
**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 6 on Possible Improvements to MAP 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 6 (Possible improvements to MAP) of the proposed *United Nations Handbook on Avoidance and Resolution of Tax Disputes*, which was recently finalized by the Subcommittee on Dispute Avoidance and Resolution.

At its twentieth session, the Committee is invited to discuss and approve the attached final version of Chapter 6 for inclusion in the proposed Handbook.

1. At its nineteenth session (Geneva, 15-18 October 2019), the UN Committee discussed the first draft of Chapter 6 on Possible Improvements to MAP included in note [E/C.18/2019/CRP.18](#). The discussion focused exclusively on the following three questions related to mediation that were included in paragraph 7 of the note.

- *Does the Committee consider that mediation would be helpful in MAP cases and should therefore be suggested as a possible improvement?* Different views were expressed on whether the possible use of mediation should be mentioned in Chapter 6. After a number of interventions on this question, the Chair suggested to keep the section on mediation in the chapter but to present it in a more succinct and neutral way, i.e. without suggesting that mediation would necessarily be an improvement and with the addition of explanations as to why mediation does not affect a country's treaty obligations to endeavour to resolve MAP cases and why there is no need to have anything in a treaty to allow the use of mediation. The Committee endorsed that approach and the secretariat was invited to propose changes to that effect in the revised draft that would be discussed by the Subcommittee at its February 2020 meeting.
- *Should the section on MAP mediation include a short description of a country's experience with mediation in the context of domestic dispute resolution?* Given the discussion on the previous question, it was agreed that Chapter 6 would not include any reference to the experience of some countries with domestic mediation, notably because of the differences between MAP and domestic dispute resolution and because the domestic use of mediation would be covered in Chapters 2 and 3.
- *Should the BusCo case study in section 6.6.5 be included in the Chapter and, if yes, should it be modified and should it be kept where it is or divided in different parts?* The Committee did not discuss these questions in enough detail to reach conclusions; it was agreed that the Subcommittee would deal with them at its next meeting and report back to the Committee.

2. It was also noted that a few written comments previously made on Chapter 6 by participants in the Subcommittee on Dispute Avoidance and Resolution remained to be discussed.

3. At its meeting held in The Hague (the Netherlands) on 12-14 February 2020, the Subcommittee was able to address all remaining issues and written comments related to Chapter 6. It made substantial changes to the chapter which are reflected in the attached revised version.

4. At its twentieth session, the Committee is invited to approve the attached version of Chapter 6 for inclusion in the *United Nations Handbook on Avoidance and Resolution of Tax*.

Chapter 6

Possible improvements to MAP

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6.1 Introduction

1. A country that concludes a tax treaty that includes provisions based on those of Art. 25 of the UN or OECD Model has a legal obligation to endeavor to resolve through MAP any admissible case presented to its competent authority under Art. 25(1). Many developing countries, however, have no or little experience with MAP and may therefore need assistance in dealing with MAP cases, which requires not only a good understanding of the MAP process but also of treaty provisions and transfer pricing principles. Even countries with significant MAP caseloads may experience difficulties in solving MAP cases with some of their treaty partners.

2. This chapter examines measures that could possibly improve MAP in these and other cases. Some of these measures have already been used to a limited extent while others have yet to be used.

3. Section 6.2 deals with the provision of technical assistance to a country with respect to one or more specific MAP cases under a program such as the Tax Inspectors Without Borders (TIWB). Section 6.3 refers to capacity-building efforts intended to improve the capacity of developing countries to meet their MAP obligations. Section 6.4 describes how the conclusion of “framework agreements” may help address some of the difficulties that the competent authorities of two countries encounter in dealing with their mutual MAP caseload. Section 6.5 examines how new technologies may facilitate the MAP process. Section 6.6 discusses the possible use of non-binding dispute resolution mechanisms in MAP cases.¹

6.2 Technical assistance with respect to specific MAP cases

4. The competent authority of a country that has no or little MAP experience and that is faced with a MAP request could benefit from the assistance of persons who have expertise of the MAP process and of the relevant treaty provisions.

5. Obviously, few developing countries would be in a position to pay consultants for that purpose. Also, MAP experience is primarily gained through work within the competent authority team of a tax administration. For these reasons, the type of case-specific MAP assistance that would likely be needed by the competent authority of a developing country would seem to be similar to the kind of assistance that is provided to the tax auditors of developing countries’ tax administrations under the Tax Inspectors Without Borders (TIWB) program (see box 1 below).

