
**Committee of Experts on International
Cooperation in Tax Matters
Twenty-second session**

Online meeting of 19 to 28 April 2021

Item 3(f) of the provisional agenda

Dispute avoidance and resolution

**Preface and Chapter 1 (Introduction and Overview) of the Handbook on
Dispute Avoidance and Resolution**

Note by the Subcommittee on Dispute Avoidance and Resolution

Summary

This note is presented FOR DISCUSSION AND APPROVAL at the twenty-second session of the Committee to be held online from 19 to 28 April 2021.

The note includes the Preface and Chapter 1 (Introduction and Overview) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*. These were finalized by the Subcommittee on Dispute Avoidance and Resolution at its online meeting of 3-4 March 2021.

The Committee is invited to discuss and approve the attached final version of the Preface and Chapter 1 for inclusion in the proposed Handbook.

1. At its twenty-first session (held online from 20 to 30 October 2020), the Committee discussed a detailed outline of the Preface and Chapter 1 (Introduction and Overview) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*. Comments were invited on the outline, particularly on the section of Chapter 1 that referred to challenges faced by developing countries in relation to the avoidance and resolution of tax disputes. The following comments were made by members of the Committee:

- One Member observed that one such challenge was how to ensure that the competent authority remained independent from the tax administration;
- Another Member suggested that the section should refer to the other side of the issue of the protection of taxpayer's rights, which was the level of exposure of some countries to tax abuse; and
- A third Member observed that some developing countries face difficulties with respect to the adoption and implementation of alternative dispute resolution mechanisms, in particular as regards the attitude of authorities in charge of oversight.

2. These observations were incorporated in the complete version of the Preface and Chapter 1 that were subsequently drafted on the basis of the outline. The members of the Subcommittee on Dispute Avoidance and Resolution were invited to send written comments on that version and these comments were discussed at the online meeting of the Subcommittee that took place on 3-4 March 2021.

3. The attached final version of the Preface and Chapter 1, which was approved by the Subcommittee during the meeting, includes the changes agreed to during the meeting as well as a few subsequent editorial changes.

4. At its twenty-second session on 19 to 28 April 2021, the Committee is invited to approve the attached version of the Preface and Chapter 1 for inclusion in the *Handbook on Dispute Avoidance and Resolution*.

Table of Contents

Preface.....	1
Chapter 1 – Introduction and Overview	4
1.1 Purpose of the Handbook	4
1.2 The importance of appropriate measures for the avoidance and resolution of tax disputes.....	5
1.3 Challenges faced by developing countries and, in particular, least developed countries.....	8
1.4 Contents of the Handbook.....	9

Preface

Taxes, which are essential for the provision of public goods and services, are a critical source of finance for the 2030 Agenda for Sustainable Development. Income taxes, in particular, contribute to reducing inequalities and ensuring greater macroeconomic stability.

Given the complexity of income tax laws, however, disputes concerning the interpretation and application of these laws are probably unavoidable in systems based on the rule of law. A main preoccupation of those responsible for designing tax systems is therefore the need to adopt measures that minimize such disputes and, where this is not possible, that ensure that disputes are resolved fairly and effectively. This is particularly important for policy makers and tax administrations of developing countries because the fair and effective resolution of tax disputes is needed to balance the need to raise revenues and the need to attract and keep foreign investment. Achieving the right balance contributes to foster domestic resource mobilization.

Work on the avoidance and resolution of tax disputes with a particular focus on the mutual agreement procedure provided for in tax treaties has figured prominently on the agenda of the United Nations Committee of Experts on International Cooperation in Tax Matters from its inception.

At its first session in 2005, the Committee discussed the pros and cons of international tax arbitration and some of its members were invited to prepare a report on alternative methods for avoiding or solving disputes. Following the presentation of that report at the Committee's second session in 2006, the Committee decided to set up a Subcommittee on Dispute Resolution to continue the work on this topic, paying attention "both to the ways of improving dispute settlement and of giving practical guidance to make mutual agreement procedures under existing treaties as effective as possible."¹

At its sixth session in 2010, the Committee discussed a report on arbitration and a draft guide on mutual agreement procedure which had been prepared by that Subcommittee. It decided that two alternative versions of Article 25 on Mutual Agreement Procedure should appear in the *United Nations Model Double Taxation Convention between Developed and Developing Countries*² (United Nations Model Tax Convention): Alternative A would not provide for arbitration while Alternative B would include a provision on mandatory arbitration.³ Written

1 *Report on the Second Session (30 October–3 November 2006)*, [E/2006/45-E/C.18/2006/10](#) (accessed on 12 March 2021), p. 12, para. 60.

2 United Nations, Department of Economic and Social Affairs, *United Nations Model Tax Convention Double Taxation Convention between Developed and Developing Countries, 2017 Update*, United Nations publication ST/ESA/PAD/SER.E/213, available at https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/UN%20Model_2017.pdf (accessed on 12 March 2021).

3 *Report on the Sixth Session (18-22 October 2010)*, [E/2010/45-E/C.18/2010/7](#) (accessed on 12 March 2021), p. 7/para. 29. These two versions of Article 25 were included in the United Nations Model Tax Convention Tax Convention in 2011.

comments were invited on the draft guide on mutual agreement procedure, which was subsequently finalized and adopted by the Committee at its eighth session in 2012.⁴

The Committee returned to the issue of the resolution of tax disputes at its eleventh session in 2015, when a paper on arbitration was presented. The Committee then decided to set up a new *Subcommittee on the Mutual Agreement Procedure — Dispute Avoidance and Resolution*.⁵ The main outcome of the work of that Subcommittee was the drafting of changes to the Commentary on Article 25 (Mutual Agreement Procedure) of the United Nations Model Tax Convention. As a result of that work, a number of changes to that Commentary, which dealt primarily with the results of the work on Action 14 of the BEPS project⁶ of the Group of Twenty (G20)⁷ and the Organization of Economic Cooperation and Development (OECD),⁸ were adopted at the fourteenth session of the Committee in 2017. During the same meeting, the Committee also adopted the first outline of a handbook on dispute avoidance and resolution on which the Subcommittee had done preliminary work.

