Dispute Resolution for International Tax: Reflections on Arbitration, the Mutual Agreement Procedure, and Mediation

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Content

Introduction

By: Anarella Calderoni and Isaác Gonzalo Arias Esteban

The resolution of international tax disputes has become an increasingly pressing issue as cross-border tax matters grow in complexity with international solutions that are not aligned. Ensuring that tax disputes are addressed in a fair, efficient, and consistent manner is essential for maintaining international cooperation and taxpayer confidence. Against this backdrop, this document examines three key aspects of dispute resolution in international tax: the Mutual Agreement Procedure (MAP), arbitration, and mediation.

These three sections of the publication are each authored by a different expert. The first section delves into contemporary debates surrounding the MAP, with a particular focus on its application in developing countries and the implications of the OECD's BEPS Action 14 proposals. The second section explores international tax arbitration, providing an overview of its evolution, the challenges it presents, and its impact on global tax governance. The final section offers forward-looking reflections on the role of mediation in international tax, evaluating its potential as a complementary or alternative tool for dispute resolution.

To integrate these perspectives, it is crucial to recognize the broader notions underpinning international tax dispute resolution. While MAP is a widely accepted mechanism its effectiveness varies significantly across jurisdictions, often hindered by procedural delays, resource constraints, and power imbalances between tax administrations. Arbitration, though more structured and enforceable, raises concerns for developing nations due to its costs, potential impartiality of arbitrators, and sovereignty considerations. Although mediation is the least explored option, its flexibility presents a unique opportunity to foster more cooperative solutions.

One critical but often overlooked dimension of tax dispute resolution is the behavioral aspect. The way in which disputes are resolved can significantly influence taxpayer perceptions of fairness and consequence, thus impacting voluntary compliance. The effectiveness of any dispute resolution mechanism is dependent on trust, procedural transparency, and the accessibility of remedies for those involved.

As the conversations on international tax proposals continue to evolve, it is imperative that dispute resolution mechanisms are included in the proposals. This document seeks to contribute to the ongoing discourse by analyzing existing practices, identifying emerging challenges, and exploring innovative approaches to tax dispute resolution. By doing so, it aims to provide varied insights for policymakers, tax administrators, and practitioners navigating the complexities of international tax disputes.

This document is a precursor to the **Maturity Model for Dispute Prevention and Resolution**, which was prepared by the Inter-American Center of Tax Administrations (CIAT) with the support of the EUROsociAL+ Program and the Inter-American Development Bank (IDB). The Maturity Model analyzes the capacity of tax administrations to prevent and resolve tax disputes in both domestic and international fields. It aims to identify opportunities for improvement, assist in defining priorities, and highlight good practices of the tax administration. For more information on this initiative, contact the International Cooperation and Taxation Directorate of CIAT.

PART 1

Contemporaneous Debates for MAP Regulations in Developing Countries (Focus on the Colombian Experience)

Natalia Quiñones

Introduction

International tax dispute resolution has become increasingly important with globalization and the expansion of the tax treaty network in the developing world. The presence of double taxation, unintended non-taxation, and taxation not in accordance with existing tax treaties has become a priority for MNE's, who have repeatedly asked for greater tax certainty since the OECD BEPS Project was launched.

As a response to this situation, the OECD BEPS Action 14 report established a minimum standard for the members of the Inclusive Framework (145 members as of November, 2023[1]) in tax treaty dispute resolution. Along with the new standard, the OECD created the FTA MAP Forum, a system in charge of conducting peer-review assessments on the compliance with the minimum standard by all participating jurisdictions. Recognizing the need to improve dispute resolution in a time of increasing complexity in the international tax rules[2], the OECD Inclusive Framework countries adopted a peer-review methodology in 2016 and committed to revealing public MAP statistics on a yearly basis.

An important portion of the peer-review elements that reflect the minimum standard are dependent on the ratification of the BEPS Multi-Lateral Instrument (MLI) or the bilateral renegotiation of existing treaties. This may be difficult given the political uncertainties associated with parliamentary ratification times and the renegotiation with partners that have not signed or ratified the MLI. However, it is only necessary to attempt renegotiation in these cases and to inform on the status, and to introduce the MLI for parliamentary ratification and, again, inform on the status to the peer review team.

Many developing countries are thus facing the challenge of implementing the minimum standard and, in some cases, of aligning internal regulations with some or all of the 12 best practices identified in the peer review documents of BEPS Action 14 on More Effective Dispute Resolution Mechanisms[3]. This process is fairly new in many jurisdictions, which is why drafting new MAP regulations and updating treaty practice requires making several decisions regarding the implementation of these standards. This chapter will examine some of the

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1 OECD (2023). *Members of the OECD/G20 Inclusive Framework on BEPS*. Available at https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf Accessed April 24th, 2024.

2 Forum on Tax Administration (2015). *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous Map Improvement.* Available at https://www.oecd.org/tax/forum-on-taxadministration/publications-and-products/map-strategic-plan.pdf. Accessed September 5th, 2021.

3 OECD (2016). *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/beps- action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf

debates that developing countries may face in the process of updating or implementing MAP regulations in compliance with the BEPS Action 14 minimum standard.

1.1. General Policy Orientation

The BEPS Action 14 Minimum Standard and the peer review process are a golden opportunity for developing countries participating in the BEPS Inclusive Framework to develop a country policy regarding dispute resolution. In particular, countries must consider whether they desire to include tax treaty dispute resolution as an element to increase their competitiveness. Given the impact of the Pillar 2 agreement and the GloBE design[3], the possibility of attracting investments with tax incentives or low rates has been significantly reduced. With this new panorama, the importance of tax certainty for MNEs has increased dramatically, and it may well become an important element in the choice of jurisdictions given that the mobility of capital investments continues to be a defining aspect of a globalized economy.

Nonetheless, developing countries may be concerned about widening the scope of a mechanism in which they have limited experience, especially in the cases in which the government lacks financial and trained human resources with enough time to perform these functions. It seems thus necessary to consider if the design of the MAP proceedings and, more generally, of international tax dispute mechanisms in the country will offer the minimum standard or will strive to offer greater certainty in order to attract investment.

1.2. Resources and Assigning the MAP Function

The first decision that tax administrations and governments face has to do with the human and financial resources necessary not just to update the system but also to ensure that the minimum standard is met and that the country's interests are properly represented in the MAP proceedings. Anytime that regulatory or legal changes are identified as necessary to comply with the minimum standard, it is ideal to ensemble a team that will include officials in charge of the drafting and approval of the required legislation or regulations, as well as the actual officials that will oversee implementing said legislation and regulations.

[3] OECD (2021)

At this point, as governments are required to guarantee sufficient funding for the MAP function[4], it is recommended that an analysis is made to define if the function shall be located within the ministry or in the tax administration. The decision has financial implications, as the chosen dependency will have to provide trained officials with enough time to study and resolve MAP cases, as well as travel and translation costs.

The Terms of Reference provide in Section C.4 that the MAP staff should be independent of the personnel who made the adjustments and not be influenced "by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty."[5] Furthermore, Element C.5 states that performance-based compensation for the MAP Competent Authority cannot be based on revenue obtained or maintained in MAP. This seems to suggest that there should be an independent MAP team separate from the treaty and transfer pricing audit teams, and separate from the treaty negotiating team, with key performance indicators based on resolution times rather than on revenue. However, the caseload for MAP in developing countries is still limited and the number of trained officials with an expertise in transfer pricing and treaties is reduced. In these cases, it is justifiable to assign the MAP function to the officials that are already in charge of treaty negotiations[6]. In all cases, it is advisable to include officials that have experience in transfer pricing, attribution of profits to permanent establishments, and general treaty knowledge. Given this mix, it is also advisable to include the APA function in the same team, as was the choice taken by Colombia in Article 12 of the Decree 1742 of 2020.

1.3. Legal and Regulatory Faculties

The minimum standard requires that competent authorities in charge of the MAP function have a series of legal and administrative powers that, in many cases, must be granted by the law itself. These empowerments must be carefully reviewed, as sometimes the lack of MAP cases has made it unnecessary to establish the powers conferred to competent authorities in treaties in force. In the case of Colombia, for example, the power to implement MAP agreements regardless of the statute

[4] OECD (2016). *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/beps- action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf. p. 14, element C.3. Colombian included this as a legal obligation in art. 869-3 of the Colombian Tax Code (Estatuto Tributario).

[5] OECD (2016). *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf. p. 14

[6] This was the case of Colombia, which assigned the MAP function to the Office for International Tax Affairs, also in charge of treaty negotiation and the definition of Colombia's treaty policy. See Decree 1742 of 2020, article 12.6.

of limitations and domestic time limitations[7] had to be explicitly contemplated in the law, and thus required a legal reform[8]. On this specific point, it is necessary to conduct a thorough review of the country's existing treaties, as this legal modification is required whenever the treaty accepts adjustments without a specific time limitation.

Likewise, the personnel assigned with the MAP function must have competent authority status, allowing them to negotiate on behalf of the country in each bilateral or multilateral MAP proceeding. This sometimes requires internal regulations, and other times it may require a formal decree or even a change in the law if the function is transferred, for example, from the Tax Administration to the Ministry of Finance or vice versa.

Furthermore, the country's competent authorities must be formally assigned with every function established in the MAP guidance, including the possibility of establishing and modifying the requirements for a MAP

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7 OECD (2016). *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf. p. 15, element D.3.

8 See the second paragraph in article 863 of the Colombian Tax Code, which reads as follows in Spanish: *ARTÍCULO 869-3. PROCEDIMIENTO DE MUTUO ACUERDO. Los contribuyentes podrán solicitar asistencia para el Procedimiento de Mutuo Acuerdo (MAP) regulado en los convenios para evitar la doble imposición suscritos por Colombia a través de la presentación de una solicitud formal ante la Dirección de Impuestos y Aduanas Nacionales (DIAN). El contenido de la solicitud, así como los detalles del procedimiento, serán aquellos que disponga la Dirección de Impuestos y Aduanas Nacionales (DIAN) mediante resolución. La Autoridad Competente para desarrollar el Procedimiento de Mutuo Acuerdo (MAP) será el Director General de la Dirección de Impuestos y Aduanas Nacionales (DIAN) o quien este delegue, quienes contarán con los recursos necesarios para llevar a cabo el Procedimiento de Mutuo Acuerdo (MAP).*

Los acuerdos que suscriba la Autoridad Competente de Colombia en desarrollo del Procedimiento de Mutuo Acuerdo (MAP) establecido en los convenios para evitar la doble imposición tendrán la misma naturaleza jurídica y tratamiento que un fallo judicial definitivo, por lo cual prestarán mérito ejecutivo, no serán susceptibles de recurso alguno, y podrán ser implementados en cualquier momento independientemente del período de firmeza establecido para las declaraciones pertinentes.

En caso de aprobación de una solicitud de Procedimiento de Mutuo Acuerdo (MAP), los contribuyentes deberán desistir de los recursos interpuestos en sede administrativa respecto de las glosas que se deseen someter a Procedimiento de Mutuo Acuerdo (MAP). Dicho desistimiento deberá ser aceptado por la Dirección de Impuestos y Aduanas Nacionales (DIAN) siempre que se adjunte copia de la decisión aprobando la solicitud de acceso a Procedimiento de Mutuo Acuerdo (MAP).

Los contribuyentes que cuenten con una solicitud de Procedimiento de Mutuo Acuerdo (MAP) aprobada y que hayan radicado una acción judicial ante la jurisdicción contencioso-administrativa deberán desistir de dicha acción en los puntos del litigio que deseen someter a Procedimiento de Mutuo Acuerdo (MAP). Dicho desistimiento deberá ser aceptado por la jurisdicción, siempre que con el desistimiento se adjunte copia de la decisión aprobando la solicitud de acceso a Procedimiento de Mutuo Acuerdo (MAP).

