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Dispute avoidance and resolution

**Chapter on Domestic Dispute Resolution Mechanisms 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 nineteenth session of the Committee to be held in Geneva on 15-18 October 2019.

The note includes the final version of Chapter 3 (Domestic Dispute Resolution Mechanisms) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*, which was recently finalized by the Subcommittee on Dispute Avoidance and Resolution.

At its nineteenth session on 14-18 October 2019, the Committee is invited to discuss and approve the attached final version of Chapter 3 for inclusion in the proposed Handbook.

1. At its eighteenth session (New York, 23-26 April 2019), the UN Committee discussed a first draft of Chapter 3 on Domestic Dispute Resolution Mechanisms of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*. The following excerpt from the report of the meeting summarizes the discussion and the decisions taken by the Committee:

After a brief presentation of chapter 3 on domestic dispute resolution mechanisms, the Committee was invited to comment on the scope of the chapter. In response to a Committee member who asked why the Subcommittee had decided that chapter 3 and the handbook would not deal with disputes related to VAT, the secretariat explained that, as reflected in the chapter on the mutual agreement procedure, the focus of the handbook was on income taxes and the Subcommittee had not sought to substantively address VAT disputes.

Another Committee member added that, in his country, the same dispute resolution mechanisms applied to both VAT and income tax disputes, and it was suggested that this type of situation could be mentioned in the handbook. The secretariat observed that the Subcommittee had already agreed to recognize that possibility, as indicated in the first bullet point of paragraph 3 of the cover note.

In response to another question, Mr. Sasseville, of the secretariat, explained that section 3.3.3 on collection considerations did not deal with disputes related to collection, but with the issue of whether payment of disputed taxes was a condition for having recourse to a dispute resolution mechanism.

The Chair concluded the discussion by repeating the invitation, contained in paragraph 5 of the cover note, that Committee members and State observers wishing to send written comments on the preliminary draft of chapter 3 should do so by email to the secretariat before 31 May 2019.

2. Written comments on the draft discussed at the Committee's meeting were subsequently received from a number of Subcommittee's participants, members of the Committee and observers.

3. Each of these comments were discussed at the meeting of the Subcommittee on Dispute Avoidance and Resolution held in Warsaw, Poland, on 1-3 July 2019. The attached revised draft reflects the decisions reached by the Subcommittee as a result of that discussion.

4. At its nineteenth session on 15-18 October 2019, the Committee is invited to approve the attached version of Chapter 3 for inclusion in the *Handbook on Dispute Avoidance and Resolution*.

Chapter 3

Domestic Dispute Resolution Mechanisms

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3.1 Introduction

3.1.1 Overview

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

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

3. The goal of this chapter is to provide practical guidance to countries that wish to improve certain aspects of their domestic dispute resolution process. These include both mechanisms that are created within, and thus as part of, the tax administration, as well as mechanisms that operate independently of the tax administration. Practice has shown that countries around the world have often chosen to adopt several different dispute resolution mechanisms instead of just relying on one. Countries should therefore determine which of the mechanisms described best suit their circumstances, the nature of the tax disputes that typically arise for their tax administration and their own legal framework (including the manner in which the taxpayer's right to a fair and transparent process and to the rules of natural justice are protected at each level of the resolution of a tax dispute).

3.1.2 Disputes covered by this chapter

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

1 Including corporate taxes. It should be noted however, that these mechanisms could also be useful to resolve disputes regarding the application of other types of taxes, such as value-added taxes (in some countries, the same dispute resolution mechanisms apply to income taxes and value-added taxes).

5. Also, this chapter does not deal with disputes concerning the exercise, by the tax administration, of its enforcement and collection powers including disputes concerning information exchanges and documentation requirements. These types of disputes do not relate to issues related to the determination of taxes payable and often involve the application of dispute resolution mechanisms generally applicable to the review of governmental actions.

3.1.3 Importance of resolving disputes

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

7. It is of critical importance for both the tax administration and taxpayers that disputes, when they arise, are addressed and resolved as quickly and efficiently as possible. Ensuring effective resolution of disputes will contribute to and enhance public confidence in the integrity of the tax administration as collector of tax revenues for the government.²

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

9. Dispute avoidance mechanisms described in Chapter 2, such as some forms of mediation, may sometimes be initiated by a taxpayer whose case before the tax administration is still at the examination stage. Such mechanisms, which may prevent a dispute from formally arising, do not eliminate the need for the mechanisms described in this chapter which are aimed at disputes that have formally arisen.

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

3.2.1 Main types of disputes

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

2 While this chapter does not deal with disputes of a general policy nature, such as concerns by taxpayers over the adoption of new audit or collection policies or the issuance of new tax forms, it is also important that tax administrations provide avenues to address such disputes with taxpayers as doing so will contribute to the public confidence in the tax administration.

- disagreements regarding the amount of taxable income calculated by the taxpayer,
- disagreements regarding the taxpayer’s choice of transfer pricing method used to value transactions between the taxpayer and its associated enterprises,
- disagreements concerning the availability or computation of foreign tax credits,
- disagreements regarding the character of items of income for tax purposes,
- disagreements regarding the existence or non-existence of a permanent establishment,
- disagreements regarding the taxpayer’s country of residence.

11. Disputes between the tax administration and taxpayers relating to the amount of tax liability may involve disagreements as to the facts on which the tax liability is based, disagreements on the interpretation of the tax law or disagreements on questions that are both factual and legal. In some countries, certain dispute resolution mechanisms are restricted to disputes concerning facts while disputes concerning the interpretation or application of the law must be dealt with by courts.³

3.2.2 Main types of domestic dispute resolution mechanisms

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

13. The first type of dispute resolution mechanism (discussed in section 3.4.1) allows for a taxpayer that disputes an action or actions of the tax administration to request a review of the action in question by a separate appeals office within the tax administration.⁴ An administrative appeal may be requested to review the conclusions of a review or audit that potentially affects the amount of tax liability owed. An essential aspect of the administrative appeal procedure is that while it is carried on by officials who belong to the tax administration, these officials must operate independently from the office that took the action being appealed from. Also, where the official who conducts the administrative appeal disagrees with the original decision or action of the tax administration, this official should be authorized to modify the decision or action accordingly so as to ensure the resolution of the dispute.

14. The second type of dispute resolution mechanism discussed (section 3.4.2) may be referred to as “administrative mediation”. Through such procedure, officials of the tax

3 Throughout this chapter, a reference to a court is generally intended to cover a “quasi-judicial tribunal”, which is a body independent from the tax administration and set up by law which, although not technically a court of law, has the power to adjudicate disputes and does so through a process similar to the process followed in a court. See section 3.5.1.

