E/C.18/2015/CRP.8

Distr.: General
8 October 2015

Original: English

Committee of Experts on International Cooperation in Tax Matters
Tenth Session
Geneva, 19-23 October 2015
Agenda item 3 (b) (vi)
Dispute settlement: arbitration issues for developing countries
and possible ways forward

Secretariat Paper on Alternative Dispute Resolution in Taxation[1]

Table of Contents

[1] The principal author of this paper is Michael Lennard, Financing for Development Office, UNDESA at: lennard@un.org. The valuable role of Juliane Gröper in preparing this paper is especially acknowledged,

A. Executive Summary

1. Although data on the Mutual Agreement Procedure (MAP) is very limited, especially from developing countries, such data as there is suggests increasing inventories of unresolved cases. This trend is widely expected to increase. As a response to this, many countries are proposing arbitration, within the MAP envelope, to ensure resolution of MAP cases that otherwise may remain unresolved after many years. Taxpayers in particular have been seeking such a mechanism.

2. Opinions vary on the arbitration option, but there is likely to be increasing discussion of the issue in tax treaty negotiations and countries need to be in a position to respond to the issues that arbitration raises, whatever the view they ultimately take on the question.

3. This paper examines the issues that arbitration, and related non-binding forms of dispute settlement, raise for developing countries, including issues of potential cost, its impact on "sovereignty" and lack of experience. It finds that there are issues that may have a particular impact on developing countries, there are also options that at least have the potential to respond to such concerns. This especially includes treaty provisions governing arbitration, clauses in arbitral agreements and making use of existing or new institutional mechanisms.

4. Importantly, this paper should not be seen as either pro-arbitration or anti-arbitration, but as recognizing that more debate needs to be had about how countries wishing to explore options for improving MAP can systematize their consideration of whether a modified MAP, such as already exists as an option in the UN and OECD Model Tax Conventions, meets their current needs in balancing the need for certainly for both taxpayers and governments. The increasing demand of citizenries that taxes lawfully imposed must be paid is also recognized as a relevant factor in the debate.

5. The paper notes the important potential role of the UN and its Tax Committee in these sorts of discussions, in view of the UN's universality as an organization, convening power and multi-stakeholder approach. It then considers options for the Tax Committee to play a constructive and confidence-building role in this debate, a debate that is already occurring, and will most likely become an increasingly important one.

6. The Committee could play a major role in bridging some of the divides that exist in this area, putting many developing countries in a better position to contribute to shaping the debate rather than being confined to responding to it.

7. The Paper then concludes by recommending that the Committee undertake, through the Secretariat, or preferably through a subcommittee, further work on this issue as it impacts on developing countries, engaging with other organizations and stakeholders. Such work could, in particular assist by:

- identifying issues that need to be addressed if we are to gain greater confidence in arbitration and other solutions (including non-binding conciliation and mediation) as a means of avoiding and resolving international tax disputes; and
- providing short, medium and longer term proposals and guidance in terms of:
  - drafts, as appropriate, of: clauses, procedural rules, provisions of the UN Model Convention text and its accompanying Commentaries;
  - suggestions for institutional and other initiatives that could help build confidence and a sense of shared justice through ITDRP; and
  - analysis of other relevant issues, including those mentioned in this paper, in practical detail with proposed solutions.

B. Background and Purpose

8. Item 3(b)(vi) of the Agenda for the UN Committee of Experts on International Cooperation in Tax Matters ("Tax Committee") 11th Annual Session (19-23 October 2015) is "Dispute settlement: arbitration issues for developing countries and possible ways forward".[2] The Secretariat was requested at the 10th Session of the Committee in 2014 to prepare a paper on this subject and this paper responds to that request.

9. In seeking to meet this mandate, the Secretariat found that it was difficult to consider possible ways forward without considering not just arbitration but also other related (and

[2] See: http://www.un.org/ga/search/view_doc.asp?symbol=E/2014/45&Lang=E p.28.

generally non-binding) forms of seeking to avoid or resolve disputes. Those considered include non-binding forms such as mediation and conciliation, either as an alternative to binding arbitration or as an adjunct or precursor to it. Some will consider that addressing such non-binding solutions may detract from the developments in some countries towards mandatory arbitration, This report, however, sees the "light on the hill" in this area as being the goal of resolution of disputes that gives sufficient levels of certainty in tax matters to stakeholders in tax and in development, being administrations, taxpayers and the wider citizenry. Movement towards that light may, in this report's view, best be achieved by variable geometries that accommodate non-binding assistance from qualified third parties, and respectfully acknowledge the range of country responses to this difficult but important issue.

10. This paper seeks to discuss arbitration of international tax disputes against the backdrop of changes to the United Nations Model Tax Convention in 2011, following changes to the OECD Model Tax Convention in 2008 as well as the release of the OECD Action Plan on Base Erosion and Profit Shifting (BEPS), containing Action 14 on Dispute Resolution in taxation, and subsequent OECD work on that Action Item. Even though the aim of this paper is not to comment on that Action Item, and its purpose is different, some of the issues considered will inevitably be related. This paper considers the framework of options for developing countries wishing to improve dispute settlement of international tax issues in a way that is attuned to their respective situations, realities and priorities.

11. The purpose of the paper is neither to champion arbitration nor to discourage its use by developing countries. Countries should, and will, make their own decisions on the appropriateness of arbitration and other forms of avoiding unresolved disputes in the light of their own situations, experience and priorities. This paper does not seek to propose any minimum standard for dispute resolution but intends merely to help country's make such decisions, by seeking to provide a clarifying and balanced analysis of what the issues are that may make this option either attractive or unattractive in particular scenarios. It examines the circumstances where the unattractive aspects might be of most significance, but also whether any such aspects can be negated by, in particular, drafting of arbitral rules and procedures or by other more structural or institutional uses, changes or adaptations. This would help countries wishing for a path to arbitration to find such a path suitable to their starting point and speed of proceeding, but would fully respect those finding other paths appropriate to their circumstances, or not seeing such a path as appropriate to them.

12. As noted below, the evolution of arbitration and Alternative (sometimes called Additional) Dispute Resolution (ADR) procedures has a long history in governmental and commercial worlds. As with any such evolution, there have been positive and negative experiences for both countries and taxpayers, some of which may be relevant to the tax experience and some of which may not. Further "triaging" of such experience for relevance to the context of international tax cooperation is potentially highly valuable work largely yet undone, and it is work where the UN Tax Committee could play an important facilitating role/

13. In the realm of international taxation, the more general evolutionary process of shaping ADR to the international tax context in a way that works for developing countries, and conversely adapting international taxation approaches to ADR possibilities remains in its beginning stages. One of the goals of this paper is to explore potential means of utilizing learning from experience (both good and bad) in non-tax contexts to develop processes to provide relief from the pressures confronting countries and taxpayers alike in the evolving world of international taxation. As an emblematic means of distinguishing our international tax context from others, the evolutionary dispute resolution process is referred to as the International Taxation Dispute Resolution Process (ITDRP). Utilization of terms such as arbitration and ADR are intended to refer to: (i) experience in contexts other than international taxation; or (ii) the existing provisions in model treaties or bilateral arrangements between countries. ADR in this sense refers to alternatives to both: (1) the classic mutual agreement procedure which does not have provision for settling deadlocks between country "competent authorities" (CAs) and (2) litigation in domestic courts. In using the well-recognized term "ADR" it is noted that reference to alternative (or additional) means of dispute resolution are for the purposes of this paper confined to other approaches that remain within the MAP "envelope". There are important questions about how ADR can be improved in the absence of (or in addition to) treaty relationships, especially where treaty networks are limited, but in such a difficult and nuanced area the treaty context seems the appropriate first point of focus for this work.

14. After pointing out the particular importance of discussions about ITDRP in international taxation, an analysis of the expressed concerns of countries and in particular developing countries about mandatory binding arbitration follows. This will help to understand the barriers that need to be overcome to set up an effective and globally relevant ITDRP system in this area, but it will also show that it is possible. This discussion will also point out different pathways that countries may wish to pursue bilaterally or multilaterally in moving towards a system giving greater certainty of resolution, but with a view to that resolution reflecting the underlying agreement between countries on substantive tax allocation issues. There will be a particular focus on: (1) possible clauses in arbitral agreements and arbitral rules; (2) institutional frameworks already existing or that could be built up; and (3) other means such as capacity building and technical support, including cooperation between developing countries. The paper concludes that the issue of ITDRP is best addressed with a simultaneous focus on short, medium and longer-term issues and opportunities to address those issues, and this paper is premised on the necessity of keeping all three aspects in view.

15. By analyzing the issues for developing countries and discussing possible responses to deal with these issues, the paper seeks to plot possible ways ahead in terms of assisting countries, especially developing countries, to find ways to minimize uncertainties for *all* stakeholders in tax systems – taxpayers, governments and the wider citizenry. In this respect the major theme of this paper is: *"In what ways can we create greater confidence in developing countries that ITDRP sufficiently serves the interest of all stakeholders in tax systems and will uphold the intention manifest in double tax agreements?*" After taking a closer look at the possibility of a multilateral agreement on tax dispute resolution, the paper will conclude by briefly outlining possible staged approaches towards ITDRP for countries wishing this. In addition, the possible roles of the UN as

well as regional and other international organizations in assisting developing countries on their way forward will be considered. Finally, some suggestions for possible actions by the Tax Committee will be made.

C. Need for Effective Dispute Resolution Processes

16. It might first be asked why all stakeholders in tax systems, including governments, have an interest in an ITDRP that is reasonably consistent throughout the world? Some reasons are as follows:

- Income allocation principles are under significant change for the first time in almost a century. Transfer pricing and related standards are being updated to reflect economic realities of the current world (not the post-World War I world). As these rules evolve, and countries develop their capacities to attract revenue away from other countries, disputes will inevitably arise between countries with business in the middle. This, and especially where the disputes remain unresolved, is in the interest of no stakeholder.

- All countries seek tax revenue from business operations engaging in their economies, even if there are differences about what level and type of engagement justifies such taxation.

- Each country needs the ability.to efficiently challenge tax planning that it believes provides insufficient tax revenue for its *fisc*, including situations involving so-called double non-taxation. Inefficient dispute resolution processes slow down the ability to resolve such challenges.

- As with all other costs in a competitive world, business seeks to minimize its global tax costs.

- The general citizenry needs to be confident that tax systems are fair and efficient.

- Cross-border tax disputes often take years to resolve and consume material (including human) resources of all stakeholders (countries and business alike).

- There is a widely held view in the international taxation world that the existing dispute resolution processes are not always working effectively. This is possibly reflected in the increasing interest in the potential of investment arbitration as a means of resolving tax disputes, but is certainly reflected in increasing levels of MAP cases being opened, outstripping the closure of existing ones.[3]

[3] OECD MAP statistics 2013, available at http://www.oecd.org/ctp/dispute/map-statistics-2013.htm: "These statistics reveal that at the end of the 2013 reporting period, the total number of open MAP cases reported by OECD member countries was 4566, a 12.1 % increase as compared to the 2012 reporting period and a 94.1 % increase as compared to the 2006 reporting period …").

- While the secrecy built into the MAP process makes data scarce, especially for non-OECD countries, that can be seen as more an argument in favor of at least lifting the veil on MAP sufficiently to obtain data than one in favor of inaction in response to perceived limitations with it. Until countries provide more data on the effectiveness of MAP, including more detail on the length of cases[4], the frequently expressed concerns of stakeholders – other governments as well as taxpayers - and the significance of unresolved cases such as large transfer pricing cases, suggest that ways to improve the MAP need at least to be discussed and explored.

- The "known known" is that an indeterminate but significant number of cases are left unresolved by MAP, while the "known unknown" is the exact number of such cases (individual countries know the number of such cases affecting them but often do not provide the figures, but even they do not know the global figure for all bilateral relationships). Continuation of the status quo without at least examining ways to better meet the dispute avoidance and resolution purpose of MAP in ways that work for developing as well as developed countries is not, therefore an attractive option for many participants in tax systems.

- It is in the interest of all parties to ensure efficient and respected tax dispute resolution mechanisms. This will take time, cooperation and patience as the countries and businesses of the world have varying levels of resources and experience in addressing the potential range of ITDRP mechanisms. Variable geometries will also be needed, as sometimes having a single superhighway towards a convening point is not as effective as having different types of feeder roads, with different characteristics, regulations and speed settings all leading towards the same point or close points.

D. A Survey of the Landscape

1. Existing Models

17. This paper leaves it to other works to survey the historical background of the ITDRP issue[5] and instead focusses on the recent history. Both the UN and the OECD Model Tax Conventions include an article on dispute resolution, Article 25. Originally this only

[4] MAP statistics 2013, available at http://www.oecd.org/ctp/dispute/map-statistics-2013.htm: "For the OECD member countries for which data was provided, the average time for the completion of MAP cases with other OECD member countries was: 3.57 months in the 2013 reporting period". This compared to 25.46 months in the 2012 reporting period and 22.10 months in the 2006 reporting period – there being no clear trend in between. As the figures are self-reported the accuracy of the figures cannot be attested to. See also the discussion in J Spencer and A Mills, "Improving Treaty Dispute Resolution: An Australian Perspective", IBFD *Bulletin for International Taxation*, 2015 (Volume 69), No. 6/7, published online: 12 May 2015, at para. 3.2.

[5] See, for example; Zvi Daniel Altman, *Dispute Resolution under Tax Treaties*, IBFD (2005); Gustaf Lindencrona and Nils Mattsson, *Arbitration in Taxation*, Kluwer/ Deventer (1981)

included the so called "classic" MAP. The classic MAP is a procedure whereby a taxpayer considering it is not being taxed in accordance with a bilateral tax treaty requests[6] a designated official, the CA of one country in relation to the treaty to consult with the CA of the other country to resolve the issue. The classic MAP, which is currently the vastly predominant model of MAP in treaties, can only reach a conclusion if both parties come to an agreement through their good faith consultations. It does however not provide for a mechanism dealing with cases where consultations do *not* lead to an agreement. This has led to long procedures and a backlog of unresolved issues.[7] As a result there have been ongoing discussions on how to improve the dispute resolution process by satisfactorily resolving unresolved cases.

18. Following a 2007 report on "Improving the Resolution of Tax Treaty Disputes" [8] the OECD introduced an arbitration clause in its 2008 Model Tax Convention to deal with cases unresolved after 2 years. Importantly, the arbitration is still within the MAP "envelope" - the arbitrator or arbitration panel does not itself formally dispose of the issue. Instead, the Competent Authorities are obliged under the treaty to dispose of the issue in conformity with the arbitration panel's decision. The UN Tax Committee also introduced an arbitration provision in Article 25 B (5) of the UN Model which is similar to but not identical with that in Article 25 of the OECD Model.

19. In this regard, it is appropriate to note that it took many years to build the consensus for the introduction of arbitration in the model treaties. That consensus took some time before the OECD Model introduced the provision, and even so, the treaty practice of OECD countries does not seem to reflect complete agreement on the value of mandatory binding arbitration. The December 2014 OECD Paper on BEPS Action 14 notes that: "In particular, not all countries associated to the OECD/G20 BEPS Project agree that mandatory and binding arbitration is an appropriate tool to resolve issues that prevent competent authority agreement in a MAP case."

20. The 2015 Final Report of the OECD on Action 14 reveals in more detail that 20 countries (all from among the 34 OECD Member Countries)[9]: have declared their commitment to provide for mandatory binding MAP arbitration in their bilateral tax treaties as a mechanism to guarantee that treaty-related disputes will be resolved within a specified timeframe". Clearly, even in the OECD context there are many countries not yet fully committed to mandatory binding arbitration after many years of discussion and "acclimatization". Other countries may require at least as long as OECD countries and G20 non-OECD countries in assessing whether such arbitration is suited for them, currently and in future.

21. The commitment of the 20 OECD countries, while somewhat uncertain in scope, is likely to mean more requests for arbitration in negotiations with developing countries.

---

6 Although paragraphs (3) and (4) in both the UN and OECD MAP Articles provide for a MAP initiated by the Competent Authority, without a taxpayer request.

7 The latest OECD analysis of its member's inventory of MAP cases (up to 2013) concludes that average MAPs take almost 2 years and the stock of cases has almost doubled since 2006, for example: http://www.oecd.org/ctp/dispute/map-statistics-2013.htm.

8 Available at: http://www.oecd.org/ctp/dispute/38055311.pdf

9 OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, 2015, page 10, *http://dx.doi.org/10.1787/9789264241633-en*

This is itself a good reason for more discussion of the issue of what arbitration, in its various forms, would mean for developing countries.