At the fifteenth meeting of the Committee in 2017, which was the first meeting of a renewed membership of the Committee, it was decided that a new *Subcommittee on Dispute Avoidance and Resolution* would continue the work of the previous subcommittee with the following mandate:⁹

The Subcommittee should consider and report back to the Committee on possible means of dispute avoidance and resolution, on both the domestic and international level. In particular, the Subcommittee will consider the Mutual Agreement Procedure, with a view to improving its effectiveness, building on the work done by the previous subcommittee. Particular attention will be paid to:

- Mechanisms to avoid and resolve disputes arising at the domestic level;
- Ways to ensure that the Mutual Agreement Procedure under article 25 (in either of its alternatives in the United Nations Model) functions as effectively and efficiently as possible; and
- Issues associated with arbitration clauses and other means as options to supplement the Mutual Agreement Procedure.

Following work on these areas, the Subcommittee will produce the following outcomes:

- A draft United Nations Handbook on Dispute Resolution and Avoidance;
- A draft updated text of the United Nations Guide to the Mutual Agreement Procedure;

4 *Report on the Eighth Session (15-19 October 2012)*, [E/2012/45-E/C.18/2012/6](#) (accessed on 12 March 2021), p. 17, paras. 76–78.

5 *Report on the Eleventh Session (19-23 October 2015)*, [E/2015/45-E/C.18/2015/6](#) (accessed on 12 March 2021), pp. 20-23, paras. 98–100.

6 More information on Action 14 of the OECD/G20 Project is provided in section 1.3, chap. 1.

7 See www.g20.org, accessed on 12 March 2021.

8 See www.oecd.org, accessed on 12 March 2021.

9 *Report on the Fifteenth Session (17-20 October 2017)*, [E/2018/45-E/C.18/2018/1](#) (accessed on 12 March 2021), p. 22, para. 74. The list of participants in that Subcommittee appears in the Annex to this Handbook.

- Drafts of possible changes to the United Nations Model Convention and/or Commentaries, as appropriate.

The Subcommittee is to focus especially on issues affecting developing economies, possible means of addressing them in a practical manner and ways to build confidence in dealing with them. It will provide recommendations to the Committee within its agreed mandate, on improvements, if any, for inclusion in the next version of the United Nations Model. The Subcommittee should work on the United Nations Handbook on Dispute Resolution and Avoidance and an update to the Guide to the Mutual Agreement Procedure as a priority.

At its sixteenth session in 2017, the Committee revised the outputs expected from the work of the new Subcommittee when it decided that, instead of updating the previously-adopted *Guide to the Mutual Agreement Procedure*, the Subcommittee should incorporate the contents of the Guide into the chapter of the Handbook that would deal with the mutual agreement procedure.¹⁰

This *Handbook on the Avoidance and Resolution of Tax Disputes* represents the final outcome of the work of that Subcommittee. The six chapters of the Handbook that were prepared by the Subcommittee were successively discussed and approved by the Committee at the six sessions of the Committee that took place from October 2018 to April 2021. The consolidated version of the Handbook was formally adopted by the Committee at its twenty-second session in April 2021.

As noted in Chapters 1 and 6, the provision of technical assistance to developing countries should improve their capacity to minimize and resolve tax disputes. Some of the contents of the Handbook have already been used in capacity-building workshops and organizers of such events are encouraged to use this complete version of the Handbook for that purpose.

We hope that this Handbook will provide a useful tool for developing countries and will contribute to their sustainable development efforts.

10 *Report on the Sixteenth Session (14-17 May 2018)*, [E/2018/45/Add.1-E/C.18/2018/7](#) (accessed on 12 March 2021), p. 15, para. 54.

Chapter 1

Introduction and Overview

1.1 Purpose of the Handbook

1. This Handbook seeks to provide guidance on the various mechanisms that may be used to avoid tax disputes and, where such disputes arise, to resolve them.

2. The Handbook has been drafted primarily for the benefit of developing countries and, in particular, least developed countries. Most of the issues that it addresses, however, present themselves to all countries, regardless of their level of development. For that reason, the guidance included in this Handbook should be relevant for all countries. The mechanisms for avoiding or resolving tax disputes that are proposed in this Handbook may not, however, be suitable for all countries. Some of these mechanisms will be more appropriate for consideration and implementation by developing countries that have more resources, including staff with the necessary experience and capability.

3. The tax disputes that are the object of this Handbook are those that may arise between tax administrations and taxpayers¹¹ under the provisions of domestic income tax¹² laws and tax treaties.

4. The Handbook is divided into two parts, each of which is described in more detail in Section 1.4. Part 1 has a broad focus and deals with mechanisms for avoiding and resolving tax disputes that could arise in a purely domestic context as well as cross-border tax disputes, including those related to the application of tax treaties. Part 2 focusses exclusively on the mutual agreement procedure, which is the procedure included in tax treaties that enables certain tax officials of the treaty countries to resolve bilaterally cross-border issues related to the application or interpretation of the treaty provisions.

11 The Handbook also covers some disputes between two tax authorities that arise in the context of a tax treaty (while references to tax authorities in this Handbook are generally synonymous to references to tax administrations, this might not always be the case, e.g. in countries where competent authority functions provided for by tax treaties are performed by officials who do not belong to the tax administration).

