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**Committee of Experts on International
Cooperation in Tax Matters
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Agenda item 3 (b) (iv)

Mutual agreement procedure

— dispute avoidance and resolution

**Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure—
Dispute Avoidance and Resolution**

I. Introduction

The following report on the activities of the [Subcommittee on the Mutual Agreement Procedure—Dispute Avoidance and Resolution](#) is presented by the Coordinator of the Subcommittee, Kim-Jacinto Henares. The Report addresses the current work of the Subcommittee, decisions required from the Tax Committee and recommends future lines of work for the next composition of the Committee. An Annex is included summarizing the main deliverables produced by the Subcommittee and indicating the workflow during the current membership of the Committee.

The Subcommittee has been able to reach consensus on changes to the UN Model and Commentary as regards non-binding dispute resolution procedures, a provisional outline for the proposed handbook on dispute resolution, the process to take forward the incorporation of BEPS action 14 into the UN Model and an update of the GMAP. It hopes that the current document will provide a good basis to cover as much relevant ground as possible for consideration by this and future Memberships of the Committee, in order to form the basis of further Subcommittee work.

I.1. Mandate

The Subcommittee was formed at the 11th Session of the Committee, in 2015. It was given the following mandate:

The Subcommittee is to consider and report back to the Committee on dispute avoidance and resolution aspects relating to the Mutual Agreement Procedure, with a view to reviewing, reporting

on and, as appropriate, considering possible text for the UN Model and its Commentaries, as well as related guidance, on issues such as, in particular:

- Options for ensuring the MAP procedure under Article 25 (in either of its alternatives in the UN Model) functions as effectively and efficiently as possible;
- Other possible options for improving or supplementing the MAP procedure, including the use of non-binding (such as mediation) forms of dispute resolution;
- Explore issues associated with agreeing to arbitration clauses between developed and developing countries;
- Means of dispute avoidance, such as Advance Pricing Agreements (APAs), while recognizing the primary role of the Subcommittee on Article 9 (Associated Enterprises) and the UN Practical Manual on Transfer Pricing for Developing Countries in addressing APAs; and
- The need or otherwise for any updates or improvements to, the Guide to the Mutual Agreement Procedure under Tax Treaties approved by the Committee at its Annual Session in 2012.

The Subcommittee is to focus especially on issues affecting developing countries, possible means of addressing them in a practical manner, and possibilities for improving guidance and building confidence in dealing with the issues in this area. It is mandated to provide its final report to the Committee at the April session in 2017, particularly addressing, as its major priority, which improvements, if any, as are most likely to be accepted by the Committee for inclusion in the next version of the UN Model. It was also agreed at the twelfth and thirteenth sessions, that work on non-binding dispute resolution options should be a priority.

I.2. Composition and activities of the Subcommittee

The members of the Subcommittee are as follows (serving in their personal capacities – countries, and organizations are listed for information only):

Kim Jacinto-Henares (Coordinator), Noor Azian Abdul Hamid (Malaysia), Johan de la Rey (South Africa), Henry Louie (USA), Eric Mensah (Ghana), Ignatius Mvula (Zambia), Christoph Schelling (Switzerland), Stig Sollund (Norway), Ingela Willfors (Sweden), Ulvi Yusifov (Azerbaijan), Adebola Bayer (Austria), Jorge Rachid/ Aloisio Flavio Almeida (Brazil), Pragya Saksena (India), Bernadette May Evelyn Butler (Bahamas), El Hadji Ibrahima Diop (Senegal), Toshiyuki Kemmochi (Japan), Armando Lara Yaffar (Mexico), Xiaoyue Wang (China), Mohammed Amine Baina (Morocco), Susana Bokobo (Repsol), Morgan Guillou (EC), Cym Lowell (ICC), Claudia Pimentel da Silva (Brazil), Jeffrey Owens (Vienna University of Economics and Business), Jacques Sasseville (OECD), Christophe Waerzeggers (IMF), Juliane Groeper (Siemens), Jan de Goude (IBFD), Enrico Martino (Italy), Franco Roccagliata (European Commission), Andrew Dawson (UK), Sol Picciotto (BMG), Richard Stern/ Norbert Roller

(World Bank) and Germán Saldívar Osorio (Mexican Ombudsman). The support of others supporting the Committee in preparing papers is also gratefully acknowledged.

The Subcommittee met once in 2017, at the European Commission Headquarters in Brussels, hosted by the European Union. It previously met twice in 2016, at the Vienna University of Economics and Business (WU), hosted by the Austrian Federal Ministry of Finance and supported by WU, and once in New York City, hosted by the UN and with some logistical assistance from EY.