Desde la radicación del desistimiento en vía administrativa o judicial, se suspenderá cualquier procedimiento de cobro coactivo hasta tanto no se expida una decisión final de Procedimiento de Mutuo Acuerdo (MAP) o se notifique de la cesación del procedimiento de mutuo acuerdo por parte de la Autoridad Competente.

request[9]. A faculty to update MAP guidance should also be clearly established in the relevant domestic legal instrument[10].

1.4. Time Limits

Another important aspect of the MAP guidance and regulations has to do with the decision of limiting the time in which treaty partners may issue adjustments on a specific fiscal year. It is a fact that each sovereign nation has its own domestic time limits for notifying assessments made on each fiscal year, and some have special time limits for important situations like years reporting fiscal losses or transfer pricing assessments. In some countries, like the US, those limits may be extremely long when compared to a developing country's time limits. However, the minimum standard requires that MAP access is granted regardless of whether the statute of limitations has expired. This may create a large asymmetry in the number of MAP cases where the adjustment has been initiated in one country and the other country has the burden of alleviating double taxation without the possibility of making unilateral adjustments. It is therefore necessary to conduct a review of existing treaties and to consider this situation in any ongoing or new negotiations. The ideal is to reach a compromise that reflects a reasonable middle point between both statutes of limitations.

Another important aspect concerning time limitations has to do with the implementation of MAP agreements[11], which was mentioned above. In all cases where MAP access is granted, if an agreement is reached, the tax administration must implement the agreement, which may raise problems with legislation that precludes tax administration officials from revising returns when the statute of limitations for auditing has expired. The tax administration usually has the ability to initiate refund or collection procedures for "closed" taxable years based on a judicial ruling or administrative settlement. Tax administrations must ensure that local legislation enables them to initiate these procedures by virtue of a MAP agreement. In the case of Colombia, the government chose to give the MAP agreements the same legal status as a judicial ruling for all purposes. This status was granted through ordinary law[12], which may not be the most suitable instrument if there are conflicts with constitutional provisions. It is therefore advisable to review if this conflicts in any way with prohibitions or powers granted to government officials in the constitution.

[9] Art. 12.6 of Decree 1742 of 2020 for the case of Colombia.

[10] Paragraph 1 of art. 869-3 of the Colombian Tax Code in the case of Colombia.

[11] Peer Review Terms of Reference, Section D.

[12] See paragraph 2 of art. 869-3 of the Colombian Tax Code. [15] Received after 2016 and reported in the MAP Statistics.

On a separate note, Element A.2 of the Terms of Reference requires jurisdictions to grant a roll-back on new Advanced Pricing Agreements (APAs), so that there is no need to initiate a MAP to extend the conclusions of the APA to previously filed taxable years. This may require legal modification if it is not already contemplated in the country's APA legislation. Of course, it will be easier to align APA and MAP policy if both functions rest with the same team.

Finally, the Terms of Reference will also measure the time spent by competent authorities in resolving a MAP request (whether with or without reaching an agreement). Element C.2 of the Terms of Reference contains the minimum standard requiring jurisdictions to resolve new[15] MAP cases in an *average* time of 24 months. This may increase the pressure in developing countries who are new to the MAP function, as they are required to comply with the same time frame as other countries that have more experience and probably a larger MAP inventory where some cases are easy and short to reduce the average resolution time. If post-2016 cases have not been addressed within this timeframe, it is advisable to create a taskforce to evacuate pending cases once the regulations are finalized. This taskforce could be temporary until the backlog of cases is cleared. After that, the regular competent authority officials would deal with new cases without the pressure of the backlog.

1.5. Interaction with Domestic Remedies

Another relevant question on the design of MAP policies concerns the interaction of the MAP with available domestic remedies. In many developing countries, unilateral adjustments made by the local tax authorities can only be challenged in courts, through a judicial review procedure. Furthermore, adjustments usually have an administrative appeals procedure that must be exhausted before reaching the judicial stage. In some countries, audit settlements are also available at any time before a judge produces a final ruling. In these cases, Inclusive Framework members must allow access to MAP, according to the Action 14 TOR Element B.5. Therefore, a taxpayer may file a MAP request while administrative and judicial remedies are still available to challenge the adjustment or position submitted to MAP.

Careful consideration must be given to the situations where the taxpayer may elect to use various remedies simultaneously, as diverging decisions may result from parallel procedures. As it is undesirable to have competing decisions on the same issue, governments must decide whether to place a "fork-in-the-road" mechanism or to at least suspend one of the procedures while the other one reaches a decision. Colombia opted for the fork-in-the-road design, which precludes taxpayers from challenging the issue in court once they choose to submit the issue to the MAP[13], unless the competent authorities involved fail to reach an agreement. Under this approach, the taxpayer must agree to suspend any pending administrative or judicial procedures until a decision is reached in MAP, or until the taxpayer is notified that the competent authorities were not

[13] See par. 2 of Art. 869-3 of the Colombian Tax Code, as well as Chapter V in Resolution 085/2020.

able to reach an agreement[14]. This last commitment by the Colombian competent authorities reflects a desire to bring more transparency to the procedure, and to save valuable resources when it is evident that the competent authorities will not be able to reconcile their respective positions to reach a compromise. This is not an explicit element of the minimum standard, but competent authorities that choose not to notify taxpayers when they are unable to reach an agreement may indirectly violate a taxpayer's due process and defense rights. Under the Colombian rules, a taxpayer may choose to resume administrative or judicial remedies if no agreement was reached in MAP.

In some jurisdictions, like the United States (US), the MAP is not viewed as a remedy, given, among other reasons, that the taxpayer is not a party to the MAP, and that the MAP's purpose is not to perform a review on the legality of a particular adjustment or position, but rather to verify the correct application of a treaty and to alleviate double taxation. Nonetheless, in many cases the MAP agreement may reverse an adjustment totally or partially, which is equivalent to providing full or partial remedy to the taxpayer. For this reason, adopting the fork-in-the-road approach reduces the resources spent, as it is not possible for the taxpayer to submit the issue again to a court if an agreement is reached in MAP.

This approach may also be useful in the long term, given the high probability that arbitration will become a minimum standard in the medium term. It is, indeed, included in the Pillar 1 agreement for developing countries who are members of the OECD or the G20 in the form of Mandatory Binding Dispute resolution for issues "related" to Amount A[15]. The cases submitted to arbitration under this mechanism, or under a future minimum standard, will be very demanding for developing countries in terms of human and financial resources. Hence, allowing the taxpayer to challenge a decision in domestic courts would be equivalent to at least partially wasting the resources spent by the government in arbitration or the mandatory binding procedure. The fork-in-the-road option guarantees that the government only has to invest once in the resolution of a specific international tax dispute.

1.6. Interaction with Collection Mechanisms

In many countries, tax debt-collection mechanisms can only be deactivated once a lawsuit has been filed for the annulment of the adjustment made by the tax administration and the judiciary has admitted the lawsuit. Because a MAP request is not a lawsuit, it is important to regulate the effects of granting access to MAP with

[14] See art. 32 of Resolution 085/2020.

[15] OECD/G20 (2021). Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. Available at https://www.oecd.org/tax/beps/statement-on-a-two-pillarsolution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october2021.pdf. P.2. Tax Certainty.

respect of the collection mechanisms. If there is a possibility that the MAP outcome will alter the debt to be collected, then it is key to provide guidance on the interaction with domestic collection mechanisms. It is possible that this guidance requires legal implementation, as was the case in Colombia, where the causes for suspending collection mechanisms are explicitly stated in the tax code.

Colombia explicitly created a legal cause for the suspension of collection mechanisms from the notification of the act that grants access to MAP, until an agreement is reached or until the taxpayer is notified of the absence of an agreement[16]. This is especially relevant in countries where collection services are outsourced or where collection is performed via automated attachment on the taxpayer's bank accounts. It is important to note, however, that this coordination is considered a best practice[17] and is therefore not a part of the minimum standard that will be enforced by the peer-review mechanism[18].

In the absence of a coordinating rule, developing countries should at least ensure that debts collected during the course of a MAP negotiation will be easily refunded if the MAP agreement eliminates or reduces the amount of the debt. In the case of attachments applied on real estate or specific taxpayer property, the Competent Authority and the collection offices must be coordinated to prevent the sale of those assets while there is still a possibility of reaching an agreement that will eliminate or reduce the outstanding debt.

1.7. Multiyear Resolution, Interest, and Penalties

Another important decision for the MAP regulations has to do with the possibility of allowing the Competent Authority to resolve multiyear disputes and to deal with interest and penalties in the MAP agreement. These decisions confer greater powers to the Competent Authority while allowing a better protection for taxpayer rights and a deeper efficacy in the resolution of disputes. If the regulations allow for a multiyear dispute[21], human and time resources will be saved given the possible inclination of the taxpayer to file various requests if a specific audit position is persistent under unchanging facts and circumstances. By allowing multiyear submissions, developing countries may shift the burden of proof to the taxpayer, thus saving time spent analyzing if the facts and circumstances for each new filing are materially unchanged.

16 See the paragraph in Art. 869-3, as well as Art. 30 of Resolution 085/2020.

17 See Colombia's Resolution 085/2020, at art. 14.16.

18 OECD (2016). *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris. www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf. p. 13, element B.P.8.

Interest and penalties are considered procedural aspects under many domestic legislations, and in all cases are tied to the determination made regarding the principal tax. Therefore, if the Competent Authority is vested with the powers to decide on the principal issue, they should also be vested with the authority to decide on the ancillary issues of interest and penalties[19]. Other jurisdictions prefer to assign the function of other tax administration officials, who may have more extensive experience in determining interest and penalties. In this later case, the taxpayer must take the MAP agreement to these officials to have interest and penalties recalculated based on the agreement reached in MAP. This may be more burdensome to the taxpayer but it is a better choice when the Competent Authority does not have personnel with experience dealing with interest and penalty calculations.

1.8. Taxpayer Participation and Requested Information

The MAP is by definition a State-to-State procedure, so in principle the taxpayer can only formally participate in the triggering of the mechanism. However, in many relevant issues submitted to MAP (especially in transfer pricing and profit attribution to permanent establishments), taxpayers hold factual information that is extremely relevant for the application and interpretation of treaty provisions. Furthermore, most developed countries with extensive MAP experience (especially the US) have come to develop a very close relationship with taxpayers and their advisors in the course of a MAP or arbitration procedure. This not only allows for a deeper understanding of the case, but it also results in a more efficient use of resources, as the taxpayer-produced materials are made available to the competent authority for its use in the preparation of country positions and MAP negotiations. Developing countries may choose to open up to these enhanced relationships with the taxpayers in the course of a MAP in order to increase transparency in the procedure and achieve a more efficient use of available resources[20]. Although it may seem more logical to allow for such access only for companies that are headquartered in the jurisdiction (as it is less likely that the taxpayer position will align with the developing country position in the case of foreign taxpayers), this distinction may be viewed as discriminatory by other jurisdictions.

The Action 14 Terms of Reference do not explicitly require a symmetric flow of information to both competent authorities, but the fact that taxpayer involvement varies greatly across jurisdictions makes it crucial to include such requirement in developing country MAP regulations, so that if the taxpayer submits a document or information to one competent authority, they must also submit it to the other competent authority[21]. This

[19] This is the case for Colombia. See art. 35 of Resolution 085/2020.

[20] See art. 18 of Resolution 085/2020 for Colombia's choice regarding taxpayer participation.