12 Throughout this Handbook, references to income taxes include corporate taxes. While the focus of this Handbook is on income tax disputes, many of the mechanisms discussed in Part 1 of the Handbook could also be useful to avoid or resolve disputes regarding the application of other types of taxes, such as value-added taxes (especially since in some countries, the same or similar dispute resolution mechanisms apply to income taxes and value-added taxes). Also, because capital taxes are covered by many tax treaties, Part 2 also covers the use of the mutual agreement procedure in relation to disputes concerning the application of tax treaties with respect to such taxes.

1.2 The importance of appropriate measures for the avoidance and resolution of tax disputes

5. The application and interpretation of income tax legislation raises a number of complex issues, particularly where cross-border transactions are involved. Since it is impossible to avoid all disputes related to such issues, tax systems should ideally be designed so as to minimize such disputes and, when these disputes arise, to ensure that they are resolved through a fair and effective process.

6. This becomes even more important in light of the additional risks of tax disputes, in particular with respect to cross-border transactions, that arise from some features of new business models that rely on the digitalisation of the economy. Additional risks may also arise from various domestic and international measures that have been introduced or proposed to deal with difficulties that have arisen from the application to these business models of tax rules that were designed a long time ago.

7. While all countries that rely on income taxes need to strive to minimize disputes and ensure that those that arise are resolved fairly and effectively, this is particularly important for developing countries. These countries are frequently confronted with the competing needs of raising much-needed tax revenues and of attracting and keeping foreign investment, which are both essential to their sustainable development. The implementation of effective measures for avoiding and resolving tax disputes provides taxpayers with greater certainty that tax laws will be correctly applied and interpreted and therefore contributes to facilitate foreign cross-border investment and cross-border trade of goods and services, including employment services.

8. In their progress reports on tax certainty submitted to the G20 in 2017¹³ and 2018,¹⁴ the OECD and IMF identified the sources of uncertainty in tax matters and the various tools that taxpayers and governments could use to reduce that uncertainty from the perspective of businesses and tax administrations. The reports analyse the results of a 2016 OECD business survey on tax certainty. Figure 9 of the 2018 report shows the top 10 tools that the survey identified among different regions as most important for addressing tax certainty.¹⁵ It reveals that improving domestic dispute regimes is seen as more important for countries of Latin America and the Caribbean, Asia and Africa than for OECD countries while mutual agreement procedure (MAP) issues appear to be relatively more important in Asia, Latin America and the Caribbean than in the OECD (and is less important in Africa, where there are relatively few MAP cases).

13 IMF and OECD, *Tax Certainty, IMF/OECD Report for the G20 Finance Ministers*, March 2017, available at <https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf>, accessed on 12 March 2021.

14 IMF and OECD, *Update on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors*, July 2018, available at <http://www.oecd.org/ctp/tax-policy/tax-certainty-update-oecd-imf-report-g20-finance-ministers-july-2018.pdf>, accessed on 12 March 2021.

15 Ibid., p. 46.

9. The 2018 report also gives a detailed account of the discussions at a Consultative Workshop on Tax Certainty held in Tanzania in 2017 and attended by more than 50 delegates, including officials from ministries of finance and tax administrations of 21 African countries. One of the possible improvements to tax policy, legislation processes as well as revenue administrations' capabilities that participants to that workshop identified as tools that could increase tax certainty in Africa was improving dispute resolution:¹⁶

Improving dispute resolution mechanisms. Implement effective dispute resolution mechanisms as a means to enhance tax certainty for both taxpayers and tax authorities. Delegates concluded that dispute resolution mechanisms should be fair, independent from audit activities, accessible to taxpayers and effective in resolving disputes in a timely manner. This requires designing an independent, workable and graduated dispute resolution process comprising an administrative and judicial stage. The administrative stage could involve alternative dispute resolution mechanisms, while, on the judicial side, the issue of judicial capacity needs to be addressed as a matter of priority.

10. As explained in these two reports and in Chapter 2, however, tax certainty does not only require effective mechanisms to avoid tax disputes when they arise but also a general environment that minimizes the potential for such disputes. This starts with the need for clear and accessible legislation and interpretative guidance by the tax administration.

11. The increased importance of effective dispute resolution mechanisms is particularly obvious in the case of the MAP, which is the focus of Part 2 of the Handbook. The number of cases involving the use of the MAP has grown steadily over the last two decades: country statistics on the MAP show that the number of outstanding MAP cases has increased on average by more than 11 per cent each year between 2006 and 2015.¹⁷ The statistics also show, however, that currently the vast majority of MAP cases arise under tax treaties between two developed countries and that relatively few mutual agreement cases involve developing countries other than large emerging economies.¹⁸ As these statistics suggest, the majority of developing countries have no or limited experience with the MAP even though the number of MAP cases involving developing countries is increasing. Regardless of a country's degree of previous experience, however, all countries that enter into tax treaties must be prepared to meet their obligations with respect to the MAP and must therefore understand that procedure and

16 Ibid., p. 28.

17 Statistics on MAP cases have been collected by the OECD since 2006: see <http://www.oecd.org/tax/dispute/map-statistics-2006-2015.htm>, accessed on 12 March 2021. As explained below, these statistics were expanded in 2016 to include more details and to include the MAP cases of all countries that are members of the Inclusive Framework on BEPS: see the statistics for 2019 at <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>, accessed on 12 March 2021.

18 The 2019 MAP statistics of the Inclusive Framework on BEPS reveal that not a single outstanding MAP case was reported by countries of the Inclusive Framework that appear on the World Bank's list of low-income economies and that only 0.8 percent of the total reported outstanding MAP cases were reported by countries (other than India) that appear on the World Bank list of lower-middle-income economies (these World Bank's lists are available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>, accessed on 12 March 2021).

implement administrative processes to deal with MAP cases that may arise under their tax treaties.