II Issues for the Current Membership of the Committee

II.1 Overview of the work to date

Throughout its mandate, the Subcommittee has been working on a number of key issues to improve both the efficiency of the MAP, and to clarify some of the terms and procedures used in the context of an alternative dispute resolution mechanism. These issues are discussed in four proposal papers, attached in the Annex to this Report. They are:

1. Non-Binding Dispute Resolution - Potential Changes to Article 25 of the UN Model
2. Changes to the UN Model deriving from the final Report on BEPS Action Plan 14
3. Proposed Outline for a UN Handbook on Dispute Resolution
4. Potential Improvements and proposed outline to the revised GMAP

In the following sections, short summaries of the above-mentioned papers are provided.

II.1.1 Non-Binding Dispute Resolution - Potential Changes to Article 25 of the UN Model

Since one of the outputs from this Committee will be the approval of a new version of the UN Model, the Subcommittee agreed that the 2017 version of the UN Model should expressly highlight the possibility of expanding the mutual agreement procedure contained in Article 25 Alternatives A and B by means of non-binding dispute resolution (NBDR) mechanisms, such as mediation. Accordingly, the Subcommittee proposes that the text of paragraph 4 of Article 25 should be expanded as follows:

“4. The competent authorities of the Contracting States may communicate with each other directly, including through joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article, ***including, where considered appropriate, non-binding dispute resolution procedures such as mediation.***”

To complement this change, the necessary changes to the Commentary to Article 25 have also been agreed upon by the Subcommittee (Annex-I). The Subcommittee also anticipates that further

guidance on the use of NBDR mechanisms will be provided in the updated United Nations' Guide to the MAP and the proposed Handbook on Dispute Resolution.

II.1.2. Changes to the UN Model deriving from the final Report on BEPS Action Plan 14

In line with the major priority identified in the mandate of the Subcommittee, which is to consider "which improvements, if any, as are most likely to be accepted by the Committee for inclusion in the next version of the UN Model", the Subcommittee examined possible changes that could be made to the UN Model as a result of the final Report on BEPS Action Plan 14.

Since the Commentary on Article 25 of the UN Model quotes a number of paragraphs of the Commentary of the OECD Model, the Subcommittee used as its starting point the proposed changes related to Action 14 that are proposed to be made to the OECD Model and that are included in Annex 5 of note E/C.18/2016/CRP.4, which was circulated in advance of the October 2016 meeting of the Committee. It concluded that, at a minimum, it was necessary to examine the changes to the quoted paragraphs in order to ensure that quotations included in the UN Model correctly identify the relevant paragraphs of the OECD Model. It also agreed, however, that a number of changes proposed to the OECD Model are relevant for the UN Model and provide useful clarifications or additional explanations.

Annex II includes the changes to the Commentary on the UN Model that the Subcommittee agreed to recommend to the Committee. It also includes a number of changes that the Subcommittee recommends to include in the UN Guide to the Mutual Agreement Procedure as well as changes that could either be made to the Commentary on the UN Model or the UN Guide to the Mutual Agreement Procedure, depending on where the Committee considers that these changes should be made.

II.1.3. Outline for a UN Handbook on Dispute Resolution

As noted in the Coordinator's Report to the Tax Committee dated October 7, 2016 (Section V.2, there was wide support from the members of the Subcommittee for a Handbook which offers guidelines, particularly for emerging and developing countries, on how to avoid and resolve cross border tax disputes. This is an approach that the Committee has already used successfully in the area of Transfer Pricing and Tax Administration and is being asked to consider in the area of extractive industries. Thus, the Subcommittee has started work on developing the outline for such a Handbook, including proposals on how it could be populated going forward. The extended outline, which provides a basic framework for the proposed Handbook and includes a short description of the topics to be covered by each chapter, is included in the Annex-III.

As envisaged by this Subcommittee, the Handbook would be a living document which would be regularly updated as developing countries gain more experience with the different dispute avoidance and/or resolution mechanisms. Accordingly, it will require extensive direct input from such countries on the issues they face when attempting to resolve cross-border tax disputes going

forward as well. On this basis, the Handbook would provide practical guidance and instructive case studies drawn from anonymized real life examples.

II.1.4. Potential Improvements to the United Nations' Guide to the MAP

The updated GMAP is expected to complement the Handbook and to be of particular value to those currently engaging in MAP procedures, but a part which is also self-standing. It will be proposed and adopted as non-binding guidance only, as for the Transfer Pricing Practical Manual for Developing Countries. An outline of the proposed updates to the GMAP is attached as Annex-IV.

II.2 Further Subcommittee Work

The Subcommittee desires to continue working until the end of June, when this membership's mandate ends, especially with regard to the update of the UN Guide to MAP and the design of the proposed UN Handbook on Dispute Resolution, as well as the work on possible changes to the UN Model resulting from BEPS Action 14 and therefore, seeks the permission of the Committee for the same. These three work streams have been extensively discussed during the meetings of the Subcommittee and the implementation of the results of the discussions will require the work in these areas to be substantially taken forward during the period after the Tax Committee meeting in April and until the end of the Subcommittee mandate in June. The Subcommittee therefore seeks permission from the Committee to extend its mandate beyond the 14th Session and to continue working to the end of June 2017. Should this proposition be accepted, the Subcommittee will prepare the documentation needed for the 15th session of the Committee in October. A date for a final meeting of the Subcommittee may be determined at the 14th Session of the Committee April meeting.

