by the two countries.

76. The MLI only prescribes a specific mutual agreement between the countries on costs and if there is no agreement, each party bearing its own costs with shared costs being split equally.

77. Competent authorities may also agree a simpler split of all expenses including arbitrator remunerations *in toto*. Countries may also bilaterally agree on a separate means for remuneration of arbitrators and provide exact remunerations or remuneration schedules for arbitrators.

19 If presented in both countries, the costs will be shared equally.

78. The UN sample mutual agreement provides some suggestions to make the remuneration of arbitrators cost-effective. It 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.

79. Further, where there is a clear disparity in financial status between the two countries involved in a tax treaty, it may be appropriate for the countries to agree that the better off country would bear more of the costs of the arbitration procedure.

5.4.8 The decision

80. Countries should be clear as to how a decision will be arrived at where there is more than one arbitrator. While a decision by simple majority would be the logical rule, there may be cases where the number of arbitrators on the panel will be reduced to an even number (e.g. where one arbitrator fails to render a decision).

81. Countries should clarify the criteria that the panel must apply to arrive at a decision. The Panel should decide the issues submitted to arbitration in accordance with the applicable provisions of the tax treaty, and applicable domestic laws of the countries involved. Countries may also allow the Panel to consider any other sources which the competent authorities of the Contracting Jurisdictions may by mutual agreement expressly identify, or which may be identified by the applicable treaty or accompanying bilateral agreements.

82. Countries should clarify whether arbitral decisions should be published or not. The UN sample mutual agreement does not, by 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 OECD sample mutual agreement allows publication if agreed to by the person making the request and both competent authorities with redacted details on the understanding that the published decision carries no precedential value.

83. Both the Commentary on the UN Model and the Commentary on the OECD Model suggest that arbitral decisions will not have precedential value. Countries that wish to provide otherwise would need to make this clear in their agreement.

84. Countries may allow the competent authorities to arrive at a different resolution in the treaty. The treaty itself may clarify that the competent authorities may resolve the case while the arbitral proceedings are pending, leading to the withdrawal of the arbitration request.

85. Both the UN and OECD Model Conventions provide that the arbitral decision shall be final and binding on the competent authorities to implement through a MAP agreement, unless the taxpayer rejects the decision. However, the UN Model Convention also allows the competent authorities the opportunity to arrive at an agreement that is different to the decision within 6 months, after which time the decision is final. In practice, this is likely to be more relevant for independent opinion, rather than baseball arbitration.