6. The TIWB program, which promotes hands-on assistance by sending experts to build developing countries’ audit and audit-related skills pertaining to specific international tax matters, could be expanded (or a similar program could be set up) in order to allow the

1 While it has also been suggested that MAP could be improved if a taxpayer could, if both competent authorities agreed in a specific case, access arbitration before the end of the two-year or three-year period provided respectively in Art. 25(5) OECD Model and Art. 25(5) alternative B UN Model, this chapter does not address possible improvements that could result from changing some of the rules applicable to arbitration.

competent authorities of developing countries to benefit from the assistance of former tax officials familiar with the MAP process and the different types of treaty disputes that are typically dealt through that process. Since the TIWB has already developed mechanisms that ensure the respect of confidentiality requirements applicable to the audit function, the same form of assistance could be provided with respect to MAP cases without breaching the similar confidentiality requirements that apply to the MAP process under tax treaties and domestic law.

Box 1. Tax Inspectors Without Borders

Tax Inspectors Without Borders (TIWB) was launched as a joint UNDP and OECD initiative in July 2015, to support countries to build tax audit capacity.

The 2015 Addis Ababa Action Agenda recognized the need to mobilise more domestic resources for development. For many developing countries, this implies strengthening tax and other revenue collection capacities. TIWB was identified as one of the tools to support developing countries to build the capacities of national tax administration and mobilise more domestic revenues for the Sustainable Development Goals.

UNDP's country-level presence and policy and programme expertise in public financial management is complemented by the OECD's technical expertise in international tax matters and access to networks of key players in the tax field. The joint initiative complements the broader efforts of the international community to strengthen co-operation on tax matters.

TIWB Objective

The objective of the TIWB Initiative is to enable sharing of tax audit knowledge and skills with tax administrations in developing countries through a targeted, real time "learning by doing" approach. Selected experts will work with local tax officials directly on current audits and audit-related issues concerning international tax matters and general audit practices relevant for specific cases. This is a specialized area of tax audit assistance, given its focus on providing assistance on real, current cases.

For each TIWB audit assistance programme, the goal will be to enhance capacity in the tax audit practice of the developing country tax administration (Host Administration). Through TIWB Programmes, the Host Administration benefits by improving the quality and consistency of its audits, which in turn brings greater certainty and potentially more revenues for the Host Administration. Over the longer term, the overall investment climate is likely to improve and a culture of taxpayer compliance can be built through more effective enforcement. More broadly, the state-society relationship can also be enhanced through greater engagement and confidence by taxpayers in the taxation process. This may lead ultimately to more effective and accountable governance. TIWB Programmes can complement existing tax-focused assistance programmes, to bring a practical approach to applying new knowledge.

Areas and forms of assistance

TIWB is focused on promoting hands-on assistance by sending Experts to build audit and audit-related skills pertaining to specific international tax matters and the development of general audit skills within developing tax administrations. Experts will work together with tax auditors from the Host Administration on actual audit cases.

TIWB facilitates expert audit assistance in areas such as transfer pricing; thin capitalization; advance pricing arrangements; anti-avoidance rules; consumption taxes (e.g. VAT, GST); high net-worth

individuals; pre-audit risk assessment and case selection; audit investigatory techniques; and industry-specific or sector-specific issues. TIWB does not cover assistance relating to customs matters nor is concerned with providing policy support, advice on legislative changes, issues related to (re)negotiations or other aspects of international tax treaties, or litigation, as existing organisations and programmes already offer support to developing country tax administrations on these matters.

The form and duration of audit assistance can vary, depending on the needs of the Host Administration as well as the types of tax matters involved, the availability of appropriate experts, and funding. For example, it may require eight weeks of assistance over three visits in the course of a six-month period.