The Subcommittee would also like to call for the elaboration of a Secretariat paper to be delivered at the 15th Session of the Committee, epitomising the work of the Subcommittee to the end of its mandate. The secretariat is to work with key people from the Subcommittee in order to deliver on this request.

III Issues for the next Membership of the Committee

It is up for the next membership of the Committee to approve the continuation of the work currently being developed under this Subcommittee, though a positive response from this Membership is likely to be given some weight in its decision.

As noted above, the Subcommittee was mandated to focus its work on issues affecting developing countries, possible means of addressing them in a practical manner, and possibilities for improving guidance and building confidence in dealing with the issues in this area. The Subcommittee chose to address those issues by updating the UN Guide to MAP (GMAP) and devising the Handbook on Dispute Resolution, as mentioned above. If the Committee agrees with the outline for the Handbook and to continue the work on the United Nations' Guide to MAP, the next membership of the Tax

Committee could use the report as a base to take the proposals forward and finalize the underlying documents. If the Subcommittee does not reach agreement on the changes to be inserted into the UN model to reflect BEPS Action 14 by June, this work could be finalized by the next membership of the Tax Committee.

IV Decisions for the current Tax Committee to take at its April meeting

The Subcommittee would like to ask the Tax Committee to decide on the following issues:

1. Agree on the proposed update to Article 25 Alternatives A and B and attached Commentary as regards non-binding dispute resolution methods and their inclusion in the next update to the UN Model Convention and their Commentaries, as proposed in Annex-I
2. Agree to include in the next update to the UN Model the changes to the Commentary proposed in Annex II which relate to BEPS Action Plan 14, and agree to recommend that other changes proposed in Annex II be included in the UN Guide to the Mutual Agreement Procedure
3. Agree on the extended outline for the United Nations' Handbook on Dispute Resolution and the procedure to further develop the outline and draft the Handbook, as provided for in Annex-III, as a basis for further work.
4. Agree that the continuation of the substantive work on APAs should be undertaken in the context of the Subcommittee on Transfer Pricing, but the Subcommittee on Dispute Resolution would also carefully follow this work and provide input
5. Agree to propose to the capacity building advisory group of the UN, the organization of a workshop on MAP for developing countries, which would be linked to the update of the GMAP and the work on the proposed Handbook on Dispute Resolution
6. Agree that the Chair of the current Subcommittee should prepare a report for the first meeting of the newly composed Committee, proposing that this work should continue under a renewed mandate (based on the existing one), setting out how the different parts of the mandate could be addressed and suggesting how to achieve a balanced representation in the new sub group on disputes. This report would be based upon the structure of the current text, as amended to take account of any guidance provided by the Committee in April.

Annexes

Papers made available for consideration by the Committee:

1. Non-Binding Dispute Resolution - Potential Changes to Article 25 of the UN Model
 - Annex 1 of the Secretariat Report addressed “Mediations and Other Forms of Non-Binding Dispute Resolution.” It noted that tax administrations have become more active in challenging tax planning strategies of MNEs, which has led to an increase in disputes. With the implementation of Country-by-Country reporting in a wide range of countries, as well as the many other actions that are currently contemplated or about to be initiated pursuant to various international projects (G20, OECD etc.), it is likely that the range and intensity of cross-border tax disputes will further increase.

The traditional means of resolving these disputes include negotiation via a treaty-sanctioned mutual agreement procedure (MAP). MAP is widely viewed as a useful tool, yet non-existent in many countries and/or partly inefficient, due to lack of capacities, lack of domestic law support, inability of administrations to always reach mutual agreements, or otherwise.

Annex 1 reviews the objectives of an effective dispute resolution framework, forms of non-binding dispute resolution (NBDR) utilized developed in non-tax areas, potential means of adapting NBDR techniques for cross-border tax disputes within the framework of the UN Model Treaty provisions relating to MAP, potential concerns of UN Member countries, and a potential framework for proceeding under the UN MAP processes.

2. Changes to the Commentary on the UN Model deriving from the final Report on BEPS Action Plan 14
 - Annex II includes the changes to the Commentary on the UN Model that the Subcommittee agreed to recommend to the Committee. It also includes a number of changes that the Subcommittee recommends to include in the UN Guide to the Mutual Agreement Procedure as well as changes that could either be made to the Commentary on the UN Model or the UN Guide to the Mutual Agreement Procedure, depending on where the Committee considers that these changes should be made.
3. Proposed Outline for a UN Handbook on Dispute Resolution
 - The Handbook would be a living document which would be regularly updated as developing countries gain more experience with the different dispute avoidance and/or resolution mechanisms. Accordingly, it will require extensive direct input from such countries on the issues they face when attempting to resolve cross-border tax disputes going forward as well. On this basis, the Handbook would provide

practical guidance and instructive case studies drawn from anonymized real life examples.