22. There are basically four differences between the UN and the OECD arbitration provisions:

    a. The UN Model provides for arbitration for MAP cases unresolved after three years, whereas under the OECD Model arbitration is initiated after two years.[10] This is understood to reflect the view that with resourcing and capacity issues in some developing countries a two year "trigger" for arbitration may be too short;

    b. According to the UN Model, arbitration is to be initiated by one of the Competent Authorities rather than by the taxpayer, as provided under the OECD Model;[11]

    c. The UN Model also allows the Competent Authorities to depart from the arbitral award within 6 months after it is rendered where they *jointly* agree on a different solution. This is not possible under Article 25 of the OECD Model, where the Competent Authorities are bound to implement the arbitral award;[12] and

    d. In contrast to Article 25 of the OECD Model, the arbitration clause is only included in one of the two alternatives in Article 25 (Article 25 B), reflecting a more cautious approach in many developing countries. Article 25 A does not include such a provision. Article 25 of the OECD Model presently contains a footnote stating that countries are free to exclude arbitration from their treaties, although the Action 14 Final Report notes that this will be removed from the OECD Model, with countries being required to expressly make reservations on the point.[13]

23. The differences in the UN Model arbitration provision as compared to the OECD Model provision are designed to address the situations of some developing countries. The explicit retention of a MAP procedure without arbitration in Article 25 A reflects a more general reluctance towards arbitration in some developing countries due to limited experience and unfamiliarity with this mechanism especially. In addition, there were some concerns raised in the Tax Committee discussions on the subject, and briefly noted in the Commentary to Article 25 of the UN Model[14] about the neutrality of arbitrators and public policy issues related to third party adjudication of such issues. Other concerns expressed in the Commentary relate to the potential cost of arbitration, and the possible asymmetrical impact of that on developing countries, as well as what was perceived as a limitation of "sovereignty" that would be a consequence of mandatory binding arbitration. Exploring what the concerns mean in practice and what can be done to address them is, as noted, one of the intentions of this paper.

---

10 Compare Article 25.5 (Alternative B) UN Model with Article 25.5 (b) OECD Model.

11 Compare Article 25.5 (Alternative B) UN Model with Article 25 OECD Model.

12 Compare Article 25.5 (Alternative B) UN Model with Article 25 OECD Model. Under both Convention Models, a taxpayer affected by the decision may reject the decision also.

13 At page 17.

14 See UN Model Double Taxation Convention Article 25 Commentary Paragraph 4 and 5 (p. 368 and 369).

2. Types of Arbitration

24. Generally speaking, in arbitration the arbitrators reach a reasoned written decision based on which outcome best expresses, in their views, the terms of a treaty ("independent opinion approach", "conventional arbitration" or "longer form arbitration" - the term used in this paper). The panel will usually be a one person panel, or else a three person panel with one member chosen by each of the countries in dispute and the third being chosen (usually by the other two panelists) as Chair.

25. In addition, in the tax area especially a special form of arbitration has been used which is commonly referred to as "short form arbitration", "baseball arbitration",[15] "final offer arbitration" or "last best offer arbitration". When short form arbitration (the term used in this paper) is applied, both CAs submit an offer to settle the dispute and the arbitrator or panel of arbitrators is then only allowed to choose between the two proposals - the one which is considered more in accordance with the treaty. In this form of arbitration there is generally no reasoned written decision required, akin to a court judgment, and it is in fact forbidden. This is designed to keep costs down and to speed the process, but also no doubt to promote confidentiality/ secrecy and prevent a system of informal precedent arising.

26. Since, in the field of taxation, ITDRP forms part of the MAP, the CAs still have to conclude their consultations, even though the outcome has to be in accordance with the arbitral award. Short form arbitration is favored by the UN Model as the default type of arbitration[16], whereas the OECD Model currently, at least, prefers the longer form.[17] Even though both the OECD and the UN Model treaty provide for the possibility of an arbitration clause in the tax treaties, in practice the treaties containing an arbitration clause remain in the distinct minority. The OECD Action 14 Discussion Draft of 2014 noted that: "Mandatory binding MAP arbitration has been included in a number of bilateral treaties following its introduction in paragraph 5 of Article 25 of the OECD Model in 2008. Action 14 of the BEPS Action Plan recognizes, however, that the adoption of MAP arbitration has not been as broad as expected".[18]

27. In the European Union (EU) there has been an intergovernmental convention on arbitration in transfer pricing cases since 1990.[19] It was meant to avoid double taxation of MNEs and to thereby improve cross-border activities in the internal market. It is often argued that the inclusion of mandatory binding arbitration has been a success because there have not been many cases that have gone to arbitration.[20] The real impact of the Convention is, however, difficult to determine as only cases solved by mutual agreement are reported by the Member States, but not which of these cases have ended in arbitration. In addition, it can be questioned whether the settlement of disputes is of itself

---

15 This type of procedure is sometimes known as "baseball arbitration", due to the fact that the salaries of US Major League Baseball players have been negotiated in this manner.

16 See: Annex to the Commentary on Paragraph 5 of Article 25 (Alternative B) p. 414.

17 See: Annex to the Commentary on Paragraph 5 of Article 25 (Alternative B). Especially compare paragraph 15 "Arbitration decision." (page 423 of the UN Model).

18 OECD Action 14 Discussion Draft, page 20.

19 Convention 90/463/EEC. For more information see: http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/arbitration_convention/index_en.htm

20 See, for example Lodin, "The Arbitration Convention in Practice", *Intertax*, 42/3, 2014, p. 175.

a sufficiently good outcome or whether it is more desirable to ensure taxation that is legitimate and in accordance with the respective treaty. In any case, a mechanism that forces countries to resolve a MAP or else they will have the matter tested in arbitration, may have more merit in a relationship between countries with a roughly equal ability to bear the costs and burdens of arbitration, but may operate less fairly where there are significant asymmetries in this respect.

28. Furthermore, the EU arbitration regime has been criticized in that the European Court of Justice (ECJ) cannot interpret the Arbitration Convention as a final instance such as is the case with EU Directives and Regulations[21] There has been discussion among commentators about whether the Convention should be re-cast into a Directive with a view to giving it greater legislative force.[22]

29. In recent years the taxation of MNEs has attracted more interest from the general public, including due to journalistic reporting on the tax strategies of major MNEs. At the request of the G-20 group of countries, in 2013 the OECD released its Action Plan on Base Erosion and Profit Shifting (BEPS).[23] As the measures proposed may increase the uncertainty of interpretation and application of tax treaties and thus give rise to a higher number of disputes between the taxpayer and the tax authorities,[24] these concerns have been addressed by Action 14 "Make Dispute Resolution more Effective".[25] Action 14 is therefore perceived to be of particular importance for the overall success of the Action Plan by many stakeholders.

30. The timeframe for the conclusion of the work on the BEPS Action Plan has been very tight – an outcome on dispute resolution was provided on 5 October 2015, although the first paper on the issue was only published in December 2014. Many commentators have taken the view that the discussion draft on Action 14 did not go far enough in promoting mandatory and binding arbitration or the development of ITDRP.[26] However, consensus on mandatory binding arbitration could not be reached.[27]

31. Whatever view is taken of the specific outcome of BEPS Action 14, it will no doubt lead to an increased focus on the difficulties that can exist under a conventional MAP (including that it can be a time consuming procedure with no guaranteed outcome for the taxpayer and administrations) and increased discussion (including in treaty negotiations) of the pros and cons of arbitration as an option. It is therefore an opportune

---

21 Dourado and Pistone, "Some Critical Thought on the Introduction of Arbitration in Tax Treaties", *Intertax*, 42/3, 2014, p.158.

22 See, for example, Oana Popa, "Confédération Fiscale Européenne 2015: Direct Taxes – Session 2", IBFD Research Platform, 15 April 2015.

23 http://www.oecd.org/ctp/BEPSActionPlan.pdf

24 See, for example: http://www.oecd.org/ctp/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf , p.4. "Work to improve the effectiveness of the mutual agreement procedure (MAP) will be an important complement to the work on BEPS issues. The interpretation and application of novel rules resulting from the work described above could introduce elements of uncertainty that should be minimized as much as possible."

25 OECD Action 14 Discussion Draft, page 4.

26 See: Public Consultation: http://www.oecd.org/ctp/dispute/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective.pdf. It should be noted that comments on the OECD paper as well as participation in the public consultations were almost entirely composed of representations from the private sector and tax advisors.

27 See: OECD Action 14 Discussion Draft, page.4 "It is also recognized that there is no consensus on moving towards universal mandatory binding MAP arbitration."

time to examine possible improvements in dealing with such disputes. The failure to reach consensus on mandatory binding arbitration seems to reflect an important reality – that of the strongly held, but widely differing views on the issue of mandatory dispute resolution for tax matters. While to some a very real extent the divisions reflect differences between developed and developing countries, it appears inaccurate to view the issue purely in these terms. Analyzing the issues and the perceptions of them raised by these discussions presents an opportunity to build a better system (an ITDRP) that has the confidence of all stakeholders and supports all the elements of global policy and administration changes now underway.

32. It is necessary to look at the experience in ADR in areas beyond the tax world, while recognizing that there will be relevant differences as well as similarities. This is important not only because of what can be learned from such experience, but also because it forms part of the background of perceptions and expectations which will inevitably color any debate on tax arbitration. It is similarly important to take all connected ADR mechanisms into consideration, non-binding as well as binding, in order to find the best solutions for the way forward.

33. A simple comparison of the various options as alternatives to litigation will illustrate some of the possible benefits of ADR mechanisms and also highlight the differences between them (a more detailed matrix of options is annexed to this paper):[28]

[28] See for example, J Owens, L Turcan, J Kollmann, AMajdanska and S Sabnis, "What Can the Tax Community Learn from Dispute Resolution Procedures in Non-Tax Agreements?" IBFD *Bulletin for International Taxation*, October 2015, page 577; M. Lennard, "International Tax Arbitration and Developing Countries", Chapter 22 of AW Rovine (ed.) *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (2015) Brill/ Nijhoff, (forthcoming).

	Litigation	**"Classic" Mutual Agreement Procedure**	**Arbitration**	**Mediation/ Conciliation/ Early Neutral Evaluation (ENE)**	**Expert Determination**
Main Features	Judges of a country decide the case under applicable law. The law of the other country involved is not taken into account. Judgment may lead to double taxation as different approaches may be taken in the two countries.	Both Competent Authorities come together to solve situations of double taxation or taxation not in accordance with the treaty by mutual agreement. A MAP is, of course, a form of dispute resolution, in which each side has a duty of good faith by the terms of the treaty. In its original form, there is no provision to resolve a "deadlock" where they cannot agree (even when proceeding in the best of good faith)	Arbitrators reach a decision either (1) by choosing one offer of the CAs (short form arbitration) or (2) by reasoning which outcome best expresses the terms of the treaty. Arbitration can be on an *ad hoc* basis or institutional. Generally it does not resolve the case itself, but the CAs are required to resolve a MAP in accordance with the arbitral decision.	These are all non-binding mechanisms and would not force the resolution of an issue, but seek to help the parties to resolve it within the MAP. In mediation a mediator facilitates the negotiations between the CAs. In conciliation the conciliator is more active than in mediation and may also make recommendations to the resolution of the dispute. In ENE a neutral party is asked to provide a non-binding evaluation of the case or a specific issue/ technical matter pertinent to the case at a very early stage. One feature of the ENE could be that the relevant CA could avail themselves of ENE on a confidential basis as part of their own evaluation of the case and in forming their views to the most appropriate resolution of double taxation.	A mutually acceptable expert makes a (usually) binding decision on parts of the dispute. As with arbitration, rather than directly resolving the MAP, the CAs would generally be obliged to resolve it themselves according to the ENE decision. If not binding, its main function would be (e.g. in a specialist area such as transfer pricing) to prevent the dispute from escalating.

34. The obvious problem with litigation in the international taxation world is that it might not provide an effective relief from double taxation in cross-border cases. This drawback has been acknowledged by the introduction of the MAP processes in tax treaties. While the MAP provides a generally effective and efficient method of dispute resolution (something that should not be discounted) it has no provision to settle cases where the countries do not agree. Even requiring countries to avoid double taxation could not settle the issue, as there will be more than one way to achieve this as well as perceptions as to whether success has been achieved.

35. As a means of breaking an impasse between CAs in a way that must be implemented uniformly in both countries, arbitration has an immediate conceptual attraction. If the only issue when considering how to improve tax dispute resolution was certainty of a result, then arbitration would always be the preferred option in practice as well. In reality, however, there are other aspects that must be accommodated also, such as ensuring confidence in the system and resolving issues consistently with an objective reading of the treaty. Other alternatives may also seek to "steer" the parties towards a solution without giving a third party complete control of the steering wheel, and such approaches may have an important role in building confidence in tax ADR over time. When there is confidence in the third party driver as understanding and properly applying the rules, they may be given control of the steering wheel.

36. The obvious disadvantage of non-binding methods of dispute resolution is that a great deal of time, money and other resources could be invested in a procedure that may lead nowhere, and indeed, in a worst-case situation could be used in bad faith to prolong discussions with no intention of resolving an issue. This is a legitimate concern, but the real possibilities for such forms of ADR in building confidence in external review of MAP cases should not be held hostage to the possibilities of a worst case scenario arising. Otherwise, the fear of promoting *non-binding* ITDRP may blunt the edge of attempts to find pathways to *binding* ITDRP that could work for developing countries as well as developed.

37. Experience has shown that many countries, especially but not only developing countries, do not consider themselves yet ready for binding arbitration in the international taxation context. In some part, this reluctance is probably a result of experience in non-tax contexts, since experience in tax arbitration law either in domestic or international contexts is extremely limited. The premise of this paper is that rather than prematurely forcing the issue, creating unwilling participants in binding arbitral systems and obscuring or impeding the real benefits of a properly functioning ITDRP system, it is systemically better to:

    a) listen to, analyze and address the concerns raised;
    b) support those countries ready to engage in arbitration after due consideration of its implications;
    c) encourage others to pragmatically consider the options and the consequences of agreeing to those options;

d) examine positive and negative lessons from areas of commercial arbitration;
e) evaluate possible institutional frameworks which could facilitate achievement of the needs of countries with limited experience in such processes; and
f) give a range of options to countries that have considered binding dispute resolution and decided that is not (yet) right for them, with the idea that these options should:
    i. represent sophisticated responses to the issues within classical MAP;
    ii. give some comfort to those concerned with the lack of certainty in MAP; and
    iii. present pathways for responding to the deficiencies of non-binding determinations in a balanced way: for example, allowing redacted versions of decisions to be published would place more incentives on countries not following a non-binding determination to at least publicly put on record why it was taking that course.

38. Increasing certainty to taxpayers is a legitimately important goal. But for some countries at a particular stage of "tax development" and familiarity with arbitration, less binding options may, at least for a time, form the best balance between that goal and goals of increasing the certainty to governments and the wider citizenry that fair taxes will be paid where and when they should be in accordance with applicable laws.

39. One issue on which preferences will differ will be as between short form ITDRP with no reasoned opinion and the longer form independent-opinion approach (with a reasoned opinion based on the tribunal's own assessment) either on an *ad hoc* basis or in an institutional setting.[29] Short form arbitration can offer more certainty of speedy and cost effective resolution in a particular case, and it is sometimes said that it forces countries to make realistic rather than "ambit" claims, especially if the CA is forced to put forward the same proposal that it first did in the MAP discussions. Other benefits of the short form include a reduced need for arbitration expertise and experience, especially of procedural and jurisdictional issues – the focus of the arbitrators is probably more easily directed to substantive tax issues. Arguably there is less danger of negative perceptions as to neutrality of the process, though the opaqueness of such proceedings and lack of reasoning may not necessarily counterbalance such concerns.

40. A possible issue with short form is that it does not necessarily lead to an outcome that is in accordance with the treaty as it only allows the arbitrators to choose between one of the solutions submitted. This leads to legal uncertainty and a lack of jurisprudence as the decisions are not reasoned and not published anywhere. It also raises legitimate integrity issues. As some transfer pricing cases have billions of dollars of tax at stake, and tax issues are of great public interest currently, there is likely to be public concern about multi-billion dollar decisions by arbitrators with a cloak of secrecy on the

[29] "Baseball" type arbitration is thus far little used in practice in tax treaties, except in treaties where the United States is a party, for instance in its tax conventions with Austria, Belgium, Canada, France, Germany, Spain and Switzerland. Because of the volume of MAPs between the US and Canada it has been of some practical importance however, even if there are no public figures or details of outcomes and therefore a great deal of speculation about how many cases there have been and how they have been decided.

proceedings and no judgment. Even a three person tribunal is no protection – for whatever reasons, the decisive voice in arbitration panels for disputes between countries, and therefore in effect the decision maker, tends to be the Chair.

41. Others would emphasize that reasoned decisions, even if not public, are likely to affirm the idea of a coherent and cohesive approach to treaty interpretation and provide guidance to the less experienced. Administrators may feel that if highly paid international experts are to be retained by countries in ITDRP, the benefit of their own views, recorded in a reasoned decision, are of much more value going forward than a mere expression of preference for the view of one CA over that of the other. Requiring reasoned decisions may also promote more analytic approaches to cases at the CA level that can form the basis of arguments in possible future proceedings.