Source: <https://www.undp.org/content/undp/en/home/programmes-and-initiatives/tax-inspectors-without-borders.html> and <http://www.tiwb.org/about/>

6.3 Capacity-building related to MAP

7. Technical assistance could also be provided to developing countries that have no or little MAP experience in the form of general training on the MAP process. That type of training, which does not require involvement in actual MAP cases between countries and does not, therefore, raise confidentiality concerns, could be provided at the national or regional level. This training should focus not only on the MAP process but also on the MAP-related commitments of the large number of countries that have joined the BEPS Inclusive Framework.² Active or retired tax officials of the competent authority units of countries that have substantial MAP experience should be involved in that type of capacity-building in order to make it as practical as possible.

8. The United Nations Secretariat and the OECD Secretariat have already started to provide capacity-building workshops on MAP. For example, in 2019 the UN, OECD and World Bank jointly delivered a MAP workshop for developing countries based on the contents of Chapter 4 (Mutual Agreement Procedure) of this Handbook. That workshop combined presentations on the different steps of the MAP process with a case study that allowed participants to gain hands-on experience of that process by working on a fictitious MAP case. That workshop is an example of collaboration between the partners of the Platform for Collaboration on Tax³ which all support, in their different capacities, technical assistance, capacity building as well as knowledge creation and dissemination in developing countries.

9. Training should also be available with respect to MAP arbitration for countries that wish to adopt that mechanism.

² See paragraphs 5 to 8 of Chapter 4 (Mutual Agreement Procedure).

³ The Platform for Collaboration on Tax which is a joint effort of the IMF, the OECD, the UN and the WBG, which 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>.

6.4 Framework agreements

10. The functioning of the MAP may be improved through the conclusion, under paragraph 3 of Article 25, of “framework agreements” between the competent authorities. Such framework agreements may address procedural or administrative issues related to the MAP (as is envisaged by the second sentence of paragraph 4 of the UN Model) or may deal with specific substantive treaty issues. For instance, where several MAP cases raising similar issues are pending, such framework agreements may allow for a quicker resolution of these cases by addressing the underlying substantive treaty issues. This approach was found to be particularly useful in the case of the India-United States tax treaty: within one year of its conclusion, a framework agreement signed in January 2015 facilitated the resolution of more than 100 cases in the information technology (software development and information technology enabled services) sector.⁴

11. The usefulness of such agreements will depend on the specific situation of the countries involved. They may be particularly helpful where there is a large number of pending MAP cases between two countries. They may also be helpful, however, in order to facilitate future discussions between countries that have not previously discussed MAP cases or that had difficulties in addressing a few cases. The agreements would then address administrative issues and procedural issues such as the conduct of regular meetings and the implementation of specific deadlines for the processing of the cases.

6.5 Use of technology

12. Since technology is ever evolving, the question arises of whether new technologies could be used to improve how competent authorities deal with the MAP and, in particular, how technology can complement and make more effective the way competent authorities interact during the MAP process. For developing and least developed countries, resource constraints still pose a great challenge in meeting the requirements for a successful implementation of the MAP. This section briefly describes some technologies that may be particularly relevant to the performance of competent authority functions, especially for procedural matters. New technology can facilitate the contacts and sharing of information between the taxpayers and competent authorities involved in a MAP case, facilitate documentation and filing requirements and help in setting up databases containing information relevant to the work of the competent authorities. The decision to implement any new technology would obviously require, especially for countries that have very few MAP cases, a careful cost-benefit analysis.

13. Technology now offers a range of tools that could be used to facilitate the contacts between the parties in a way which would make such exchanges more secure, structured and low cost by creating a common platform. The common platform may involve the use of secure clouds (i.e. shared platforms that are secure and with controlled access) or shared software (the same software programs deployed in multiple locations that are able to securely communicate

4 Press release dated 16 January 2016 issued by India’s Central Board of Direct Taxes, available at https://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/439/PressRelease_28-1-16.pdf

with each other). Either would make it possible to deliver this sort of capability at much lower costs than in the past. When using these tools, a key consideration is the securing of information shared. Without a secure system, users would be hesitant or, even, prevented by laws or regulations in their jurisdiction from sharing sensitive information.

14. In the context of a MAP, information needs to be shared between the taxpayers and competent authorities and between the competent authorities themselves. In the case of tax treaties with respect to which MAP arbitration is allowed, information also needs to be exchanged between the competent authorities and the members of the arbitration panel (and their staffs, in some cases). This information must be kept confidential and can be extremely sensitive (e.g. the taxpayer's trade secrets). An access control system must be in place to provide adequate permissions to all of these parties.