[21] Colombia included asymmetry in the information as a cause for ceasing competent authority assistance to the taxpayer in art. 16 of Resolution 085/2020.

is applicable to private hearings or meetings, emails, and any other type of information exchanged between the competent authority and the taxpayer.

1.9. Arbitration and Supplementary Dispute Resolution

The pressure for mandatory binding dispute resolution in the context of international tax disputes has increased rapidly with the BEPS project and the work on Pillar 1. It is true that arbitration is not yet a part of the minimum standard, but an increasing number of countries are already preparing for the time when it will be included as a minimum standard for all the members of the Inclusive Framework. Currently, Element C.6 of the Terms of Reference for the Action 14 Peer Review requires jurisdictions to "provide transparency with respect to their positions on MAP arbitration". Because the inclusion of MAP arbitration is a matter of bilateral negotiations for most developing countries, it is likely that if a jurisdiction is open to allowing voluntary or mandatory solutions with a treaty partner, it is in exchange for greater taxing powers at source (including, for example, a services PE with a low time threshold). One possible way to address this demand for transparency without harming the treaty negotiation strategy is to reveal that the country may be willing to accept arbitration under specific conditions in the framework of a bilateral negotiation. This statement may also facilitate the renegotiation of old treaties where the inclusion of full or limited MAP arbitration is accepted in exchange for better conditions for the source country in other articles.

The inclusion of the UN or OECD model's current Article 25 in new treaty negotiations is one of the recent trends for countries like Colombia, which is also submitting domestic tax arbitration for parliamentary approval in 2022.

The reason for this trend is closely related to the greatest criticism that MAP faces: it is not efficient due to the fact that competent authorities have no obligation to reach an agreement. Therefore, granting access to MAP but refusing to reach an agreement is still a possibility that taxpayers, some developed countries, and the OECD, are wanting to eliminate by pressuring countries to adopt mandatory binding dispute resolution mechanisms in case the competent authorities fail to reach an agreement in MAP. The object of introducing these procedures is to force competent authorities to reach an agreement. Some developing countries (those belonging to the OECD or the G20) will already face this pressure in the case of unilateral transfer pricing or profit attribution adjustments that are deemed "related" to Amount A under Pillar 1.

While this trend is extended to other developing countries, it is highly advisable to include arbitration in the capacity building programs for competent authorities and relevant government officials involved in the MAP functions. Moreover, a developing country may gain a competitive edge if it chooses to include supplementary dispute resolution (SDR) mechanisms in its MAP functions. Mediation, for example, may

alleviate the pressure on competent authorities to reach an agreement on their own, and independent mediators may bring further confidence that the agreement reached is reasonable. In fact, mediation seems particularly useful in the prevention stage, that is, when the taxpayer has identified a risk and would like to discuss it with the competent authorities before there is an official adjustment. The same is true for expert determination, which may assist competent authorities in assessing the solidity of their country position if the dispute were taken to an arbitration panel or a single baseball arbitrator. Those mechanisms are not mandatory and may contribute towards capacity building in developing countries, which is why jurisdictions reviewing or creating new MAP guidance are encouraged to consider the benefits of these SDR solutions in their MAP practice. Besides, adopting them does not require legal changes in most countries, as it is the competent authorities who maintain the power to make the decision.

Finding independent experts and mediators who can show a deep understanding of developing country positions is becoming easier with the increase in global training opportunities, and former authorities and judges may be a top choice to pilot these solutions. Of course, the more developing countries start adopting these mechanisms, the easier it will become to find suitable experts and mediators that can later serve as arbitrators if it becomes a part of the minimum standard for Action 14 in the medium term.

Conclusions

Drafting MAP regulations and habilitating laws requires a series of decisions that are key to establishing whether a jurisdiction will be more or less competitive in terms of tax treaty dispute resolution. As mentioned above, these are times when the space for competing with tax incentives is significantly reduced with the approval of Pillar 2, regardless of whether the country will implement the Income Inclusion and Under-Taxed Payments rules domestically, as it is clear that many residence countries will be applying them to capital that is exported to traditional source jurisdictions. In this context, the debates presented above can be viewed as an opportunity to make the country more competitive, without a need to concede on fundamental positions such as the events that trigger a taxable presence under a treaty, or whether a domestic tax measure is discriminatory under article 24 of the model treaties.

Naturally, the decision to be more competitive requires a higher investment in human resources, which is still mandatory in the peer-review framework for Action 14. It is therefore advisable to review these debates before a scheduled peer-review under Action 14, so that the jurisdiction has had time to approve the necessary legislation and budget appropriations to be consistent with the decisions made for each of the debates illustrated hereby.

Finally, it is important to note that the more resources are spent on gaining MAP experience, the more likely the country will be to prevail in any mandatory binding mechanism approved in the future. It is therefore wise to invest in MAP now, in order to prevent losses when (and if) the country is forced to accept mandatory binding solutions in the medium or long term.

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OECD. (2016). *BEPS Action 14 on more effective dispute resolution mechanisms – Peer review documents*. OECD/G20 Base Erosion and Profit Shifting Project. https://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peerreview-documents.pdf

OECD. (2021). *Peer review terms of reference: Action 14 – Mutual agreement procedure*. OECD Publishing.

OECD. (2023). *Members of the OECD/G20 Inclusive Framework on BEPS*. https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf

OECD/G20. (2021). *Statement on a two-pillar solution to address the tax challenges arising from the digitalisation of the economy*. OECD. https://www.oecd.org/tax/beps/statement-on-a-two-pillarsolution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october2021.pdf

PART 2

International Tax Arbitration: What it Means and How it Has Evolved

Ubaldo González de Frutos

2.1. A Decisive Moment for International Tax Arbitration

For years, there has been ongoing tension between developed countries, that have pushed to impose arbitration as a last resort mechanism for resolving tax disputes, and developing countries opposing it due to limitations in resources, capacity (Mooij, 2017),[22] and a lack of negotiating experience (Bawney, 2021).[23]

In this political context, the principle of legal certainty, which ensures that taxpayers have the right to seek resolution for legal disputes, has been juxtaposed with the principle of sovereignty.[24] The principle of sovereignty, derived from the statist-Westphalian[25] tradition, emphasizes non-interference by third parties, whether they are states or individuals, in a country's internal affairs.

After two decades of refining the doctrine and regulations surrounding international tax arbitration, which will be examined in this chapter, developing countries are now confronted with a dilemma. In order to participate in the Pillar One mechanism of the Inclusive Framework, they must decide whether to accept mandatory and binding arbitration. If they do so, they will be eligible to receive their share of the taxable base, referred to as "Amount A," which provides a potential source of financing. This decision will require them to sign a multilateral treaty that facilitates the resolution of disputes within their jurisdiction[26]. However, in exchange for the revenue, they will be required to adhere to mandatory binding arbitration. This application of the principle of "do ut des" (give and take) applies specifically to tax disputes related to Pillar One, including disputes over transfer pricing, business profits, and determining whether the subject matter falls within the scope of Amount A. It may also extend to issues concerning "Amount B."

Countries' commitment to embrace international tax arbitration applies only to tax disputes within the scope of Pillar One. It does not extend to other tax disputes outside of this framework. Nevertheless, the importance of adopting international tax arbitration, even in a limited capacity, should not be underestimated.

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[22] Mooij, H. (2017): *Global Tax Policy and Post-BEPS Dispute Resolution*. Kluwer International Tax Blog. http://kluwertaxblog.com/2017/06/19/global-tax-policy-post-beps-dispute-resolution.

[23] Bawney, I. (2021): *Fit for Purpose? Reconceptualising Arbitration Clauses in International Tax Treaties.* En Very Youg Arbitration Blog. https://www.vyablog.com/2021/12/fit-for-purpose-reconceptualising.html.

[24] Enshrined in the United Nations Charter, the principle of sovereignty translates into the obligation of third states to refrain from intervening in the internal affairs of a country, as well as the freedom of countries to submit such matters to settlement procedures in accordance with the United Nations Charter (Article 2.7): https://www.un.org/es/about-us/un-charter/chapter-1.

[25] According to political scientists, the concept of sovereignty dates back to the Peace of Westphalia, a treaty that ended the Thirty Years' War in 1648, and it forms the basis of contemporary international law.

[26] The draft of the Multilateral Convention to Implement Amount A of Pillar One was published on October 11, 2023. https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.htm.

Firstly, many countries continue to encounter legal barriers to arbitration, imposed through constitutional, statutory, or case law provisions. Civil law systems, in particular, adhere to the principle of non-disposition of public rights[27], which applies to both domestic and international arbitration. Such positions will need to be modified to accommodate arbitration, even if limited to Pillar One of the Inclusive Framework. For instance, it will be necessary to enact national legislation to regulate procedures and acknowledge the enforceability of awards issued by international arbitrators.

Equally important is the need to address capacity building within tax administrations to successfully implement this framework. As emphasized by the United Nations High-Level Panel on International Financial Accountability, Transparency, and Integrity, several factors must be taken into consideration when contemplating this policy option. These factors include the limited experience of many developing countries in dispute resolution procedures, the financial constraints associated with the high costs of arbitration, and the potential for biased outcomes or arbitrators. It is also important to note that some developing countries have had negative experiences in resolving disputes under international investment protection agreements (FACTI 2021).[28],[29]

An additional hurdle arises from the absence of an international tax arbitration institution, similar to the International Court of Arbitration of the International Chamber of Commerce,[30] or the Arbitration System of the International Centre for Settlement of Investment Disputes (ICSID) of the World Bank Group.[31] These established institutions play a vital role in resolving state-state and state-investor[32] disputes governed by bilateral investment treaties (BITs). In response, the United Nations FACTI Panel has put forth a proposal for the establishment of an impartial and equitable mechanism under the UN's purview to address international

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27 In Spain, Article 7 of Law 47/2003, of 26 November, General Budgetary Law, states that "The economic rights of the State Public Treasury may not be alienated, encumbered, or leased except in cases regulated by law, and, without prejudice to what is established [for bankruptcy proceedings], the rights of the State Public Treasury may not be judicially or extrajudicially settled through compromise, nor may disputes concerning them be submitted to arbitration, except by means of a royal decree agreed upon in the Council of Ministers, after hearing the State Council in full."

28 FACTI (2021): *Panel de Alto Nivel sobre Responsabilidad, Transparencia e Integridad Financieras Internacionales. Integridad Financiera para el Desarrollo Sostenible*, United Nations, 2021. https://www.factipanel.org/explore-el-informe-del-panel-facti.

29 Although not all experiences are negative. For example, in 2020, the Permanent Court of Arbitration ruled in favor of Guatemala in a multimillion-dollar dispute. https://www.prensalibre.com/economia/guatemala-gano-demanda-internacional-por-reclamo-millonario-de-expropietaria-de-energuate.

30 https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration.

31 https://icsid.worldbank.org/es.

32 In the field of international trade, the English language distinguishes between "commercial disputes" (those that occur between states) and "business disputes" (those between a state and an individual or entity).

tax disputes (Recommendation 4c, FACTI 2021). Nevertheless, at present, this recommendation has not been translated into action.

Reflecting these limitations, support for mandatory and binding tax arbitration in the international arena remains in the minority. An examination of the arbitration clause within the Multilateral Instrument (MLI), which we will delve into further, reveals that out of the 100 signatories, only 31 have accepted it (see details in the Annex) (OECD, 2017).[33] Furthermore, among the 31 countries that have opted for the arbitration clause in the MLI, only 22 have chosen the OECD's preferred option, known as the "baseball-style" final offer arbitration.[34] The other nine countries prefer the "independent opinion" arbitration, which instills greater trust, particularly for developing countries.