12. The G20/OECD Project on Base Erosion and Profit Shifting (BEPS) has had a significant impact on the implementation of the MAP. The BEPS Action Plan recognized that its recommendations to counter base erosion and profit shifting had to be complemented with work aimed at improving the effectiveness of the MAP as a mechanism for resolving treaty-related disputes.¹⁹ Work in this area was carried out under Action 14 (Making dispute resolution mechanisms more effective) of the BEPS Action Plan. The final report on Action 14²⁰ includes a number of best practices related to the MAP. It also sets forth a minimum standard with respect to the resolution of treaty-related disputes through the MAP which has the following objectives:²¹

- Ensure that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner
- Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes
- Ensure that taxpayers can access the MAP when eligible.²²

13. The large number of countries that have joined the Inclusive Framework on BEPS²³ have committed to implement that minimum standard²⁴ (which is not the case for countries that are not members of the Inclusive Framework). The fact that compliance with the minimum standard is reviewed and monitored by other countries is intended to ensure a greater international scrutiny of how each country that is a member of the Inclusive Framework applies the MAP.²⁵ Two elements of the minimum standard will also contribute to that result. First, the minimum standard requires all countries that are members of the Inclusive Framework on

19 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264202719-en>, accessed on 12 March 2021, page 23.

20 OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/9789264241633-en>, accessed on 12 March 2021.

21 Ibid., p. 9.

22 On 18 November 2020, the OECD released a consultation document seeking input on proposals for a review of the Action 14 minimum standard concerning “a) Experiences with, and views on, the status of dispute resolution and suggestions for improvements [...]; b) Additional elements to strengthen the Action 14 Minimum Standard; and c) Additional elements to strengthen the MAP Statistics Reporting Framework” (that consultation document is available at <https://www.oecd.org/tax/beps/public-consultation-document-beps-action-14-2020-review-november-2020.pdf>, accessed on 12 March 2021). That review process was still ongoing when this Handbook was finalized.

23 As of February 2021, 139 countries and jurisdictions were members of the Inclusive Framework on BEPS: see <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf>, accessed on 12 March 2021.

24 The elements of that minimum standard and the best practices included in the final report on Action 14 are included in the Annex to Chapter 4.

25 See <http://www.oecd.org/tax/dispute/beps-action-14-peer-review-and-monitoring.htm>, accessed on 12 March 2021.

BEPS to provide annual statistics on their MAP cases,²⁶ including their total MAP caseload, the average time required to complete MAP cases, the general outcomes of the MAP cases that were closed, the other jurisdictions involved in the cases and the proportion of the cases that dealt with issues regarding the allocation of profits between associated enterprises or the attribution of profits to a permanent establishment as opposed to other issues. Second, all these countries must become members of the FTA MAP Forum,²⁷ a subsidiary body of the OECD Forum on Tax Administration (FTA)²⁸ which meets regularly to deliberate on matters affecting the MAP and to monitor the implementation of the minimum standard.

1.3 Challenges faced by developing countries and, in particular, least developed countries

14. While the issues addressed in this Handbook present themselves to all countries regardless of their level of development, the specificities of developing countries, in particular the least developed countries, create a number of challenges with respect to the avoidance and resolution of tax disputes.

15. The limited resources of the tax authorities of these countries may be the main challenge. A lack of personnel with the capacity and expertise to deal with complex tax issues, particularly with respect to cross-border transactions, means that these issues might not be dealt with adequately. This creates risks of not assessing tax that should be payable (e.g. as a result of tax avoidance transactions) and of generating disputes that could easily have been avoided, e.g. through clear legislation or proper guidance by the tax administration or by a greater awareness, by that tax administration, of its treaty obligations.

16. Limited resources also impact these countries' capacity to effectively resolve disputes that arise. This relates to the treatment and resolution of disputes by both the tax administration and by independent parties, primarily the courts. For instance, lengthy delays in obtaining a final court decision are frequent in some countries, which undermines the usefulness of having access to domestic courts to resolve tax disputes. Also, the absence of judges specialized in tax law tend to favour a literal interpretation of tax legislation. Such a literal approach may restrict the ability to arrive at solutions that are equitable for taxpayers and for governments in need of tax revenues and may have the effect of facilitating tax avoidance.

17. There has recently been an emphasis by the international community on the provision of assistance to developing countries to help them minimize and resolve tax disputes. This assistance may help these countries overcome these and other challenges, particularly in the international context and in relation to the MAP.

18. Other challenges that arise for developing countries include, in some of these countries, the absence of tax treaties or the existence of a limited tax treaty network, which may prevent

26 See *Action 14 - 2015 Final Report*, footnote 10, p. 15.

27 Ibid., p. 16.

28 See OECD Forum on Tax Administration, see <http://www.oecd.org/tax/forum-on-tax-administration>, accessed on 12 March 2021.

the resolution, through the mutual agreement procedure, of some cross-border issues with other tax administrations, in particular issues related to transfer pricing and attribution of profits to permanent establishments. This may increase the potential for double taxation and may add to the pressure to provide tax incentives or to grant special tax regimes to large foreign investors. Other challenges that are specific to the MAP are examined in paragraph 6 of Chapter 4.

19. The protection of taxpayer rights, including the right to confidentiality, may be another challenge in some countries. Without confidence that these rights will be respected, taxpayers may have little trust in available dispute avoidance and resolution measures.

20. Some countries may also have difficulties in ensuring the independence of officials involved in the resolution of tax disputes vis-à-vis those responsible for the audit or collection of taxes. This problem is often encountered with respect to officials performing the competent authority function in MAP cases.