The Outline proposed in Annex 3 seeks approval from the Committee on the topics which are likely to be included in the Handbook and subjected to further analysis going forward.

4. Proposed Outline for a UN Guide on MAP

The note seeks approval of the proposed Outline at the 14th Session. Approval from the Committee is sought on the methodology and the next steps to go in-depth in the work “on possible updates to the UN Guide to the MAP – considering BEPS and any other potentially relevant recent developments”.

The document suggests the most appropriate updates to be included in the UN Guide to MAP (GMAP):

1. A set of principles: why is important to include them and why are they useful for developing countries.
2. A description of the process (specially focused on developing countries): What are the questions that a country should resolve for designing and implementing a MAP process in a proper manner? Some of the questions are already answered in the current GMAP and the paragraphs where the issue or solutions are adopted are highlighted. More work should be done to identify if these parts of the GMAP should be improved.
3. A draft template for MAP requests and a draft template.
4. A practical case study (from the moment the MAP is requested until the adjustments are made by the domestic Administration).

Annex 1

UN Subcommittee on Dispute Resolution

Non-Binding Dispute Resolution - Potential Changes to Article 25 of the UN Model (*both Alternatives A and B*)

This note builds upon the previous work of the Subcommittee on non-binding dispute resolution (NBDR) mechanisms, which is set out in Annex 3 of the Report to the Tax Committee (E/C.18/2016/CRP.4). During the Subcommittee meetings it was agreed that NBDR mechanisms should be given particular consideration in the course of the work on the update of the 2017 UN Model Convention. Accordingly, this note presents the changes to the text and Commentary on Article 25 which were agreed on by the Subcommittee during its third meeting, in February 2017.

The Committee is asked to approve the proposed changes and agree that the text should be inserted in the next update to the UN Model.

Non-Binding Dispute Resolution Potential Changes to Article 25 of the UN Model

(both Alternatives A and B)

4. The competent authorities of the Contracting States may communicate with each other directly, including through joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article, ***including, where considered appropriate, non-binding dispute resolution procedures such as mediation.***

Potential Changes to the Commentary on Article 25 of the UN Model

A. General Considerations

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8. [new para] Under both Alternative A and Alternative B, countries may also want to consider the potential benefits of non-binding dispute resolution procedures, such as mediation (as discussed in Section C below).

New Section C: Use of Other Supplementary Dispute Avoidance and Resolution mechanisms [to be inserted before current section C]

41. [renumbered: 20] 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. ***The possibility for such assistance through the utilization of non-binding methods of dispute resolution, such as mediation is highlighted in paragraph 4 of Article 25, Alternatives A and B.***

21. 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 dispute to providing insights or views on the substantive tax matters at hand in the dispute. Such

procedures should, however, be utilized with due regard to the time constraints involved in the competent authority process.

22. *Guidance with respect to such non-binding dispute resolution mechanisms is anticipated to be included in future updates of the UN Guide to MAP and, possibly, in a UN Handbook on Dispute Avoidance and Resolution. Such updating may also include guidance on how to facilitate development and utilization of non-binding dispute resolution procedures in competent authority processes.*

23. *There is currently a lack of experience in using non-binding forms of dispute resolution to assist competent authorities in meeting their Mutual Agreement Procedure responsibilities. However, such methods are presently used for the resolution of tax disputes under the domestic laws of some countries. Countries wishing to consider such an option in the context of the Mutual Agreement Procedure may, therefore, wish to consider the broader experience, while keeping in mind the special characteristics of the Mutual Agreement Procedure. Such procedures could have the advantages of improving the functioning of the Mutual Agreement Procedure, developing experience and confidence in the competent authority process via levelling the playing field between the concerned competent authorities, as well as potentially avoiding the issues that are often perceived as arising with respect to binding dispute resolution mechanisms.*

24. *In the event that countries desire to establish such non-binding forms of dispute resolution in the context of the Mutual Agreement Procedure, they may need to address, among other aspects, 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. Guidance with respect to such rules will be included in future updates of the UN Guide to MAP and, possibly, in a UN Handbook on Dispute Avoidance and Resolution.*

Annex 2

[To be added]

Annex 3

Handbook on Dispute Resolution – Proposal Paper and Outline

Given the widespread support for developing a Handbook on Dispute Resolution (Handbook) and a revised version of the UN Guide on the Mutual Agreement Procedure (GMAP) during the discussion at the last meeting of the Subcommittee on Dispute Resolution in New York, the sub-group has prepared an annotated outline for such a Handbook. It covers all of the issues which have been discussed by the group and cross references back to the relevant papers which have been prepared and presented during the previous meetings.

