Comments on CRP. 2

- José Troya, Committee Member

Paragraph 2

Considering the discussions held within the Committee and even in other fora such as the inclusive framework, asserting that countries are showing increasing interest is somewhat misleading, especially for developing countries. Therefore, it is suggested to change the first sentence of the paragraph to something along the following text:

"2. This chapter examines the use of arbitration as part of the MAP, an approach for which some stakeholders are showing increasing interest."

Section 5.3 (Paragraphs 21-33)

In general, the purpose of giving a balanced view of concerns and benefits, as was decided by the Committee, is not fully achieved if several concerns are presented with counterarguments while benefits are not. Therefore, the following general changes are suggested:

a) Counterarguments may be changed or deleted;
b) Counterarguments may be moved to the benefits section;
c) Benefits may be presented with counterarguments.

Additionally, in several parts of this section, arguments are pointed out as if they unequivocally correspond to countries, developing or developed. Although sometimes such assertion may be adequate, it should be noted that the UN Tax Committee Members act in their personal capacity and that some arguments may not necessarily reflect the views of countries, either developing or developed.

For specific paragraphs, the following changes are recommended along these observations:

Paragraph 22

First *sentence*: "Several concerns raised primarily by members from developing countries during discussions at the Committee level have been recorded in the UN Model Commentaries."

Paragraph 23

"23. Members from these countries are of the view that arbitration in tax treaty disputes affects the sovereignty of their countries. Some countries consider the inclusion of arbitration of a tax dispute "unconstitutional". Some other countries consider that the inclusion of arbitration, whilst constitutional, may create other constitutional obligations such as extension of such remedies in domestic cases. Other countries that do not have the above concerns have raised the issue of shifting of decision-making power from the State to members of an arbitration panel. These concerns may be exacerbated if the Constitution and the legal system of a country prevent tax sovereignty to be legally ceded to arbitration instances"

Note: The Constitution of Ecuador expressly proscribes treaties that cede sovereignty to international arbitration instances.

Paragraph 24

“24. Some countries have also raised concerns as regards costs. Arbitration necessarily entails costs in terms of fees for the arbitrators and may entail costs for facilities and additional fees for counsel/representation. Also, developing countries may be concerned that these fees could be payable in a foreign currency on a scale that is not proportional to the resources available to them. There may also be concerns by developing countries that they may need to hire outside experts to assist them in a MAP arbitration process, although previous MAP arbitration cases suggest that this would not be necessary.”

The deleted sentence may be reinserted in section 5.3.2., under a new “*Low costs”* subtitle.

Paragraph 25

“25. Members from several developing countries have also raised concerns as regards the perceived lack of experience of their countries in arbitration as compared to that of developed countries. This may put undue pressure on the competent authorities of developing countries..”

Paragraph 31

“31. The most significant benefit perceived by some countries in adding arbitration to the MAP process is the “prophylactic effect”. Since the purpose of arbitration is not to replace the MAP with an independent evaluation of the case by arbitration, but to supplement the current MAP process in those few cases where the competent authorities are unable to agree on a resolution in a timely manner, such countries claim that the inclusion of arbitration would encourage the conclusion of more cases in an efficient manner. In practice, this has been the experience under the Canada-United States tax treaty, which has included mandatory binding arbitration since 2010. On the other hand, such effect may become negative if it results in an undue pressure on the competent authorities of developing countries that lack the experience needed to agree with a solution.”

Paragraph 33

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