4 As indicated in note 15, the office in charge of such “administrative appeal procedure” will often be the office that has the initial responsibility to address taxpayers’ objections.

administration trained in dispute resolution techniques facilitate the dialogue between the relevant officials in the tax administration and the taxpayer with the aim of helping to resolve the dispute. Whereas under the procedures for administrative appeals and independent reviews of audit position the intervening parties provide their own analysis of the action or actions taken by the tax administration that led to the dispute, the role of the mediator is merely to enhance the communication between the disputing parties and facilitate an agreed resolution of the matter. Through such facilitation, the mediators assist the parties in clarifying and understanding each other's positions or forming a mutually acceptable compromise.

15. The remaining dispute resolution procedures discussed in this chapter (section 3.5) involve parties that are independent from the tax administration. First, resolution of a tax dispute through the judicial system is allowed under the legal framework of almost all countries (section 3.5.1). The parties in dispute will often first attempt to resolve a dispute through other means, such as through administrative appeals, because these other means may resolve the dispute more quickly and avoid the financial costs of litigation for both the taxpayer and the tax administration. In fact, some countries require that, as a general rule, a taxpayer must first use available administrative appeals mechanisms before a case may be brought to courts. Subject to any judicial appeal rights, court decisions are binding on both parties to the dispute.

16. Some countries have established, as an alternative to the civil courts of general jurisdictions, specialized courts that deliberate only on matters related to taxation (section 3.5.2). These specialized courts have a number of advantages. First, their narrower jurisdiction allows for the design of a more streamlined and time-efficient process for hearing cases. They also allow a more targeted staffing of judges who have prior expertise in taxation. This facilitates a judge's ability to understand and decide tax disputes, which are often very technical in nature.

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

18. Section 3.5.4 briefly discusses the independent mediation mechanism, a function that is sometimes offered by a tax ombudsman service. Section 3.5.5 addresses expert determinations, a mechanism that is available in some countries to solve purely factual questions.

19. The final type of dispute resolution mechanism, which is described in section 3.5.6, is the independent arbitration of disagreements between the tax administration and the taxpayer. That section briefly describes the structure and operation of an arbitration procedure, including how a purely domestic arbitration procedure differs from the mutual agreement procedure

arbitration procedure found in some bilateral income tax treaties. A more detailed description of the latter type of arbitration is provided in Chapter 7.

3.3 Common issues for domestic dispute resolution mechanisms

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

3.3.1 Ability to reach compromise solutions

21. There are significant differences in the ability of tax administrations to negotiate and accept compromise solutions to tax disputes.

22. In some countries, the tax administration has a broad discretion to accept a solution that would depart from its original position in order to resolve a tax dispute at the administrative or judicial level. In the United States, for example, it is possible for taxpayers and tax authorities to reach “negotiated settlements” in order to settle a tax dispute at the administrative appeal stage or even after litigation has been undertaken. In that country, the risks inherent to the litigation process is an acceptable justification for a negotiated agreement that results in the payment of a lower amount of tax (and of interest and penalties) than what the tax administration originally claimed even if the tax administration considers that its original claim is justified.

23. Tax administrations that have the power to negotiate in this manner, however, must typically follow certain principles in reaching compromise solutions.

24. In some countries, such as Ecuador and Peru, the tax administration does not have the legal authority to depart from what it considers to be the tax payable under the law and cannot, therefore, reach a negotiated solution. In such a case, the tax administration must recognize that its original position, or part thereof, was not justified before it can agree, in the context of an administrative dispute resolution mechanism, to reduce the amount of tax initially assessed.

25. Where a tax administration has the authority to negotiate compromise solutions, this negotiation is usually not an “all or nothing” discussion and the reviewing official is normally able to settle the matter for a portion of the disputed tax in order to allow for the prompt resolution of the dispute without the need for litigation. Jurisdictions where the tax administration is allowed to negotiate compromise solutions during the administrative review or appeal process resolve a large number of cases at this level without the need for litigation.

26. The nature of negotiated compromise solutions requires that a degree of discretion must be given to the official of the tax administration who negotiates with the taxpayer. This may be problematic in countries where corruption of public officials and political interference are serious risks. It is for that reason that some countries do not give their tax administration the legal authority to negotiate compromise solutions. These risks may be partly mitigated by

requiring the review of each compromise solution by a panel consisting of members of the tax administration with appropriate expertise who did not have any prior involvement in the particular dispute. It is also possible to reduce these risks through the public disclosure of the strict parameters within which compromise solutions may be reached (see, for example, the United Kingdom's *Litigation and Settlement Strategy*⁵). In many countries, the ability to reach compromise solutions on a principled basis is a normal attribute of the tax administration and its exercise does not require any specific framework.

3.3.2 *Time limits*

27. Countries commonly provide, in their domestic laws and/or administrative practices, time limitations for the tax administration and taxpayers to take certain actions, such as reviewing or amending a properly filed tax return. Once a tax return has been correctly submitted, the tax administration is typically allowed a certain period of time to review and assess additional tax regarding the taxable period covered by the return, at least as long as the taxpayer acted in good faith.⁶ Similarly, a taxpayer that wishes to amend a return that has been previously submitted must typically do so within a certain period of time.

28. Time limits such as these are essential to ensure that taxpayers acting in good faith are not exposed to a review of their tax liability many years after the relevant taxable events took place, when the information related to these events may no longer be available. Also, a tax administration should not be exposed to having to issue a tax refund for a given tax year decades after that tax year.

29. Time limits, however, may create issues when implementing a domestic dispute resolution mechanism.⁷ The following basic example illustrates the difficulty: assume that in 2018 the tax administration of State A audits a return for the year 2014 that was correctly submitted by the taxpayer in 2015. As a result of the audit, the tax administration assesses additional tax of 100, and issues a notice of assessment for that additional tax. The taxpayer disagrees with the assessment and seeks recourse through the applicable administrative appeal procedure. That procedure continues into 2019. In appeals, the amount of additional tax assessed by the tax administration is reduced from 100 to 25. The taxpayer accepts the reduced assessment.

30. Assume that, under the domestic law of State A, the tax administration may only modify a tax assessment within a period of three years following the proper filing of the return by the taxpayer. In this example, while the preliminary assessment of 100 of additional tax was within the statute of limitations, the reduction in the assessment to 25 as a result of the administrative appeal is technically beyond the general deadline provided by domestic law.

5 Available at <https://www.gov.uk/government/publications/litigation-and-settlement-strategy-lss>.

6 In many countries, no time limit is applicable in case of tax evasion or similar conduct by the taxpayer.

7 Similar issues arise with respect to the implementation of the mutual agreement procedure of tax treaties; see section 5.4.6 of Chapter 5.

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

32. While the example above illustrates the importance of extending time limits in order to fully implement an administrative appeals resolution, the same is true for other dispute resolution mechanisms, all of which can be time consuming. It is equally critical in situations when a dispute has been submitted to arbitration or review by a tax ombudsman, or if the parties litigate the dispute in the courts, for statutory time limits to be extended in such a way to allow whatever resolution is reached to be fully implemented.