The sub-group had an extensive discussion of this attached text at its meeting on the 13/14 February, 2017 and agreed upon this note, which is in two parts:

- 1) A suggested procedure for how the Handbook could be finalised over the next two years, considering that the development of the handbook will need to be closely coordinated with the GMAP;**
- 2) An outline for the text, which the sub-group agreed, should not be too detailed at this stage.**

In each of the main sections, there would be illustrations from country case studies and the emphasis throughout would be on providing practical guidelines, which tax administrations can easily follow.

The note is now submitted for approval at the 5-8 April, 2017 meeting of the Committee.

PART I: PROPOSED PROCEDURE FOR DEVELOPING THE HANDBOOK

In order for the Handbook to provide good and practically relevant guidance to developing countries, it will require extensive direct input from such countries on the issues they face when attempting to resolve cross-border tax disputes. The consulting process suggested below would also be used to obtain inputs on the UN Guide to MAP (GMAP). The following process is suggested in order to receive that feedback and incorporate it into the handbook:

Step 1: A rough draft outline of the Handbook will be agreed on by the Tax Committee. The agreed outline is described in detail in the second part of this paper. It gives a tentative overview of the topics to be discussed in the Handbook and is not prescriptive concerning the contents of the individual chapters.

Step 2: The version of the outline which has subsequently been endorsed by the Tax Committee will be used as a basis to receive feedback from developing countries. For this purpose, a meeting of the interested developing countries will be organized by the Tax Committee. This meeting could be organised back to back with the April meeting of the Full Committee in New York and / or with a meeting of the sub-group if it becomes possible to organise one between April and June, 2017. During these meetings, the outline of the Handbook will be presented by the drafters and submitted for comments.

Step 3: After the issues raised by the developing countries have been incorporated into the outline, the sub-group will begin drafting the relevant sections.

Step 4: A first draft of the Handbook will be submitted for a second round of comments in another meeting of the developing countries, which would commence with a two-day workshop on methods to avoid and resolve international tax disputes, based on the contents of the Handbook, and finish with a one-day question and answer session and round for inputs on the contents of the Handbook and the design of the workshop.

Step 5: Based on the inputs from the workshop, templates for the different procedures outlined in the Handbook will be designed. The templates will cover all relevant steps of the procedure and the submissions of both the tax authorities and taxpayers.

Step 6: In order to accurately reflect the practical experience of the taxpayers, an anonymous survey of the taxpayers' experience with dispute resolution procedures and the relevant aspects of tax administration in developing countries will be conducted. The taxpayers will also receive the opportunity to comment on the Handbook. The results of the survey and the comments of the taxpayers will be collated to a separate paper and circulated.

Step 7: The paper concerning taxpayer experience will be reviewed by the sub Group on disputes in terms of how the original text may require modification.

Steps 8 & 9: The final text of the Handbook will be submitted to the UN Subcommittee for Dispute Resolution for review and, after it has been adapted and agreed, will be presented to the Tax Committee.

PART II: OUTLINE OF THE HANDBOOK

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1 Domestic Tax Procedures

1.1 Tax audit process

This section would detail the objectives and the desired functioning of the tax audit process and issues faced by different countries in this respect. This section would also propose suggestions for how countries currently facing issues may wish to re-structure their audit function.

1.2 Litigation process

This section would deal with the various mechanisms available for tax dispute resolution in the domestic laws of different countries including administrative and judicial remedies such as appeal, review, revision etc. and how these remedies are used for the resolution of disputes. This section would also detail issues faced in these processes such as the possibility of stay of demand, procedural safeguards, taxpayer rights etc. and propose suggestions on how to structure a domestic tax dispute resolution framework.

1.3 Special Tax Chambers/Tribunals

This section would deal with specialized tax chambers and tribunals, which are used by different countries, and their experience with such bodies, specifically whether they have resulted in the more effective resolution of tax disputes in those States.

1.4 Tax Ombudsman

This section would describe the functions of a tax ombudsman and its role within the domestic administrative and judicial procedures and analyse the experience of the countries employing such a body, such as India and Mexico, in order to determine whether these have resulted in the more effective resolution of tax disputes.. In light of the same, advantages and disadvantages would be pointed out.

1.5 Advance Rulings/Settlements

This section would describe processes involved in advance rulings and settlements and describe how these processes may be helpful in supplementing conventional judicial or administrative remedies for the more efficient resolution of tax disputes as well as potential issues which should be given consideration in the design of the processes and their potential impact on cross-border tax disputes.

1.6 Issues faced by developing countries

This section would detail issues faced by developing countries in designing and implementing domestic administrative procedures and propose solutions on how these issues may be resolved.

2 Current Issues in Tax Treaty Dispute Resolution

2.1 Terminology

This section would contain definitions and conceptual framework for important terms that are used in the context of dispute resolution to cater to countries having little or no experience with these concepts.