15. A number of competent authorities are using technical platforms for processing exchange of information requests and the question arises whether these experiences can be shared and how new, innovative technologies may be used by developing countries.

16. One possible approach would be to set up a secure cloud server for the relevant dispute, to which the taxpayer and the competent authorities could upload the documents that they wish to share. The access to the documents would be restricted depending on the folder in which they are stored.

17. Technology might also help in setting feasible time schedules and deadlines as well as organizing the workflow of steps and approvals required by a MAP, thereby contributing to the timely resolutions of MAP cases. Such a scheduling tool could help the parties involved to schedule their meetings more efficiently by synchronizing with their other schedules, sending timely reminders of meetings etc.

18. Technology could provide simpler access to MAP for all taxpayers as well as providing them information concerning developments in their cases. The question of access to MAP does not only concern the availability of existing information, but also the submission of new information and even the filing of a MAP request. A common platform may help ensure that relevant data is structured and presented in a consistent way, facilitating its treatment. The documentation required to file a request for MAP could also be provided online, where it could easily be updated and accessed by the competent authorities. Ideally, the tool would include pre-programmed information concerning the type of documents necessary and a separate upload of each document type would be possible.

19. Similarly, where arbitration may be used to resolve issues that arise in a MAP case, technology could facilitate cost-effective cooperation between the competent authorities and/or the arbitrators as regards communications, meetings with arbitrators and transfer of documentation.

20. In addition, technology could help the competent authorities with time management concerning MAP cases prior to arbitration. The deadline within which the MAP has to be

solved and the timeframes recommended for certain actions within that deadline may be automatically calculated and an additional electronic notification shall be sent as an “alert” to each of the officials assigned to a MAP case, letting them know that the deadline to complete a MAP prior to arbitration is approaching.

21. Technology could also help protect the privacy concerns of taxpayers in arbitration. Since arbitration involves third parties who may receive sensitive information belonging to the taxpayer in an arbitration process, technology could help provide a secure and protected environment under which such information is accessible to the arbitrators for limited use under the arbitration process.

6.6 Non-binding dispute resolution (NBDR) mechanisms

6.6.1 The possibility of using NBDR in the MAP context

22. As explained in Chapter 5, following amendments to both the OECD and UN models, countries, especially those with long experience with MAP, have undertaken to resolve “stalled” MAP cases by way of arbitration. The arbitration procedure applicable to the relevant tax treaties is part of the MAP process and is only triggered where negotiations between the competent authorities have been unsuccessful for a two⁵ or three⁶ year period.

23. It has been suggested that expert evaluation, mediation and other forms of Non-Binding Dispute Resolution (“NBDR”) could constitute an alternative (e.g. for countries which question the appropriateness of arbitration for resolving tax disputes in their respective contexts), or a precursory step, to arbitration.

24. NBDR as discussed in this section would not require any prior commitment to a binding resolution of the matter in dispute. It would be part of the MAP process and if the competent authorities were able to resolve a case through the assistance of NBDR, they would implement the agreed solution though the conclusion of a mutual agreement as in any other case resolved through the MAP.

25. The Commentary on Article 25 of both the OECD and UN models recognizes the possibility of using NBDR in order to assist in the resolution of MAP cases. As noted in paragraphs 41 and 41.1 of the UN Commentary:⁷

41. It is recognized that, for some countries, the process of agreement might well be facilitated if competent authorities, when faced with an extremely difficult case or an impasse, could call, either informally or formally, upon outside experts to give an advisory opinion or otherwise assist in the resolution of the matter. Such experts could be persons currently or previously associated with other tax administrations and possessing the requisite experience in this field. In essence, it would largely be the personal experience of

5 Art. 25(5) OECD Model.

6 Paragraph 5 of Article 25 (alternative B) UN Model.

7 See also paragraphs 86-87 of the OECD Commentary.

these experts that would be significant. This resort to outside assistance could be useful even where the competent authorities are not operating under the standard of an “agreement to agree”, since the outside assistance, by providing a fresh point of view, may help to resolve an impasse.

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

26. Unlike arbitration, where the arbitrators provide a solution to issues that the competent authorities are unable to resolve within a certain period of time, NBDR would involve an independent third person who could facilitate the reaching of an agreement but who does not decide the case for the parties (which is why this approach is referred to as “non-binding”).