21. Given that the income tax legislation of developing countries is typically simpler than that of developed countries, the tax administrations of developing countries are frequently more vulnerable to avoidance transactions, a problem that is likely exacerbated by the adoption of a literal interpretation approach by the courts (disputes related to avoidance transactions are typically difficult to resolve and frequently reach courts).

22. The constitutional and legal framework of some developing countries, including the views of authorities in charge of the application and interpretation of the relevant rules, may also create difficulties with respect to the adoption and implementation of some mechanisms for the avoidance or resolution of tax disputes. In some countries, for instance, the use of alternative dispute resolution mechanisms has been found to be contrary to constitutional or basic legal principles.

1.4 Contents of the Handbook

Part 1 – Measures to avoid and resolve tax disputes

23. Part 1 relates to measures that may be taken by countries for the avoidance and resolution of income tax disputes that may arise both in a domestic and international context. It includes this introductory chapter as well as Chapter 2 on Approaches to avoiding disputes and Chapter 3 on Domestic dispute resolution mechanisms. It is acknowledged that the distinction between measures that aim to avoid disputes and those that seek to resolve them is sometimes unclear; in order to distinguish the two, this Handbook considers that mechanisms for resolving disputes are those that are applicable to disagreements concerning income taxes that have been assessed or reassessed. This therefore excludes measures, such as certain forms of administrative review or mediation, that may be available to resolve disagreements that may arise at any stage up to, and during, the audit process, i.e. before the audit results in a reassessment or demand to pay tax. Some of these other measures are discussed as part of the approaches used to avoid disputes that are dealt with in Chapter 2.

Chapter 2 – Approaches to avoiding disputes

24. Chapter 2 begins by explaining what types of potential disputes are addressed and the importance and benefits of effective dispute avoidance mechanisms for both tax administrations and taxpayers.

25. The chapter then discusses how the first and likely most effective way of preventing tax disputes is to ensure that taxpayers can easily determine their tax rights and obligations under the tax law. A first way to contribute to that objective is to have clear and accessible legislation and interpretative guidance; the chapter explains how setting up a public consultation process before the final adoption of tax legislation allows stakeholders to provide insights to the legislator on the effectiveness, the implementation and the compliance costs of proposed tax legislation. It will also help if governments are conscious of the interaction between proposed domestic legislation and the legislation of other countries and with the country's international obligations, for instance those arising from tax treaties. Similarly, in performing its audit function, it will be important for the tax administration to have a level of global awareness that allows it, in the course of auditing compliance with domestic tax law, to assess whether bilateral tax treaties have been interpreted and applied appropriately. Another aspect to take into account is the legal environment in which the dispute avoidance mechanisms operate: tax law is part of public law and hence, is subject to the same procedural and substantive restrictions that apply to other parts of public law; in addition, in reaching an agreement or solution with a taxpayer related to the application of tax legislation, a tax administration needs to conform with the rule of law and the principles of good administration applicable in the relevant country. When designing, implementing and administering tax legislation, it is also important to keep in mind that taxpayers should be treated equally before the law. Finally, developing more sophisticated risk assessments will enable tax administrations to focus on high risk sectors and high risk taxpayers, which, in turn, should lead to a reduction in the number of disputes and a more effective resolution of disputes with high risk taxpayers since more resources will be available to address these disputes.

26. These general considerations are followed by a description of various specific approaches used by countries to avoid tax disputes, which constitutes the main part of the chapter.

27. This begins with a reference to the guidance and advice provided by a tax administration. Such guidance and advice can be effective in preventing disputes from arising when it is clear, accurate, consistent, and accessible to the taxpayers. A tax administration may provide guidance on how the tax law operates generally. A description of the types of guidance provided by the Australian Taxation Office illustrates different forms that such guidance can take. A tax administration may also provide advice on a taxpayer's obligations or entitlements under specific provisions of the law, such advice being generally in the form of public or private rulings. This is illustrated by a reference to the types of advice provided by the Australian Taxation Office and by Kenya Revenue Authority.

28. The next approach discussed in the chapter is the Advance Agreement/Pre-Filing Agreement, which is a variation of the advance ruling concept. A description of the Pre-Filing Agreement Programme that the IRS offers to corporate taxpayers illustrates that approach.

29. The chapter goes on to discuss how the use of advance pricing arrangements (APAs) can also be an effective tool in avoiding disputes between tax administrations related to transfer pricing. After describing the nature of an APA and the legal basis under which unilateral, bilateral or multilateral APAs can be concluded, the chapter identifies a number of issues that should be considered by a country wishing to establish an APA programme. A brief description of Indonesia’s APA programme shows how it has actually been done by a developing country.

30. Different approaches aimed at improving the relationship between the taxpayer and the tax administration, and therefore at reducing the potential for disputes, are dealt with in another section of the chapter. That section first discusses the nature and potential benefits of “cooperative compliance”, which generally refers to an approach that builds on a reciprocal relationship of trust and cooperation between the tax administration and the taxpayer. A brief description of the Tax Compliance Incentive Programme (Pro-Conformity) that has been proposed by the tax administration of Brazil illustrates how cooperative compliance could be of interest not only for developed countries (where it has primarily been used so far) but also for emerging and developing countries. This is supplemented by general guidance for countries that may want to consider setting up a pilot study to see how cooperative compliance could work within their legal, political and administrative environment. The section also discusses how the appointment of a single point of contact, or “relationship manager”, who would be responsible for the tax administration’s overall relationship with a taxpayer (which would be particularly helpful in the case of large taxpayers and high-net-worth individuals), could help prevent disputes. This approach is illustrated by the description of the Client Relationship Manager Programme of the Tax Administration Jamaica.