2.1.1 Types of Disputes

A broad description of various types of disputes that may arise including investor-state disputes, state-state disputes etc. along with a short description of their characteristics and the main issues faced with each type of dispute

2.1.2 Different Mechanisms to Avoid and Resolve Cross-Border Tax Disputes

Short definitions of the mechanisms to be described in more detail in the following sections

Owing to limited experience of some developing countries with cross-border dispute resolution mechanisms, it is difficult for them to directly consider entering into such binding/non-binding dispute resolution mechanisms. Therefore, it is important to develop a common understanding of terms and procedures by precisely defining each mechanism with details of whether they would be mandatory/binding in the UN Model, Commentaries and GMAP.

2.2 What is the Status Quo? (Statistics)

This section would rely on the most recent statistics on MAP and tax treaty dispute resolution developed under the inclusive framework of the OECD as part of Action Plan 14 to show the status quo position as and when the Handbook is released.

2.3 The Need for Effective Dispute Resolution in Cross-Border Disputes

Best practices as regards dispute resolution are necessary to avoid uncertainty since:

- Several novel anti-avoidance measures have been proposed in the BEPS Project;
- There is an increase in available information through CbCR and EoI; and
- There is an increase in domestic law and treaty related anti-avoidance policy from developing countries

The proposal is to build on the work done in Action Plan 14 to ensure that the existing framework of the MAP is improved to deal with the present tax environment.

2.4 Issues developing countries are facing with regard to cross-border disputes

Biggest concerns are:

- Lack of experience in and resources for MAP;
- Limited knowledge of MAP procedures amongst taxpayers;
- Lack of statistics from developing countries on MAP.

This section would also discuss issues such as the use of Bilateral Investment Treaties or private Government agreements by taxpayers to resolve tax disputes.

2.5 What are the reasons that have led developing countries not to engage in MAP?

A UN Survey could be used to populate this section of the Handbook

2.6 The UN work on Dispute Resolution

The Sub-committee was formed in 2015 for the following:

- Ensuring efficiency and effectiveness of the UN Model MAP procedure;
- Consider possible options for improving MAP, such as non-binding dispute resolution;
- Explore issues associated with arbitration clauses between developed and developing countries;
- Discuss domestic options for dispute avoidance such as APAs as a secondary option to the Model;
- Discuss need for improving the UN GMAP

The Subcommittee has been focusing its work the following:

- Develop the procedural elements of MAP on a step-by-step basis;
- Update the UN GMAP with a more case study-oriented approach;
- Discuss whether countries having limited experience in MAP are losing tax revenues.

3 Mechanisms to avoid cross-border tax disputes

3.1 On a domestic level

3.1.1 Legislation and guidance

A brief section on how clear laws/regulations along with clear and internationally aligned treaties and transparent and consistent application of such laws are required to avoid cross-border tax disputes, irrespective of the policy concerned.

3.1.2 Tax audit practices and domestic tax policies

This section will briefly explain the importance of tax audit practices and such policies in the minimization of tax disputes. The section will link back to the procedures discussed in chapter 1.

3.1.3 Cooperative Compliance

Co-operative compliance focuses on higher levels of collaboration and disclosure between taxpayers and tax authorities in order to arrive at a mutually acceptable solution. The tax authorities benefit from increased transparency and taxpayer cooperation, as well as the assistance of business in developing commercial awareness. However, the tax authorities are also expected to increase their commercial awareness, provide timely advice and also take commercial deadlines into account. This leads to a win-win situation, providing incentives for taxpayers to be compliant and allowing the revenue body to focus on potentially less compliant taxpayers.

This section will look at:

- Definition and characteristics of co-operative compliance;
- Advantages as compared to the ordinary adversarial system;
- Possible drawbacks from a developing country perspective;
- State practices on co-operative compliance (pilot case studies of developing countries that have implemented cooperative compliance) and a roadmap for possible implementation.

3.1.4 Joint audits/Simultaneous audits

Since revenue authorities across the globe are increasing collaboration for the purpose of tax audits, proposals involving joint action of revenue authorities from multiple States are gaining momentum. Specifically, joint audit, where one taxpayer is audited by a team comprising representatives from the revenue authorities of multiple States or simultaneous audit, where one taxpayer is independently audited simultaneously by revenue authorities of multiple States are proposals that are becoming more and more popular. Using such techniques involving cooperation to speed up the audit process of a taxpayer may lead to bilateral, streamlined solutions, leading to reduction of disputes. This section will briefly explain the definition and characteristics of these audit mechanisms and set out how they can be used to reduce disputes.

3.2 On an international level

3.2.1 APAs

An APA, as a mechanism, is legally possible under the MAP process in tax treaties where two tax authorities can enter into an agreement as regards the transfer pricing consequences of a transaction from the perspective of both States. Such an approach prevents double taxation/double non-taxation and is key to reducing disputes and to guaranteeing tax certainty to taxpayers, while ensuring a fair allocation of tax revenues amongst the States involved. Additionally, multilateral APAs can be helpful in achieving tax clarity in a dispute involving multiple states.