42. To some participants in this discussion, there could be a disjuncture between: (i) on the one hand, frequent arguments for a single set of transfer pricing rules based on the arm's length approach and adhered to transparently by all countries; and (ii), and, on the other hand, empowering decision-makers (such as arbitrators) who can be seen as essentially unaccountable, to decide issues based on which argued amount is closest to an arm's length result in their opinion. In the view of such persons, an approach that may be useful in quickly resolving a dispute (an issue of importance in resolving baseball salary disputes before the season commences) and one that is not of great public importance (the exact salary of a baseball player) may not be appropriate to issues of taxes paid to the State by multinational enterprises that are of great and legitimate public interest and operate on a different time scale.

43. Those with concerns about the short form of arbitration see particular integrity, quality, consistency and equal treatment risks in the secrecy and dependence often on one arbitrator's views, and in a justification of the views not being required. If they have concerns about an arbitration system being inherently biased in favor of investment and taxpayers as many do, they see such a system as making it harder to counter such a bias, particularly where the arbitrator must choose between one country's position, which is more capital exporter (and residence) oriented, and the other, which is more capital importer (and source) oriented. They also see such a system as favoring those with the most experience in putting forward a compelling and professional looking argument over those with better underlying arguments that are nevertheless not as well presented.

44. The alternative view, equally firmly held by others, is that a "short form" system, especially as the decision is usually required to be based upon a country's initial position in the dispute, forces countries to take reasonable positions from the start, which should encourage better decision-making at an earlier stage and lead to less need for arbitration. Proponents also see, as noted above, benefits in focusing arbitrators on addressing substantive issues and discourages them form increasing their jurisdiction or unnecessarily prolonging proceedings. In this view, efficiency of resolution is more important in improving dispute resolution and encouraging reasoned decisions than creating a body of reasoned decisions that have no precedent value and, consistently with the MAP process itself, will not be shared anyway. On this view, the costs and

delays inherent in reasoned decisions are unnecessary and may create confidentiality risks.

45. A short form system is perhaps especially well adapted to dealings between two countries with similar systems, many tax issues arising between them, and where a continuing relationship is considered best maintained by quick non-public resolution of particular cases. In such cases, the CAs desire to encourage resolution may be facilitated by a system where one of the CA's positions must be adopted. The US-Canada MAP arbitration process is an often-mentioned example of the effectiveness in dealing with a large number of cases and avoiding disputes from arising, by encouraging reasonable and well considered positions at CA level. This system has the virtue of being in active use at present, although the lack of public information on the workings of that system makes it very difficult for its efficacy to be judged by other countries. As always, the lack of data and other information about arbitration proceedings may has some advantages in instant cases, but may be an impediment in encouraging change and improvement of ITDRPs.

46. This paper now looks to some of the particular concerns expressed about arbitration and explores those concerns and how they might be addressed.

E. Identifying and Resolving Particular Issues

47. In the following part of this paper, an analysis of the most commonly raised concerns with regards to ADR and arbitration in the international taxation context, but most specifically arbitration, and some of the opportunities to address these, will be noted. Experience from areas outside the tax arena is taken into consideration where appropriate. The importance of careful drafting of any type of ITDRP clauses and procedural rules cannot be over-estimated. The UN and the OECD are possible forums to give guidance on drafting, which is particularly important in this area as leaving a gap in procedure can lead to the whole process stalling. There are external clauses that can be drawn upon, such as UN Commission on International Trade Law (UNCITRAL) clauses[30], and these can allow wider arbitration experience, built up over many years, to be drawn upon and pitfalls avoided that might be new to tax experts but well understood to arbitration experts. Some of these drafting issue are considered below, particularly the role of drafting in building confidence in a system among those unfamiliar with it.

48. Institutional arrangements also have a potentially important role in creating confidence. A further option that has not yet been sufficiently explored in the ITDRP debate is that of making more use of an institutional framework to address some of the procedural and other issues that may arise in an arbitration. This possibility is considered further below.

[30] The UNCITRAL Arbitration Rules are available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html The Conciliation rules are available at: http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf

1. Sovereignty

49. The most commonly raised issue when discussing any form of binding ADR, but in particular mandatory binding arbitration, is what is often termed the impact on "sovereignty". Countries are generally considered to be sovereign in their tax affairs, although in practical terms this is somewhat constrained by the policies of other countries that impact on their tax system in an increasingly global world. An example would be the policies of secrecy jurisdictions that promote hiding income from tax officials in the country with the right to tax it. This is one form of "spillover" (called by the IMF a "base spillover").[31] Another is tax policies in countries competing for the same investments, which introduces tax competition by similar or out-competing changes among the pool of competitor countries (referred to as a "strategic spillover" by the IMF).[32]

50. Within the bounds of actual sovereignty, by signing double tax treaties countries have decided, with all the seriousness of a binding international agreement, to allocate taxing rights between themselves in cross border cases in accordance with the treaty provisions. They thereby seek to encourage cross border trade and investment, but also to ensure the collection of tax revenue where the value producing profit is created. In one sense, this very act of agreeing to international law (and implemented by domestic law) to act in a certain way (taxing in accordance with certain rules only, whatever its domestic law might have otherwise allowed) creates limitations on how a government can act in future, thus binding itself not to exercise its sovereignty in a certain way. The obligations are substantively the same whether or not there is a binding arbitration provision.

51. Such restrictions on future action by a government are "self-inflicted" as, in fact, an exercise of sovereignty, and are balanced by limits on future actions by the other agreeing government as well. This, in a sense, makes more practically effective the exercise by the first country of taxing rights in accordance with the treaty, as there will not be double taxation and any negative impact on investment climate is limited under the treaty the other country has agreed to a credit or exemption for tax imposed. Perhaps an analogy could be to driving rules – by agreeing to drive on one side of the road as a "social contract" we limit our ability to drive on the other side (at least without severe consequences) but by joining with others in that agreement we enhance our ability to exercise the right to drive safely and effectively on an agreed half of the road. This certainty is as important to encouraging road transport as the certainty of agreed international tax rules is to investment calculations and government budgeting.

52. Even apart from the allocation of taxing rights, treaties also constitute agreements to, for example, exchange tax information or allow mutual recognition and enforcement of tax judgments. These aspects also allow each country's exercise of tax sovereignty to

[31] IMF Staff Paper, Spillovers on International Corporate Taxation, May 9, 2014, p. 8.
[32] IMF Staff Paper, Spillovers on International Corporate Taxation, May 9, 2014, p. 8.

be more effective in practice. Finally, on the issue of sovereignty and tax treaties, it is often forgotten that a country may demonstrate its exercise of sovereignty by:

a) excluding certain structural issues from ITDRP. For example, the memorandum of understanding between the U.S. and Canada excludes cases that: (i) neither CA has accepted; (ii) either CA ceases to provide assistance; or (ii) both agree are not suitable;
b) excluding cases where the issue impact a number of cases and are more in the nature of policy issues; or
c) other terms as appropriate.

Of course, the ultimate exercise of sovereignty would be to withdraw from a treaty, although the arbitration clause might in its terms still apply to existing MAP issues.

53. With that said, it appears that there are at least three aspects of mandatory binding arbitration which countries might be referring to when expressing sovereignty concerns. The concerns might relate to whether:

a) in effect giving such a dispositive power to the decision of an external arbitrator or panel (i.e. requiring a civil servant to dispose of a matter in accordance with the arbitrator panel decision) would be an unconstitutional delegation of power;

b) it is constitutional but may constitutionally lead to flow-ons, such as a requirement to give local taxpayers access to a similar arbitration procedure (i.e., in non-MAP cases; this could occur because treaties create tax treatment more concessional for international than local investors; any extension of the right to arbitration to local investors could adversely impact revenue collection and the efficient use of limited tax administration resources); or

c) even if there are no formal constitutional issues directly or indirectly preventing agreement to mandatory binding arbitration, there is a concern that allowing, in effect, third parties to decide matters does not sufficiently protect the "sovereignty" preserved to the government. In other words, such a regime may be seen as inappropriately intruding into legitimate areas of governmental policy space, because of the lack of checks and balances over the actions taken by arbitrators.

54. We now turn to each of these possible "sovereignty" objections.

(a). Unconstitutionality

55. Firstly, some countries *may* have constitutional constraints in their jurisdiction that do not allow them to implement tax arbitration. This most likely could occur because civil servants cannot be directed to act in accord with a decision that is not the decision of a local court or tribunal or which could have any impact on sub-federal states. The number of countries where these sorts of issues would arise is likely to be small, but the options

of amending the constitution to implement mandatory binding arbitration in tax matters could be limited. It is difficult for countries to know the constitutional law of another country and this is an issue which should be addressed at an early stage of negotiations between countries by clearly explaining an issue. While a constitutional amendment just to address such an issue is perhaps unlikely, one option might be a most favored nation (MFN) provision offering an arbitration provision to the other country in the future if it is granted to another country. This would confirm the good faith of the objection but would also provide for cases where the constitution is amended or the prevailing interpretation changes within the courts or government more generally, *and* this is then confirmed by a tax arbitration clause with another country.

56. In considering MFN clauses, it would be important to take into account differences in bargaining power between the countries. In this regard, it might be considered that a potential downside of such a clause would be to draw a less experienced country into ITDRP for which it may not feel ready or sufficiently resourced to undertake. On the other hand, an MFN does not itself promise arbitration until the policy decision to give it has been taken in another case, and yet gives the country seeking arbitration something in return for not pressing the issue further – an agreement to treat it the same as other countries. This makes any later decision to give arbitration a more momentous one because of the flow on, but by making this clear it may lead to better policy than having a single treaty granting arbitration which then encourages treaty shopping, in any case. MFNs could only offer an OECD country discussions with a view to arbitration when arbitration is agreed with another OECD country, of course (as happens in many existing MFN treaty clauses on withholding tax rates) and the renegotiation gives some ability to negotiate the sort of trade-offs offered in the treaty where arbitration was first agreed. Having an MFN that *automatically* gave arbitration upon another arbitration clause taking effect (as sometimes also happens with the much simpler issue of withholding tax rates) would, on the other hand often be legally difficult and uncertain and would seem generally inadvisable.

(b). Constitutional but with unfeasible consequences

57. The suggestion has sometimes been made in discussions with experts that the inclusion of an arbitration provision or the like might be constitutionally possible in itself, but may entail further constitutional consequences. It could, for example, mean for countries that must treat all taxpayers equally if they were to allow for arbitration in treaties, they would also have to do so domestically. Of course such "equal treatment" clauses in Constitutions tend to be drafted to only apply to persons in "similar" positions. If this is interpreted to mean (as it often would be) that equal treatment was only required for local taxpayers engaged in a MAP process relating to a bilateral tax treaty, it would not have any domestic impact and should not cause any difficulty. If, however, there was an obligation to extend arbitration to all domestic tax cases where the taxpayer so elected – perhaps after the expiration of a certain time – the associated costs and other issues might make the introduction of arbitration into the MAP a difficult policy decision. If such an issue arises in practice (an issue the authors have not been able to determine

with certainty), it is again something that should be explained to the other negotiating party as quickly and clearly as possible during treaty negotiations.

58. An MFN clause in such a case might also be an assurance of good faith – indicating that if there is a change that breaks the link between treatment in a MAP and non-MAP disputes (such as by a Supreme Court decision) arbitration could then be allowed under MAPs without unintended flow-ons.

(c). "Sovereignty" in a more generalized sense

59. Thirdly, it seems that some countries have a generalized concern about decision making power on MAP issues shifting from individual countries (each of which effectively has a veto under a MAP without arbitration) to an entity that they may not have sufficient experience with or confidence in. When "sovereignty" is invoked as an objection to mandatory binding arbitration, this is most commonly the concern that is being expressed. The ability to say "no" is an important power that may be exercised properly and objectively correctly even where it may lead to double taxation (most obviously when the other side puts an unreasonable position and will not move from it). Many countries do not want to lose control over tax revenues or the dispute resolution proceedings under such circumstances, and are often concerned at the power of arbitrators to effectively rewrite treaties without review.

60. It is sometimes stated that if countries have accepted dispute resolution in other areas, such as under WTO dispute resolution, then they should be able to accept mandatory binding arbitration for tax matters also. Of course, this does not necessarily follow – the WTO has procedural and institutional provisions in place to assist developing countries,[33] ensure consistency in approaches of panels,[34] and an appeal system to an Appellate Body.[35] It does not follow that acceptance of this process as part of the WTO "package deal" implies willingness or readiness to accept mandatory binding tax arbitration.

61. It is also true that a government must give up some level of policy space to deliver the level of investment certainty necessary to encourage investment that in turn promotes country development – an important function of tax treaties. While it is for each country to make its own decisions on what that desired type of investment is and how investor-friendly the investment environment should be, and therefore what amount of policy space is to be retained or restrained by the country, it is expected that countries should be transparent about this and abide by their tax treaty obligations.

62. These considerations mean that what should be sought in a dispute resolution system is, in principle, a reliable and rigorous decision making apparatus that upholds the treaty as agreed, using means of interpretation that represent customary international law approaches (applicable to all countries) as codified in the *Vienna Convention on the Law*

[33] WTO, "Developing Countries in WTO Dispute Settlement", https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm

[34] WTO, ""The Panels", https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm

[35] WTO, ""The Appellate Body", https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm

of Treaties. Obviously this outcome should be achieved in the speediest and most cost efficient way possible consistent with those ends.

63. Equal access to justice between rich countries and poorer countries, and between countries experienced in arbitration and those inexperienced in it, will also be necessary for a truly inclusive and successful arbitration system at the global level. There is much to be said for the view that for an effective system to exist all these qualities must not just exist in the system, but must also be *seen t*o exist in the system. From this perspective the issue of transparency, as noted below, may play an important role in building the necessary confidence, even understanding that there will likely be some resistance to greater transparency from many governments, including in developing countries, because of the traditional veil of secrecy over MAP proceedings and the apparently common preference of countries for keeping arbitration within the MAP "envelope". In much of the non-tax commercial world, regulatory matters have evolved to become more transparent.

64. All of these elements of the "sovereignty" objection illustrate that there is a need to understand and then seriously address country concerns with regards to sovereignty and to find ways to overcome potential barriers on the way to a more efficient ITDRP. Experience and confidence building, familiarization and time will play a significant role in this process. All parties involved should keep in sight the overall goal of more tax certainty for all stakeholders and a well-functioning dispute resolution framework as part of that.

65. It is only by making decisions *in accordance with the respective tax treaty's allocation of taxing rights* as objectively evident, not merely by resolving double taxation as an end in itself, that such certainty will be attained. This is perhaps the key to moving forward on improving dispute resolution - recognizing that too broad a power to depart from that objective reality, ascertainable from the treaty itself and relevant context has systemic risks, whether that too broadly allowed power resides with the CA or with a third party arbitrator. In a functioning dispute resolution system that can achieve sufficient confidence from participants in it generally, *each stakeholder must be held accountable in some fashion to the legitimate expectations* of the others.

66. In that light, some of the concerns at third party power in MAP settlement could be seen as in many respects reflecting, not (just) defects in arbitration systems as currently understood by those expressing the concerns, but instead inherent systemic defects in MAP itself to deal with some of the issues most often brought to MAP. This could include placing too much power and discretion in the hands of individuals (whether CAs or arbitrators) as well as the difficulty in challenging such decisions because of the inherent lack of precision in concepts such as the transfer pricing "arm's length standard".

(i). Short versus long form arbitration

67. The question has arisen whether short form or longer form arbitration is most amenable to dealing with "sovereignty" concerns in their various manifestations. If there is a

constitutional imperative against arbitration, the form will not matter – it will not rescue the possibility of tax arbitration. If either form is constitutional, but there are flow-on (consistency/ equal treatment) implications to the benefit of other taxpayers not engaged in the MAP, and they would be required to follow the same *form* of MAP, then there could be cost benefits in a short form approach. But this could itself pose the same sorts of risks because of its very lack of transparency and focus on consistency and equality of treatment between taxpayers.

68. With respect to a general concern about passing decision-making power to a third party, it might be thought that the restraint of power on the arbitral panel – that it can only choose one proposal or the other - might reduce the sovereignty concerns. That might be so in some cases, but others would see the lack of a system requiring decisions based fully on the meaning of a treaty interpreted, in accordance with customary international law and treaty rules of interpretation as creating an extra level of uncertainty that further reduces sovereignty or, at least, makes it harder to confidently exercise. Obviously, if the view of Country A is adopted, there is no sovereignty issue for it in that particular case – its view will completely rule the disposition of the case. For Country B it is, however, no consolation in sovereignty terms that another country's view has been adopted instead of its and that Country B must conform to that view. This is especially if there is no written explanation and justification for the outcome, as is generally the case in short form arbitration.

(ii). Treaty shopping

69. One aspect of arbitration provisions in tax treaties that is related to the sovereignty issue is that of "treaty shopping" of arbitration provisions. There will no doubt be a phenomenon of at least attempted treaty shopping to take advantage of (the currently very rare) arbitration provisions with developing countries, as there has been in relation to investment treaties.[36] It is because of treaty shopping that limitation of benefits provisions (usually referred to in that context as "denial of benefits" provisions) are increasingly a part of such investment treaties.[37]

70. With increasing focus on the need to address treaty shopping in tax treaties, whether by limitation of benefits provisions or more general principal purpose tests or a combination of the two,[38] arbitration clauses in treaties will add an extra urgency to ensuring only intended beneficiaries receive the benefit of treaties in practice.