31. The next approach described in Chapter 2 is “International Compliance Assurance Programme” (“ICAP”), which is a voluntary programme for a multilateral co-operative risk assessment and assurance process that was launched in January 2018 as a pilot programme. After another expanded pilot programme in 2019, ICAP is now being run as a full programme open to all OECD Forum on Tax Administration (FTA) member tax administrations. In February 2021, the FTA released a handbook on ICAP containing information on the ICAP process which reflected the experience and feedback of the tax administrations and the multinational enterprise groups (MNE groups) that participated in the two pilots.²⁹ ICAP provides for a multilateral approach to early tax certainty for eligible MNE groups which could have the effect of preventing disputes from arising between those MNE groups and the tax administrations.

29 Forum on Tax Administration, *International Compliance Assurance Programme – Handbook for Tax Administrations and MNE Groups* (Paris, 2021), available at <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf>, accessed on 12 March 2021.

32. The use of joint audits is another approach described in the chapter. That approach was introduced in 2010 by the FTA and is to be distinguished from simultaneous tax audits. The chapter explains that joint audits, where two or more countries join to form a single audit team to conduct a taxpayer examination, could result in quicker issue resolution, more streamlined fact finding and more effective compliance. For this reason, joint audits may provide tax certainty and therefore could be effective in preventing disputes from arising between tax administrations and taxpayers.

33. The “independent review of the statement of audit position” is an independent review procedure conducted during the audit stage which operates as a dispute avoidance mechanism when the outcome of that independent review has the effect of preventing a dispute from formally arising (e.g. where that review leads the tax administration to abandon the idea of issuing a reassessment for additional income tax payable in a specific case). The chapter describes how that type of procedure is provided by the Australian Taxation Office.

34. The last dispute avoidance approach referred to in Chapter 2 is that of mediation offered during a tax audit. The chapter describes two different types of mediation processes that can be conducted during the audit stage: the first, “in-house facilitation”, involves an impartial official of the tax administration acting as a facilitator whilst the second, “independent mediation”, involves mediation services provided by an independent body (the chapter describes the main features of that type of procedure as it is used in Mexico).

Chapter 3 – Domestic dispute resolution mechanisms

35. Chapter 3 deals with the domestic³⁰ mechanisms that are generally available in countries to resolve disputes that can arise between tax administrations and taxpayers with respect to the determination of income taxes payable.³¹ It aims to provide practical guidance to countries that wish to improve certain aspects of their domestic dispute resolution process, it being understood that each country needs to determine which of the mechanisms described in the chapter are best adapted to its own situation, in particular its legal framework and the nature of the tax disputes that typically arise in it.

36. The first part of the chapter emphasizes the importance of making mechanisms available to taxpayers to resolve disputes as efficiently and quickly as possible. The chapter goes on to provide a number of typical examples of disputes resulting from findings from an audit or examination concerning the amount of tax liability, explaining that such disputes may relate to the facts of a specific case, to the interpretation of the law or to both. This is followed by a quick overview of the main categories of dispute resolution mechanisms, a distinction being made throughout the chapter between mechanisms that are provided by the tax administration,

30 As opposed to international mechanisms such as those provided by treaties.

31 Chapter 3 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.

such as the administrative appeal procedure, and those that exist separately from, and outside of, the tax administration, such as the resolution of a tax issue by the courts.

37. The main part of the chapter discusses a number of issues that are common to most forms of domestic dispute resolution mechanisms. These include, for example, whether and to what extent a tax administration is able to negotiate and accept compromise solutions to tax disputes, the importance of time limits, considerations related to the collection of disputed taxes and related penalties and interest as well as the coordination between different dispute resolution mechanisms.

38. The remaining parts of the chapter describe the main types of domestic dispute resolution mechanisms. The first of these are the administrative appeal procedure and the administrative mediation, two mechanisms through which dispute resolution is provided by the tax administration. This is followed by a discussion of different mechanisms through which dispute resolution is provided by independent parties. In almost all countries, taxpayers have the right to seek resolution of tax disputes in courts. Independent mediation services are also available in some countries. The chapter also notes the role that a tax ombudsman that operates outside the tax administration may play in resolving domestic tax disputes, while indicating that some countries have established a tax ombudsman within the tax administration. The expert determination and arbitration procedures that are available in some countries are discussed at the end of the chapter.

Part 2 – The dispute resolution mechanism of tax treaties: the mutual agreement procedure

39. Part 2 of the Handbook deals exclusively with the Mutual Agreement Procedure (MAP), which is the dispute resolution mechanism provided for in bilateral tax treaties. That part is divided into three chapters.

Chapter 4 – The mutual agreement procedure

40. Chapter 4, the longest chapter of the Handbook, first provides a general description of the MAP, which is separate and independent from any administrative and judicial dispute resolution mechanisms provided by domestic law. It also explains the crucial role of the MAP towards ensuring that countries respect their tax treaty obligations. Since the majority of developing countries have no or limited experience with the MAP, the main purpose of the chapter is to provide guidance to these countries even though its contents should also be relevant for a broader range of countries. The chapter, which complements the guidance on the mutual agreement procedure found in the Commentary on the United Nations Model Tax Convention and is subordinate to that guidance, makes a number of references to the minimum standard and the best practices included in the final report on BEPS Action 14,³² which are reproduced in the Annex to that chapter.³³

32 See section 1.2 above.

33 See footnote 10.

41. While Article 25 of both the United Nations and OECD models provides for three different types of MAP, the chapter focusses primarily on the first type, the so-called “MAP on request”, which involves requests made to competent authorities of the treaty States by persons that consider that they have not been taxed in conformity with the provisions of a tax treaty. The chapter provides a list of typical treaty issues that are dealt with under that type of MAP with emphasis on issues related to the allocation of profits between associated enterprises and the attribution of profits to permanent establishments since these issues represent the majority of outstanding MAP on request cases.