Latin America is no exception to the challenges associated with accepting mandatory binding arbitration. Arias-Calderoni (2021)[35] has succinctly summarized these difficulties, which include lack of experience among officials, mistrust in the impartiality of arbitrators, constitutional or sovereign concerns, procedural costs, and the potential risk of losing tax credits.

In 2021, out of the ten countries in the region that have signed the MLI, nine have rejected arbitration. These countries include Argentina, Chile, Colombia, Costa Rica, Jamaica, Mexico, Panama, Peru, and Uruguay. Their decision not to accept arbitration aligns with the challenges and concerns outlined earlier. The sole exception in the region is Barbados, which has voluntarily chosen to embrace arbitration.

The eventual implementation of international tax arbitration, even in a limited capacity such as within Pillar One, poses challenges and carries significant costs. However, once integrated into the tax legislation of developing countries, it can solidify as an institution of International Tax Law (Malamis and Cai, 2021)[36]

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[33] OECD (2017): *La firma del pionero Convenio Multilateral contra la erosión de la base imponible y el traslado de beneficios colmará las lagunas normativas y el vacío legal de los que adolecen miles de convenios fiscales a escala mundial*. https://www.oecd.org/tax/la-firma-del-pionero-convenio-multilateral-beps-colmara-las-lagunas-normativas-de-los-convenios-fiscales.htm

[34] In this type of arbitration, typical of baseball games, the arbitrator must choose between the two positions expressed by the parties; they do not have discretion to select an intermediate point, which is why it is also known as a "baseball-style" or "pendulum" arbitration. It is argued that this approach encourages the parties to adopt moderate positions instead of extremes. However, critics argue that it may result in a lack of thorough motivation or legal reasoning in the award determination.

[35] Arias Esteban, G. and Anarella Calderoni (2021): *Análisis del Arbitraje Vinculante Obligatorio y del PAM*. In CIATBlog, September 7, 2021. https://www.ciat.org/ciat-blog-analisis-del-arbitraje-vinculante-obligatorio-y-del-pam/.

[36] Malamis, S. and Qiang Cai (2021): International Tax Dispute Resolution in Light of Pillar One: New Challenges and Opportunities *Bulletin for International Taxation.* https://www.ibfd.org/sites/default/files/2021-09/OECD_International%20-%20International%20Tax%20Dispute%20Resolution%20in%20Light%20of%20Pillar%20One%20New%20Challenges%20and%20Opportunities%20-%20IBFD.pdf.

and be included in future bilateral treaties. In this Chapter, we provide an overview of the evolution that tax arbitration has undergone to reach its current state. Our objective is to provide political stakeholders with the necessary information to facilitate decision-making processes.

2.2. Inarbitrability

The evolution of international arbitration in tax matters began with a series of doctrinal works advocating for the exclusion of mediators and private party adjudicators from tax disputes.[37] These arguments were not based on explicit provisions that prohibited arbitration,[38] but were grounded in political philosophy, which associated taxation with the exercise of sovereignty. Accordingly, tax treaty law maintained that the resolution of tax disputes fell exclusively within the jurisdiction of state judicial organs until 2008, when the OECD included international arbitration in the OECD Model Tax Convention. However, the concept of tax disputes being non-arbitrable started to lose prominence earlier, as evidence emerged showing that State-party commercial disputes were being successfully resolved through arbitration in an increasing number of cases (Melchiona, 2003 and 2004),[39] and ultimately due to the incorporation of the arbitration institution into international soft law frameworks.

2.3. The Proliferation of Conflicts with Globalization

While tax arbitration was considered as a possibility as early as the 1920s --during the works of the League of Nations (Pit, 2014[40])- its formal institutionalization in international tax law is a relatively recent development. The origins can be traced back to 1976, when the European Economic Community (now the European Union) proposed a directive to address double taxation through arbitration in cases involving associated enterprises residing in different member states. However, it took 14 years for the proposal to be adopted on July 23, 1990, in the form of the European Arbitration Convention. This agreement aimed to resolve double taxation

[37] A good compilation of this doctrine can be found in Park, W. (2008): Arbitrability and Tax. *Boston University School of Law Public Law & Theory Paper* No. 17-32.

[38] "*No hard-and-fast rule prohibits all tax arbitration per se.*" (Park, 2008).

[39] Melchionna, L. (2003): "Tax Disputes and International Commercial Arbitration," 74 *Diritto e Pratica Tributaria Internazionale* (2003) 769. Melchionna, L. (2004): Arbitrability of Tax Disputes, *IBA Section on Business Law, Arbitration and ADR Committee Newsletter 21* (May 2004).

[40] Pit, H.M. (2014): Arbitration under the OECD Model Tax Convention, Follow-up under Double Tax Conventions: An Evaluation. 42, *Intertax*, No. 6, pp. 445-469. https://kluwerlawonline.com/journalarticle/Intertax/42.6/TAXI2014043.

resulting from transfer pricing adjustments when the affected entities are part of a group and reside in different EU countries.

Conversely, discussions on arbitration within the OECD began in 1984. However, during that time, the Committee on Fiscal Affairs did not identify any significant issues with the functioning of the mutual agreement procedure and therefore did not perceive a need for arbitration (OECD, 1984[41]). It was a lengthy process for the OECD Council to embrace the inclusion of arbitration in its Model Tax Convention. After twenty-four years of discussions, amendments, and deliberations, the decision to introduce arbitration was finally made in 2008. As a result, a new paragraph was added to Article 25(5) of the Model Tax Convention to accommodate tax arbitration as an optional means of resolving disputes that the mutual agreement procedure had been unable to settle.

The slow progress of arbitration in international tax disputes can be attributed to factors such as the volume and value of cases involved. Two decades ago, the number of international tax disputes was relatively low. However, with the globalization of economic activities, there has been a significant increase in litigation, as multiple countries issue concurrent assessments to tax the same income.[42]

Prior to that time, taxpayers who were dissatisfied with the decisions made by tax authorities in a particular country had limited options and often resorted to seeking resolution through the courts. However, with the establishment of the OECD Model Tax Convention on Income and on Capital (OECD, 1963[43]), an additional remedy called the Mutual Agreement Procedure (MAP) was introduced. This remedy grants taxpayers the opportunity to request assistance from the competent authority in order to transform a dispute between the taxpayer and the state into a matter involving both states. For this to apply, there must be an article in the bilateral treaty based on Article 25 of the Model Convention. In such cases, the issue is resolved through a procedure that essentially functions as a pact between the competent authorities of both countries, similar to a transactional agreement under Article 1,809 of the Spanish Civil Code.[44] Consequently, if the requested competent authority deems the claim valid but is unable to find a satisfactory solution independently, it

[41] OECD (1984): *Transfer Pricing and multinational enterprises: Three Taxation Issues*. https://www.oecd-ilibrary.org/taxation/transfer-pricing-and-multinational-enterprises_9789264167803-en

[42] Not necessarily in the sense of legal double taxation, the double taxation against which the treaty provides protection can also be in an economic sense (Park 2008, p. 182).

[43] OECD (1963) *Draft Double Taxation Convention on Income and Capital*. https://www.oecd-ilibrary.org/taxation/draft-double-taxation-convention-on-income-and-capital_9789264073241-en

[44] A transaction is a contract by which the parties, by giving, promising, or withholding something, avoid the provocation of a lawsuit or bring an end to one that has already begun.

commits to exerting every effort to reach an amicable agreement with the competent authority of the other contracting state. The goal is to prevent taxation that contradicts the provisions outlined in the Convention.[45]

A notable feature of this dispute resolution system is that the Mutual Agreement Procedure (MAP), included in treaties based on the OECD or United Nations Models, only mandates countries to exert every effort to resolve the issue, without obligating them to reach a definitive solution. As a result, while the procedure has proven effective in numerous cases, there are also instances where it has not yielded satisfactory outcomes.

When countries engage in a Mutual Agreement Procedure, resolving the issue often involves rectifying positions that were initially taken in administrative acts. However, this process faces inherent challenges in acknowledging any errors, especially considering that these acts may have already become final and unchallengeable, leaving no domestic legal recourse to rectify the situation. Consequently, the number of conflicts without a temporary solution started to rise, and some issues remained permanently unresolved. This situation has had adverse effects on the affected taxpayers, as well as on international trade and investment as a whole. In response to these challenges, international organizations, starting with the European Union and later the OECD, recognized the need to combat this situation and made it a policy objective in the realm of taxation. They have pursued various approaches to address the issue, one of which is the utilization of international arbitration.

2.4. Arbitration Arising Out of Investment Protection Treaties

Prior to the reforms implemented by the European Union and the OECD, some companies had already turned to international commercial arbitration as a means to resolve tax disputes. These arbitration proceedings were based on Bilateral Investment Treaties (BITs). Despite being established at a later stage than double tax conventions,[46] BITs quickly gained popularity and now have a similar number of agreements in place.[47] By the time arbitration was being discussed within the OECD in 2004, BITs had already proven effective in resolving

[45] Article 25(2) of the OECD MC.

[46] The first Bilateral Investment Treaty (BIT) appeared in 1959 as part of a broader movement to shield international investment with legal protection. This trend gave way to other instruments as well, such as the United Nations Conference on Trade and Development (UNCTAD), and the arbitration system embodied by the Center for International Arrangement of Differences relative to Investment (CIADI).

[47] There are 2,837 Investment Protection Treaties (IPTs) according to the UNCTAD database, https://investmentpolicy.unctad.org/international-investment-agreements. The exact number of tax treaties is not known with precision because there is no public database specifically for tax treaties. However, the estimated number is often cited as over 3,000. Only the 90 countries and jurisdictions that are part of the MLI convention have a total of 2,800 treaties among them.

tax disputes between private investors and states (Malamis and Cai, 2021[48]). To date, there have been at least 140 cases of tax disputes successfully resolved through commercial arbitration (Lang et al., 2017,[49] Melchionna, 2003). One particularly notable case is Yukos vs. Russia, which involved a claim of $50 billion, accompanied by sanctions and an embargo. In this instance, the Arbitral Tribunal ruled in favor of the claimant, declaring it as an instance of indirect expropriation (Investment Treaty News, 2014[50]).

Double Tax Conventions (DTCs) and BITs serve different purposes but do overlap in certain aspects. BITs are primarily intended to safeguard foreign investors from discrimination, uncompensated expropriation, and arbitrary treatment, while also providing certainty regarding the legal consequences of their investments. They operate within the realm of private international law and establish commitments by states to uphold the protection of investors' rights. On the other hand, DTCs focus on eliminating double taxation that may arise from cross-border economic activities. They function as instruments of public international law and regulate conflicts between states. Both types of treaties share the common objective of promoting cross-border investment and facilitating economic growth (Pistone, 2017[51]). Since 2015, the United Nations Conference on Trade and Development (UNCTAD) has been examining the interaction between BITs with tax provisions and DTCs. In April 2019, the Secretariat of the Committee of Experts on International Cooperation in Tax Matters published "The Interaction of Tax and Investment Agreements."[52] Additionally, in 2021, UNCTAD, in cooperation with the World Tax Policy Center at the University of Vienna, released a guide titled "International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know."[53] These publications assess the most relevant provisions of BITs concerning their impact on tax measures, using the Investment Policy Framework for Sustainable Development as a foundation (Owens, Ndubai y Rao, 2021[54]).

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48 Fn. 15.

49 Lang, M., Owens, J., Pistone, P. et al., (2017): *The Impact of Bilateral Investment Treaties on Taxation*, IBFD Ámsterdam.

50 Investment Treaty News (2014): *Yukos v. Russia: Issues and legal reasoning behind US$50 billion awards* International Institute for Sustainable Development.