71. The 2014 protocol to the 2012 *Netherlands- Ethiopia Tax Treaty* ensures, for example, that both limitation of benefits clauses and arbitration provisions exist in that treaty. In such a treaty, there is a very important issue of how limitation of benefits provisions and

[36] M Lennard, "Transfer Pricing Arbitration as an Option for Developing Countries", *Intertax* Vol. 42 No. 3 (2014), 179 at pp.185-6

[37] The United States, China and India have model investment treaties with such provisions, for example. See for a discussion: Lindsay Gastrell and Paul-Jean Le Cannu, "Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions", ICSID Review, Vol. 30, No. 1 (2015), pp. 78–97, http://icsidreview.oxfordjournals.org/content/30/1/78.full.pdf+html

[38] See, for example, OECD, "Preventing the Granting of Treaty Benefits in Inappropriate Circumstances" (BEPS Action 6), 16 September 2014 at page 20ff.

arbitration provisions will operate in practice, and to some degree the answers are unclear. One scenario is that the limitation of benefits provisions remain sufficiently watertight over the life of the treaty and the arbitration provisions do not themselves create treaty shopping opportunities. Another scenario is that the limitation of benefits provision proves to have limits to its effectiveness. They may cut down treaty shopping opportunities overall, but may greatly increase the attractiveness of such treaty shopping as is available, because of the benefits of certainty that there will be an arbitrated outcome to any unresolved disputes.

72. If such treaty shopping occurs, there is an extra element that deserves consideration. It appears that arbitral panels themselves will, for practical purposes, make the decisions about the scope of the provision and therefore whether they have jurisdiction to rule on an issue. Will this create an impetus for a panel to find for its own jurisdiction, which has consequences in terms of work and payment? Perhaps more importantly, will it be perceived as doing so however diligent a particular tribunal is in trying to address such issues fairly? These are important questions, as a tendency for arbitrators to find that the limitation of benefits clause does *not* operate to restrict treaty benefits will constitute a narrow reading of an important provision that may (while not precedential in a formal sense) become influential. It is difficult to see how such a decision could be overturned. Under a UN Model approach, both CAs could agree to ignore the ruling, but that would perhaps be unlikely on such an issue - a country favoring arbitration may prefer a broad jurisdiction being exercised to have a matter arbitrated, especially with the decision having no precedential value. In any case, the recent Netherlands treaties with Ethiopia and other African countries, for example, follow the OECD Model approach of only giving the *taxpayer* the power to reject the arbitral decision. The UN Model also allows: "a person directly affected by the case" to reject the mutual agreement that implements the arbitration decision, it should be noted[39]

73. It remains to be seen, therefore, whether limitation of benefits provisions as interpreted by arbitral panels will be effective in confining access to arbitration provisions to the originally intended beneficiaries. Will arbitral panels tend to enlarge their scope of jurisdiction rather than find that a case cannot go forward and that their work is at an end? Most likely, as is the case of investment arbitration rulings, there will be divergent views taken on interpretation of provisions denying benefits, [40] and complete certainty will be elusive for all stakeholders in tax systems.

74. Perhaps one scenario in such a case is that, absent an effective mechanism for enforcement, the party opposed to arbitration will simply refuse to participate (and contribute to the costs). Even if a panel is nevertheless formed and makes a decision in such a case, it may ultimately be ignored (as exceeding the panel's jurisdiction) by the non-participating party. Because of the consequences of such an action, and any possible

[39] At article 25(5).

[40] Lindsay Gastrell and Paul-Jean Le Cannu, "'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions", supra fn. 32, p 94ff. One of the major issues in such cases is that of what, including notice, is required to trigger a denial of benefits and whether the denial is retrospective. Such specific issues should not occur in relation to an "automatic" provision as is usual in tax treaties -- "shall be entitled to the benefits … only if…", or provisions where the CAs agree together to deny benefits, although there may be questions about treaties which allow countries to unilaterally "deny" benefits when certain criteria are met. Even in other cases, there will be other issues requiring interpretation in view of the length and complexity of most limitation of benefit provisions.

retaliation, for international tax cooperation it is to be hoped that such an outcome does not happen, but any tendency of arbitral tribunals to systemically enlarge their own jurisdiction in cases (something in which they have a vested interest) would be equally unfortunate. Having some sort of institutional and procedural framework to have a disinterested, or at least less interested, review of such jurisdictional issues would do a great deal to increase confidence in the arbitral framework. This is discussed below.

2. Potential cost, delays and lack of resources

(a). Key issues

75. The issues raised with regard to the potential costs of the arbitral proceedings are difficult to address in two respects. Firstly, there is not enough arbitral experience in international taxation, especially as to longer form arbitration, to be truly certain of the costs involved. Some countries, mainly developed countries, perceive dispute resolution outside of the domestic courts as a cost-efficient option. Others, especially developing countries, fear that they will be confronted with much higher costs than under domestic litigation. It is probably the case that the costs of litigation (including the costs of hiring external lawyers) in many developing countries are often much lower than in developed countries, and this may account for a difference in perspective as to the relative cost of arbitration.

76. The costs for ADR include the costs of hiring arbitrators and facilities, but also may involve the costs of hiring external advisors and counsel. Such costs can vary heavily depending on the approach chosen, complexity of the dispute, and may also depend on the amount involved (institutional fees or arbitrator fees may be scaled according to the amount in dispute). The costs involved in an arbitration procedure are also the reason why the Commentary to Article 25 B of the UN Model currently favors short form arbitration as the default form of arbitration for countries choosing arbitration. It is perceived as less costly due to its shorter time-frame, the lack of reasoned written decisions and the likelihood of a single arbitrator.[41] Costs may arise in arbitration proceedings for setting up a meeting, travelling to another country, conducting the proceedings, translating and preparing documents and so forth. Moreover, the countries will have to pay their share of the salaries of arbitrators and organization costs for the tribunal as well as the costs of representation. If there is unfamiliarity with arbitration, some outside expertise might need to be brought in as well. If the mechanisms do not function properly, it might lead to delays and as a consequence to higher costs.

77. Furthermore most of the costs are likely to be payable in a foreign currency. Some CAs in developing countries might face difficulties in obtaining such funds within the domestic budget and the commitment to arbitration is also likely to necessitate bearing an exchange risk.

[41] For an example of an agreement on “short form” arbitration, which limits the time taken and costs, see the Arbitration Board Operating Guidelines for disputes between the United States and Germany; http://www.irs.gov/Businesses/Corporations/Arbitration-Board-Operating-Guidelines

78. It is of utmost importance to ensure that these cost issues do not distort outcomes under the MAP against those countries least able to bear them. There is a concern that CAs from developing countries, especially the least developed, might effectively be "forced" to agree to an outcome proposed by the other CA involved in the MAP not because they are convinced of the arguments put, but simply to avoid having to go through arbitration because the costs cannot be sustained or the necessary budgetary approvals simply cannot be obtained. Such a situation would drain a country's faith in not just the arbitration process but the whole MAP process. An imbalance of economic power should not influence whether or not a good case is proceeded with to arbitration.

(b). Possible ways forward

79. The cost issues can, however, be addressed as elements of an evolving ITDRP. First of all, it is possible for countries to implement time and cost controls. The Memorandum of Understanding between the US and Canada[42] represents an example. Here, the countries have clearly set out a timeframe for the arbitral proceedings and have also allocated the costs. In order to minimize costs, they have set a frame for how many days and for what work arbitrators will be paid. This is a way to avoid unnecessary delays and costs, though it is easier to implement in the "short form" relied on under the US-Canada Agreement than under longer forms, and some countries may not prefer this option.

80. The OECD and UN model agreements seek to impose some requirements on timeliness of the arbitral decision,[43] although as the failure to meet these can only need to a new arbitrator or panel being appointed, and that may not be strictly enforced (and would be expensive), there is no *guarantee* of settlement within a certain time. In general, especially for longer forms of arbitration, it is difficult or impossible to be completely confident of time frames in arbitrations, especially if the arbitrator takes up fact finding as part of the process.

81. However, it still needs to be addressed how the costs that arise in any case, whatever their overall level, are to be paid for.

82. It would also be possible to devise cost limitations for advisors, counsel or service providers (regardless of who funds the costs). Such limitations could be supervised by an institution facilitating the ITPRP, as discussed below.

83. Another option is to provide a mechanism where one panel may hear different cases that involve the same issue (such as a specific recurrent issue in transfer pricing cases). Neither the UN nor OECD Models currently address this issue. This could be a very useful way of addressing MAP backlogs between CAs in the most consistent and cost effective way. It would help reduce the risk of a country with scarce resources for arbitration being forced to either sustain multiple actions and costs for addressing what

[42] See: http://www.irs.gov/pub/irs-utl/2010_arbitration_mou_nov_8-10_-_final.pdf
[43] UN sample agreement, paras 6, 11 and 16, OECD sample agreement, paras 6, 16 and 17.

is effectively the same issue or else agree to the other side's position without being convinced by it.

84. A third option would be that the taxpayer could pay the costs for the proceedings. In general, taxpayers with material issues stalled in the CA process (often transfer pricing) are likely to be willing to incur incremental costs to speed resolution, as length of the process is extremely expensive. They may genuinely not care as to the outcome, as long as it is one that will avoid the possibility of double taxation, and in that sense may regard themselves as disinterested as to the specific terms of the double taxation-avoiding resolution.

85. This is one element of willingness to incur fees for receiving tax rulings or Advance Pricing Agreements (APA), which are required from taxpayers in some countries.[44] The situation for arbitration is more complex than in APA cases, however. Taxpayers are parties to an APA but are not directly part of the MAP or an ITDRP proceeding within the MAP "envelope" and many countries would see their involvement in bearing the costs as opening the door to greater taxpayer involvement in the process than they might wish.

86. Looked at from another perspective, it is questionable whether taxpayers should be expected to bear the costs for ITDRP of the CA's processes in relation to each other, processes over which the taxpayer is able to exert little influence or control by direct input. Indeed, the taxpayer(s) would bear the costs of both countries, perhaps without assurance of results or absence of double taxation. The concept of "no taxation without representation" could create great pressure for more taxpayer oversight over the way in which the arbitration is conducted, and more involvement in it, and opinions will vary over the benefits or otherwise of that.

87. While some countries charge for APAs, as the OECD guidance on MAP notes: "[t]ypically there are no fees charged by the competent authorities for MAP cases"[45]. There are significant differences between APAs and MAPs. The differences are, first, that the taxpayer is a party to such APAs. The likely costs of an APA are probably more easily calculable than arbitration costs with third party expenses involved, especially if the arbitration does not follow the "short-form" approach. In most countries, APA fees are typically framed (at least in principal) as being designed to cover out-of-pocket costs of the tax authority, not personnel or other costs of processing the case. Nevertheless, cases where the level of fees is framed in terms of the value of the transactions for which an APA is sought mean that any such relationship between fee and expenses is only a very broad one.

88. Even if payment of costs by taxpayers was considered appropriate, there may be at least a perception that arbitrators are more likely to take the view espoused by the taxpayer (i.e. the view that a particular country has exercised taxing rights not in accordance with

[44] See for example C. Romano, *Advance Tax Rulings and Principles of Law* (2002) IBFD at p. 277; Lex Mundi, Tax Rulings: "A Global Practice Guide" (2012), at: http://www.lexmundi.com/Document.asp?DocID=5647

[45] OECD, "Manual on Effective Mutual Agreement Procedures" (MEMAP) February 2007 Version, page 15, http://www.oecd.org/ctp/38061910.pdf

a treaty) in that way satisfying one of the two formal parties to the case (the CAs) as well as the funder of the case.

89. Finally, taxpayers often argue that they do not care where they pay taxes, as long as they only pay once, as noted above, and that they are thus disinterested as to the form of the resolution. On this basis, they might legitimately say that it is not their responsibility to fund MAP resolution and might only support such a system where it gave greater taxpayer rights to participation than many countries are willing to accept.

90. Certainly it appears that taxpayer funding, or partial funding, of an ITDRP, is most likely to be accepted by governments and the citizenry in an institutional setting where a fee based (for example) on the amount at stake is pooled and drawn upon to pay institutional and institutionally administered ITDRP fees in cases generally, rather than being tied to the specific resolution of the taxpayer's own case on an *ad hoc* basis. While this may not be a very attractive option for taxpayers in a specific dispute it could provide an efficient means of addressing these matters if a broad enough range of countries were subject to such requirements. This is likely to be another area where some common administrative mechanism would be appropriate and, hopefully, would provide a source of greater confidence for all stakeholders in the integrity of the process.

(c). Cost allocation to be addressed by potential clauses

(i). Division according to prior agreement

91. One way to address the cost issue is by introducing clauses in a dispute resolution agreement determining what each party must pay. This way there are clear guidelines provided and there is more predictability. The allocation of costs could be based upon some mathematical formula according to which the costs for arbitration will be split between the countries. This could, for example, either be based on GDP per capita or on the scale of apportionment of the expenses of the United Nations.[46] Such an approach would balance the proceedings and not put so much pressure on developing countries to simply come to any agreement. Alternatively, a developed country could agree to pay a higher percentage of the costs, for example, say 70-75 per cent, and this could be time bound, such as for a stated period of years, with a review after that. This would show good faith, discourage the economically more powerful actors from "running up costs" and would recognize that, especially as it gains expertise in arbitration, the developing country may have other disproportionate costs in equilibrating its position to that of the developed country (it may for example need to hire expensive experts because of its unfamiliarity with such dispute resolution processes).

[46]See: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/238

(ii). Discretion to arbitrators

92. Another possibility would be to leave the decision as to the allocation of costs to the discretion of the arbitrators. If this option were preferred, it would be useful to provide some general guidelines and possible options of how to allocate the costs, such as based in part on the ability to pay. These could look similar to the possible clauses outlined in the previous section. While such clauses might be useful in cases where there is already a high level of confidence in arbitrator expertise and impartiality, arbitrators will ultimately form their own views and there is little scope for appeal. Also, governments might prefer such matters to be addressed by a formula rather than evidence having to be produced on a government's ability to pay in a particular case.

(iii). Ways to address cost allocation in an institutional framework

93. Cost allocation can also be addressed in an institutional framework. An institution could set up a "blind fund" where the taxpayers or the governments proportionately or otherwise, would have to pay a certain amount. Monies donated by countries (and others such as foundations) wishing to support ADR on tax matters could also be an important part of such a fund. All the money for the proceedings would then come out of this fund, with no direct link between any inflows and outflows. Such a blind fund could be set up for a period such as 10 or 15 years (remembering that it would take some years before any proceedings would be triggered under a new ITDRP), or could be indefinite.

94. An independent institution would also be a good platform for capacity building (including training technical assistance as necessary and acting as a clearing house for relevant information). It could help countries, especially developing countries, plan the costs and pay them with the least adverse impact on immediate cash flows.

(iv). Possible UN-related actions

95. Lastly, it is important to point out what the UN could potentially do to support developing countries, with appropriate support from UN Members and external funding, such as from foundations. One possibility would be for the UN to set up a trust fund based on such contributions out of which developing countries could be supported when engaging in ITDRP. It might be difficult to attract donors to a fund focused merely on payments to arbitrators, but one focused also on building up expertise among countries (including examinations, framing proposals and dispute resolution) and encouraging confidence in the system might be more attractive as giving a practical stake in improving dispute resolution while safeguarding the ability of developing countries to legitimately protect revenue.

96. The UN could develop, in consultation with stakeholders and arbitration and tax experts, guidelines on ITDRP issues for developing countries or countries generally, as well as other related subjects (such as how to conduct proceedings for arbitrators). Furthermore,

the UN could offer capacity building for developing countries. This could be done by offering workshops or even special internships and fellowships on ADR-related issues.

97. Finally, the UN could facilitate (alone or in conjunction with other organizations – something that applies to all these proposals) something similar to the "Tax Inspectors without Borders" initiative of the OECD[47], focusing on assistance in resolving tax disputes. This would not only have a systemic benefit in promoting confidence in the system, and would be a vehicle for greater South-South and North-South interaction on tax cooperation issues, but would help to address particular cost and resource issues at source, as and when they arise. Recently retired practitioners or governmental experts, and perhaps even still-serving judges (for some roles) or academic experts with practical experience in international taxation and dispute resolution could thereby share their knowledge with developing countries. They could help countries by advising them on general tax dispute avoidance resolution issues or by providing them with a non-binding expert opinion in specific cases. A trusted assessment of one's argument without the presence of the other party, or a candid discussion with both countries present, could empower those within the organization seeking resolution and make it easier for positions to be modified towards settlement.

98. Such facilitations would help level the playing field and create the shared sense of justice necessary to a successful international dispute settlement system, as well as building developing country expertise that would lead to more developing country arbitrators and advisors in this area over time.