27. A widespread form of multi-tiered dispute resolution mechanism found in non-tax international treaties and commercial contracts is to: (i) give the parties a certain timeframe for reaching agreement through negotiation; (ii) then obtain input of an expert and/or mediator; and (iii) finally, if these “non-binding” attempts are not successful within the fixed timeframe, the dispute can (or must) be escalated to binding dispute settlement (e.g. arbitration).

28. While there does not seem to be any tax treaty that provides for the use of a similar multi-tiered process, it has been suggested that the type of NBDR described in (ii) could be used in MAP cases. Proponents of that suggestion refer to the fact that NBDR has been used by a number of tax administrations, with varying degrees of success, to facilitate the resolution of domestic tax disputes.

29. It should be noted, however, that the experience of NBDR in the domestic tax context may not be easily transferred to the MAP context because the MAP process involves tax officials from two countries rather than a taxpayer and the tax administration of a country. Although NBDR is frequently used in the domestic tax context, there is no reported case where NBDR has been used to successfully resolve a MAP case.

30. This section focusses on the possible use in the MAP context of two specific NBDR mechanisms – expert advice and mediation.

31. Expert advice is a NBDR mechanism that consists of a technical expert reviewing evidence presented by both parties.⁸ This procedure involves an independent third party acting as an expert and rendering advice, in contrast to a judge or arbitrator appointed to decide a dispute. In such a procedure, the determination made by the expert is advisory in nature with respect to the issue referred to by the parties. In a non-tax context, expert advice is especially useful with respect to disputes of valuation as well as disputes of a purely technical nature in commercial or business sectors,⁹ including in particular financial services, hydrocarbons, environmental issues, water resources, or renewable energy sources.

32. Mediation is a form of process-related assistance that involves the use of a mediator or facilitator to aid in solving a dispute. As with expert advice, the input of a mediator is advisory in nature. The degree of activity of the mediator can range from a rather passive to a more active role, depending on the needs of the parties and the nature of the dispute. It can include, for instance, monitoring the treatment of the dispute, making process-related suggestions, facilitating the discussions, identifying missing information, discussing with the parties the strengths and weaknesses of their respective arguments and offering input on total or partial solution of the dispute via compromise of respective positions. This mechanism is frequently used to resolve various types of disputes outside the MAP context.

6.6.2 Different views on the appropriateness of using NBDR in the MAP context

33. Proponents of using NBDR in the MAP context suggest that doing so could have the following benefits:

- May help develop confidence in international tax dispute resolution under the UN Model in a manner consistent with each country’s comfort level and allow the competent authorities to maintain control of the case resolution.
- May help clarify complicated issues and fact patterns and better target the discussions between tax authorities, thereby allowing them to reach a MAP agreement more efficiently.
- May provide a flexible and cost-efficient way for the competent authorities to get the views of third parties on disputed issues.
- May provide a means of “leveling the playing field” where the experience of the competent authorities is unequal.

34. Others, however, argue that the addition of NBDR to the MAP could have the following disadvantages:

- As NBDR is not binding, there is no guarantee that the case will be resolved.
- If no agreement is found through the NBDR process, the dispute remains unresolved despite the additional costs incurred. While the MAP process would then continue, the

8 http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf.

9 Ibid.

NBDR may have caused further delays, which may be particularly relevant where the dispute has also been submitted to the domestic litigation process in one or both countries.

- Time and resources would need to be used to develop and test NBDR in the MAP context.
- Finding independent third parties that have the appropriate skills and the necessary confidence of both parties may require time and efforts.

6.6.3 Possible use of expert advice and mediation in MAP

35. In the MAP context, expert advice could involve the competent authorities relying on the services of a professional with experience in the issues that the parties are unable to resolve.

36. It has been suggested that mediation could be adapted to the MAP process in specific situations. It could, for instance, be used between countries with different levels of experience to try to build confidence and experience in the handling of MAP cases or to overcome an impasse.

37. A mediator could offer an opportunity for the CAs to view a specific case, or the MAP process itself, from a different perspective. Such perspective could be acquired through the mediator's restatement of the positions or of the critical issues, which could highlight elements of the case or procedural context that are not possible to be recognized when seen from the perspective of a tax administration which seeks to resolve a MAP while keeping in mind the need to protect its country's taxing powers in accordance with the relevant treaty provisions.