This section will look at:

- the definition and characteristics of bilateral/multilateral APAs, including the nature of cases where such APAs should be invoked;
- The requirements for running a bilateral/multilateral APA programme from a developing country perspective i.e. resources and personnel, facilitation of meetings, funding etc;
- Advantages and disadvantages for taxpayers and States as against the present system from a developing country perspective;
- State practices on APA programmes and a possible roadmap for implementation.

This section would also draw upon the work undertaken by the UN sub-group on Transfer Pricing.

4 Mechanisms to resolve cross border tax disputes

4.1 Mutual Agreement Procedure (MAP)

4.1.1 The MAP Process

This section is intended to provide a basic framework of the MAP process to countries having little or no experience in entering into such a process. Here is where a close coordination will be required with the GMAP work.

This section will look at the legal basis for MAP i.e. whether either State taxes a person not in accordance with the Convention as per Article 25 of the UN Model. The section will then, consider the purpose and importance of the MAP and highlight when a taxpayer would be eligible to access MAP under a tax treaty. It will also mention how MAP, being a remedy which co-exists with domestic remedies, is important to guarantee the correct application of the provision at a bilateral level as opposed to a unilateral interpretation by one State.

The section will also look at the typical variety of cases dealt with in MAP and the various types of MAP possible (from individual cases mentioned above to competent authority agreements on interpretation of the treaty or other general issues) before considering the importance of the competent authority function, its role, functions and structure in detail.

This section will look at the interaction between MAP and domestic law and how both remedies would co-exist from a legal standpoint.

Finally, this section will address the taxpayers' role in the MAP process as well their rights and obligations.

This section will provide the procedure involved in a MAP case with focus on the following:

- Format and content for MAP request;
- Situations in which a MAP request can be made;
- Time-limits for making a MAP request;

- Format for response by competent authority to MAP request;
- Effect of invoking a MAP request;
- How a competent authority should evaluate a MAP request;
- Format for a competent authority to contact the other competent authority;
- Format and guidance for interaction between competent authorities;
- Timeline for competent authority negotiations;
- Format for competent authority agreement;
- Nature of MAP agreement – status in domestic law, implementation/execution;
- Possibility of challenge to MAP agreement;
- Relationship with other procedures – including penalties.

4.1.2 Ways to expedite/improve the effectiveness of the MAP process

4.1.2.1 The use of technology

In the context of constantly evolving technology, it is important to consider whether some of these new technologies could be used to speed up the procedural issues of MAP and to address the issue of resource constraints as regards MAP raised by developing countries.

This section will elaborate on how technology may be used both at a unilateral level to ramp up the efficiency of the MAP unit of a country in a cost-effective manner and at a bilateral level to facilitate the meetings, discussions and sharing of information between the States involved in a MAP to arrive at timely and expedient solutions, in line with the political goals set out by BEPS Action Plan 14.

4.1.2.2 Improving data collection & analysis of the inventory

This section will focus on how developing countries, in particular, can improve their MAP statistics, so as to understand present shortfalls and to move towards improving the system. In addition, the benefits of looking through pending MAP cases and using the results for improving the MAP framework in a State will be addressed, especially by combining/grouping cases.

4.1.2.3 Framework agreements

This section will look at framework agreements i.e. general agreements between competent authorities on certain positions involving the concerned tax treaty could reduce disputes and thus, improve MAP.

4.2 Non-Binding Dispute Resolution (NBDR) Mechanisms

4.2.1 Mediation

Mediation is a process in which a neutral person, institution or commission participates in MAP negotiations as a ‘facilitator’, helping parties to resolve their dispute by clarifying the facts and/or legal issues involved. Although there are many approaches, in classical mediation proceedings, the mediator assists the parties, notably, by:

clarifying the issues in dispute;

- requesting documents and data;
- asking questions and listening actively to the parties' arguments; and
- exploring options for an agreement on mutually acceptable terms.

The degree of activity of the mediator can range from a rather passive to a more active role, depending on the needs of the parties and the nature of the dispute. A form of mediation that may also be considered is ‘good offices’. ‘Good offices’ usually refers to a process in which an independent third country or an international organization acts as a mediator.

This section will detail the concept of mediation and how it can be applied to MAP, the procedure to be followed for mediation in MAP processes, State practice with regard to mediation in tax disputes and potential advantages/drawbacks of using mediation for improving the efficiency of MAP.

4.2.2 Conciliation

Conciliation is similar to mediation insofar as it is a voluntary and flexible process where the parties seek to reconcile their differences with the assistance of the conciliator, who acts as a neutral third party.

The main difference between conciliation and mediation is that in conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal which they could follow if they wish to as opposed to mediation where the mediator would traditionally play a more passive role.

This section will detail the concept of conciliation and how it can be applied to MAP, the procedure to be followed for conciliation in MAP processes, State practice with conciliation in tax disputes and advantages/drawbacks of using conciliation for improving the efficiency of MAP.