3. Lack of experience and familiarity

(a). Key issues

99. Many countries, particularly developing countries, have recognized that they do not have sufficient experience in ITDRP when compared to countries experienced at the domestic and/or international tax levels. Some countries might simply not be very familiar with the ideas behind ADR and find it a difficult concept to engage with for cultural or other reasons, let alone exploring its particular tax-related aspects. As a result, some fear that if they allow ITDRP mechanisms into their treaties too readily, they are more likely to lose disputes and tax revenue. This might not be because of any underlying "wrongness" of their claim, but due to inexperience in "packaging" a case in a way that will most appeal to arbitrators used to hearing (and presenting, as many arbitrators act as counsel also) cases in a certain way. Because arbitration tends to be a secretive process, those with the most cases (as participants) will tend to know more about what has appealed or not to particular arbitrators, whereas the infrequent arbitration "litigant" may feel it can at best "buy in" this specialized knowledge by hiring expensive outside counsel and, at worst, will be at a constant disadvantage.

[47] For more information see: http://www.oecd.org/tax/taxinspectors.htm

100. It is important to address the lack of experience of some countries compared to others by capacity building and by providing sufficient guidance. It has to be taken into account that in other areas, such as commercial and investment dispute resolution, and within the WTO especially, similar problems existed and various ways have been found to address these, with greater or lesser success. The tax world is fortunate to be able to intelligently draw lessons from such experiences. Additionally, countries need to be familiarized these mechanisms. That could, for example, be done by a step by step approach, giving countries some more time to familiarize themselves with arbitration before committing to it fully.

(b). Possible ways forward

101. The lack of *experience* of many developing countries, could, as with the cost issues addressed above, be addressed effectively by a specialized institution overseeing arbitrations. Internships and fellowships could be offered for promising candidates, including governmental experts. Regular workshops, particularly for tax specialists from developing countries, could take place and an effective website could be a focal point for tax arbitration issues. A clearing house function for relevant information could also be undertaken.

102. These sorts of undertakings would help to develop experience in countries that have not used arbitration or other dispute resolution mechanisms in the past or only have done so on very few occasions or mainly outside of the tax arena. This is helpful if they decide to go down the arbitral route, but also in deciding that very question.

103. An institution could also help to establish networks of future arbitrators from developing countries. By providing further training for experts from developing countries a bigger and more diverse pool of arbitrators can be created, which would be of benefit to the overall success of arbitration and in developing confidence in it. By engaging with academia, including young academics, the pool of potential arbitrators in that sphere can be further expanded, an important resource for trying to find persons independent but acceptable to governments and who are likely to train others in ITDRP.

104. The lack of *familiarity*, though related, is harder to address directly (though the measures above would assist) and it needs to be tackled by further discussions and through an overall well-functioning dispute resolution system. A natural sequencing would first be for developing countries to gain experience in ADR on purely domestic tax issues and then to internationalize it, but there will undoubtedly be great pressure on both developed and developing countries to skip that step of domestic acclimatization.

105. Papers which seek to analyze the issues and look for acceptable responses also play a role in enabling countries to examine the many facets of ITDRP, with their respective risks and opportunities, and then minimizing the former and maximizing of the latter. The lack of familiarity mainly goes back to the traditions, history, culture and ways of approaching differences of view among countries. This should be recognized and respected. Seeking to address those aspects can lead to stronger, fairer and more globally acceptable ADR, MAP and international tax cooperation.

106. More fully integrating non-binding approaches into the system might be one example of this, including as a preliminary step that may or may not lead to binding solutions. Equally, agreeing to an arbitration clause but delaying enforcement until either (i) both countries have signified their readiness or (ii) the "holdout" country has implemented arbitration with another country (with the MFN provisions noted above) would give time for familiarization and training. It might then be in the interests of the other country to assist this process.

4. Even-handedness of arbitration

(a). Key issues

107. Currently there is probably a small pool of potential arbitrators (or other persons in an ITDRP) around the world, when it comes to international taxation and more particularly transfer pricing, the area from where some of the largest and most difficult cases are likely to come. This is probably especially the case for experts likely to be acceptable to developing countries, and most particularly for binding arbitration. As noted above, building the tax arbitration talent pool to include sufficient developing country experts will be a major challenge as more and more developing countries enter into arbitration or other ITDRP agreements. Attention to ensuring diversities of arbitrators in terms of language, race, gender and age could also make the system more broadly representative and acceptable. It would also facilitate a systemically better and more aware system with more experts having the suitability for international cross-cultural tax dispute avoidance and resolution work.

108. At present, despite the fact that the vast majority of the global population lives in developing countries, potential international tax arbitrators are likely to predominantly come from developed countries. There are some legitimate historical reasons for this, of course, such as the permanent establishment and arm's length concepts being largely built up in developed countries as well as the presence of a large volume of tax academic work and discourse there. While developing countries are beginning to make their presence felt in both norm development and the discourse and practice of international taxation, there is inevitably (though unfortunately) a lag before these positive developments will be fully expressed in the pool of potential arbitrators.

109. Developing countries might fear that the potential arbitrators currently available cannot adequately take their standpoint and realities into consideration. The issue is not so much that arbitrators from developed countries do not have sufficient knowledge on taxation in developing countries or even that they will not try to be as even-handed as their experience allows them to be, but there is more of a concern that these arbitrators might not be so familiar with the challenges administrations and CAs might face in developing countries and the genuinely available ways of responding to those challenges. They might therefore have unrealistic expectations of developing countries. If they have a background advising taxpayers from the developed world the doubts may be especially

strong. The best developed country arbitrators will no doubt overcome this potential deficit in legitimacy by the quality of their advice, but in a new area, that will inevitably take some time.

(b). Possible ways forward

110. There are at least three aspects to addressing this potential deficit in legitimacy:

a. increasing the pool of developing country arbitrators and other persons participating in an ITDRP;
b. increasing the awareness of potential arbitrators, conciliators and mediators etc. from developed countries of developing country issues and realities – including, for example, of the UN Model Tax Convention which reflects common developing country practice and priorities; and
c. enabling greater recognition of developing and developed country experts with sufficient skills, experience and understanding to undertake ADR involving developing countries, whether through an accreditation system or otherwise.

111. Training more tax specialists from developing countries to the point where they are potential arbitrators is a long term project. In the meantime, in parallel with such efforts, it needs to be ensured that the current pool of arbitrators remains independent and is chosen according to clear criteria that favor such independence and even-handedness.

(i). Matters to be addressed by clauses

112. Clauses in arbitration agreements should address the impartiality of the arbitrators and state who can be an arbitrator. Such clauses could be similar to those used in commercial arbitration.[48] Furthermore, it should be ensured that the appointing authority in cases where countries do not choose an arbitrator is not a national of either of the countries party to the dispute. There should be a provision that the next most senior person of the relevant institution who is a national of neither of the countries in dispute should fulfil that role instead. This is lacking in the OECD sample agreement, but is provided for in the UN sample agreement. The experience of other arbitrations might be drawn on as to whether further provisions are needed, such as in cases where the appointing authority, being a natural person in both of these model agreements, is incapacitated.

113. Furthermore, the overall impartiality of the arbitrators needs to be addressed more closely. The selection of arbitrators could perhaps be conducted in accordance with guidelines such as the International Bar Association Guidelines on Conflict of Interest[49].

[48] See, for example, JAMS *http://www.jamsadr.com/clauses/#Party* Party-Appointed Arbitrators – "*All arbitrators shall serve as neutral, independent and impartial arbitrators."*

[49] The current version of the IBA Guidelines is applicable to commercial and investment arbitration and contains 7 general standards and 4 application lists. Although the guidelines are not binding, they are widely used by arbitral institutions as they give guidance on best practices and try to ensure legal certainty, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

These have been widely used and are illustrative and thus easy to understand and apply. Additionally, they have been designed to apply to dispute resolution generally and not to any one specific type of arbitration.[50] They are thus easily accessible for the tax world. If applied properly, greater independence can be achieved, though it can never be absolutely ensured (of course, this is also the case with domestic court judges). Such guidelines could be adopted, potentially in a modified form, in individual arbitration agreements between countries, and could possibly be referred to as an option in the UN Model Tax Convention Commentary.

(ii). Possible institutional frameworks

114. An institution could train arbitrators, mediators, conciliators etc., and raise awareness with regards to issues involving developing countries. This would help to ensure (but cannot guarantee) that such a person is attuned to taking a pro-active role towards ensuring that the proceedings operate fairly for both sides and does not misinterpret delays or other particular behavior resulting from limited resourcing or inexperience as lack of cooperation or bad faith. A number of organizations[51] are involved in the development of various arbitration mediation and other procedures. However, currently they are mainly handling disputes between private parties.

115. Whether or not the existing institutional framework is suitable for dealing with international tax disputes as a totality, some rules and procedures developed for commercial arbitration could usefully be implemented in the tax context. Such institutions may, of course, develop tax related procedures and clauses for consideration by negotiating parties for inclusion in their tax treaty practice.

116. One area where commercial arbitration experience could be drawn upon is in the selection of arbitrators. Currently, Article 25 of the UN Model and its Commentary provides only limited guidance. Essentially, the two CAs each appoint an arbitrator. Those arbitrators then collectively choose a Chair. Institutions handling commercial arbitrations either provide a list of arbitrators (e.g. the AAA) or even appoint arbitrators according to certain criteria (e.g. the ICC). In order to provide developing countries assistance in the selection of arbitrators, the secretariat of an institution could provide and manage a list of possible arbitrators in accordance with their specialties and help countries in nominating an arbitrator or choosing one for proceedings. A list of potential arbitrators could include both topic specialists and generalists and could play a role in identifying developing country arbitrators, keeping gender and other representation issues in mind. Such a list could also include information about the number of times an arbitrator has served in other disputes and the countries involved. Under the EU Arbitration Convention dealing with transfer pricing cases there is also a panel of

[50] See: http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf p.29

[51] Including but not limited to: The International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), the Arbitration Institute of Stockholm Chamber of Commerce (SCC), the Swiss Chambers' Arbitration Institution (Swiss CAI), the China International Economic and Trade Arbitration Commission (CIETAC), the Commercial Arbitration and Mediation Center for the Americas (CAMCA), the International Centre for Settlement of Investment Disputes (ICSID) and the World Intellectual Property Organization (WIPO).Arbitration and Mediation Center

arbitrators nominated by countries, from whom an individual arbitrator or panel can be chosen.

117. An institution, whether a specialist arbitration institution or an international organization such as the UN, or partnerships between such organizations,, could also quite easily play an effective role in defusing potential disputes by having a list of possible early neutral evaluators, conciliators or mediators ("Neutral Parties") who could be called upon at short notice to help bring the parties together in consensus, or at least ensure that realistic appraisals of the risks involved in leaving the matter unresolved or else having it taken forward to binding arbitration could be made. This would encourage measures to "short circuit" a potential dispute before positions become rigid, and might be especially useful between CAs not having enough dealings to warrant a list of such persons themselves. Neutral Parties could also be trained by the institution, including training as need to develop qualifications to become an arbitrator as an element of the ITDRP.

118. There are many options to draw upon existing institutions and give them a role in tax disputes. Specialist arbitration institutions such as the International Chamber of Commerce's International Court of Arbitration[52] as well as specialist arbitration centers in developing and developed countries might well seek such a role in future and whether or not that happens, their expertise in the conduct of arbitration (as well as other forms of ADR, in most cases) and provisioning for it in agreements can be an important contribution to discussion on these issues. The same can be true of bodies that provide draft rules and other forms of guidance, such as the UN Commission on International Trade Law (UNCITRAL)[53] as well as bodies with expertise in international investment disputes, such as the World Bank's International Centre for Settlement of Investment Disputes[54] and the UN Conference on Trade and Development (UNCTAD)[55]. There will be further developments, such as the nascent TRIBUTE[56], which is a proposed international tax tribunal with support, including for case administration, from the Permanent Court of Arbitration[57].

(iii). Possible UN-related actions

119. The UN can draw valuable experience from the WTO, the Secretariat of which provides any of their Member Countries with assistance upon request regarding dispute resolution. Moreover, developing countries can ask for special assistance and will be supported on technical issues and in answering legal inquiries.[58] An important element going forward will be to study positive and negative lessons from the experience of the WTO, as well as under investment agreements and in various forms of commercial arbitration. If similar ITDRP support was to be provided as that provided by the WTO

52 http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/
53 http://www.uncitral.org/uncitral/en/index.html
54 https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx
55 http://unctad.org/en/pages/DIAE/DIAE.aspx
56 http://www.tribute-arbitration.org
57 http://www.pca-cpa.org/showpage37e7.html?pag_id=363
58 See: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm

in trade dispute settlement, the UN would be a possible platform in view of its universality and convening power.

5. Transparency vs. Confidentiality

(a). Key issues

120. Tax arbitral proceedings are currently confidential and therefore in line with the approach taken in the MAP more generally. This secrecy of the MAP, and the arbitration procedure embedded in it, is usually premised on two bases. On the one hand, the premise that businesses do not want to make their tax affairs public and on the other hand, the premise that confidential proceedings allow more flexibility for achieving a mutually acceptable result between governments. This emphasis on confidentiality over transparency is reflected in the Arbitration Board Operating Guidelines for several US tax treaties. For example, that applicable to US-Germany disputes states:

> 16. Board's Determination
>
> a. Within 9 months of the appointment of the chair, the chair shall provide the written determination concurrently to each competent authority. (See paragraph 22(h) of the Protocol.)
> b. The written determination shall include only one of the two proposed resolutions for the issue(s) presented to the Board except for in circumstances described in paragraph 11 of the Memorandum of Understanding.
> …
> d. The written determination shall not include any rationale or analysis. (See paragraph 22(j) of the Protocol.)
> e. The determination of the board will have no precedential value. (See paragraph 22(j) of the Protocol.)
> f. No information relating to the Proceeding (including the board's determination) may be disclosed by the members of the arbitration board or their staffs or by either competent authority, except as permitted by the Convention and the domestic laws of Germany or the United States. (See paragraph 22(n) of the Protocol.)
>
> …..
>
> 17. Terminating a Proceeding
>
> …
>
> (d) At the termination of any proceeding each board member must immediately destroy all documents or other information received from either competent authority, or otherwise reflecting the considerations or discussions of the arbitration board, and delete all information that may be stored on any computer, personal data assistant or other electronic device or media.[59]

[59] Available at; http://www.irs.gov/Businesses/Corporations/Arbitration-Board-Operating-Guidelines

121. As there are no publicly available outcomes to a confidential arbitration (though unconfirmed details may sometimes "leak") a major down side of such confidentiality is that there is little knowledge of the proceedings, except among those directly involved. This makes it difficult to draw from experience or to monitor the fairness and effectiveness of dispute resolution systemically. It makes it hard to build confidence in the system, including among the wider citizenry and in other countries not yet convinced by the arguments for arbitration, a situation which applies whether or not such countries would actually prefer confidentiality in any such process. Similarly taxpayers, even if they agree in principle with confidentiality, cannot ascertain if the same rule is applied to their case as compared to other cases. On the other hand, and as mentioned above, there is a view that the secrecy does allow for flexibility and gives governments the opportunity to make decisions without any external influences.

122. However, the question next arises of whether it is really necessary to keep the proceedings and the outcomes so entirely secret or whether there is a possibility to publish the outcomes in a redacted form. Such a redacted publication would be in line with the transparency provided in, for example, court cases. Redaction could be done by the arbitrators themselves or could be done separately.

123. Such redacted publications (or even a regular record of key points from arbitral decisions) would respond more effectively to the call for transparency to promote consistency and confidence in the system. The wider citizenry are taking a greater interest than ever before in how tax systems function, especially at the interface of revenue collectors and MNEs. Not responding in some fashion to that increased scrutiny could impact on the perception of ITDRP as a means of obtaining justice.

124. A body of redacted or even summarized opinions could help in informing this debate, as well as producing a chain of decisions. While not precedential or uniform (e.g., because the treaties under consideration will vary) as would need to be made clear, the summaries could legitimately help promote consistency on important points through allowing arbitral decisions to be judged at least in some measure on the force of their reasoning and their application of normal treaty interpretation rules to tax treaty issues. Obviously such summaries are far more suited to long form arbitrations than short form arbitrations and would generally not apply to other, non-binding, forms of ITDRP.

125. The benefits of redacted decisions might be particularly relevant in the area of transfer pricing, where a great deal of effort is being put into clarifying the rules. In fact, there might be criticism that seeking flexibility to depart from those rules under the cover of secrecy necessarily puts in question the viability of the rules themselves.

126. The argument can be made that the issue of secrecy of ITDRP merely flows from the secrecy of MAP, and while that remains, it necessary follows that ITDRP within a MAP envelope should be secret. While this has some cogency, the actions of government employees, albeit secret from the public, remain accountable to the government. The decisions of the arbitrator(s) must in effect be adhered to and implemented by the CAs[60]

[60] Under the OECD Model the taxpayer may prevent the decision being implemented, and under the UN Model the two CAs may agree not to implement it, but in either circumstance any particular CA must implement it in the absence of the

but there is not the same level of accountability for decisions taken, in the absence of some form of appeals system. The lack of accountability to governments should means the arbitrator has the ability to act without fear of favor, but the lack of accountability to independent bodies, such as an appeals court, means the secrecy involves higher stakes, and can be seen as making some degree of public access to the decisions taken more important than for a CA.