33. In some jurisdictions, with the agreement of the taxpayer, tax authorities may be able to extend the time period for assessment of additional tax. Such an extension may be requested during an examination of the taxpayer's return, where the revenue authority has not yet finished its review or, where this extension is not already provided by law, during the administrative appeal or judicial process (in order to allow the outcome of that process to be implemented). In some countries, taxpayers may be able to request that an extension of the time period be limited to certain issues, meaning that the revenue authority may assess additional tax only with respect to those issues.

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

3.3.3 Collection considerations

35. Where tax payable, penalties or interest are assessed, the amount assessed must be collected. A number of collection tools are typically available to tax administrations for the purpose of collecting tax from taxpayers who fail to remit the appropriate amounts payable on time.⁸ Collection procedures typically begin with the tax administration sending to the taxpayer a written request for payment with a stated deadline. If payment is not received within the specified deadline, imposing levies or liens on a taxpayer's bank accounts or other property may become necessary. Where the taxpayer is unable to pay the amount assessed, jurisdictions may permit a taxpayer to enter into a compromise with the tax authority to pay a lesser amount and/or pay the liability in instalments over a period of time.

36. Where the amount of tax owed is under dispute, the question typically arises as to whether the disputed amount should be immediately collected. A program for administrative appeals or mediation should encourage good faith engagement and negotiation by both parties

8 Note that a number of countries have included in their tax treaties provisions similar to those of Article 27 of the UN and OECD models through which they agree to assist the other treaty country in collecting finally determined taxes, as well as related interest and penalties, owed to that country.

to the dispute. For example, the tax administration may find it more difficult to resolve the dispute if it considers that it may have to refund taxes already collected. To that end, it is advisable that collection actions be suspended with respect to a disputed amount of tax, interest and penalties once a case has been submitted to administrative appeals, mediation or judicial litigation or, at least, that such a suspension be allowed in cases of hardship. Such a suspension could be associated to the requirement of providing an appropriate guarantee (e.g. to prevent the risk of a taxpayer leaving a country or disposing of all its assets before the conclusion of the dispute resolution process); it could also be subject to conditions intended to prevent procedural delays aimed at postponing collection.

3.3.4 Penalties and fines

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

38. There are various types of penalties which may be imposed, depending on local law. Delinquency penalties may be imposed on taxpayers who fail either to pay a tax liability or to file required tax forms. Accuracy-related penalties may be asserted where a taxpayer fails to report the correct amount of tax due and underpays the correct tax liability. Penalties may generally be based upon a taxpayer's negligence or careless, reckless or intentional disregard of the tax law. Penalties may also be asserted where the taxpayer has undertaken a transaction that is specifically designed to avoid tax. These penalties may be imposed by the tax administration, subject to the taxpayers' right to challenge their application before the courts, or may require penal proceedings before a court.

39. A revenue authority may consider waiving or removing a penalty if the taxpayer can prove that it had reasonable cause for its failure to comply with the various obligations. For example, penalties may be inappropriate if circumstances leading to non-compliance were beyond the taxpayer's control, or where the taxpayer properly relied upon the advice of the revenue authority, a tax professional, or legal precedent such as court decisions.⁹

40. There are instances in which, as part of the resolution of the dispute, it is appropriate to reduce or even waive certain penalties that have been imposed on the taxpayer. In particular, penalties that are computed as a percentage of tax liability should be adjusted in a manner that is commensurate with any reductions in the tax liability that resulted from the resolution of the dispute. The same is true for any interest charged to the taxpayer that is based on the amount of tax liability. The extent to which penalties and interest may be reduced or eliminated should be clear with respect to any dispute resolution mechanism.

3.3.5 Jurisdictional issues

41. Certain dispute resolution mechanisms do not apply to particular types of tax disputes and the question will sometimes arise as to whether a particular dispute may be dealt with under a specific domestic dispute resolution procedure. For example, in some countries, general

9 The U.S. and the U.K., for example, provide for this concept of "reasonable cause."

courts are not allowed to decide issues related to the constitutionality of tax legislation, such issues being the exclusive jurisdiction of a constitutional court or similar body. There are also countries where the jurisdiction of courts that generally deal with tax matters is restricted to questions of law so that purely factual matters cannot be decided by these courts. It is also possible that quasi-judicial tribunals and arbitrators are prevented from addressing arguments related to human or procedural rights.

42. Also, in some countries, access to administrative appeals is not allowed for certain classes of tax disputes, such as cases that raise issues that are currently under consideration in the domestic court system, cases containing issues with no legal precedent or cases containing issues for which domestic courts in different regions have rendered conflicting decisions. A further example is provided by rules that provide that the availability of a particular dispute resolution mechanism depends on the amount of tax in dispute.

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

44. To the extent that it is already known, any restriction on the jurisdictional scope of a particular dispute resolution mechanism should be disclosed in publicly-available guidance so that taxpayers seeking recourse to resolve a tax dispute are aware of which mechanisms are at their disposal. Not all jurisdictional questions may be anticipated, however, and it is therefore important to provide mechanisms for the judicial resolution of jurisdictional issues that have not previously been addressed.

3.3.6 Coordination with other dispute resolution mechanisms

45. In the event that a country makes available more than one mechanism for resolving tax disputes, it is important to ensure a proper coordination between such mechanisms. It may be the case that certain dispute resolution mechanisms could and in fact are intended to apply simultaneously with regard to a particular dispute. In other cases, it would be more appropriate to allow certain mechanisms to apply alternatively or sequentially. Any applicable rules concerning such coordination should be made publicly available in order to avoid taxpayers pursuing the wrong dispute resolution mechanism.

46. For instance, in many countries (e.g. Belgium and India), taxpayers are generally required to try first to seek resolution of a tax dispute through the applicable administrative appeal procedure before being able to seek redress through the court system. Such a rule seeks to avoid the time and financial costs of pursuing judicial litigation where there is a reasonable chance that a dispute may be resolved by the tax administration. In some cases, however, it should also be possible for the taxpayer and the tax administration to agree to bypass the administrative appeals process, for instance in a case where a taxpayer intends to challenge in court a well-documented administrative practice of the tax administration.

47. Another example applicable to cross-border transactions is where a tax dispute includes a disagreement concerning the interpretation or application of a tax treaty. As is explained in detail in Chapter 5, almost all modern tax treaties contain provisions on “mutual agreement procedure” that allow a taxpayer who considers that there has been taxation not in accordance with the terms of the tax treaty to bring its case to the competent authorities designated in these treaties. The coordination between domestic dispute resolution mechanisms and the mutual agreement procedure is an important issue. While most countries will allow the mutual agreement procedure and domestic recourses to be initiated in parallel, they will also often want to ensure that both processes are not actively pursued simultaneously in order to avoid the risk of conflicting decisions.¹⁰ Also, most countries will wish to avoid situations where the competent authorities would conclude a mutual agreement that would be binding on the tax administrations but where the taxpayer could resume or initiate judicial proceedings in order to obtain a different result in one of these countries.¹¹

48. As a further example, the administrative mediation procedure described in section 3.4.2 below is intended to serve as a complement to other dispute resolution mechanisms that are provided by the tax administration. The role of a mediator is to facilitate communications between the taxpayers and the tax administration to help them reach a mutually satisfactory settlement. It follows that administrative mediation is typically available even when a case has reached the stage of administrative appeals or independent review to facilitate communications during those two processes. It also follows, however, that administrative mediation will typically not be available with respect to disputes that have been submitted to courts (such disputes, however, may then be eligible for the type of independent mediation discussed in section 3.5.4).