51 Pistone, P. (2017). *The impact of bilateral investment treaties on taxation*. Amsterdam 2017 https://www.ibfd.org/sites/default/files/2021 08/18_020_The_Impact_of_Bilateral_Investment_Treaties_on_Taxation_final_web.pdf.

52 Committee of Experts on International Cooperation in Tax Matters, Secretariat Paper (2019): *The Interaction of Tax, Trade and Investment Agreements*, UNTC (Apr. 23-26, 2019).

53 Committee of Experts on International Cooperation in Tax Matters, Secretariat Paper (2021): *International investment agreements and their implications for tax measures: what tax policymakers need to know.* https://unctad.org/es/node/32320.

54 Owens, J., J. W. Ndubai, y S. Rao (2021): Bridging the Policy Gaps: A Tax-Focused Guide to Investment Agreements for Tax and Investment Policymakers. *Tax Notes International*, 101, 10. https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/Articles_by_Owens/2021tni10-12-Owens_Ndubai_Rao_Policy_Gaps.pdf.

2.5. Tax Arbitration in European Union Law

Tax arbitration within the EU emerged earlier than in the OECD. On July 23, 1990, the "European Arbitration Convention"[55] was signed, with the objective of eliminating double taxation in transfer pricing matters arising from administrative actions involving multinational groups operating in different EU countries. In instances of double taxation, the affected company has the option to present its case to the competent tax authority. If the authority fails to provide a satisfactory solution, the company can pursue the mutual agreement procedure with the tax authorities of the EU country where the associated company is located. When the authorities of both countries exhaust the mutual agreement procedure, they refer the case to an advisory committee responsible for proposing a resolution for the dispute. Although the tax authorities have the ability to reach a mutually agreed solution that may differ from the advisory committee's recommendation, the latter becomes binding in the absence of an agreement. The committee comprises a presidency, two representatives from each competent tax authority, and an even number of independent members.

In April 2004, the EU Joint Forum on Transfer Pricing in the field of Corporate Taxation developed a Code of Conduct to ensure the effective implementation of the European Arbitration Convention. This Code of Conduct underwent revision in 2009, providing further clarity on various aspects such as the convention's scope, case acceptance, mutual agreement procedures, and dispute resolution processes. Despite these efforts, the number of unresolved cases between EU countries continued to increase, prompting the adoption of Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the EU, in 2017. This directive serves as a reinforcement of the Arbitration Convention. Firstly, the Directive has a wider scope compared to the Convention, as it encompasses all taxpayers subject to income and capital tax under bilateral tax treaties. In contrast, the EU Arbitration Convention is specifically restricted to disputes related to transfer pricing cases. Secondly, the Arbitration Directive is part of EU law and, therefore, has a higher legal status than the Arbitration Convention. Lastly, the procedures outlined in the Arbitration Directive are more refined and comprehensive compared to those under the EU Arbitration Convention (Malamis and Cai, 2021).

2.6. Arbitration Under the OECD Model Convention

In light of challenges encountered in achieving effective agreements in all MAP cases, the OECD took action in 2003 by initiating a comprehensive review of the international tax dispute resolution process. To enhance dispute resolution, a commission was established between Working Party 1, dedicated to Tax Treaties, and

[55] Convention on the Elimination of Double Taxation in Case of Correction of Profits of Associated Enterprises.

Working Party 6, dedicated to Transfer Pricing (OECD 2004[56]). The primary goal was to establish a robust MAP process that would inspire confidence among taxpayers and address all aspects, ranging from initial access to the implementation of agreements.

The private sector had raised two key concerns regarding the MAP: (i) the lack of transparency and participation for taxpayers, where the process was seen as a "black-box" without their involvement, leaving them without the opportunity to present arguments or receive timely and adequately reasoned resolutions. Moreover, in cases where the resolution was delayed, inconsistent, or insufficiently justified, taxpayers had no right to appeal or seek clarification. And (ii) there were instances where countries were unable to reach a resolution for the dispute, highlighting the need to explore alternative techniques for resolving such cases (OECD 2004, p. 3).

In order to tackle the initial issue, the OECD introduced the Manual on Effective Mutual Agreement Procedures (MEMAP, OECD 2007[57]), and suggested modifications to the Model Convention along with its commentaries. Furthermore, it was advised to adopt best practices for incorporating these changes into domestic legislation, and the consensus was reached to publish national guidelines to assist taxpayers. These guidelines, bolstered by BEPS Action 14, gradually transformed into the obligation to publish country-by-country MAP profiles.[58] Additionally, in the spirit of transparency, countries were required to disclose statistics on MAPs.[59]

To address the issue of unresolved cases, the 2004 report put forward the utilization of supplementary techniques, which were already endorsed by the OECD Model Convention and its Commentaries. These techniques encompassed various approaches, such as senior officials reviewing cases, the option for competent authorities to seek an impartial expert's "advisory opinion" to aid their decision-making process (as mentioned in paragraph 46 of the Commentary to Article 25), the opportunity for parties to request an "opinion" from the Committee on Fiscal Affairs regarding the "correct interpretation" of a treaty provision (as stated in paragraph 47), and the establishment of a "joint committee" to address specific matters, as outlined in paragraph 4 of Article 25 of the OECD Model Convention and paragraphs 4 and 41 of the Commentaries

These techniques indeed bear resemblance to methods employed in private law for conflict resolution, particularly mediation facilitated by a third party. However, it is important to note that in mediation, two degrees of intensity exist. The first degree involves the mediator assisting the parties in identifying areas of

[56] OECD (2004)*: Improving the process for resolving international tax disputes*. Available at https://www.oecd.org/ctp/treaties/33629447.pdf.

[57] OECD (2007): *Manual on Effective Mutual Agreement Procedures.* https://www.oecd.org/ctp/38061910.pdf.

[58] Available at https://www.oecd.org/tax/dispute/country-map-profiles.htm.

[59] Available at https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.

agreement by evaluating their individual strengths and weaknesses. However, the mediator does not make decisions on behalf of the parties and lacks independent decision-making authority. The second degree, on the other hand, encompasses binding mediation or arbitration, wherein the third party renders a decision or award that conclusively resolves the dispute.[60]

Building upon these principles, the OECD proposed the supplementation of Article 25 with the inclusion of arbitration (OECD, 2004, para. 126), although the specific form of arbitration was yet to be determined. Arbitration, in fact, encompasses a wide array of dispute resolution techniques that share a common characteristic: they grant a certain level of decision-making authority to neutral and independent third parties. In this sense, the arbitration procedure possesses a quasi-judicial nature. However, unlike a judicial process, the parties involved in arbitration delegate a certain degree of decision-making authority to the third party responsible for resolving the dispute. Moreover, they agree, to varying extents, to comply with the resulting decision.

In 2003, although there was limited experience in using arbitration for resolving cross-border tax disputes, there were several reference models available. Apart from the European Arbitration Convention, which provided a framework for arbitration, over 60 bilateral tax treaties already included some form of arbitration provision. Moreover, the International Fiscal Association and the International Chamber of Commerce[61] had put forth detailed proposals for arbitration in tax matters. Alongside these models, the influence of investment protection treaties (IPTs) should not be overlooked. The OECD report in 2004 acknowledged that dispute resolution procedures were already being implemented in the commercial context under the World Trade Organization (WTO), resulting in a final and binding resolution of commercial disputes. It recognized the growing pressure to extend the application of such procedures to tax issues.[62]

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[60] The explanatory statement of the Law of December 22, 1953, on private law arbitrations in Spain, defined arbitration as the situation that arises when a direct settlement of a potential dispute is no longer possible, but there are areas of harmony accessible to third parties. In such cases, a longstanding experience has established the effectiveness of involving third parties in the pacification process, who, enjoying the trust of the parties involved, can be granted the necessary authority to impose a satisfactory decision upon them. https://www.boe.es/buscar/doc.php?id=BOE-A-1953-16398.

[61] *Arbitration in International Tax Matters, Draft Bilateral Convention Article, Doc. No. 180/455 Rev.* (10 September 2001). (Couzin, R. (2002): *Arbitration in Tax Treaties*, 29 Tax Planning International Review 12, and annex 5 of the OCDE 2004 report).

[62] *The impact of unresolved tax disputes on trade and investment is undeniable, and any weakness in the treaty-based mechanism for resolving tax disputes invites the expansion of trade-related dispute resolution mechanisms* (OECD 2004, pg. 3).

Building upon these precedents, the member countries of the OECD reached an agreement in February 2007 to modify the Model Convention,[63] which came into effect in 2008.[64] Subsequently, the United Nations made a similar modification in 2011, albeit with minor differences compared to the OECD's version (Bawney, 2021[65]).

2.7. BEPS Action 14

A significant milestone was achieved in 2015 with the introduction of BEPS Action 14. This action established a minimum standard for the effective and timely resolution of disputes, subjecting the outcomes to a peer review mechanism. It once again emphasized the promotion of mandatory and binding arbitration as a complementary option to the mutual agreement procedure found in tax treaties (OECD, 2016[66]).

Nevertheless, despite the initial intention of BEPS Action 14 to encourage the widespread adoption of tax arbitration across countries, it was observed that only 20 countries, all of which were OECD members, showed interest in this mechanism (Malamis y Cai, 2021).[67] Consequently, Action 14 was refocused on enhancing the effectiveness of Mutual Agreement Procedures, similar to the approach taken in 2007. The key distinction is that the current practice of MAP includes a minimum standard and undergoes a peer review process facilitated by an OECD working group. For more on this subject, see Part 2 of this document.

[63] https://www.oecd.org/ctp/arbitrationtobeanoptionincross-bordertaxdisputesoecdcountriesagree.htm.

[64] OECD (2008): Draft Contents of the 2008 Update to the Model Tax Convention. https://www.oecd.org/tax/treaties/40489100.pdf.

[65] Fn. 2.

[66] OECD (2016): *Hacer más efectivos los mecanismos de resolución de controversias, Acción 14 – Informe final 2015*, OECD and G-20 project on Base Erosion and Profit Shifting, OECD Publishing, Paris, https://doi.org/10.1787/9789264258266-es.

[67] These 20 countries together accounted for 90% of the existing disputes at that time (Germany, Australia, Austria, Belgium, Canada, Slovenia, Spain, France, Ireland, Italy, Japan, Luxemburg, New Zealand, Norway, The Netherlands, Poland, Sweden, Switzerland, the United Kingdom, and the United States) (OECD, 2016, p.10).

2.8. The Multilateral Instrument

A new avenue for international arbitration emerged with the introduction of the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (MLI).[68] It should be noted that BEPS Action 14 alone was not sufficient to address the limitation of Article 25(2) of the Model Convention, which only requires efforts to resolve the issue, without specifying a particular outcome. Developed countries advocated for the inclusion of a binding arbitration clause in the MLI, similar to the one outlined in paragraph 5 of Article 25 of the Model Convention. However, consensus on this matter was not achieved. As a result, the binding arbitration clause was relegated to optional provisions within Part VI of the Multilateral Instrument.

The MLI officially came into effect on July 1, 2018, encompassing a provision for optional mandatory and binding arbitration. Part VI of the MLI outlines more detailed rules regarding two primary forms of tax arbitration: (i) independent opinion arbitration and (ii) final offer arbitration. Under the independent opinion approach, arbitrators possess significant discretion to determine an appropriate solution and provide legal reasoning akin to traditional adjudication. On the other hand, the final offer or baseball arbitration approach necessitates that arbitrators choose only between the solutions proposed by the two tax authorities.