127. A greater level of transparency would also respond to another concern - that a small circle of arbitrators, advisors and officials from countries directly affected or otherwise well advised, will know about most of the outcomes and make their decisions accordingly, thereby reinforcing the impression that some countries may be "in the loop" but most will be "out of the loop" and thus disadvantaged. The advantages and disadvantages of transparency and the various potential levels of it will have to be carefully considered when designing any new framework.

(b). Possible ways forward

128. Short form arbitration especially bears the risk of being very hard to monitor if there is no transparency. There is no reasoned decision to begin with and additionally the outcome is not made public. This gives a great deal of discretionary power to the arbitrator(s) (who generally decide their own jurisdiction and whose decisions on this can very rarely be overturned) and might be of special concern to countries worried about giving excessive power to one person or a group of three persons. The UN Model nevertheless has short form arbitration as the default option, but the UN Tax Committee can always re-evaluate which of the options, if any, should be preferred as the default option.

129. UNCITRAL has recently published Rules on Transparency in Treaty-based Investor-State Arbitration.[61] In addition the ICSID Secretary General has raised similar issues of transparency.[62] The Arbitrator in a WTO Country of Origin Labelling case has also, at the request of the parties, opened a session for public viewing.[63] In a recent note about the new Indian Bilateral Investment Treaty Model it was noted that: "Reflecting a global trend, India's Model BIT mandates greater transparency in tribunal constitution, claims, proceedings, and awards."[64] These developments reflect the increasing desire for transparency in areas where there is a legitimate public interest. This is comparable to the area of tax, where, as already pointed out, the public understandably has a great interest in seeing that MNEs pay their appropriate share of tax in accordance with the law, and taxpayers have an interest in ensuring they are not being treated less favorably than other taxpayers. The OECD guidance on MAPs also notes developments towards

decision/ agreement of another party that it should not be implemented. No CA, acting alone, can veto the implementation of the arbitral decision.

61 See: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

62 See: http://www.freedominfo.org/2014/06/icsid-secretary-general-plans-propose-transparency-changes/

63 WTO, "WTO hearings on US – COOL arbitrations opened to the public" (3 August 2015) https://www.wto.org/english/news_e/news15_e/disp_03aug15_e.htm

64 Srividya Jandhyala, "Bringing the State back in: India's 2015 model BIT", Columbia FDI Perspectives, No. 154, August 17, 2015, http://ccsi.columbia.edu/publications/columbia-fdi-perspectives

greater transparency of APAs, another form of avoiding or resolving disputes: "Many countries publish APA annual reports describing their programs and publicizing statistical results to promote their use and ensure transparency in the process."[65]

130. Furthermore, some degree of transparency allows not only the general citizenry but also other interested parties, such as revenue administrations and other arbitrators and advisors, around the world, to have access to the outcomes of arbitral proceedings. At least for decisions where written reasons are produced, this would further allow for familiarization and confidence building and promote consistency in interpreting the same clauses internationally – even without any formal precedent, *de facto* lines of authority based upon the persuasiveness of the argument will remain. There would be more clarity on the independence of arbitrators and more opportunity to build trust in the system as one that works. The most capable arbitrators would also be more readily identified, and those who were shown by their decisions to be deficient would be less likely to be chosen in other cases.

6. Finality vs. Reviewability

(a). Key issues

131. Arbitral awards in current practice present final and binding outcomes for the CAs who must resolve the case in accordance with the decision. The provisions that a taxpayer may reject a MAP based upon the decision and that, under the UN Model, the CAs acting together may reject it, does not change the fact, already noted, that any single CA is bound to implement it unless something happens that is always at least in part outside that CA's control (rejection by the taxpayer or by the other CA).

132. There is also effectively no possibility for review or appeal. While some courts may have inherent review rights (such as Supreme Courts under a country's constitution), these would only be exercised in truly exceptional cases, such as obvious bias of the arbitrators. This lack of an effective appeals mechanism has been criticized by stakeholders in other areas (such as in the context of international investment arbitration), and is no doubt a reason for some governments' general reluctance towards arbitration. While there are advantages and disadvantages to an appeal mechanism (the main disadvantage being the cost, resources and time involved in any such extra layer of consideration), a lack of confidence in the system could lead to a slower than expected uptake of arbitration or a lack of implementation (or "enforcement") of arbitration decisions, an issue further considered below.

133. In examining the final and binding nature of arbitration in tax matters, it is especially useful to look at the experience in other areas.

[65] OECD, MEMAP (2007) at page 43.

(b). Possible ways forward

(i). The ICC scrutiny test

134. The ICC subjects all institutional arbitration proceedings to scrutiny by the ICC Court of Arbitration[66] with respect to the form of the proceedings and award, as well as drawing attention to point of substance (but not compatibility with mandatory law, according to the ICC rules). This means that the arbitral panel will submit its draft award at the end of the proceedings to the Court, which will then carefully check it. The Court can formally make modifications, but can also make recommendations with regards to the substance of the award. These recommendations do not have an effect on the freedom of making the decision, but may be taken into account. The justification for such review is that, by scrutinizing the arbitral award, the court can take mandatory law into consideration and ensure compliance with the institutional rules governing the proceeding.[67] It is understood that the scrutiny process generally only takes a few weeks.[68]

(ii). The Washington Convention review and annulment procedures

135. The Washington Convention (ICSID Convention) on investment arbitration includes in Article 51 a *review* provision in cases where facts are discovered by either party that are "of such a nature as decisively to affect the award, provided that when the award was rendered such fact was unknown to the tribunal." Furthermore, the applicant must not have been negligent. Article 52, in addition, provides for *annulment* proceedings in five situations:

a) that the Tribunal was not properly constituted;
b) that the Tribunal has manifestly exceeded its powers;
c) that there was corruption on the part of a member of the Tribunal;
d) that there has been a serious departure from a fundamental rule of procedure; or
e) that the award has failed to state the reasons on which it is based.

Successful annulment procedures mean that the matter will have to be re-considered by another panel, however.

(iii). A full appeal procedure

136. Another option would be to introduce a full appeal procedure to arbitration. The option to appeal exists outside the tax world under some arbitration rules (e.g., under those of

66 http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-process/award-and-award-scrutiny/
67 http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-process/award-and-award-scrutiny/
68 http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-arbitration-process/award-and-award-scrutiny/

the American Arbitration Association).[69] Of course the WTO system has a sophisticated standing Appellate Body system which achieves the same result. In the tax arena such a procedure could really only be dealt with effectively via an institution with clear rules and standards to ensure the overall quality of such an appeal mechanism. An *ad hoc* procedure for appeal would be technically possible, but much more difficult to implement.

137. The question remains whether there is added value in introducing any of these three options. A scrutiny test and an annulment procedure might provide some valuable checks and certainty elements, but a full-fledged appeal procedure, while possibly maximizing these benefits, could also lead to significant delays and additional costs. In the end it is also not certain that there would actually be "better" outcomes or more legal certainty if an appeal procedure were to exist.

138. Finally, it has to be remembered that under the UN Model the CAs can collectively agree not to follow an arbitral award. In other words, it needs (and is sufficient that) at least one CA be satisfied with the decision for both of the CAs to be obliged to implement it.[70] In short form arbitration, it is particularly unlikely that both CAs would agree *not* to follow the decision of the arbitrators as in this form of arbitration one of the party's argument has been fully accepted. As long as (as can be expected) that party remains satisfied by the decision it will have to be implemented by both CAs. Even in longer form arbitration, it would be very rare that both CAs would be sufficiently unhappy with the decision to want to reject it, especially as it lacks formal precedential value.

7. Enforceability

(a). Key issues

139. A further important aspect, which has perhaps not yet received the consideration it deserves, is the enforceability of an award rendered by an arbitral panel. This becomes an issue in the (hopefully rare) case where the country that "lost" expected tax revenue does not propose to comply with the outcome of the arbitration. In the area of commercial disputes, the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention)[71] has been negotiated for this purpose and has become the major means of enforcing commercial arbitration decisions. The Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention)[72] has its own enforcement provisions in the area of investment disputes settled under that convention. It is highly questionable whether either of these conventions could assist in enforcement of a MAP related arbitral decision, however.

69 See: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218, also see: Jams: http://www.jamsadr.com/appeal/ and CPR: https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf

70 See Annex to Paragraph 5 of Article 25 (Alternative B) at pp.422-423.

71 See: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf

72 See: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf

(b). The New York Convention 1958

140. The New York Convention does not require enforcement of awards made in the country where enforcement is sought,[73] and a great many parties have also made a formal reservation to the effect that it will only be applied to enforce arbitrations made in another country which is a Convention Contracting State (the "reciprocity" exception)[74]. The Convention may not inherently apply only to commercial arbitrations in its terms, but a large number of parties have taken the permitted option of only applying it to such cases, by making a formal declaration to that effect.[75]

141. There thus seems to be, at most, a limited role for enforcement of tax arbitral awards under the New York Convention. The matter appears to be further complicated by the fact that a MAP arbitral decision is not designed to be generally enforceable of itself. Rather, it is designed to be something that the CAs must follow in determining the issues. This *may* mean that the decision itself cannot be enforced, and that at most the obligation of one country's CA to implement it would have to be challenged in the event of a failure to do so.

(c). The Washington (ICSID) Convention 1965

142. The Washington Convention provides that:[76]

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

143. A key point is that the Washington Convention applies to disputes between countries and investors, not to disputes between CAs. In any case, it requires consent to the matter being arbitrated (normally provided in a bilateral or multi-partite investment treaty or in a State's contract with an investor).

144. The International Centre for the Settlement of Investment Disputes (ICSID) was created by the Washington Convention and is a part of the World Bank Group. In more recent times ICSID has developed distinct rules for an "Additional Facility". This allows, for example, for: "(b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the

---

73 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Article 1(1)

74 Article 1(3).

75 Article 1(3).

76 Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 1965, Article 25 (1).

State whose national is a party to the dispute is a Contracting State; and (c) fact-finding proceedings."[77]

145. The Additional Facility could have some role in tax cases between countries and taxpayers, perhaps, but only where both have agreed to this. It does not apply in the case of disputes *between* countries. Access to the Additional Facility also only happens when the Secretary-General of ICSID is satisfied that for cases not directly related to an investment (and therefore not subject to Washington Convention determination) the underlying transaction has features which distinguish it from an ordinary commercial transaction.[78]

146. It, therefore, does not appear possible that ICSID proceedings could play a part a resolving MAP disputes. They could play a role in addressing (1) tax disputes not specifically investment-related between a country and a taxpayer (where both consented) and they could play a role to the extent that (2) bilateral investment treaties or contracts might address the taxing activity of the country and constitute consent to that form of dispute resolution. To what extent and in what circumstances tax issues can be subject to ICSID determination under this second category is a question on which there are many views, and upon which this note does not seek to pronounce. The important point for current purposes is that the relevance of ICSID forms of dispute resolution is not direct, and at most indirect in suggesting possible arrangements and rules that may assist in improving international tax dispute resolution.

(d). Possible ways forward on implementation and enforcement?

147. This analysis of the New York and Washington Conventions indicates that there is at very least a substantial risk that an arbitral award rendered in one country in the context of a MAP is not formally enforceable in another country. As to enforceability of the award in the country of the award itself, that would remain dependent on its own domestic law and court system. The action would most likely have to be one to force the CA of the country to implement the ruling (such as a *writ of mandamus*) rather than the enforcement of the award *per se*.

148. Lack of effective enforcement would undermine the effectiveness of such an arbitration mechanism embedded in the MAP mechanism. It therefore needs to be considered, for those countries agreeing to arbitration, how to ensure that the arbitration is applied in practice by the CAs (unless under a treaty following the UN Model - type provision both CAs agree *not* to implement it; or a taxpayer directly affected does not accept the MAP based on it, under the OECD or UN Models).

---

77 Additional Facility Rules, 2006, Article 2(2), https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf

78 *Additional Facility Rules*, 2006, Article 4(3).

8. A possible multilateral agreement on tax dispute resolution?

(a). Key issues

149. There are opportunities for a more effective dispute resolution by implementing some key provisions in a multilateral agreement. Bilateral treaties between countries that are already in place would not be replaced but could be complemented and if necessary modified by a multilateral agreement regarding dispute avoidance and resolution. Achieving such a multilateral agreement on a ITDRP mechanism within the MAP "envelope" would appear to be far less complex than achieving a multilateral agreement addressing substantive treaty issues, although it would need to take into account and fully respect differences (i) in the MAP article between countries, as shown in country practice, and (ii) between the UN and OECD Models on arbitration issues.

150. Effective dispute resolution calls for a consistent approach to ensure legal certainty. The current bilateral framework, consisting of more than 3000 treaties, is very difficult and time-consuming to amend. It would appear impossible to create an international framework for dispute resolution that works fairly for developing countries and yet is based purely on the re-negotiating of bilateral treaties one by one (usually more at the request of the developing than the developed country), at least within a reasonable time frame.

151. The challenge of a multilateral agreement on ITDRP would be that it needs to address the legitimate call for greater certainty in this area, while respecting the different situations, views and priorities of countries. Such an agreement, to properly fulfil its function and bring the "hearts and minds" of governments with it, would need to embed developing country (including the least developed) voice and participation in its preparation as an instrument, in its practical functioning (such as in panels and panel procedures) and in its Secretariat, should there be one. Multi-stakeholder involvement in the process and in its practical application, would also be especially important to developing a broad confidence in it. Through that approach the "three certainties" - for (a) *taxpayers* (including those in a similar position to the taxpayer directly affected by a particular case) (b) *governments* and (c) the *wider citizenry* will all be appropriately sought. Inevitably, this means none of these certainties will be absolute, but they will be sufficiently in balance to reflect the "partnership for development" among the parties and achieve recognition of a system delivering preference to none and justice to all.

(b). Ways forward

152. Some potential benefits of a properly constructed multilateral regime could be as follows, drawing in part on the discussion in other parts of this paper:

(c). Setting up an institution?

153. While not essential to a multilateral agreement on ITDRP, such an agreement would present an opportunity to set up a standing institution to ensure more effective dispute resolution in the future and create a body of knowledge and experience that can be accessed by all and is unattainable in a world of distinct and non-transparent *ad hoc* proceedings. Introducing an independent and fully representative body by means of a multilateral agreement (perhaps as an additional option for willing countries) would allow for more guidance and coherence in ITDRP as already addressed in previous sections. It would also allow those participating in a multilateral treaty at a more basic level to examine the pros and cons of a deeper engagement over time and to make decisions based on this at their own pace.

(d). Disputes involving several countries

154. A multilateral agreement could possibly facilitate the resolution of disputes where more than two countries are involved, something that bilateral treaties are not adapted for.[79] While a multilateral agreement on dispute settlement alone would not create multilateral agreements on substantive tax matters it appears possible for a single dispute panel to, by agreement of all country parties, consider cases where more than one treaty relationship is relevant to the outcome, such as in so-called triangular cases. To resolve such disputes in one procedure rather than in separate ones, or even with the same arbitrator(s) presiding could save a great deal of time and money.[80]

(e). Allocation of costs

155. There could be a clear formula of how to allocate the costs that arise out of ITDRP and more particularly arbitration. Trust funds could be used to help developing countries address the costs of an arbitration process. The related problems of payments due in foreign currency could also be addressed through such a fund. This would create a level playing field and allow developing countries to engage in arbitration without having to worry about unpredictable costs.

---

79 See: Altman, "Dispute Resolution under Tax Treaties", 2005, p.399.

80 The OECD Final 2015 BEPS Report on a Multilateral Instrument goes further to contemplate a possible multilateral MAP taking the view that: "there is merit in developing a truly multilateral MAP if the goal is to resolve multi-country disputes. Such a provision would enable MAP consultation with the competent authority of all parties to a multilateral instrument that are concerned with a case involving a taxpayer active in many jurisdictions. To provide certainty and resolution of disputes in the post-BEPS environment, such a provision would further provide for arbitration where the competent authorities are unable to resolve the case by mutual agreement." OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 -2015 Final Report*, 2015, http://dx.doi.org/10.1787/9789264241688-en

(f). Transparency

156. Furthermore, there could be rules regarding transparency of the proceedings. A framework could provide the right balance of confidentiality. An institution supporting such a convention could provide a consistent and public record of redacted decisions and notes on the trends of decisions that could reduce disputes in the future and make their resolution more predictable. It could engage regularly with stakeholders to serve as an "early warning system" of issues jeopardizing the success of ITDRP but also help set up a "rapid response" by country parties to those issues. An appropriately mandated institution could help pinpoint uncertainty in treaties and the UN and OECD Models that should be addressed. More transparency in all these things may help in developing greater confidence in the multilateral system going forward, as well as revealing issues that may need to be addressed multilaterally to ensure that continuing confidence.