38. As explained in Chapter 4, treaty provisions based on Article 25 of both the OECD and UN models impose a legal obligation on the competent authorities to endeavour to resolve admissible MAP cases presented pursuant to Art. 25(1). These treaty provisions do not, however, prescribe the process through which the competent authorities should do so. Subject to the possible application of other treaty provisions (including in particular the confidentiality requirements of Article 26), the competent authorities are therefore free to use mechanisms such as NBDR when seeking to resolve MAP cases and, to the extent that such mechanisms are non-binding, no treaty provisions are required in order to allow their use. The use of such mechanisms does not, however, restrict the competent authorities' obligation to endeavour to resolve MAP cases: a competent authority could not, therefore, justify a failure to genuinely attempt to resolve a MAP case on the fact that NBDR was used in that case.

39. Since NBDR mechanisms do not require competent authorities to implement solutions with which they do not agree, it is unlikely that a country which has committed to MAP would have serious domestic law issues with using such mechanisms. To the extent that a competent authority has the legal authority to negotiate a MAP case and enter into a mutual agreement,

domestic law is unlikely to prevent it from committing, when doing so, to a process whose outcome is not binding upon it without its consent.¹⁰

40. A different issue is whether countries should provide the terms and conditions for the use of NBDR for MAP proceedings on a case-by-case basis or adopt a general framework for doing so.

41. If they are determined on a case-by-case basis, these terms and conditions could be agreed informally by the competent authorities when deciding to use NBDR in a specific case or could be documented more formally in a procedural mutual agreement concluded under Art. 25(3). The conclusion of such a procedural mutual agreement would seem more important if competent authorities decided to implement NBDR through a general framework that could apply to multiple cases. Such a general framework could avoid the need to renegotiate over and over the process through which NBDR could be used. On the other hand, a disadvantage could be inflexibility, especially if the rules cannot easily be amended.

42. An alternative approach could be to agree, through a procedural mutual agreement, on a general framework with a set of default rules and allow the competent authorities to negotiate alternative or additional rules applicable to any specific case.

43. The terms and conditions governing the use of NBDR as part of the MAP process could include the following:

- Nature of the procedure: expert advice or mediation, or the option to combine both.
- When and how should NBDR be initiated.
- Whether the use of NBDR would be mandatory.
- How to determine the issues to be submitted to NBDR.
- The different stages of the NBDR procedure and whether some of them could be omitted in specific cases.
- If necessary, clarification of the interaction with other domestic administrative or court proceedings and tax treaty arbitration (if available).
- Default timelines.
- The process of selection of the expert or mediator.
- The role, function and attributions of expert or mediator.
- The interaction between the expert and the mediator if they are different and both are used in the same case.
- Issues related to the eligibility, qualifications, potential conflicts of interest (and disclosure thereof), vetting, and appointment of the expert or mediator.

10 The extensive practical and legal experience with the use of NBDR in non-tax areas may be consulted for guidance on domestic legal aspects.

- Impartiality obligations and rules on the safeguarding of the independence of the expert or mediator.
- The confidentiality obligations of the expert or mediator and the regime applicable to disclosed information.
- Guidance on whether information submitted or proposals made during NBDR discussions may be disclosed in subsequent court proceedings or other contexts (so-called “without prejudice rules”).
- Logistical aspects of the NBDR process (place, language, translations, participants, transcripts and meeting minutes etc.).
- Whether the expert or mediator is allowed to communicate separately with a competent authority in the hope of finding grounds for mutual agreement without disclosing the contents of the discussion and/or results with the other competent authority.
- The possibility and extent of the participation of the taxpayer.
- The termination of proceedings.
- Who should pay the costs of the NBDR process.

Many of these issues are similar to those addressed in the parts of Chapter 5 and of the Commentaries of the UN and OECD models that deal with the logistical aspects of arbitration.

44. As already noted, NBDR could be envisaged either in the absence of MAP arbitration or as a supplementary means of dispute resolution preceding arbitration.

45. NBDR as a precursory step to arbitration could increase the efficiency of arbitration, notably because the arbitration could more easily focus on the key issues and could, if the competent authorities agreed, make use of specific fact findings or economic evaluations made by an independent expert.