4.2.3 Expert evaluation

Expert evaluation is similar to the above methods, except that here, an expert on the field would be asked to give his/her views on the dispute which would not be binding on the parties – but may help guide them towards a resolution. The role of experts is usually restricted to evaluating factual or technical issues pertaining to his field of expertise, and does not include an actively “facilitative” role in the process. It could therefore be an option to simultaneously use both experts and mediators/conciliators for resolving a dispute.

Any additional issues arising in the implementation of expert evaluation in a MAP context not pointed out above will be discussed in this section.

4.2.4 Interaction between NBDR and the MAP

This section will detail and conclude on how NBDRs can be used to improve MAP processes in general, particularly in light of the non-binding processes described above, and will highlight the advantages/disadvantages of using such approaches both from a legal and a practical perspective.

4.3 Mandatory Dispute Settlement: Arbitration

4.3.1 Concept in the UN Model

The option for mandatory arbitration is already present in the UN Model where a MAP case pending for 3 years should be submitted to arbitration by the competent authorities.

Several key issues relating to arbitration such as: long form v. short form arbitration, formats and timelines (as in the case of MAP), selection of arbitrators, independence and transparency rules, sharing of costs, possibility of challenge and interaction with domestic law will be discussed in this section.

Separately, this section will also highlight how this process, directly and indirectly, promotes the resolution of disputes in MAP and will point out the underlying factors and features distinguishing this process from ‘arbitration’ as known in commercial and bilateral investment disputes (where decision-making is completely relinquished to a third party).

4.3.2 Concerns of developing countries

This section will shed light on the more fundamental concerns raised by developing countries in the past regarding the even-handedness of arbitration, as well as more practical concerns regarding lack of resources, costs and independence, for example. It will highlight why tax treaty arbitration has so far not been successful among developing countries and explore options accommodating their concerns.

5 Conclusions

In light of the above, a brief conclusion will be provided in this section on the way forward for tax treaty dispute resolution with a special focus on developing countries.

6 ANNEXES

6.1 Examples of wording in domestic law (linked to Section 1, 3)

6.2 Templates for the MAP (Reproduced from the GMAP)

6.3 Templates for NBDR processes (linked to Section 4.2)

6.4 Templates for arbitration (linked to Section 4.3)

6.5 Country Practices (cross-referenced in the text)

6.6 Case Studies (cross-referenced in the text)

For each of the major issues there would be case studies drawing upon the practical experience of emerging and developing economies.

Annex 4

Outline of the Guide on Mutual Agreement Procedure (GMAP)

Susana Bokobo – Repsol (with comments)

1. General remarks.

- a. Introduction (Importance to Facilitate Foreign Investment in Developing countries and typical cases dealt with in the MAP).
- b. Principles that govern MAP
- c. The Competent Authority
- d. Obligations and rights of the taxpayer.
- e. Treaty “obligation” to undertake to resolve by mutual agreement cases of taxation not in accordance with the Convention.
- f. The legal status of a mutual agreement.

2. MAP Process.

a. Common provisions.

- i. Ways to improve and ensure MAP access.
- ii. Ways to ensure that both competent authorities are made aware of MAP requests being submitted.
- iii. The relationship between MAP and domestic law administrative and judicial remedies.
- iv. The consideration of interest and penalties in MAP.
- v. The suspension of tax collection during a MAP
- vi. Multilateral MAPs and APAs.
- vii. Time limits to solve a MAP.
- viii. The possibilities of using alternative dispute resolutions (ADR) mechanisms in the MAP process (conciliation, mediation, others).

b. Process initiated by a resident.

- i. Who can request. Active legitimation. The consequences of a bona fide taxpayer.
- ii. Time-frame for submission.
- iii. Format, content and documents of request.
- iv. Remedy of the defects and possibility to improve the request.
- v. Admission.
- vi. Development of the process.

1. The position paper.
 2. Communication of the CA position paper to the other competent authority.
 3. The use of technology.
 4. Possibilities of the involvement of the taxpayer.
 5. The exchange of positions.
- vii. Ways to finish the process.
1. Taxpayer right of withdrawal.
 2. Agreement.
 3. No agreement. Consequences. Arbitration (option B).
- viii. Execution of the agreement.
1. Ways of execution: ex officio or upon request of a party.
 2. The adjustment.
- c. Process initiated by a non-resident (requested by a resident of the other contracted State)**
- i. Who can request. Active legitimation. The consequences of Bona fide of taxpayer. (A non-resident who consider that the Tax authorities of the contract State has apply incorrectly the tax treaty).
 - ii. Time-frame for submission.
 - iii. Format, content and documents of request.
 - iv. Remedy of the defects and possibility to improve the request.
 - v. Admission.
 - vi. Remission to points vi – viii.
- d. Process initiated by other contract State.**
- e. Domestic Implementation.**
- f. Training and capacity building.**

ANNEXES

- 1.- Template of request.
- 2.- Cases of study: Transfer Pricing example; Other examples.
- 3.- MAP statistics in developing countries.