The prevailing perception is that the final offer approach encourages the disputing parties to adopt more reasonable positions, thus facilitating the resolution of the dispute. This dynamic arises from the realization that if a party's final offer is too extreme, the panel would select the opponent's offer. In contrast, unlike the independent opinion approach, final offer arbitration typically does not yield well-reasoned decisions, as the outcomes generally consist of a numerical value without additional information or comments from the panel.

2.9. Mandatory and Binding Arbitration in the Multilateral Treaty of Pillar One

The most recent significant development is the incorporation of mandatory and binding arbitration in relation to Amount A of Pillar One in the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from

[68] OECD (2017): *La firma del pionero Convenio Multilateral contra la erosión de la base imponible y el traslado de beneficios colmará las lagunas normativas y el vacío legal de los que adolecen miles de convenios fiscales a escala mundial*. https://www.oecd.org/tax/la-firma-del-pionero-convenio-multilateral-beps-colmara-las-lagunas-normativas-de-los-convenios-fiscales.htm.

the Digitalization of the Economy (OECD, 2021[69]) This signifies that arbitration will be implemented for the portion of profits that are redistributed to countries where users of large multinational companies are located, as defined by Amount A itself.

As the Pillar One proposals currently stand, there is suggested a two-tiered mechanism for allocating profits to market jurisdictions:

1. Amount A which embodies a portion of the residual profit that market jurisdictions are entitled to, irrespective of whether the multinational enterprise maintains a physical presence within these jurisdictions.

2. Amount B which denotes a predetermined compensation for the baseline marketing and distribution functions conducted in the market jurisdiction. This compensation is determined based on the arm's length principle, albeit in a simplified manner.

To ensure legal certainty, Pillar One introduces innovative processes for the prevention and resolution of disputes. Given the complex and multilateral nature of the taxable base, conflicts may arise from determinations made by different tax authorities. In order to mitigate such conflicts, a new multilateral convention has been developed[70], which will be required for implementation by jurisdictions adopting the Pillar One content. This convention will establish cohesive and synergistic mechanisms for preventing and resolving disputes. Furthermore, the new multilateral instrument will not only replace relevant provisions of existing tax treaties but will also apply to jurisdictions that currently lack a bilateral tax treaty in force.

The scope of application of the dispute resolution mechanism within Pillar One is a particularly intriguing aspect of the ongoing debate. While there are varying viewpoints among countries, the intention is to apply the mechanism not only to Amount A, which is widely accepted in principle, but also to other components of Pillar One (OECD, 2020[71], p. 13). The rationale behind extending the mechanism to Amount A is the practicality and feasibility concerns related to allowing individual tax administrations to independently assess, audit, and resolve potential disputes arising from the calculation and allocation of Amount A by multinational enterprises (OECD, 2020, p. 174). Hence, the Pillar One package encompasses a mandatory and binding dispute prevention process that includes a clear and manageable procedure. This process aims to provide early certainty and minimize disputes related to all aspects of Amount A.

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[69] OECD (2021): *Statement on a Two Pillar Approach to Address the Tax Challenges Arising from the Digitalization of the economy*. https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm.

[70] See https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.htm

[71] OECD (2020): *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint*. https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm.

The process is structured around a representative panel, adopting a dual format with a review panel and, when necessary, a determination panel. Its primary objective is to ensure early legal certainty (OECD, 2020, p. 174). Once an MNE accepts the outcomes of this process, the decisions become binding on both the MNE and the tax administrations of all jurisdictions impacted by the calculation and allocation of Amount A, even those that did not directly participate in the panel. In the event that the MNE does not accept the process's results, it retains the option to seek domestic remedies. This comprehensive approach significantly reduces the likelihood of post-disputes arising in the application of Amount A. However, should disputes arise, the new approach also offers enhanced dispute resolution measures, including mandatory and binding arbitration.

The question of whether to extend the mechanism to other elements of Pillar One is not straightforward. Within the Inclusive Framework, some countries strongly advocate for a comprehensive mandatory and binding dispute resolution mechanism that covers all aspects. However, there are also countries that hold the view that disputes unrelated to Amount A should be addressed using the existing framework of mutual agreement procedures, which involve non-binding administrative procedures.

To reconcile these divergent opinions, the Blueprint suggests a solution where groups of MNEs falling under the scope of Pillar One would be subject to a new mandatory and binding dispute resolution process for any transfer pricing or permanent establishment disputes. However, this process would be regarded as a last resort and employed only after exhausting all other prevention and dispute resolution tools. As for other taxpayers, the Inclusive Framework proposes two approaches: a mandatory and binding dispute resolution process and a mandatory but non-binding dispute resolution process, coupled with peer review elements and statistical reporting requirements.

Specifically, concerning Amount B, the Inclusive Framework intends that any disputes related to it, such as determining whether a taxpayer's operations fall within the definition of "marketing and distribution activities," would also be subject to the mandatory and binding dispute resolution mechanism. However, this approach would be utilized as a last resort, implemented only after exhausting all other prevention and dispute resolution tools.

Developing economies that have a minimal number of MAP cases, as determined through the peer review conducted under Action 14, may be exempted from the requirement to implement a mandatory and binding dispute resolution process. This exemption is based on the criteria for deferral of a jurisdiction's peer review. It would be considered disproportionate to mandate these economies to commit to such a process, given their limited or no prior experience with MAP cases. However, they have the option to voluntarily participate in the mechanism if both competent authorities agree that it should be employed to resolve unresolved MAP cases.

Conclusions

Building arbitration into international tax law has been a lengthy process, launched with the European Arbitration Convention in 1990 and fueled by the inclusion in 2008, by the OECD, of arbitration on paragraph 4 of Article 25 of the OECD Model Tax Convention. Also, the Committee of Experts on International Cooperation in Tax Matters contemplated it on Article 25.5 (Option B). The OECD has attempted to expand the use of this effective dispute solving mechanism every time an opportunity has presented: firstly BEPS Action 14 (in 2015), later on the Multilateral Instrument to Implement BEPS (in 2018), and more recently on the Multilateral Convention to Implement Amount A of Pillar 1 (in 2023). Despite these efforts, developing countries continue to refuse to embrace mandatory and binding arbitration, on concerns of the high costs of arbitration and the potential for biased outcomes or arbitrators. In this refusal there is also a great deal of weight of a legal tradition of civil law that for centuries has refused to accept that public rights may be subject to powers other than the courts. Yet, civil law countries in Europe have already made the transition to binding and mandatory arbitration, paving the way for other countries to follow the same route. The negotiation of the Multilateral Convention to Implement Amount A of Pillar One provides the opportunity for a change of policy, and Latin-American countries should be ready to move on, provided they get support from the international community to build capacity in tax administrations to effectively manage dispute resolution processes.

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Annex 1

Arbitration Positions in the BEPS Multilateral Treaty, as of June 20, 2023[72]

Final Offer Arbitration	Independent Opinion Arbitration	No Arbitration
Australia	Andorra	Albania
Austria	Slovenia	Saudi Arabia
Barbados	Greece	Argentina
Belgium	Hungary	Armenia
Canada	Japan	Bahrain
Curaçao	Malta	Belize
Spain	Papua-New Guinea	Bosnia – Herzegovina
Fiji	Portugal	Bulgaria
Finland	Sweden	Burkina Faso
France		Cameroon
Germany		Chile
Ireland		China (People's Republic)
Mauritius		Colombia
Italy		South Korea
Lesotho		Costa Rica
Liechtenstein		Ivory Coast
Luxembourg		Croatia
New Zeland		Cyprus
The Netherlands		Denmark
United Kingdom		Egypt
Singapore		Slovakia
Switzerland		United Arab Emirates
		Estonia
		Gabon
		Georgia
		Guernsey
		Hong Kong (China)
		Iceland
		India
		Indonesia
		Isle of Man
		Israel

[72] https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf

Final Offer Arbitration	Independent Opinion Arbitration	No Arbitration
		Jamaica
		Jersey
		Jordan
		Kazakhstan
		Kenya
		Kuwait
		Latvia
		Lithuania
		North Macedonia
		Malaysia
		Morrocco
		Mexico
		Monaco
		Namibia
		Nigeria
		Norway
		Oman
		Panama
		Pakistan
		Peru
		Poland
		Qatar
		Czechia
		Romania
		Russia
		San Marino
		Senegal
		Serbia
		Seychelles
		South Africa
		Tunisia
		Turkey
		Ukraine
		Uruguay

PART 3

Prospective Reflections on Mediation in the International Tax Context

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3.1. The UN's Work on the Avoidance and Resolution of Tax Disputes

Throughout recent years the United Nations through its Committee of Experts on International Cooperation in Tax Matters (hereafter known as 'the Committee') has paid special attention to the resolution of tax controversies via Mutual Agreement Procedure (MAP), this means, using the mechanism which allows contracting states to resolve the complaints filed by taxpayers regarding an incorrect application of the provisions of the treaty or the interpretation of said instrument.[74]

In the year 2005, the Committee analyzed the pros and cons of international tax arbitration and elaborated a report on the alternative mechanisms for the prevention and resolution of controversies, under the premise that the MAP, according to statistics and experiences, was not being sufficiently effective in some countries to resolve cross-border tax disputes.

In 2006, as a result of the presentation of said report, the Committee decided to create a Subcommittee on Dispute Resolution (hereafter known as 'the Subcommittee') to provide continuity on this work and elaborate measures that could contribute to the effectivity of the MAP.

In 2010, as fruit of the Subcommittee's work, the Committee approved two alternative versions of Article 25 of the United Nations Model Double Taxation Convention Between Developed and Developing Countries (hereafter known as the United Nations Model Double Taxation Convention).[75] Alternative "A" does not establish mandatory arbitration between competent authorities to resolve definitively the conflict that detonated the MAP, while Alternative "B" does establish it, setting a certain basis for its development.

In 2012, the Committee approved the Guide to the Mutual Agreement Procedure Under Tax Treaties (hereafter known as the UN Guide on MAP).[76] Even though this document is inspired on the Manual on Effective Mutual Agreement Procedures[77] published by the Organization for Economic Co-operation and Development (OECD),

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[74] Mentions referring to the MAP in this Chapter are made to the modality contained in paragraphs 1 and 2 of Article 25 of the United Nations Model Convention.

[75] United Nations Model Double Taxation Convention Between Developed and Developing Countries accessible at: https://desapublications.un.org/file/914/download

[76] The Guide to the Mutual Agreement Procedure Under Tax Treaties can be found at: https://www.un.org/esa/ffd/wp-content/uploads/2014/10/ta-Guide_MAP.pdf

[77] The Manual on Effective Mutual Agreement Procedures can be found at: https://www.oecd.org/tax/dispute/manualoneffectivemutualagreementproceduresmemap.htm#:~:text=The%20MEMAP%20is%20intended%20as,binding%20rules%20upon%20Member%20countries.

its content is based on the provisions of the United Nations Model Double Taxation Convention which allow it to offer a special approach aimed at countries with limited experience in said procedure.