42. The chapter includes a diagram and a flowchart that show the different actions normally involved in a MAP on request case. These are regrouped under the following five steps of a typical MAP process:

1. The MAP request
2. The unilateral stage of the consideration of the MAP case
3. The bilateral stage of the consideration of the MAP case
4. The conclusion of the MAP
5. The implementation of the mutual agreement reached through the MAP
6. The guidance included in the chapter addresses each of these steps in detail.

43. The section on the MAP request explains who is allowed to make a MAP request, to which competent authority the request should be made, when such request should be made and how it should be filed. A description of the format and contents of a MAP request includes a detailed example of a fictitious MAP request that would satisfy the requirements of most countries that have published guidance on that issue (that example is followed throughout the chapter by other examples of documents typically produced in the course of the MAP process). The section also addresses specific issues such as whether access to MAP can be denied in certain cases, what happens if the taxpayer who requests the MAP is also pursuing domestic recourses such as a court challenge, whether a single MAP request may be made for the resolution of recurring issues where the relevant facts and circumstances are the same, whether taxes may be collected once a MAP request has been filed and whether a MAP request may be withdrawn. The role of the competent authority that receives the request is explained in the last part of that section.

44. The subsequent section addresses the unilateral stage of the consideration of the MAP request, which requires that the competent authority that received the MAP request examine the merits of the request in order to determine whether it appears to be justified and, if that is the case, whether that competent authority can unilaterally eliminate the taxation not in accordance with the treaty provisions without the need to consult the competent authority of the other treaty country involved. This is followed by the section that deals with the bilateral stage of the consideration of the MAP, which is the step of the MAP process that must take place if the competent authority that received the MAP request concludes that the objection included in the request appears to be justified but that it is not able to resolve the case

unilaterally. That competent authority must then engage with the competent authority of the other treaty State with the objective of jointly arriving at a satisfactory resolution of the case. Different methods of communication may be used for that purpose but the chapter explains that the process is typically initiated by inviting the other competent authority to provide a position paper or by offering to do so. That position paper and the written response produced by the competent authority that receives it will normally constitute the basis for the subsequent discussions between the competent authorities.

45. The fourth step of the MAP process, which is the conclusion of that process, is analysed in the subsequent section. That part of the chapter discusses the different possible outcomes of a MAP case and describes the different actions that are typically undertaken when the competent authorities reach a proposed agreement in a case, which normally requires the taxpayer's acceptance of that agreement and the formal conclusion of the agreement.

46. The next section deals with the last step that takes place after such an agreement is concluded, which is the implementation of the mutual agreement reached through the MAP. That section explains the legal obligation that is imposed on the treaty States to implement such a mutual agreement regardless of any time limits that may exist under the domestic law of the States and gives a few examples of domestic measures that may be required in order to implement that mutual agreement.

47. That section is followed by a table that summarizes the different actions involved in a MAP process that were discussed in the preceding sections and provides a tentative timetable showing reasonable deadlines for each of these different actions.

48. The next section of the chapter briefly examines the process for the two other types of MAP provided for by Article 25 of the United Nations and OECD models, namely the "interpretative or procedural MAP" envisaged by the first sentence of paragraph 3 of the article and the "MAP on double taxation not dealt with under the treaty" which is governed by the second sentence of that paragraph.

49. This is followed by a section that addresses various aspects of the communications that take place between the competent authorities in the context of any type of MAP and which are subject to the rules of Article 26 of the United Nations and OECD models concerning the exchange of information and, in particular, the confidentiality requirements imposed by that article.

50. The last part of the chapter provides guidance on the organization of the MAP functions within a tax administration and on how a competent authority should approach a MAP case. It stresses the importance for competent authorities to make every effort to resolve cases in a principled, fair and objective manner, deciding each case on its own merits and not with reference to revenue considerations or an overall balance of results.

51. Chapter 5 completes the analysis of the MAP included in Chapter 4 by examining the provisions that allow for the mandatory arbitration of issues arising from a MAP request that competent authorities are unable to resolve within a certain period of time.

52. The chapter first describes the key features of the provisions of paragraph 5 of Article 25 Alternative B of the United Nations Model Tax Convention which, unlike Alternative A of the article, provides for such mandatory arbitration. In doing so, it explains how this “MAP arbitration” is fundamentally different from commercial arbitration. The chapter also describes the differences between the arbitration provisions of the United Nations Model Tax Convention and those of paragraph 5 of Article 25 of the OECD Model Tax Convention and provides a brief background for the arbitration provisions included in Part VI of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI).³⁴

53. The chapter presents the different views that have been put forward concerning recourse to MAP arbitration and analyses the perceived concerns and perceived benefits that have been raised by members of the United Nations Tax Committee, as referred to in the Commentary on Article 25 of the United Nations Model Tax Convention.

54. The perceived concerns first relate to the view that arbitration may affect a country’s sovereignty and, in some countries, could raise constitutional issues. There are also concerns with respect to the costs of arbitration and some countries’ lack of resources, including as regards the availability of local experts who could act as arbitrators. Another concern that has been expressed relates to the developing countries’ lack of experience and familiarity with MAP and arbitration. Similarly, it has been argued that the existing small pool of possible arbitrators who can deal with complex international tax and transfer pricing issues come from the developed world and might not be familiar with concerns of developing countries. Concerns about transparency have also been raised because, like other parts of the MAP process, MAP arbitration proceedings are generally considered confidential and opinions are not published.