3.3.7 Admissibility of additional documents, evidence or arguments

49. A tax official or independent party involved in the resolution of a tax dispute needs access to information concerning that dispute. In most cases, information and arguments already communicated with respect to the dispute should be available to such person subject to the confidentiality requirements referred to in the next section. Different policy considerations, however, govern whether and to what extent these persons should be able to obtain and consider documents, evidence or arguments that were not previously presented. For instance, information that is relevant to the resolution of a dispute should be communicated to the tax administration as soon as possible in order to prevent resources from being allocated to the processing of a dispute that could otherwise have been easily avoided or resolved. Also, where a taxpayer or the tax administration is only allowed to appeal the decision of a court on the basis that a question of law was wrongly decided, the limited scope of the appeal process would be easily circumvented if, in the course of the appeal, a party to the dispute were allowed to raise legal arguments that were not presented to the court that reached the decision that is appealed from.

10 See section 5.4.2.7 of Chapter 5.

11 See section 5.4.5.2 of Chapter 5.

50. For these and other reasons (such as differences in legal systems), there are often restrictions on the ability of both taxpayers and tax administrations to refer to previously undisclosed documents or information, or to raise novel arguments, under different dispute resolution mechanisms. Tax administrations are encouraged to make publicly available guidance for taxpayers regarding not only what information needs to be included in a valid request for dispute resolution but also which restrictions, and exceptions thereto, are applicable as regards the documentation and arguments that may be raised in the context of the relevant dispute resolution process. It will not always be possible or appropriate, however, to prevent a person responsible for resolving a tax dispute from considering relevant information that was not disclosed to the tax official or officials who took the action that led to a dispute. In such cases, the best course of action may be to remand the case back to these officials for further consideration (as is done in the United States).

3.3.8 Confidentiality

51. Officials of a tax administration who are involved in processing tax disputes will generally be subject to strict legal requirements concerning the confidentiality of taxpayer data. By contrast, when individuals who are not tax officials are involved in the resolution of tax disputes, such as when a tax ombudsman is established as an organization separate from the tax administration or when outside experts are appointed to an arbitration panel or to act as mediator, it is important to ensure that such individuals or organizations are subject to the same or similar confidentiality requirements. This may be provided by legislation or by requiring the relevant individuals to execute legally binding confidentiality agreements.

52. In a large number of countries, however, court proceedings are public and the names of taxpayers involved in tax litigation, as well as relevant documentation, are publicly available. Thus, when a tax dispute reaches courts, confidentiality requirements may no longer apply as regards what is disclosed to the court or tribunal. Rules vary considerably among countries, however, and even in countries where public disclosure of judicial proceedings is the rule, the name of the taxpayer involved may remain confidential and exceptions may be allowed with respect to sensitive information.

3.3.9 Measuring effectiveness

53. Confidentiality requirements do not prevent a country from collecting and disclosing aggregate statistics concerning the outcome of cases processed through dispute resolution mechanisms. This could be done, for instance, by the tax administration as regards the tax disputes that it processes and by each court as regards the disputes that it is requested to resolve. Such statistics, which are produced by many countries, contribute to the determination of whether a particular dispute resolution is effective and to the identification of potential areas for improvement. Such statistics could include general information such as the number of cases processed, the break-down of cases based on their outcome (e.g. resolved in favor of the taxpayer or in favor of the tax administration), the average time required to process cases and the percentage of cases dealing with some topics that frequently arise in practice. A good

example are the statistics on the mutual agreement procedure that are produced by countries that are members of the Inclusive Framework on BEPS.¹²

3.3.10 Tax expertise of individuals in charge of resolving tax disputes

54. It is important that the individuals who have been tasked with resolving tax disputes possess sufficient expertise in the relevant taxation rules. In the case of dispute resolution provided by the tax administration (e.g. the administrative appeal procedure described in section 3.4.1), this should generally not be an issue as long as sufficient budgetary resources are allocated to that function so that appeals officials are experienced and well-trained. Involving individuals with tax expertise is equally important where dispute resolution is provided by independent parties: taxpayers and tax administrations are unlikely to be satisfied by decisions of domestic arbitration panels that would reveal that the members of the panels lack expertise in the relevant taxation laws and rules.

55. Given the broad jurisdiction of some courts, however, it may be difficult to ensure that a tax dispute is heard by a judge that possesses extensive tax expertise, which may be particularly problematic with respect to complex tax cases. One solution that has been adopted by many countries is the establishment of a specialized tax court or tribunal, or a specialized tax unit within a more general court, whose jurisdiction is exclusively or primarily restricted to tax disputes. Such specialized bodies are more likely to attract and retain judges and members who have tax expertise and, through internal discussions and the sharing of decisions, further contribute to the development of the expertise of these individuals. Countries, however, need to weigh the potential costs and benefits associated with the establishment of such specialized bodies. For instance, if relatively few tax-related cases are typically heard in a country's civil courts, it may be difficult to justify the resources required to establish a specialized judicial body.

3.3.11 Reliance on precedents

56. Another issue that is common to all domestic dispute resolution mechanisms is the extent to which a specific tax dispute may or should be decided based on decisions already rendered in similar cases.

57. The courts of most countries have well-developed rules and principles applicable to the question of whether and to what extent judges have to follow a decision on a similar issue that was previously rendered by a court of the same country (typically referred to as a legal precedent). In most cases, lower courts are expected to follow precedents from courts, in particular supreme courts, that hear appeals from decisions of lower courts. Decisions rendered

12 See paragraph 3 of Chapter 5.

by other judges of the same court or courts of the same level, however, are not always given the same precedential value and may simply be considered as relevant.¹³

58. Accessibility to previous court decisions is sometimes an issue in developing countries. Where general access to court decisions is allowed, which is the case in a large number of countries, tax administrations and courts are encouraged to maintain a public web site through which decisions, or at least decisions that address questions of law, are publicly accessible.

59. A question that is primarily relevant in relation to disputes related to the provisions of tax treaties but which may also arise with respect to the interpretation of domestic tax provisions is whether foreign court decisions may be relied upon by domestic courts. While foreign court decisions clearly cannot be considered as legally binding, there does not seem to be any policy or legal reason that would prevent a domestic court from at least consulting the views expressed by foreign judges on the interpretation of similar legislative or treaty provisions. This is frequently done in the courts of a number of common law countries. Clearly, language issues may prevent recourse to such foreign decisions but, at least as regards tax treaties, detailed summaries and full translations of foreign decisions are often available.