In 2015, the Committee approved the creation of a new Subcommittee on Mutual Agreement Procedures. One of the most representative achievements of this Subcommittee was the redaction of the paragraph 41.1 of the Commentaries on Article 25 of the 2017 United Nations Model Double Taxation Convention, in which it is recognized the possibility of utilizing, in a MAP, alternative dispute resolution mechanisms, such as mediation.[78]

By virtue of the importance that said paragraph has on the development of this Chapter, together with paragraph 41 that precedes it, its transcriptions are considered adequate:

> *41. It is recognized that, for some countries, the process of agreement might well be facilitated if competent authorities, when faced with an extremely difficult case or an impasse, could call, either informally or formally, upon outside experts to give an advisory opinion or otherwise assist in the resolution of the matter. Such experts could be persons currently or previously associated with other tax administrations and possessing the requisite experience in this field. In essence, it would largely be the personal experience of these experts that would be significant. This resort to outside assistance could be useful even where the competent authorities are not operating under the standard of an "agreement to agree", since the outside assistance, by providing a fresh point of view, may help to resolve an impasse.*
>
> *41.1 The possibility for such assistance may include the utilization of non-binding methods of dispute resolution, such as mediation. For countries that wish to use such procedures, there are several non-binding methods that can be used to resolve disputes between parties at an early or later stage of the competent authority process. Such non-binding means of dispute resolution could range from facilitating the relational aspects of the competent authority process to providing insights or views on the substantive tax matters at hand in the dispute. Such methods are presently used for the resolution of tax disputes under the domestic laws of a number of countries. These procedures should, however, be utilized with due regard to issues such as the timing and duration of the procedures, the mechanism and criteria for selection of the mediator or other such appointed person and, the treatment of confidential information.*[79]

[78] The 2010, 2014 and 2017 OECD's Model Tax Conventions also recognize the use of mediation during a MAP, in paragraph 86 of the Commentary to Article 25 of said Models.

[79] The United Nations Model Double Taxation Convention between Developed and Developing Countries is available at: https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/20203/UN%20Model_2017.pdf

Months later, in October of 2017, the first session of the new members of the Committee for the period 2017-2021 took place. In said session, the decision of creating a new Subcommittee on Avoidance and Resolution of Controversies was made and, after a broad discussion, the mandate[80] that would conduct the work of said Subcommittee was set[81].

The mandate was extremely clear: the new Subcommittee shall depart from the work carried out by the previous Subcommittee to examine the possible mechanisms for avoidance and resolution of controversies, for both national and international levels, with aims of improving the efficiency of the MAP in any of the alternatives set in Article 25 of the UN Model Double Taxation Convention.

The result of this work had to be embodied in 3 documents, one with high priority and two with medium priority. The high priority document was a Handbook on the Avoidance and Resolution of Tax Disputes, and the other two were the update of the UN Guide on MAP, as well as a project of possible amendments to the United Nations Model Double Taxation Convention and its commentaries.

It is important to highlight that the Committee, in said mandate, emphasized that the Subcommittee should consider the factual issues that especially affect developing economies, the possible means to face said issues and the ways to promote the confidence to respond at such.

Attentive to the priorities set in the mandate and with the purpose of achieving more efficiency on the works entrusted through it, in a subsequent session, the Committee determined that instead of updating and individually publishing the Guide on MAP, the Subcommittee should include it in certain Chapters of the Handbook on the Avoidance and Resolution of Tax Disputes.

This Handbook is the result of the works of the *Subcommittee on Avoidance and Resolution of Controversies*. It is composed of 6 Chapters, discussed and approved by the Committee in-between October of 2018 and April of 2021, including Chapter 4, in which the updated UN Guide on MAP was introduced. The final version of this work was released on October of 2021.[82]

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[80] The full content of the mandate is available at: *https://www.un.org/esa/ffd/tax-committee/tc-subcommittee-dispute-avoidance-and-resolution.html*

[81] The author had the privilege of participating in the Subcommittee, which he deems an enriching and knowledge-nurturing experience.

[82] The United Nations Handbook on Avoidance and Resolution of Tax Disputes is available at: *https://www.un.org/development/desa/financing/what-we-do/ECOSOC/tax-committee/thematic-areas/dispute-resolution*

3.2. On the Lost Opportunity of Deeply Reflecting about Mediation in the MAP

One of the expectations generated by the elaboration of the United Nations Handbook on Avoidance and Resolution of Tax Disputes was the way in which the potential use of alternative dispute resolution mechanisms would have to develop to improve the efficiency of the MAP.

This expectation was natural and justified for various reasons. The most important one being the clarity of the mandate entrusted to the redacting Subcommittee, inasmuch as it should be based on the work carried out by the previous Subcommittee in order to seek for a way to make the MAP more efficient, through the use of alternative dispute resolution mechanisms.

Thereby, if one of the most representative achievements of the previous Subcommittee was the amendment to paragraphs 41 and 41.1 of the Commentaries to Article 25 of the UN Model Convention, in which the possibility of utilizing mediation within the MAP was recognized, it would have been logically foreshadowed to benefit from said advance and take a step forward to try to design a framework of reference aimed to the potential implementation of said alternative mechanisms, reflecting on which cases it could result feasible, the role that the mediator would hold between the competent authorities and the role that, given the case, could hold the taxpayer in said procedure, to mention a few aspects.

Given the clarity of the mandate, it may be stated, the redacting Subcommittee was not only capable of, but rather had the obligation to explore if mediation could contribute to improve the efficiency of the MAP, moreover for those purposes the mandate authorized the analysis of successful experiences in the domestic level and precisely with said objective an interesting integration of the Subcommittee was carried out, which included noted professional individuals of diverse countries that from any role had contributed to the success of said domestic experiences and that most likely could have detonated an interesting debate about how, from their practical vision, they could try to adapt to an international level the key elements of a successful local-level mediation.

It seemed then that the context was set out for the UN to seize the opportunity presented by the redaction of the Handbook and for it to reflect with proper depth on how international tax mediation could be implemented, assuming its role as a key player in the design of public policies, models and guides on structural subjects in the matter of global taxation; however, it finally seemed as if the achievements regarding mediation were overshadowed compared to those achieved in other matters to which principal focus was deployed. This assertion is based on the reasons further explained below.

Through the process of redaction and discussion of said contents it was notable the interest that awoke, especially among the experts from developing countries, the conception, practice, and results that were reported by the use of mediation in the resolution of domestic tax controversies in some countries, which set the table to explore how those experiences could be exported to the international level.

In fact, an important number of experts from these countries supported the idea of openly reflecting about this matter and manifested it in various face-to-face meetings, which was in line with what was set in the mandate as to the fact that the Subcommittee had to consider, in the execution of its job, the challenges and needs of developing economies, as well as the possible means to face said challenges.

Attentive to this concern, the majority of the members of the redacting team of Chapter 6 of the Handbook, elaborated a robust text that presented, in addition to what today is offered in the existing Chapter, an specific introduction regarding mediation, the role of the mediator, the unforeseen problems that may arise during mediation, the choice that the mediator could take regarding the tested party in transfer pricing cases, the role that domestic experience represents in face of an eventual implementation of mediation in the international level, the role that an Ombudsman could play in an eventual cross-border mediation and a proposal of practical implementation of mediation during a MAP based on a case study.

Surprisingly, for the parties that had proposed the mentioned contents, the final decision of the Subcommittee was to present to approbation of the Committee the content of Chapter 6 visible in the definitive version of the Handbook, which in the authors opinion falls short to purely reflect in all its extension the product of the lively discussions that were behind it.

The reason for which it was decided to eliminate the contents about mediation that were originally proposed was, in essence, that a Handbook is no place to make recommendations about subjects of which there is no evidence or practical experience.

In response to said argument a reply was formulated arguing that it would be a pity not to include a prospective vision on mediation in the Handbook, since it would deprive the UN of following the path laid out by the modification of the commentaries to Article 25 of the Model Convention, in the sense of trying to explain how that option could be implemented for the countries that were interested in it.

It was also expressed that eliminating the proposed content would go against what was expressly entrusted to the Subcommittee on the approved mandate, to which there was no reply. The author's position, manifested by writing before all the members of the Subcommittee, was the following:

> *"…As far as I remember, practically all the representatives of developing countries are in favor of talking in prospective about mediation in MAP context no matter we do not have an example of this now.*

This is critically important since the aim of the Handbook is precisely to focus and help developing and less developed countries.

To me, downplaying mediation, beyond any technicalities regarding the lack of experience on Mediation/ MAP, is a strong disdain on what less MAP experienced countries want to explore and talk about."

Finally, the position that proposed the elimination of the prospective text about mediation prevailed to result in the approbation of Chapter 6 in the terms that can be read in the definitive version of the Handbook. It can be taken as a lost opportunity that the UN leaned towards that position, since, in conjunction with the OECD, they are the only international bodies that have the sufficient strength to introduce new institutional ways of thinking regarding the development of the MAP.

Perhaps the UN could have acted with higher intensity to avoid that the limitative vision around mediation, which was upheld only by a few experts from developed countries. Some may assert that, in this matter, the UN could have pushed forward with more passion to attend the concerns and visions that are of interest especially to developing and less developed countries in a subject of such importance as it is the resolution of international tax controversies.

3.3. MAP: An Equal Set of Rules for Operators with Different Realities

Every alternative mechanism for the resolution of tax controversies must be regulated through general guidelines to achieve its institutionalization.

Notwithstanding, reported experiences on an international level find in the flexibility of said regulation a key element to reach for a successful operation of the alternative mechanism, mainly if it is about consensual procedures, by virtue of the power that the parties hold to seek within themselves the solution to the problem that they face.[83]

[83] The MAP is a controversy solution procedure which nature is originally considered as consensual, since the competent authorities of the countries that entered into a bilateral convention to avoid double taxation are those who, in the beginning, can find a common solution to the conflict denounced by the taxpayer and that initiated said procedure. However, it could also be recognized a adjudicative procedure, in case that the solution to the conflict of application of interpretation of the treaty is resolved via arbitration, as agreed upon the respective competent authorities.

What grants the flexibility in the regulation and operation of consensual procedures is the possibility for the parties to make adjustments they consider necessary to generate greater trust between them and increase the possibilities of overcoming the dissent.[84]

This is of special relevance in situations in which some of the parties feel that they do not stand on an equal ground during the process, either because they do not count with the same level of understanding, experience or knowledge in the handling *per se* of the alternative mechanisms, or well, with respect to the elements that integrate the fundamentals of the conflict.

Having established this, it is deemed appropriate to share for contrast what in repeated occasions was discussed, in the context of the works of the Subcommittee, about what seems to be the position of the OECD when it comes to change proposals regarding the MAP.

The following concept is not a quote that can be attributed to someone in particular, but rather a construction of what was stated every time any alternative leaning towards the improvement of regulation of the MAP was explored, via the implementation of alternative dispute resolution mechanisms:

> *The Mutual Agreement Procedure is well designed, lets allow it to operate and not alter its structure. What is needed for it to reach an optimum efficiency level on a global scale is that all countries comply with the obligations set regarding said procedure that are established in the Treaty. Those obligations are binding to the States, for its compliance is not optional. If all countries followed this premise, surely the results of efficiency would show, same as those which are already being noticed in many jurisdictions.*

Notwithstanding that some may agree that the compliance of obligations regarding the MAP are not optional for the competent authorities, it could be considered as a limitative vision to reduce the problem surrounding the inefficiency of this procedure to simply demand the compliance with the obligations set in the treaty, without taking into consideration the abysmal differences that exist in the realities lived by the various competent authorities.

Taking said premise as valid would uphold the equivalent to demanding that we must all respect the transit rules of our city and aspire that, with said demand, there would not be any accidents, leaving out of sight the plurality of aspects that can be observed in the noncompliance of said rules.

Without ceasing to demand the compliance of the obligations that derive from the treaty, one may argue that we must lean towards the flexibility which was mentioned in preceding paragraphs and lose the fear of exploring adjustments to the structure of the MAP that tends to generate experience, knowledge and

[84] Pasquale Pistone and Jan J.P. de Goede, *"Flexible Multi-Tier Dispute Resolution in International Tax Disputes"*, International Bureau of Fiscal Documentation, Amsterdam, The Netherlands, 2020, Page 208, Section 11.7

confidence, especially in jurisdictions that are not familiarized with this procedure, such as developing or less developed countries.