(g). Venue

157. The venue of ITDRP can be very important in creating confidence in the system for all affected stakeholders. There would need to be rules as to where the proceedings should take place. A default option could be developed, allowing the CAs to choose an alternative on a case by case basis or on a more systemic basis by advance agreement. If there was an institution set up as part of the agreement, it could be the default venue. The interplay between ITDRP in MAP proceedings and the venue for that ITDRP perhaps needs further discussion. The ability of the taxpayer in a MAP to choose which CA to take its request to, as proposed in the OECD Final Report on Action 14[81] may, for example, have implications for venue, since paragraphs 12 of both the OECD and UN model agreements provide that:

> Unless agreed otherwise by the competent authorities, the competent authority to which the case giving rise to the arbitration was initially presented will be responsible for the logistical arrangements for the meetings of the arbitral panel and will provide the administrative personnel necessary for the conduct of the arbitration process. The administrative personnel so provided will report only to the Chair of the arbitration panel concerning any matter related to that process.

Obviously the dispute would be heard in that country in most or all cases. Of course, where a group has members within two countries, the same choice of venue would be made depending upon which member sought a MAP, even without the changes proposed by the OECD. The change to allow a single taxpayer to choose the forum and the administering authority facilitates this choice however and may prove significant in practice.

[81] At page 22 ff.

(h). The possibility of a review mechanism and/or appeal procedure

158. A multilateral agreement could be a good way to introduce some form of a review mechanism of the proceedings, although this would require some institutional support. This would further ensure legal certainty and allow the correction of outcomes that clearly contradict the treaty. Suitable transparency of results would help create a non-binding but international tax jurisprudence. A genuinely representative multilateral process would give its own authority to an appeals process and a secretariat or other institutional basis answerable to countries generally would help ensure its effective operation.

(i). Enforceability

159. A multilateral agreement is the best way to introduce provisions with regard to the recognition and enforcement of an award, which is of utmost importance. It is not desirable to create a system where dispute resolution is always subject to the possibility that a country refuses to enforce the outcome. Nevertheless, enforceability of international conventions is rarely "watertight" and the best assurances of good faith are that any such convention is (a) voluntarily entered into; (b) based on common understandings; (c) creates or relies on existing trusted independent institutions; (d) has mechanisms (including as to stakeholder engagement) to ensure confidence that rules and relevant institutions are owned by all and responsive to the needs of all; and (e) is capable of being improved and adjusted to developments over time.

160. Finally, it is noteworthy that the OECD has also recognized the additional value of a multilateral agreement in their current work on BEPS in Action 15. Dispute Resolution is mentioned as one of the items to be addressed in such a possible multilateral agreement.[82]

9. The need for staged approaches and variable geometries

(a). Key issues

161. It is clear that the current dispute resolution system in the tax arena does not work efficiently in some cases. This paper has noted that there are ADR mechanisms, including but not limited to binding arbitration, that can potentially play an important role in improving the effectiveness and efficiency of tax dispute resolution.

162. How ITDRP is managed, its sequencing and its ability to be tailored to different situations will, however, play a large part in how successful its implementation will ultimately be. Whether it builds up trust on the one hand or, on the other, contributes to a sense that the system is weighted against the weakest and less experienced participants rather than specially supporting them will be decisive. In this context, it has become

[82] For more information see: http://www.oecd.org/ctp/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf

evident that there are ways to address the concerns raised and to take them into account in designing a tax dispute resolution framework. This paper has outlined opportunities to move forward by negotiating a multilateral treaty purely on dispute avoidance and resolution, as a possible way of tying together these issues in the quickest overall and most uniform way.

(b). Possible ways forward

163. An attempt needs to be made to outline some possible ways to introduce concepts of ITDRP more fully into tax treaties in a staged approach. Possibilities will be divided in short term, middle term and long term approaches.

(i). Short term

164. First of all, it is important to ensure that all countries are put in a position to implement ITDRP, i.e. Article 25 of the UN/OECD Model, in their double tax treaties *if they so wish*. This means giving greater guidance on the choices available and their possible implications in different circumstances. Capacity building to make these decisions and achieve their benefits is an important part of this. Policy space, and the time and opportunity to develop confidence in the system from within, something which has taken time even for many developed countries, is a sensitive but important aspect of this process. That policy space, where needed, should be the *quid pro quo* for willingness to genuinely analyze how the MAP can be improved.

165. Furthermore, it should be considered whether other ITDRP mechanisms can be included in the Model Conventions and bilateral tax treaties for countries not yet ready to agree to binding arbitral proceedings. An example could be to have non-binding conciliation or mediation instead of arbitration if the dispute has been unresolved for two or three years at the request of one of the CAs. This has some risks of prolonging and making more costly the proceedings. However, accelerated conciliation or mediation procedures, with limits as to costs and perhaps weighting the costs towards the country most able to pay, could contribute to a better long term relationship between the countries and a defusing of disputes before they become solidified by formal arbitration[83]

166. So called "multi-tiered" or "escalator" dispute resolution clauses (widely used in commercial contracts[84]) whereby binding arbitration is the final means of resolving disputes but where it can only be invoked after non-binding steps are attempted, would be another option to allow breathing space between the MAP proceedings and binding dispute resolution. They could help to familiarize countries with arbitration and other forms of ADR. There is inevitably a risk that the non-binding process will not be treated with sufficient seriousness by a CA believing it will be successful under the binding

[83] It is considered that it makes more sense to engage sooner in mediation than in arbitration because completely deadlocked negotiations are to be avoided prior to mediation.

[84] Chapman, "Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith", Kluwer Law International 2010, Volume 27 Issue 1, p.90.

process or, in a worst case scenario, is willing to ignore even a binding decision. Whether the down side of additional mechanisms and possible costs and time delays is justified by the upside of more efficient processes will depend, of course, on the countries involved.

167. But these potential "negatives" to escalation processes can be addressed in the procedures themselves. Part of the escalation process can be one of escalation within the organization represented by the CA (i.e. an internal review at a higher level) to prevent a situation where the view of one person or group in an organization prevails without necessarily being fully tested, either because that person or group has final decision making power or because they control how the issue is presented in any memorandum on the issue going higher up the chain of command. In a highly technical area, this issue (sometimes called "stove piping") prevents serious risks to good decision-making, perhaps especially in decisions affecting other countries. The OECD MEMAP notes the potential value of internal reviews.[85] Where CAs have regular dealings, there might also be value in building up a first step of regular discussions and an "early warning system" to allow potential disputes to be detected early and solved by discussions well before a formal MAP procedure has begun and before positions have become "locked in".

168. The Dispute Review Boards (DRBs) used in construction projects often have a similar early warning and early resolution function.[86] It has been noted that:

> Standard DRBs are basically comprised of three construction-knowledgeable neutral members who serve as an advisory board and are available to issue Advisory Opinions to assist the Parties to the DRB, the Owner and General (or prime) Contractor, in settling any disputes that develop between them. The DRB meets on a regular basis and reviews the progress and status of the construction project with the responsibility of not only assisting in settling of disputes but also in attempting to prevent disputes before they occur. If the DRB is not successful in preventing and/or settling a dispute through DRB meetings and the issuance of Advisory Opinions, the dispute will need to go forward to a more formalized adjudication process such as binding arbitration or litigation to arrive at a "Final and Binding" settlement to the dispute.[87]

169. The construction industry is in fact perhaps a good model, deserving greater study, where it is recognized that respecting agreed outcomes is important, that correct payments as legally required should be made, and that time equals money, but also that the inevitable disputes should not derail an important ongoing relationship to the detriment of all stakeholders. This model recognizes that the best way to prevent this is by having a clear, transparent, real-time, even-handed and cool-headed escalation process that seeks to prevent issues from becoming personalized, unduly delayed or detached from the importance of a wider relationship. It is perhaps especially telling that construction project escalation processes often have recourse to third party expertise,

85 OECD, MEMAP (2007) at page 39.

86 See for example, "Advantages of Dispute Review Boards"; http://www.constructiondisputes-cdrs.com/creative_dispute_resolution_proc.htm#CREATIVE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

87 Construction Disputes Resolution Services, "Dispute Review Board Models"; http://www.constructiondisputes-cdrs.com/creative_dispute_resolution_proc.htm#CREATIVE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

often at increasing levels of formality and "bindingness" the longer the dispute continues.[88]

170. For some countries, non-binding procedures could be implemented instead of binding arbitration for a specified number of years or until arbitral provisions were agreed or the country objecting to arbitration triggered an arbitration MFN clause by agreeing to that in another treaty.

(ii). Medium term

171. Negotiations on all new tax treaties that are being concluded (and relevant re-negotiations of older treaties) should at least seek to address how MAP can be made to function with maximum efficiency and fairness to all stakeholders.

172. International (including regional) organizations and countries could (and should be put in a position to) facilitate such a process by publishing rules, guidelines and procedures to access and use the MAP and ITDRP. Countries can do the same to build up the confidence of administrators and taxpayers in the system. Furthermore, countries can obtain awareness of ITDRP through participating in any UN Tax Committee work on the issue.

(iii). Long term

173. In the long run, there may well be a multilateral agreement as outlined above and below. Such a multilateral agreement would ensure a consistent approach that will lead to a better overall result and could systematically, and with a limited number of possible formulations (useful for certainty), help address many of the issues for both developing and developed countries.

174. Ultimately, all unresolved MAP cases should be resolved in a way that is respected as fair to all involved and there should be consistency with regards to the applicable rules as an integral part of that fairness. It is obviously easiest to achieve such consistency if there is an institution tasked with (as far as possible) ensuring it, and procedures designed to the same end.

175. It has to be noted that it is of utmost importance not to overly burden CAs and taxpayers in the short and medium term. If there are too many steps and option being introduced at the same time, ITDRP will not be seen as a solution but rather as a further complication of international tax cooperation.

176. It is possible also that in the long term an international tax tribunal and even a Global Tax Organization might emerge, of the types discussed in a thoughtful analysis by

[88] for example: Bill Spragins, "The Dispute Resolution Escalation Process", *Construction Executive Risk Management* (7 February 2014): http://enewsletters.constructionexec.com/riskmanagement/2014/02/the-dispute-resolution-escalation-process/ American Arbitration Association, *The Construction Industry's Guide to Dispute Avoidance and Resolution* (2009), available at: https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010811

Altman.[89] This is at least a distant eventuality. What is certain is that considering the pros and cons of such possibilities will not be wasted time – it will enliven us to the risks and benefits of various options for a more thoroughgoing approach to avoiding and resolving international tax disputes, but also the risks and benefits of more conservative approaches more rooted in the past.

(c). Possible UN-related roles

177. The next question, addressed in part above, is that of what possible roles the United Nations and other regional, national or international organizations might have in setting up a more effective ITDRP system. Should there be an institutional framework? Is it better to rely on an existing arbitral institution or should there be a new body?

178. Any of the measures that can be taken depend on the willingness of countries. International organizations do not have the power to change the law, but they can merely make suggestions and serve as a platform to find common ground. If there is some agreement, it will be easier to make changes to the existing bilateral tax treaty system by a multilateral agreement as this provides more consistency.

179. Analysis of the concerns raised, as discussed above, has shown that a many problems could be overcome most readily (though not exclusively) by use of an institution. One question, ultimately beyond the scope of this paper, is whether this should be done by introducing a "tax branch" to one of the bigger existing arbitration institutions.[90] The challenges in using such an institution are that a new branch would have to be tailored specifically for the tax arena and an existing institution would have to engage in trust building (especially with developing country governments). The other alternative is to introduce ITDRP under the auspices of the United Nations[91].

180. The great challenge in building a new institution is gathering sufficient support of countries for its existence, role and placement. This would be a good opportunity to ensure a well-balanced representation of countries, particularly developing countries in the Secretariat and in dispute resolution panels.

181. It may emerge that the broadest range of comfort in Member countries would be for the UN itself to be responsible for mapping the way forward, working with a respected and long-experienced institution, but drawing upon the expertise of other bodies. This would provide a good opportunity to ensure a well-balanced representation of countries, particularly developing countries in the Secretariat and on dispute resolution panels. Such a role would require adequate resources to undertake the responsibility, of course. Performance of such a role would practically (and healthily) require the UN to engage the resources of existing institutions, including regional and other international

89 Altman, "Dispute Resolution under Tax Treaties", 2005, p. 351ff and pp. 398.

90 One could think of: the ICC, AAA, LCIA, SIAC, JAMS International, and Arbitration under the Stockholm Chamber of Commerce etc.

91 As suggested, for example, by Gustaf Lindencrona and Nils Mattsson, *Arbitration in Taxation*, Kluwer/ Deventer (1981), pp. 65-66.

organizations with respected experience in dispute resolution in diverse areas of cross-border commerce.

F. Conclusions and Summary of Proposals

182. Arbitration and other forms of ADR have a potentially very useful role in avoiding and resolving international tax disputes, but it is important that confidence is built in them as truly global solutions that will work as well for developing countries (including the least developed) as for developed. This process requires more analysis of the issues and the lessons from other areas of ADR and more consideration of "variable geometries" in ITDRP that will unlock the possibilities for tax ADR as a balancing of certainties – the certainties of taxpayers that international tax disputes will be resolved without double taxation, the certainty of governments that such disputes will be in accordance with relevant treaties, and the certainty of other taxpayers and the wider citizenry that tax will be paid in accordance with the law.

183. There are many aspects to building the necessary confidence in all stakeholders, including:
    - practical analysis of issues for countries in particular situations, and options to address them;
    - support to developing countries in undertaking analysis of whether and what form of ITDRP is right for them;
    - support to developing countries in ensuring any lack of familiarity and resources does not disadvantage them in cases;
    - clauses designed to:
        - speed the resolution, which will reduce costs of all parties and speed the collection of revenue by the countries;
        - reduce the risks of excessive costs;
        - ensure the balance between encouraging investment and bringing in revenue found in a treaty will be reflected in arbitral panels, procedures and decisions;
        - encourage good decision making and avoidance of disputes at governmental level, so minimizing the need for ADR;
        - address the transparency and confidentiality issues in a way that best meets the legitimate needs of all stakeholders;
        - address the enforcement issue, while encouraging the good faith application of treaties (in accordance with customary international law) that should limit differences in relation to enforcement;
        - limit the scope of arbitral jurisdiction to that intended under the agreement and discourage "jurisdictional creep", possibly in tandem with a review mechanism in limited circumstances, scope and duration; and
        - apply most favored nation obligations so that if a country unwilling to agree to arbitration in a treaty negotiation later agrees to such a provision it is under an obligation to negotiate with the initial treaty partner with a view to providing for arbitration on similar terms.
    - Considering in detail the possibilities that might be faced in existing or future institutions for addressing the various concerns of developing countries, assisting

them in arbitral cases and demonstrating ADR as an issue that has potential benefits for all countries when carefully assessed and addressed.

184. With this background, and in view of the universality and inclusiveness of the United Nations and the increased interest in the UN role in international tax cooperation, the Tax Committee might want to consider setting up a multi-stakeholder Subcommittee on Alternative Dispute Resolution that, with the assistance of the Secretariat, could work towards:

- identifying issues that need to be addressed if we are to gain greater confidence in ADR as a means of avoiding and resolving international tax disputes; and
- providing short, medium and longer term proposals and guidance in terms of:
  - drafts, as appropriate, of: clauses, procedural rules, provisions of the UN Model Convention text and its accompanying Commentaries;
  - suggestions for institutional and other initiatives that could help build confidence and a sense of shared justice through ITDRP; and
  - analysis of other relevant issues, including those mentioned in this paper, in practical detail with proposed solutions.

185. Work in accordance with such a mandate could include a more detailed report on ITDRP to be presented at the 2016 Annual Session. Such a report could further elaborate on the situation in developing countries and conduct studies in order to find more tailored solutions, including possible clauses to facilitate ITDRP at various paces and in various manifestations as might suit particular developing countries. It could also propose a revised model agreement or alternative agreements with variations to address issues for countries in differing positions, both developed and developing. This could include, for example, proposed clauses to deal with costs, contain the jurisdiction of arbitrators and so forth as well as an evaluation of measures short of binding arbitration.

186. Such work would of course in a balanced way draw upon the relevant work of others, such as the OECD, regional organizations and arbitration fora, in this field. This is also an area where input from taxpayers, advisors, academics and civil society will best ensure a balanced and practical outcome.

187. While much of this work would reach fruition under the next Membership of the Committee an early start on that work would assist in bringing on board as wide a set of perspectives as possible. Alternatively, the Secretariat could continue this work and develop more specific recommendations for the Committee to consider at the 2016 or 2017 Annual Sessions.

188. The Subcommittee, or, in the absence of a Subcommittee, the Secretariat, could (perhaps in a distinct paper or an Annex) propose some possible simple changes to the Commentary of Article 25 of the UN Model for its next version. This might include, for example, proposed wording for the UN Model Agreement found in the Commentary providing for consolidation of cases on essentially the same issues, or considering options for payment of costs and the venue of arbitration in more detail. Obviously this would be on the basis that any work on ITDRP would only be of relevance for countries

wishing to have something akin to UN Article 25 B (including an ITDRP such as arbitration) in their treaties and should not prejudice those preferring Article 25 A.