60. The issue of precedents also arises with respect to dispute resolution provided by the tax administration. A tax administration will generally seek to avoid having tax officials spend their time analysing and deciding questions that other tax officials have already decided; it will also seek to provide the same treatment to taxpayers in the same circumstances. For these reasons, a tax administration should implement mechanisms that allow all tax officials involved in the resolution of tax disputes to have access to decisions rendered by their colleagues in cases similar to those that they are dealing with. While in most cases confidentiality requirements make it impossible for these decisions to be publicly disclosed, the publication by the tax administration of administrative guidance and rulings (redacted so as to remove confidential taxpayer information) may contribute in making public the positions developed by the tax administration in response to frequently-arising disputes.

3.3.12 Formalistic and purely discretionary approaches

61. Persons involved in the resolution of tax disputes are frequently required to interpret tax legislation in the light of the specific facts of a case. A question that often arises is the extent to which such persons may exercise discretion in doing so.

62. As far as judges and members of quasi-judicial tribunals are concerned, precedents will often exist as regards the approach that should be adopted when interpreting tax legislation. That approach is typically influenced by the nature and tradition of the legal system of a country (e.g. common law or civil law) and will frequently evolve over time.

13 In some countries (e.g. the United States and India), some important or controversial issues may be decided (or reviewed, in the case of the United States Tax Court) by larger benches that include a larger than usual number of judges. Such decisions will typically be given precedential value within that court.

63. Many countries have gradually abandoned overly formalistic approaches under which the words of a tax statute were read literally without regard to their context and the intention of the legislator. Under one such approach, any doubt as regards a tax statute had to be resolved in favor of the taxpayer. In many countries, there is now a greater recognition that the words of the tax law should be read in context and that the purpose of the provisions should be taken into account in determining how these should be interpreted. This approach is expressly mandated when interpreting the provisions of tax treaties, as is recognized by Article 31(1) of the *Vienna Convention on the Law of Treaties*.¹⁴

64. Persons in charge of resolving tax disputes should not have complete discretion as to how to solve these disputes. The principle of the rule of law requires that these persons, whether acting as judges, tax officials or in another capacity, perform their functions in accordance with the law. In addition, it is important that tax officials decide disputes in accordance with the applicable administrative guidance. While courts may legitimately disagree with interpretations put forward by the tax administration, taxpayers are entitled to expect a consistent treatment from the tax administration and tax officials should therefore comply with the administration's published guidance until it is decided to reverse or abandon such guidance.

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

65. This section describes in more detail a number of dispute resolution mechanisms that operate within and as part of the tax administration. These procedures are typically administered through an office within the administration that is separate and independent from the offices that perform audit, examination or collection functions.

3.4.1 Administrative appeal procedure

66. In many countries, taxpayers may avail themselves of a dispute resolution process that is provided by the tax administration itself and through which tax officials who are different from those who took the action that is disputed (such as an assessment for an additional amount of tax following an audit) review these actions at the request of the taxpayer affected; this is the role, for instance, of the Independent Office of Appeals in the United States and the Commissioner of Income-tax (Appeals) in India. This internal review process, which is referred to as an "administrative appeal procedure" throughout this chapter, is typically initiated by a formal objection or opposition presented by the taxpayer.¹⁵

67. The purpose of the administrative appeal procedure is to provide taxpayers who disagree with certain actions or decisions taken by tax officials with the ability to request a review of

14 *Vienna Convention on the Law of Treaties*, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. To the extent that Article 31 is a codification of customary international law, this approach is applicable even in countries that have not signed or ratified the *Vienna Convention on the Law of Treaties*.

15 The office in charge of such "administrative appeal procedure" will therefore be the office that has the initial responsibility to address taxpayers' objections. For instance, in Jamaica, this is the unit to which such objections must be sent.

these actions/decisions by different tax officials. The most crucial aspect of a successful administrative appeal program is that it operates independently from the exam, audit and collection functions so as to avoid a situation in which the officials who took the disputed actions or decisions influence the outcome of the review.

68. If a taxpayer disagrees with a tax adjustment resulting from the audit or examination process, the taxpayer is typically afforded the right to challenge the examiner's determination at the administrative level prior to initiating judicial proceedings. While some jurisdictions (e.g. Brazil) do not allow for an administrative review of the examiner's findings, most do. Resolution of tax disputes through administrative review without the need for litigation is typically more efficient, as regards costs and resources, for both the government and the taxpayer. In most countries, taxpayers are not required to pay the disputed tax if they file an administrative appeal. In some countries, an efficient administrative appeal procedure that resolves disputes prior to litigation not only saves taxpayers and the tax administration time and money, but may also help alleviate the problems of an overloaded court system.

69. The office that deals with taxpayers' appeals should seek to resolve tax disputes in an independent, fair and impartial manner, with the goal of resolving disputes where the taxpayer is right without requiring the taxpayer to file a lawsuit. As such, this office should consider all the factual information and relevant legal sources before reaching a decision.

70. As already noted,¹⁶ when setting up an administrative appeals procedure, it is important to implement oversight measures to mitigate potential corruption risks. At the same time, however, it is important to ensure that the tax officials in charge of appeals do not feel constrained to follow the decisions reached at the audit or initial review stage.

3.4.1.1 Function of the office in charge of administrative appeals

71. As already mentioned, it is crucial that the office in charge of appeals operate separately and independently from the parts of the tax administration whose actions may lead to disputes with taxpayers, such as the exam, audit and collection functions. In order to protect this independence and to ensure an impartial and objective review of each case, the assigned appeal official should not have any prior involvement with the action (i.e. the audit, examination or assessment) that gave rise to the dispute.

72. The function of the office in charge of appeals is to provide a *de novo* evaluation, at the request of the taxpayer, of the disputed conclusions that have resulted from an exam, audit or from a determination of additional tax payable. In doing so, the office in charge of appeals must have the ability to arrive at its own independent conclusions concerning the tax administration's previous actions, and where appropriate, to either uphold or reduce the taxes owed as a result of the administration's original decision. For example, if after reviewing the results of the examination of a tax return that resulted in an assessment of additional tax of 100, that office determines that the appropriate amount of additional tax that should have been assessed is only 80, the office in charge of appeals will typically have the power to require that

16 See paragraph 2626 above.

the amount of tax assessed be adjusted accordingly so that if the taxpayer accepts the revised amount, the dispute is resolved.

73. In order to resolve disputes without creating new ones and to maintain public confidence in the administrative appeal procedure, in most countries, the office in charge of appeals has the authority to maintain or reduce the amount of tax resulting from the prior decisions of the tax administration to which the taxpayer objected. It cannot, however, increase the amount of tax assessed by taking positions that are different from those initially taken by the tax administration.

74. The specifics of the administrative appeal procedure vary among jurisdictions. Some of the differences result from differences in the legal systems (e.g. common law or civil law); others result from factors as diverse as a government's trust in its tax administration and the expertise of tax officials. In countries such as the United States, for example, the administrative appeal officials are authorized to negotiate and conclude binding final settlements on behalf of the government. In other countries (such as Peru), this possibility does not exist.