The challenge relies on giving flexibility to the normative structure in force to make room and adapt for the different realities that the operators of said rules face, such as occasions where jurisdictions do not have the infrastructure and technical knowledge to comply with providing access to the MAP or to put their efforts in reaching an agreement.

With the purpose of demonstrating the sharp differences that can exist between the different operators of the MAP, it is worthy to learn some of the problems and necessities faced by the competent authorities of developing or least developed countries in the handling of said procedure, parting from the clarity of what international tax experts expose on the matter.[85]

3.3.1. The Lack of an Adequate Structure to Carry Out the Functions of a Competent Authority

In general, within the competent authorities, there are no special task forces that handle MAPs. Many tax administrations have a small area, integrated with few qualified personnel, completely in charge of the whole international taxation spectrum. Complex cases are not necessarily assigned to an expert official capable of analyzing the issue, which has a negative impact on the solidity, depth and agility with which a MAP must be treated.

3.3.2. Lack of Independence of the Competent Authority

Generally, competent authorities either have no independence from the audit function of the tax administration or they act based on a collection policy dictated by the Ministry of Finance This stops the competent authorities from contradicting the auditing authorities even in the cases where they lack technical merits, losing the opportunity to grant unilateral tax relief, including when there has been tax collection not in accordance with the respective convention. Due to its transcendence, this is one of the principal issues to which attention and work has been directed for many years.

[85] See Mutual Agreement Procedure in Tax Treaties: Problems and Needs in Developing Countries and Countries in Transition, written by Carlos Protto, available at: https://kluwerlawonline.com/journalarticle/Intertax/42.3/TAXI2014020

3.3.3. Absence of Performance Indicators in the MAP and Technical Training

Taking into account the budget constraints of some competent authorities, it is uncommon to find technical training programs for the personnel in charge of the international tax disputes, similarly, there are no indicators or references that could serve to evaluate their performance, such as the time needed to resolve a MAP or the consistency in the interpretation of certain provisions of the treaty during said procedure.

The most common consequences that are materialized in the MAPs handled before competent authorities of developing economies, due to this type of constraints, are the following:

a. Due to the lack of resources to analyze a MAP from an early stage of the tax conflict, as it could be during the development of an audit, the beginning of the procedure starts only once there is a determined tax liability, which limits the maneuvering capacity of the competent authority to find a solution to the problem that affects the taxpayer, moreover, usually there is no independence to revert what was determined by the auditing authority.

b. The lack of resources and training provokes the competent authorities to not react in a timely manner during the elaboration of a solid document in which they establish their initial position in the MAP, which complicates the interaction and technical discussion with the competent authority of the other State, especially if it is taken into account that said document is the basis of the discussions that will develop throughout the whole procedure.

c. The inconvenience generated by taxation not in accordance with the convention are downplayed and, as a result, there is no commitment with the resolution of these type of disputes.

Based on the foregoing, it is logical that experts from developed countries, with budget, training and infrastructure for the handling of cross-border tax disputes, would consider that it is sufficient to comply with the obligations that derive from the tax treaty to endow efficiency to the MAP, but as it has been witnessed, it turns out a little bit more complex from different realities.

This is confirmed by the information published in the 2020 Mutual Agreement Procedure Awards by the OECD.[86] These awards recognize the performance of competent authorities, in which naturally not one country of a developing or less developed economy is shown.

The winners of these awards were: Switzerland and Australia, for the shortest time in resolving transfer pricing and other cases. Spain, for the least proportion of cases prior to 2016 in the final inventory, as well as Luxemburg and Norway for the most efficient handling of cases. The award for the peers of jurisdictions

[86] 2020 Mutual Agreement Procedure Awards – OECD

that handled in the most efficient manner their conjunct workload of cases was granted to Italy-Spain, for the transfer pricing cases, and to Norway-Sweden for other cases. Finally, the award for the jurisdiction with the greatest progress in the handling of the MAP was for Ireland.

In conclusion, the inefficiency of the MAP does not completely derive from its normative structure, but rather in a considerable measure from the lack of flexibility to recognize the different realities lived by the operators. This gives importance for the use of alternative dispute resolution mechanisms within the MAP, such as mediation, to be explored as an option to endow that flexibility and offer to the least developed jurisdictions the possibility of testing a mechanisms that compensate for their lack of experience through the assistance of a neutral mediator between competent authorities, with the objective of leveling the playing field, reducing asymmetries and generating confidence to achieve consensus that allow for an avoidance of double taxation.

Lastly, it should not be a reason to yield in trying to improve the MAP based on the necessities faced by developing countries the fact that, according to the most recent OECD statistics,[87] 95% of the MAP cases are concentrated within 25 countries, in which there are very few countries with transitioning economies.

The double taxation phenomenon is a problem with global effects, but foremostly affecting the countries to which we refer, by depriving them of being able to capture more foreign investments and, with it, of the possibility to achieve greater economic development. Let's take into account that the rest of the reported MAP cases, this is, the 5%, were presented in 40 jurisdictions in which there are a major number of transitioning economies and represent, according to the numbers reported by the OECD, a total of 790 cases in inventory, not concluded, by 2020.

3.4. Could Mediation Provide Effectiveness to the MAP?

Some years back the author participated in the task force that designed, proposed and lobbied the approval of the legal norm that recognized for the first time in Mexico mediation as an alternative dispute resolution mechanisms for conflicts that arose between the taxpayers and the tax authority during the development of tax audits.

The mere fact of thinking about the incorporation of a third party into a relationship that only allowed for the presence of the tax office and the taxpayer generated skepticism among specialists and officials of the tax administration, since it was hard to visualize the added value that this third party could provide for in the solution of controversies that arose in the course of an auditing procedure.

[87] 2020 Mutual Agreement Procedure Statistics – OECD

As the discussion progressed, the tax authority transformed that skepticism in fear of the unknown, for accepting mediation during an audit represented the possibility for a third party to participate in a procedure in which historically the only parties that knew about what happened inside were the auditor and the audited.

After a broad parliamentary discussion, the legal incorporation of tax mediation in Mexico was approved and 8 years after its implementation it reports successful experiences in many fronts, in which it notes a lesser judicialization of tax conflicts before the courts, a significant increase in the tax collection via tax audits, as well as a greater confidence for both parties of the conflict, arising from the transparency, consistency and conclusiveness achieved when a solution to the tax conflict is reached through the mediation procedure.

The reference made to this experience is intended to highlight some of the parallelisms between what was lived prior to the incorporation of mediation to the Mexican legal framework and the debate that now exists surrounding if the same alternative mechanisms can endow more effectivity to the MAP.

Beforehand awareness is placed on the fact that the Mexican experience and any other domestic experience that reports positive results about mediation, cannot be a direct reference that allows to assure the success of said alternative mechanism within the MAP.

However, even when the differences between a local and an international tax conflict are evident, given the dissimilar origin of the conflict, the parties in dispute and the role of the taxpayer, only to mention a few, I do not find a solid argument that disqualifies seriously reflecting on the matter. On the contrary, e there are some premises and experiences of domestic mediation that can be applied to international tax mediation, as will be further expose.

For the moment, the most evident parallelism that can be identified is the fear of the unknown. Being a witness of the reluctance of some experts of developed countries to explore how mediation could work in within the context of a MAP reminded the author of the pessimism and disbelief that was present in the parliamentary debate in a domestic scale.

The argument used in Mexico to overcome this fear was the optional character given to the proposed mediation. The incorporation of that alternative mechanism did not impose an additional instance to those that previously existed to resolve the conflicts that arose during an audit, but instead it respected the existing procedure and only conceded the possibility for the parties in conflict to explore a new mechanism that allowed for the solution of their dissents in the best manner.

Not enough reasons can be found as to why this argument could not be replicated at an international level, since no one is raising that mediation should impose a new mandatory instance in within the MAP or that, as a result of this, the timeframes that govern the procedure could be extended. It is simply about giving

the opportunity to competent authorities that wish for it, to explore a new mechanism that leans towards improving the communication with the counterparty and leveling, with the intervention of a third party, the procedural or substantive asymmetries that did not allow them to reach for an agreement in the ordinary development of a MAP.

Something that worked to introduce tax mediation in Mexico was the design of incentives to provoke benefits for the parties, in some way, when they reached a consensus through the alternative mechanism. For example, if the dissent is resolved though Mexican mediation, the taxpayer can access important percentages of fine wavers and the authority collects in a more agile manner without having to judicialize the conflict.

In the MAP one cannot identify any incentive that by itself motivates competent authorities to achieve agreements in the MAP, beyond reporting good numbers for statistics carried out by the OECD. On the contrary, as an example, some competent authorities have manifested their concerns surrounding that regardless the efforts made to reach agreements in a MAP that could have been complicated, time-consuming and expensive, the taxpayer always holds the possibility of rejecting that agreement.

This lack of incentives opens the door to the possibility of replicating the domestic experience and try to design a mediation procedure that is attractive in any way to competent authorities.

An idea, following the example above, could be to generate certainty to said authorities in respect to that the bilateral solution reached in the MAP, through mediation, could not be repudiated by the taxpayer. To give viability and balance to this option, it would be granted in an exclusive manner to the taxpayer the possibility of soliciting mediation, having elapsed a certain time in the MAP without an agreement being reached. Once solicited this alternative mechanism, the competent authorities would be obliged to recur to it based on a well-defined reference framework regarding timelines and procedures, in exchange of that, if a consensus is reached through mediation, the taxpayer will not be able to reject the implementation of the agreement between the parties.

This is, the sequence of the procedure would be, in essence, the following:

a. The option of detonating mediation would be exclusive of the taxpayer, only in the case that there is a deadlock in the regular processing of the MAP.

b. The request of mediation would oblige the competent authorities to recur to the procedure, but not to find a solution, as it is distinctive of any alternative dispute resolution mechanism.

c. In case that the parties in conflict reach for an agreement, that result would be binding for the taxpayer.

Another incentive that could be generated in international mediation, as a result of the domestic experience documented in Mexico, is the consistency achieved in how certain conflicts are resolved, due to the transparency that is accomplished with the intervention of a third party that mediates and facilitates the points on which the controversy relies.

There needs to be greater transparency in the process, greater consistency in the procedural and substantive performance of the conflicted parties, provoking with it, predictability in the way that certain matters are resolved in which there is coincidence in features or aspects in common. Experience dictates that the sole presence of a third party transports the controversy to a "crystal box" in which it is harder for the parties in conflict to not comply with their procedural obligations or for them to adopt technical positions without sustain that prevent the construction of agreements.

As well as these, incentives have been discussed to make mediation in the MAP more attractive, based on domestic experience, for example, related to the advantages offered by an expert mediator in the substantive matter of the conflict, or the improvement that is achieved in the relationship of the parties in dispute when said third party intervenes, among others.

Conclusion

It shall be recognized that although one may believe in the implementation of tax mediation at the international level, it is not and will not be, by itself, the "silver bullet" that solves all the challenges that MAP faces.

Mediation also offers disadvantages such as not guaranteeing a solution to the problem, the necessity of investing more time and resources for its implementation or the difficulty of conciliating its timeframe with the proper timeframe currently demanded by the mutual agreement procedure. Notwithstanding, taking into account the results that could be reached in the case that the alternative mechanisms show successful, it is worth it to continue insisting on the matter.

The elaboration of a solid framework on how this alternative mechanism could work in detail and in practice undoubtedly entails further analysis and discussion, however, it is unquestionable that the UN's Handbook on the Avoidance and Resolution of Tax Disputes is, if not the most, one of the recent products with major transcendence in the matter, and it can be assured, it now represents a new starting point and a new opportunity for the UN to adventure into reflecting in detail and proactively about how tax mediation could be implemented at the international level.

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