

Dispute Resolution in International Taxation

Secretariat Paper

General objectives of the paper

- ▶ Data is limited - is there a problem?
- ▶ Not promoting or discouraging arbitration - up to countries in their own circumstances, but the perceived shortfalls in MAP mean arbitration WILL be discussed in negotiations
- ▶ Informed discussions of all options is preferable for all
- ▶ Looks at the various options of Alternative Dispute Resolution (not just arbitration)
- ▶ Analyses the issues concerning ADR in order for countries to respond to requests to discuss it but ultimately to make their own “best” decision

General objectives of the paper

- ▶ Explores potential means of utilizing learning from experience in the non-tax context
- ▶ Analyses the issues and options on mandatory binding arbitration
- ▶ Addresses short / medium / long term solutions
- ▶ Address issue not just from the perspective of certainty for taxpayers but also certainty for governments and wider citizenry

Forms of Alternative Dispute Resolution

Litigation

Mutual Agreement Procedure

Arbitration

Mediation / Conciliation / Early Neutral Evaluation

Expert Determination

Short Form v. Conventional Arbitration

Short form Arbitration	Conventional Arbitration
Arbitrators choose between two proposed solutions by the CAs	Arbitrators make an independent decision based on facts submitted
No reasoned written decision	Reasoned decision
Decision not necessarily in accordance with the treaty	More accountability of arbitrators with regards to the decision
Low costs	More costly
Confidential	Transparent / Confidential
No precedence	Precedence / more consistency

Identifying and Resolving Particular Issues

- I. Sovereignty
- II. Costs
- III. Lack of experience
- IV. Even-handedness of arbitration
- V. Transparency vs. Confidentiality
- VI. Enforceability
- VII. Finality vs. Reviewability

Sovereignty

Constitutionality

Unfeasible
consequences

Other concerns

Costs

- ▶ Time and cost controls
- ▶ Taxpayer could pay the costs?
- ▶ A trust fund?
- ▶ Countries could pay according to:

**Mathematical
equation**

**Developed
country agrees
to pay more**

**Arbitrators
decide**

**Institutional
framework**

Lack of experience

Capacity
Building

Building up a
Network

Non-binding
mechanisms

Even-handedness of arbitration

- ▶ Increasing the pool of arbitrators from developing countries
- ▶ Create awareness of developing country's issues and realities
- ▶ Enabling greater recognition of experts with sufficient skills and experience with arbitration involving developing countries

Transparency vs. Confidentiality

- ▶ Currently highly confidential
 - ▶ Business secrets
 - ▶ Flexibility for governments
- ▶ Little knowledge about the proceedings
- ▶ No precedents
- ▶ Public interest in the outcomes
- ▶ Trend towards more transparency
- ▶ Publish redacted version of the outcome?

Finality vs. Reviewability

- ▶ Currently final and binding outcomes
- ▶ Effectively no possibility for review or appeal
- ▶ Experience from other areas

**ICC
scrutiny test**

**Washington
Convention**

**Full appeal
procedure**

Enforceability

- ▶ Enforcement of an arbitral award rendered
- ▶ Experience from other areas

**Washington
Convention**

**New York
Convention**

Multilateral Agreement

- ▶ Setting up an institution
- ▶ Multi-party disputes
- ▶ Allocation of costs and foreign exchange
- ▶ Transparency
- ▶ Venue
- ▶ Review or appeal mechanism
- ▶ Enforceability

Staged Approach

- ▶ **Short term**
 - ▶ Art. 25 UN / OECD Model
 - ▶ Guidance on options available
 - ▶ Other forms of ADR
 - ▶ Escalator clauses
- ▶ **Medium term**
 - ▶ Functioning of the MAP
 - ▶ Rules, guidelines and procedures to access MAP
- ▶ **Long term**
 - ▶ Multilateral Agreement
 - ▶ Institution

Benefits of setting up a Subcommittee?

- ▶ Multi-stakeholder Subcommittee - representing many viewpoints - must be well balanced
- ▶ Create greater confidence in addressing ADR issues
- ▶ Take a closer look at developing countries needs and possible responses
- ▶ Provide short / medium / long term proposals
 - ▶ Draft clauses, procedural rules or guidelines
 - ▶ Initiate confidence building
- ▶ Prepare a more detailed report

Benefits of setting up a Subcommittee?

- ▶ Seems best for a subcommittee on MAP and effective dispute avoidance and resolution to address:
 - ▶ Effective MAP, including the 2012 UN Guide (based on MEMAP);
 - ▶ Issues and ways of dealing with them in Arbitration;
 - ▶ Possible uses of non-binding conciliation, mediation, expert determination