75. In some countries, the appeal process cannot result directly in an adjustment of the tax assessed: if the decision is favourable or partly favourable to the taxpayer, the case is sent back to the tax administration that must reassess the case (unless the taxpayer opts to pursue an additional mechanism, such as available arbitration or judicial litigation procedures).

3.4.1.2 The administrative appeal request

76. The tax administration should make publicly available guidance on how to request an administrative appeal. Such guidance should emphasize any time limits for making such a request. For example, the administrative appeal procedure may require that the taxpayer submit an administrative appeal request within a specified number of days of the taxpayer's receipt of the notice of the action giving rise to the dispute, such as a letter of assessment, or demand of payment, of additional tax after the conclusion of an audit or exam.

77. The format of such a request should be simple enough to allow unsophisticated taxpayers to initiate an administrative appeal. One would expect the request to typically include the following information:

- the taxpayer's name, address and tax identification number;
- a reference to the notice or letter from the administration describing the action or decision that has triggered the dispute (such as a notice of assessment of additional tax, or a notice of intent to initiate collection procedures against the taxpayer), including the date of that notice or letter;
- the date of the relevant event or the taxable period concerned;
- a description of each decision or action to which the taxpayer objects and of the arguments supporting that objection, which may include, especially for large taxpayers,

references to any relevant legal provision or authority supporting the taxpayer's position.

78. Ideally, it should be possible for taxpayers to make such a request electronically through a secure web site that would automatically link the request to the notice or letter that triggered the dispute, thereby avoiding the need to provide some of the above information.

3.4.2 Administrative mediation

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

80. By its nature, the administrative mediation procedure complements other dispute resolution mechanisms and may thus be invoked simultaneously. For instance, one situation in which administrative mediation might be useful is where a taxpayer has made a request under the administrative appeal procedure but finds it difficult to communicate with the tax officials in charge of appeals. In that case, the assistance of a mediator from the tax administration may facilitate the discussions. In some countries, mediation may also be requested by the tax officials in charge of appeals. In many cases, however, administrative mediation may only proceed if both the taxpayer and the relevant tax officials agree to participate. It should also be noted that in some countries (e.g. Belgium and the United Kingdom), mediators may, and actually do, reject cases where their assistance has been requested, for instance, because they consider that the substantive issues on which the dispute is based cannot be resolved through additional discussions.

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

82. The administrative mediation function does not typically involve a *de novo* evaluation of the dispute or a modification of the disputed decision, although it may result in a recommendation or suggestion for a different solution. Therefore, officials performing the administrative mediation function do not require the authority to evaluate and possibly modify the original decision against the taxpayer, as is the case with officials performing the

administrative appeal function. Nevertheless, the mediation officials will need to have the authority to have access to confidential (e.g. taxpayer-specific) information in order to effectively facilitate communication. To the extent that the officials who conduct the administrative mediation also work as appeal officials, they should already be legally allowed to access confidential information.

83. An administrative mediation program should be structured in such a way that mediation could be initiated early in the administrative appeal process. Given the potential benefits that could be gained from mediation before a decision is taken by the tax administration, mediation could even be made available while the matters in dispute are at the pre-assessment stage, such as in audit, examination or collection (see Chapter 2). Moreover, it is critical that both parties to the dispute agree to submit to the administrative mediation and express their desire to seek a resolution to the dispute. The administrative mediation may involve a mediator simply investigating a case and reporting to a taxpayer without taking further action. In many cases, however, the two parties will be convened to a meeting that is facilitated by the mediator.

84. A flexible approach should be taken regarding the form and contents of a request for administrative mediation. Given the possibility that administrative mediation could take place at any stage of a tax dispute, even before it is formalized (in the case of a mediation process contemplated by Chapter 2), the request will not always be accompanied by a copy of the decision against the taxpayer (such as a notice of assessment of additional tax), as such decision may not have been issued when the mediation is requested.

3.5 Mechanisms through which dispute resolution is provided by independent parties

85. This section discusses domestic dispute resolution mechanisms that generally operate outside the tax administration. In almost all countries, taxpayers have the right to seek resolution of tax disputes in courts, although practice has shown that taxpayers often seek recourse through other mechanisms before resorting to litigation so as to avoid incurring costs and delays, which can be substantial, or to avoid adverse publicity as court proceedings are generally public. Independent mediation services are also available in some countries. While this section also explores the role that a tax ombudsman may play in resolving disputes, countries may equally consider establishing a tax ombudsman within the tax administration, although in that case it will be critically important that the ombudsman enjoy complete autonomy and independence from the rest of the administration. Finally, the expert determination and arbitration procedures that are available in some countries are discussed at the end of this section.

3.5.1 Resolution of disputes in courts

86. As previously indicated, taxpayers generally have the right to seek resolution of a tax dispute in courts.¹⁷ Such courts may be civil courts of general jurisdiction (courts that

¹⁷ As explained in paragraph 46, in some jurisdictions, taxpayers are required to seek resolution of a tax dispute at the administrative level (i.e. through the administrative appeal procedure) before initiating court

adjudicate all types of legal challenges), administrative courts, commercial courts or specific tax courts. They may also be “quasi-judicial tribunals” which, for the purposes of this chapter, correspond to separate bodies set up by law in order to decide specific types of disputes and which, although not technically courts of law, have the power to adjudicate disputes and do so through a process similar to the process followed in a court. In these quasi-judicial tribunals, disputes are adjudicated by experts who may or may not have legal training.¹⁸

87. Almost all countries also provide for the possibility for both the taxpayer and the tax administration to appeal a decision of the court that first renders a decision on a tax dispute. Some appellate level courts will review only a lower court’s decisions on questions of law (i.e., the appeal court will not be allowed to reverse the factual findings of the lower court), while other courts will review both questions of law and questions related to the facts of the case.

88. The benefits of judicial resolution of tax disputes include securing a final determination of the taxpayer’s tax liability, which cannot be re-examined by the tax authority or another court (except to the extent the jurisdiction provides for judicial appeals). In addition, judges and members of a quasi-judicial tribunal may be perceived as more impartial and objective than the tax officials in charge of administrative appeals.

89. As already indicated, judicial proceedings and decisions rendered by courts are usually public.¹⁹ While this transparency serves to enhance confidence in the judicial process and provides useful precedents as to how the law should be applied and interpreted, some taxpayers may be reluctant to initiate judicial proceedings because of this loss of confidentiality.

90. There is important variation among the countries’ judicial processes applicable to tax disputes and it would be beyond the scope of this chapter to discuss these variations in detail. A key difference, however, is often the extent to which a court will hear legal arguments and testimonies by witnesses. While this is a fairly typical process in common law countries, it may be more exceptional in civil law countries where courts tend to rely more on a written procedure.