55. On the other hand, the perceived benefits that have been attributed to MAP arbitration by members of the United Nations Tax Committee who supported it first include the fact that it guarantees the resolution of MAP cases. It has also been argued that the inclusion of MAP arbitration provisions in a treaty has a “prophylactic” effect by encouraging competent authorities to compromise so as to resolve MAP cases more quickly and efficiently, the purpose of arbitration not being 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. Other perceived benefits are that MAP arbitration provides more certainty to taxpayers as regards the conclusion of the

34 <http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf>, accessed on 12 March 2021.

mutual agreement procedure and that it reduces reliance on sometimes inadequate unilateral domestic remedies.

56. The last part of Chapter 5 discusses different aspects of the procedural rules that competent authorities should consider adopting as regards the conduct of proceedings under MAP arbitration provisions. The United Nations and OECD models as well as the MLI indicate that competent authorities typically enter into a competent authority agreement as regards such procedural rules and need to do so in order to practically implement MAP arbitration. These rules should first address the process through which arbitration must be initiated, taking into account the fact that while the United Nations Model Tax Convention provides that the request for arbitration may be made by the competent authority of one of the two States involved in the MAP case, the OECD Model Tax Convention and the MLI provide that arbitration is initiated by a request by the taxpayer. The chapter then addresses how and when the “terms of reference”, which are the questions to be decided by the arbitration panel, should be determined. It also discusses the process through which the arbitration panel should be selected, including possible provisions on the required qualifications and independence of arbitrators and their eventual replacement.

57. A key aspect of arbitration that should be dealt with in either the treaty itself or a competent authority agreement is what type of arbitration process should be followed. 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. The chapter explains these two different processes and the specific rules that each requires; it also stresses the need for strict time limits for each step of these processes.

58. Other procedural aspects of MAP arbitration addressed in the chapter include the responsibility for logistical arrangements, in particular if physical meetings of the arbitration panel are required, how to ensure the confidentiality of taxpayer information exchanged during the arbitration process and the payment of the costs involved in the arbitration process, including the remuneration of the arbitrators. The final aspect addressed in the chapter is how an arbitration decision should be arrived at by the arbitrators and the possibility for competent authorities to depart from that decision.

Chapter 6 – Possible improvements to the MAP

59. Chapter 6, the last chapter of the Handbook, concludes the analysis of the mutual agreement procedure by discussing various measures that could possibly improve the MAP, particularly in developing countries. While there is already some limited experience with a few of the measures discussed in that chapter, other measures have not been used, at least in the context of the mutual agreement procedure.

60. The first possible improvement described in Chapter 6 is the provision of technical assistance to a country under a programme such as the UNDP-OECD Tax Inspectors Without Borders (TIWB).³⁵ The chapter describes that programme and explains that it can support the provision of technical assistance with respect to MAP or APA cases. The 2020 Annual Report of the TIWB³⁶ indicated that the programme would be expanded to cover new areas of tax assistance, including tax treaty negotiation and administration. Such an expansion could provide the competent authorities of developing countries with even greater access to the expertise of former tax officials familiar with the MAP process and with the different types of treaty disputes that are typically dealt through that process.

61. Technical training on the MAP process is another possible improvement discussed in Chapter 6. Such training would be aimed at improving the capacity of tax administrations of developing countries to deal with MAP cases; it could deal with the MAP process as well as the MAP-related commitments of the large number of countries that have joined the BEPS Inclusive Framework. The chapter refers to the example of the capacity-building workshops on MAP that have already been provided by the partners of the Platform for Collaboration on Tax.³⁷

62. The chapter also explains how the conclusion of “framework agreements” could help address some of the difficulties that the competent authorities of two countries encounter in dealing with their mutual MAP caseload, especially where there is a large number of pending MAP cases between these countries. Such a framework agreement could address procedural or administrative issues related to the MAP or could deal with specific substantive treaty issues. The chapter gives the example of the framework agreement concluded in 2015 by the competent authorities of India and the United States, which facilitated the resolution of more than 100 cases in the information technology sector.

63. The use of new information technologies to facilitate the MAP process is another possible improvement discussed in Chapter 6. New technology could provide a secure environment that would facilitate contacts and the sharing of information between the taxpayers and competent authorities involved in a MAP case, facilitate record keeping, time management as well as documentation and filing requirements. In the case of treaties that provide for MAP arbitration, technology could also help the competent authorities with time and documentation management and help protect the taxpayers’ privacy rights by providing a secure and protected environment for making the necessary information accessible to the

35 See Box 1, chap. 6.

36 OECD/UNDP (2020), *Tax Inspectors Without Borders – Annual Report*, available at <http://tiwb.org/resources/reports-case-studies/tax-inspectors-without-borders-annual-report-2020.htm>, p. 10, accessed on 12 March 2021.

37 The Platform for Collaboration on Tax, which is a joint effort of the IMF, the OECD, the UN and the WBG, was set up with a major aim “to better frame technical advice to developing countries as they seek both more capacity support and greater influence in designing international rules”. See <https://www.worldbank.org/en/programs/platform-for-tax-collaboration>, accessed on 12 March 2021

arbitrators. The decision to implement any new technology would obviously require a careful cost-benefit analysis, especially for countries that have very few MAP cases.

64. Finally, the last part of Chapter 6 discusses the possible use of non-binding dispute resolution (NBDR) mechanisms in MAP cases. Some have referred to the use of NBDR in the domestic tax context to suggest that it could improve the MAP process. Others, however, have expressed the view that the experience of NBDR in the domestic tax context may not be easily transferred to the MAP and have observed that there are no reported cases where NBDR has been used to resolve successfully a MAP case. The chapter discusses whether expert advice and mediation could constitute an alternative or a precursory step to MAP arbitration. It presents what some consider to be benefits and disadvantages of that suggestion and explains how expert advice and mediation could be implemented in the context of MAP and possible issues that this could raise.