Annex: Dispute Resolution Process Comparison

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
What are the main features in this option?	Judges of a country decide the case under applicable law.	Both CA come together to solve situations of double taxation or taxation not in accordance with the treaty by mutual agreement. Request made by taxpayer. Taxpayer has no direct involvement (though may have an opportunity to present to Competent Authorities (CAs)) No provision to resolve if CAs can't agree.	CA exchange final figures (in a purely monetary dispute) and the arbitrators will choose one figure over the other, without any written decision as to the reasons for the choice. Request for arbitration made by CA (UN Model) or Taxpayer (OECD Model) after matter unresolved in MAP after 3 years (UN Model) or 2 years (OECD Model) Procedures are determined by the CA	Arbitrators reach a reasoned written decision based on which outcome best expresses, in their views, the terms of a treaty. The decision is not made public. *Other modalities same as in previous column.* The method is currently favored by the OECD Model.	This option relies on pre-established Institutional procedures which ensure the arbitration proceedings begin and keep moving in a timely manner. The institution may have its own arbitral rules but other rules, devised by the parties or others such as UNCITRAL Rules, may be used. Secretariat can provide some assistance informally or formally.	**Mediation** involves a trained mediator, usually but not necessarily a lawyer or tax expert, facilitating a negotiation and a more objective self-analysis from parties, but not making binding decisions or recommendations. **Conciliation** is a term usually used to describe what can be seen as a variant or subset of mediation. In conciliation, the conciliator plays a more direct role in	An agreement is made that a mutually acceptable expert should decide all or at least part of the dispute. This is often used when the expert's evidence is likely to decide the factual matters of the case Usually binding but it could be agreed to be simply advisory. No oral hearing may be required and the decision may be made on the papers only.

[92] Ad hoc arbitral panels are conducted by the parties to the dispute and the arbitrators. Rules from institutions may be used but the institutions are not involved in the process.
[93] Ad hoc arbitral panels are conducted by the parties to the dispute and the arbitrators. Rules from institutions may be used but the institutions are not involved in the process.
[94] An institution with a secretariat and dispute settlement expertise oversees the conduct of the process to a greater or lesser extent

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
			Sole Arbitrator or 3 person panel (one chosen by each country and the third chosen by the first two). Arbitrators do not formally decide the issue, but the CAs are required to settle the MAP in accordance with the decision. At present the limited experience of Country-Country arbitration has been through ad-hoc procedures, with the most used mechanism being expedited arbitration. This method is currently favored by the UN Model.		Institution could also produce draft clauses and a list of qualified arbitrators to choose from. *Other modalities same as in previous column.*	resolving the dispute, including by making proposals for settlement. **Early Neutral Evaluation** is a non-binding ADR process. A neutral party is asked to provide a non-binding evaluation of the merits of a dispute. It is conducted early in a dispute.	

	Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**	**Ad Hoc[93] "Full Form" Arbitration**	**Institutional[94] Arbitration**	**Mediation / Conciliation/ Early Neutral Evaluation**	**Expert Determination**
Who makes the decision?	The judge(s)	The CAs of the two countries. A decision depends on their agreement.	The arbitrator/ arbitral panel (Under the UN Model the two CAs can agree *not* to follow the arbitral decision, but that would be very rare, as one CA's view has been accepted in its entirety).	The arbitrator/ arbitral panel (Under the UN Model the two CAs can agree *not* to follow the arbitral decision, but that would be very rare, as one CA's view has been accepted in its entirety).	The arbitrator/ arbitral panel (Under the UN Model the two CAs can agree *not* to follow the arbitral decision, but that would be very rare, as one CA's view has been accepted in its entirety).	The parties retain control	On the specific matters left to Expert, he or she decides. The CAs remain control over the MAP, unless agreed that the Expert's view be only advisory.
Likely costs and who pays?	While the court costs are not borne by the parties, they bear their own costs of legal representation and expert witnesses as well as incidental costs such as translation. Costs will vary considerably between countries and depend on the complexity of the issue.	Countries of relevant CAS bear resource costs of the CA function and likely travel costs of at least one CA (several MAP issues). Typically there is no fee for a MAP procedure.	The CAs bear the costs of the arbitration including their own costs and shared costs relating to the arbitrator – usually equally shared. Costs are likely to be low in view of the limited role of the arbitrator and short time frames.	See previous column, but: Costs are higher than for expedited arbitration, but how much more depends on the length and complexity of the arbitration. Limits on the jurisdiction of the arbitrator, scope of the case and the time taken for various steps would reduce the likely costs.	See previous column, but: Additional costs for the institution The discipline imposed by the institution on the proceedings might possibly outweigh the costs of that institutional procedure. Costs are higher than for expedited arbitration, but how much more depends on the length and	The CAs bear the costs - usually these are equally borne. The cost advantages are that the parties do not have to meet, lawyers can be present or not, and the process is usually cheaper than most forms of ADR. The costs borne would mostly comprise the cost of travel of one CA/ team (borne by that CA) and costs	The CAs bear the costs of expert determination - usually these are equally borne. In cases where the expert makes a binding decision costs are likely to increase. Costs would mostly comprise the cost of travel of one CA/ team (borne by that CA) and costs (equally borne) of the expert and travel.

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
					complexity of the arbitration. Limits on the jurisdiction of the arbitrator, scope of the case and the time taken for various steps would reduce the likely costs and make them more predictable	(equally borne) of the mediator etc. (including travel).	ED conducted entirely on the papers would be cheaper than one involving hearings.
Likely speed of resolution?	Litigation will often be the slowest procedure and does not have a bilateral aspect so is not itself likely to avoid double taxation.	Great variation between countries. Average time for completion of cases between OECD countries in latest (2013) OECD reporting period was 23.57 months.	Speedy, with no reasoned decision required and often a timetable prescribed, such as under the US-Canada Protocol, this is likely to be the quickest form of arbitration.	Speed depends on agreed procedure but with no institution involved, and possibly no sanction for arbitrator or party delays this speed may not be achieved in practice.	Speed depends on agreed procedure but having an institution in place is likely to reduce delays. Especially if there are sanctions it administers for delays.	Very speedy where it resolves the issue, but may not do so. The ENE is likely to be the speediest option of the early intervention procedures.	Very speedy where it resolves the issue, but may not do so.

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
Enforceability	Not applicable – there may be an agreement to mutually enforce agreements or the courts may do so without such an agreement, but that would not seem to supplant the CAs right to disagree with the outcome of the foreign court in its own capacity.	Provided for in the treaty as between the two countries. No provision for enforcement in 3rd countries. Unlikely to be an issue, as resolution depends on agreement.	Provided for in the treaty as between the two countries. No provision for enforcement.	*See previous column*	*See previous column*	Not binding, so not enforceable.	In a contractual situation the determination is usually only enforceable as if it is a condition of the contract. It is not enforceable as a court judgment or arbitral decision.
Likelihood of Procedural bottle necks/delays and possible ways of avoiding them.	Will depend on the country of litigation, but domestic proceedings are often subject to procedural delays.	As resolution depends on mutual agreement, highly susceptible to delays and lack of resolution.	Low likelihood.	Some likelihood, as there is more likelihood of jurisdictional and procedural issues arising. The Ad hoc nature may allow for streamlining to avoid logjams, but carries risks that matters not foreseen or adequately addressed will lead to	Likely to be less than for Ad Hoc because of the institutional experience. Adoption of a well thought set of procedural rules will limit the risk. Costs of delaying proceedings being able to be borne by Party responsible, where fault exists.	No likelihood	Low likelihood.

	Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**	**Ad Hoc[93] "Full Form" Arbitration**	**Institutional[94] Arbitration**	**Mediation / Conciliation/ Early Neutral Evaluation**	**Expert Determination**
				difficulties and attendant costs. Adoption of a well thought set of procedural rules will limit the risk.			
Likely pros and clauses etc. needed to achieve them	Direct taxpayer involvement in the case. Costs of Judge and facilities are publicly funded. Will eventually give a binding result. More adapted to multiple parties and joinder of similar cases. Appeals are possible for losing party. Publication of judgments and appeals system can be seen as showing citizenry that their interests are being protected and promote consistency,	Consensus based, Country to Country, which countries appear to prefer. Proceedings and outcomes not public – seen by some as giving more scope for flexible solutions.	<u>General issues for ad hoc arbitration:</u> Parties can select arbitrators. Confidential. High levels of control over cost and how proceedings conducted. <u>Specific issues for expedited arbitration:</u> - Speed - Low cost - Flexibility	*See previous column for general issues for ad hoc arbitration* A decision which seeks to follow the correct interpretation of the treaty, and which may be useful in improving consistency of CA practice and if made public in some form, the consistency of decisions by arbitrators. More accountability of arbitrators (most particularly when the results are being published), especially important in large cases or those	*See previous column for general issues but:* Considerable levels of control over cost and how proceedings conducted. Benefits of Institutions experience and expertise. If hearings are held at an institution, there may be some advantage in this occurring on "neutral ground"	Parties can select mediators/ conciliators/ evaluator. Increases likelihood of parties forming a realistic appraisal of their cases and breaking deadlocked MAP discussions including economic and reputational issues as well as the purely legal. A successful outcome is consensual rather than imposed – useful to the continuing relationship between countries and CAs	Relatively cheap. Well adapted to issues where specialist expertise is needed, including valuation issues. Focuses on substantive issues not procedure. • Flexible • Generally binding (unless the parties provide otherwise). Usually very speedy and relatively inexpensive

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
	at least in that country but perhaps also internationally over time. A body of case law should emerge in many countries.		- Confidentiality Limited role of arbitrator - less room for "jurisdictional; creep" No fees payable to an arbitration institution. Arbitrators' fees negotiated directly between the parties and the arbitrators as compared to institutional arbitration, where the arbitrators' fees will be set by the institution.	involving central differences on principle.		and re-establishing broken lines of communication. Great flexibility in procedure and outcomes. Tend to be speedy, and not very expensive. Confidential to the public, but transparent to the parties involved May narrow issues even if not completely successful May be a step, in a "multi-tiered" dispute settlement before the matter can go to arbitration.	Allows sensitive information to be kept confidential Useful where there is a continuing relationship that needs preserving – usually less confrontational. Possibly less risk of "jurisdictional creep" than in arbitration, as matters for decision should be technical and closely defined. As there is usually no reasoned decision, there is less chance of appeals. Some consider this attractive. May be a step, in a "multi-tiered" dispute settlement before the matter can go to arbitration. Could also be a mechanism available

	Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**	**Ad Hoc[93] "Full Form" Arbitration**	**Institutional[94] Arbitration**	**Mediation / Conciliation/ Early Neutral Evaluation**	**Expert Determination**
							at any time there is an issue after an agreed period of time than can clearly be determined by an expert.
Likely cons and clauses etc. needed to avoid them	Time of proceedings, which will in many – but not necessarily all - cases far exceed the time taken by arbitration, Cost (although this can vary significantly between countries, and tends to be cheaper in most	Possibility of non-resolution and double taxation through legitimate differences. Reliant on resources and experience of CA, which is often lacking, even in highly developed countries.	<u>Specific to Ad Hoc Arbitration</u> Without the backing of an institution, there is perhaps more likelihood of procedures not being adequate because of an unexpected issue (though using established arbitral	*See previous column* Negotiating a complete set of rules which meet specific needs may require a great deal of time and resources, and that process may favor the more experienced party.	<u>Specific to Institutional Arbitration</u> Institutional Rules and ways of doing business may not be appropriate to tax related disputes or the parties in question. Less flexibility than Ad Hoc arrangements	Evaluation may be ignored by one or both of the parties. Possibly may lock in the position of the "winning party" and it becomes unwilling to seek a reasonable compromise.	Not as suitable where there are many issues involving multiple expertises. Confidential and Often no reason is given – lack of transparency can lead to suspicion.

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
	developing countries, even though time frames are often longer). This is especially due to the need to engage lawyers on procedural and substantive issues. May not be a body of sufficient expertise in many court systems to deal effectively and consistently with highly specialized tax disputes. Many see litigation as being unsuitable in this area as being too much dominated by lawyers as opposed to economists, accountants etc. Even where there is expertise in the court	Relies on good faith by parties, which cannot always be assumed. Even where there is good faith, not well-equipped to resolve different interpretation that are deeply held but vary widely. Likely to come under greater strain post-BEPS	rules, such as UNCITRAL rules would reduce this) especially if the relationship has broken down . Risk of timelines and other requirements not being met by arbitrators and parties is higher, without a registry to keep things moving and an institution having some reputational risk in such delays or unresolved issues. Negotiating a complete set of rules which meet specific needs may require a great deal of time and resources, and that process may favor the more experienced party.	<u>Specific to Long-Form Arbitration</u> Time and costs involved will exceed that in an expedited arbitration. Greater risk of "jurisdictional creep" by the arbitrators Greater risk of unexpected procedural issues.	Some fees will be payable to the Institution for its services and use of any facilities – in a high value dispute this may be very significant even if the issues for decision are not great. Likewise fees may be proportionately very high in the case of a low value dispute that is one of principle. CAs may be required to respond within unrealistic time frames, especially in view of resourcing issues with many CAs. Institutional rules would have to be specifically tailored to the tax environment and the unequal level of experience with ADR.	ENE usually only works well on a technical point with a predominant view as to the correct interpretation or approach. May be less well adapted to the language of tax treaties or concepts such as the arm's length principle. Arbitration and mediation also give the parties greater power over costs compared to litigation, and if an institutional procedure is chosen they can take advantage of its resources. The obvious disadvantage is, of course, the fact that the mediator, conciliator or evaluator has no power to impose a	Not readily enforceable, even if formally "binding". No appeals.

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
	system, parties do not choose the judge. Proceedings are more public and decisions, while they may be redacted, are public also. Essentially Unilateral – binds one CA only and involves one taxpayer only. Other CA may not agree with the outcome. Media scrutiny and often combative nature of litigation can contribute to breakdown of relationship between parties.		<u>Specific to Expedited Arbitration</u> Not well adapted to cases where the differences are not merely over a money amount. No reasoned decision provided for. Most successful parties will be those able to predict likely arbitral results, which may not necessarily equate with the correct interpretation of the treaty. May confirm concerns at "horse trading" and weaken calls for a principled adherence to e.g. Arm's Length Pricing or particular PE principles.			binding decision on the parties. Unsuccessful mediation/conciliation/ evaluation involves wasted costs and delay.	

	Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**	**Ad Hoc[93] "Full Form" Arbitration**	**Institutional[94] Arbitration**	**Mediation / Conciliation/ Early Neutral Evaluation**	**Expert Determination**
Which types of country are likely find it more difficult to maximize the benefits of this option (countries to be categorized, maybe in a separate matrix, by matters such as [comparative] stage of development, financial and human resources, access to reliable outside expertise, treaty networks, experience in ADR, constitutional impediments, other agreements/ treaties with ADR)	Countries where tax courts are not well developed and respected. Countries where commencing a MAP may jeopardize right to litigate the issue, especially if the MAP is unsuccessful.	Countries regarding the signals of traditional MAP as insufficient to project a welcoming tax and investment environment – likely to become more of an issue if more similarly situated countries adopt mandatory binding arbitration. Countries with resident companies likely to benefit from other countries agreeing to arbitrate disputes. Countries agreeing with other countries that certain issues should *not* be covered by MAP. Two countries having significant issues on interpretation of a treaty clause or clauses, with insufficient confidence	Countries without experience in arbitration, particularly at country-country level, or unable to bear the likely costs of it. Countries considering there is a serious risk they will be subject to costs they cannot readily bear, and which feel they may have to give up pursuing a justified view. Countries considering, after fair consideration of the issue, that arbitral panels are likely to be inherently favoring more residence country interpretations than source country interpretations, even when the latter are validly held by the country after analysis	*See previous column* Countries that may support binding arbitration but consider cost and speed issues, and the risk of giving the arbitrators too much jurisdiction favor expedited arbitration.	*See previous column* Countries that may support binding arbitration but consider cost and speed issues, and the risk of giving the arbitrators too much jurisdiction favor expedited arbitration in an ad hoc framework. Countries not trusting proposed institutions and preferring CA flexibility and control.	Countries unable to properly assess the quality of the advice given by the mediator/conciliator/evaluator. Countries believing this will merely impose an extra cost, and is unlikely to break an impasse after 2-3 years in the MAP even if ENE is used at an earlier stage than classic mediation	Countries unable to properly assess the quality of the advice given by the expert. Countries with very different approaches that are unlikely to be able to readily agree on a neutral expert (or to both have faith in a body that can appoint a suitable expert where they cannot agree).

	Litigation	Traditional MAP (i.e. without a specific arbitration clause)	Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration	Ad Hoc[93] "Full Form" Arbitration	Institutional[94] Arbitration	Mediation / Conciliation/ Early Neutral Evaluation	Expert Determination
		in an external adjudication. Countries believing courts are best alternatives to traditional MAP.	of the treaty in accordance with applicable treaty interpretation norms. Countries considering, after fair consideration of the issue, that there would be a legal impediment to arbitration or that it would create major legal or administrative difficulties, such as an obligation to give local taxpayers the same rights of arbitration. Countries that may support binding arbitration but consider the amounts involved, the secrecy and/or the lack of a reasoned judgment fully drawing on the arbitrator's expertise favor a full form approach.				