91. One consequence of this distinction is that countries where the hearing of witnesses is the norm tend to have “trials” and also pre-trial fact findings that may be formal or informal. Informal fact-finding, or “discovery,” often means that the parties will stipulate the facts in advance of a trial, which speeds up the litigation process and assists in settlement of many cases prior to trial. Formal discovery, on the other hand, may involve, for example, requests for documents from the opposing party and depositions of witnesses. The parties are not

proceedings. In jurisdictions where this is not required, initiating a court proceeding may preclude an administrative appeal.

18 For this reason, persons adjudicating tax disputes in quasi-judicial tribunals are often referred to as “members of the tribunal” as opposed to “judges”.

19 See paragraph 52.

required to agree on any facts; instead, the facts are determined by the fact-finder – a judge, member of tribunal or, more exceptionally, a jury.²⁰

92. Other countries however, do not have formal pre-trial fact findings. The facts and legal arguments are presented by the parties (taxpayer and tax authority) to the court at the time the proceedings are initiated along with the information and evidence they were able to obtain.

93. In many countries, special procedures exist to allow tax cases that raise the same or similar issues to be dealt with together or to be resolved based on the results of a “test-case”. This reduces the costs, duplication and risks of conflicting decisions involved in dealing with such disputes.

3.5.2 Specialized tax courts

94. As mentioned in the previous section, because of the complexity of tax law, many countries have established a specialized court or quasi-judicial tribunal whose jurisdiction is limited to tax issues.²¹ Judges or members of these specialized courts and tribunals typically have expertise in tax matters and are thus in a better position to resolve cases dealing with these matters. Tax court judges and members are usually independent from the tax administration although in some countries, disputes are resolved by a panel of judges and members, some of which are tax officials.

95. One of the benefits of having experts adjudicate tax cases is that it may ensure a quicker resolution of tax disputes and may therefore reduce the caseload and delays of a country’s general court system. While it is often possible to appeal the decisions of a specialized tax court, appellate courts are typically not specialized in tax matters (even though they may have specialized tax units if the number of tax appeals justifies it).

96. Tax courts in some countries can enable and encourage settlements at an early stage of the litigation process. However, as in the case of the administrative appeal process, other countries do not provide taxpayers and/or tax authorities the possibility of reaching a settlement once litigation has commenced.

97. In many countries that offer specialized tax courts, simplified procedural rules are available in the case of judicial proceedings concerning tax disputes involving small amounts or some categories of taxpayers (e.g. individuals as opposed to legal entities). These procedures may alleviate the need to be represented by a lawyer, thereby reducing the costs of tax litigation for taxpayers. This, for example, is the case in Mexico.²²

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

21 The jurisdiction of these courts may be limited to a particular category of tax matters, such as disputes concerning cross-border transactions, or may extend to a wide variety of direct and indirect tax matters.

22 See paragraph 101.

98. The following are a few examples of specialized tax courts in developing countries.

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

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

101. Mexico, through its Federal Court of Administrative and Tax Justice, offers a "traditional" tax trial, an "on-line" tax trial, a "summary" tax trial and a "substance over form" tax trial. The alternative pursued by the taxpayer before the Court depends on the amount of the tax liability at stake, the reasons for the tax assessment or the physical proximity of the taxpayer with the Court. For example, if the tax authority's assessment is based only in formalities, the taxpayer may choose to pursue the "substance over form" trial, as the Magistrates are empowered to overlook formalities and nullify tax debts if there is substance in the taxpayer's position.

3.5.3 Tax ombudsman

102. The dispute resolution mechanism described in this section, often referred to as a "tax ombudsman," shares certain similarities with the administrative mediation procedure discussed in section 3.4.2 above but may also serve certain functions of a more general nature, such as the safeguarding of taxpayer rights and ensuring that the administration is providing fair and adequate services to taxpayers by, for example, dealing with taxpayers' complaints related to the services provided by the tax administration. The tax ombudsman is a specialized version of the more general concept of ombudsman, which historically has been referred to an institution that defends the people. The increased use of tax ombudsman bodies may reflect a recognition across countries of the complexity of their respective tax systems and the importance of ensuring that the rights of taxpayers are respected, that the services of the tax administration are provided in an equitable and efficient manner, and that the government should facilitate the resolution of controversies between the tax administration and taxpayers.

103. While the tax ombudsman body described in this section is an independent party, countries wishing to establish a tax ombudsman may also decide to set it up within the tax administration. In such a case, it is important that the ombudsman be allowed to operate independently, in particular from the audit, examination and collection functions, and be

allocated adequate resources to perform its functions (see section 3.4.2 above). Both types of bodies exist in practice and have been found to provide positive results.

104. The creation of tax ombudsman bodies has become more common in recent years, although the names given to these bodies differ. In Australia, it is referred to as the Inspector-General of Taxation, which is a body separate from the Australian Taxation Office. In the United States, the Taxpayer Advocate Service is an independent organization within the Internal Revenue Service. Ombudsman bodies in Spanish-speaking countries are commonly referred to as the Defender of the Taxpayer (*Defensoría del Contribuyente*).

105. The establishment of a tax ombudsman body outside the tax administration may enhance the confidence that taxpayers will have in the ability of the tax ombudsman to perform its functions because taxpayers may consider that a separate agency is more likely to ensure an equitable treatment of disputes with the tax administration. The efficiency of the tax ombudsman body will depend not only on that independence but also on the expertise of its officials. Where the tax ombudsman is set up as a body independent of the tax administration, it will also be important to ensure that it will have the legal authority to access taxpayer-specific and other confidential information and that it will be required to maintain that confidentiality.

106. When the tax ombudsman is established within the tax administration, it is critical that it be separate from all the other operating functions of the administration and that it operate independently from these other functions. This is especially true regarding the audit, examination and collection functions. Where the tax ombudsman performs the more general role of monitoring the tax administration's provision of services to taxpayers, it will also be important to ensure its independence from other offices such as those that establish generally applicable administrative practices (e.g. audit and collection policies), promulgate regulations or other guidance and draft forms. The independence of the tax ombudsman may also require that its budget be allocated and administered separately.

107. Recourse to the services of a tax ombudsman should be as simple as possible. It is also important that taxpayers be made aware of the existence and role of the tax ombudsman.

Box 1. Tax Ombudsman: the positive experience of Mexico

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

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

another taxpayer-specific service provided by PRODECON is the legal representation of certain taxpayers to assist them in their dealings with the tax administration.

PRODECON's complaint procedure

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

Under the complaint procedure, PRODECON reviews and analyzes the protest of the taxpayer, and gives the tax official involved in the controversy a period of 72 hours to present his views of the complaint in the form of a report. After reviewing the official's report, if it determines that the complaint has merit, PRODECON will issue non-binding recommendations for modifying the position of the tax administration with a view to resolving the dispute. If the official declines to follow the recommendations, PRODECON will make the recommendations publicly available in a way that will maintain the confidentiality of the taxpayer's particular data.

Since PRODECON's establishment, the complaint procedure has been widely utilized by Mexican taxpayers. According to data provided by PRODECON, by 2019, 170,000 requests for assistance had been submitted under the complaint procedure since its creation.

PRODECON's conclusive agreement procedure

The conclusive agreement procedure, established in 2014, is an alternative dispute resolution mechanism for tax controversies in Mexico. Taxpayers under audit who do not agree with the position and findings of the tax authority have the right to appear before PRODECON to request its intervention as a mediator.²³ The procedure provides a transparent and amicable forum for the taxpayer and the tax authority, with an impartial third-party observer, to discuss the tax treatment or the tax law's interpretation that is being applied during the audit, with the objective of achieving consensus to solve the dispute.

According to data provided by PRODECON, 10,500 mediation requests have been processed so far by PRODECON, which facilitated resolution of the majority of the disputes involved. The procedure allows for the resolution of disputes without judicial recourses, thus saving litigation costs for both taxpayers and the government.

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

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

Although the aim of the conclusive agreement is to reach an agreement that resolves the entirety of tax controversy, partial resolutions are also permitted. In the case of a partial resolution, the

23 This aspect of the work of the PRODECON is mentioned here even though it is not a dispute resolution mechanism within the meaning of this Chapter.

tax administration may resume applicable audit and collection procedures on the remaining open issues.

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

PRODECON's legal representation and defense service

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

3.5.4 Independent mediation²⁴

108. The conclusive agreement procedure offered by the PRODECON (see box 1) provides a good example of an independent mediation mechanism. While the aim and techniques of an independent mediation mechanism are somewhat similar to those of the administrative mediation service described in section 3.4.2, a key difference is that the independent mediation allows recourse to a mediator who does not belong to the tax administration and may therefore be perceived as more independent by the taxpayer.

109. As is the case for a tax ombudsman service set up as a body separate from the tax administration (see paragraph 105), countries wishing to provide an independent mediation service will need to ensure that the mediators will have the legal authority to access taxpayer-specific and other confidential information and that they will have the legal obligation to maintain such confidentiality.

3.5.5 Expert determination

110. In some countries, purely factual questions, such as the market value of an asset, may be referred to an expert whose mandate is simply to make the required factual determination. This may be done as part of judicial proceedings when it is decided that a purely factual and technically complex matter should be determined by an independent expert whose finding is then submitted to the court. In these circumstances, the determination of the expert is binding on the parties.

24 While this section focusses on the role that an independent mediator can play in the resolution of domestic tax disputes, Chapter 6 explains how mediation could be used in the context of the mutual agreement procedure provided by tax treaties.

111. Recourse to an expert determination may help avoid the costs of a “battle of expert witnesses” where both sides try to influence a court’s decision on a complex factual issue by having their own expert witnesses present their opinions to the court which is then called upon to make a decision on that issue.

112. Expert determination should not be confused with the use of expert witnesses, who may be used by one or both parties in judicial proceedings in order to try to establish some factual aspects of a tax case. Expert witnesses do not determine the relevant factual question but simply present their position (orally or in writing) to the court, which is solely responsible for reaching a decision on the relevant question of fact. Similarly, expert determination should not be confused with cases where the court appoints its own expert in order to provide advice to the court regarding certain aspects of a tax dispute.

3.5.6 Arbitration

113. In a few countries (e.g. Portugal), a domestic arbitration procedure allows for the binding resolution of a dispute between the tax administration and the taxpayer by one or more independent parties acting outside a formal judiciary framework. In these countries, arbitration is typically allowed only after available recourses to the tax administration (e.g. an administrative appeal or an independent review of a statement of audit position) failed to result in an agreement to resolve the issue.

114. Such domestic arbitration procedures applicable to tax disputes are fundamentally different from the MAP-arbitration provisions sometimes found in bilateral tax treaties or provided by Part VI of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*. As explained in Chapter 7, MAP-arbitration provisions are designed exclusively to resolve disputes that prevent the competent authorities of the countries that are party to a tax treaty from concluding a mutual agreement under the mutual agreement procedure provided by these treaties; it is therefore a procedure to resolve disputes between two tax administrations as opposed to disputes between taxpayers and tax administrations.

115. Domestic arbitration procedures may be provided by law or may be available through agreements with the tax administration. In the first case, arbitration may be available as a right (if the applicable conditions are met); otherwise, arbitration is only available with respect to a specific case if both the taxpayer and the tax administration agree.

116. The domestic arbitration of tax disputes may be restricted to questions of fact, such as the valuation of an asset or the arm’s length price of a transaction but, in some countries, questions of law are also eligible for arbitration.

117. A number of different aspects must be addressed when designing a domestic arbitration procedure. These include:

- *The selection of arbitrators*: The number of arbitrators and the process for their selection should be clear. In domestic tax arbitration, it is frequent to have a single arbitrator who is jointly selected by the taxpayer and the tax administration. Any

requisite qualifications or selection criteria that arbitrators must satisfy should be specified. As far as possible, the parties should seek to appoint an arbitrator who has relevant expertise. For example, if the dispute involves disagreement over the valuation of an asset, the parties may wish to require that an arbitrator possess at least five years of experience in asset valuation. Also, in order to avoid conflicts of interests, an arbitrator should not have had any prior involvement with the particular dispute, or the taxpayer concerned.

- *The form of the arbitration procedure:* Arbitration may take different forms. For instance, under the so-called “baseball” or “final offer” arbitration, the arbitrator is only asked to make a choice between the position of the taxpayer and that of the administration and cannot adopt an intermediary solution, which has the benefit of forcing the parties to abandon extreme positions. Under the “independent opinion” approach, the arbitrators have more discretion but may then require more information and need to provide a more complete justification of their decisions. Whatever form is used, it will be important to provide procedural rules for the conduct of the arbitration proceedings, such as the deadlines for the different steps leading to the arbitral decision and the conduct of the arbitrators (e.g. the arbitrator should be precluded from any *ex parte* communications with either party prior and during the arbitration proceedings).
- *Arbitration costs:* Applicable rules should provide which party will bear the costs of arbitration, including the remuneration of arbitrator(s), or how these costs will be shared between the parties. For instance, it could be provided that each party will pay one half of the arbitrator’s compensation, expenses and related fees and costs.
- *Confidentiality of information:* Unlike court proceedings, the domestic arbitration procedure is usually confidential. It will therefore be necessary to ensure that arbitrators have access to taxpayer-specific and other confidential information and that they are legally bound to maintain the confidentiality of any such information, for instance through a binding arrangement with the tax administration.
- *Binding nature of the decision:* A critical aspect of the arbitration procedure is the extent to which the arbitral decision should be final and binding for both the taxpayer and the tax administration. If arbitration is intended to be an alternative to judicial proceedings, it would be logical to assume that the arbitral decision would be final and binding on both parties. In some countries, however, the taxpayer may have the right to reject an arbitration determination and take the issue to court. Also, in many countries, it is generally possible to ask a court to invalidate an arbitral decision on procedural grounds, such as where the arbitrators exceeded their jurisdiction.