Issues Paper
International Tax and Investment Center October 2015

Dispute Resolution: The Next Frontier

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INTRODUCTION

Preliminary Remarks

Over the last few years more and more tax treaties have been concluded in order to eliminate double taxation and double non-taxation. The BRICS and developing countries are stepping on this train. Many developing countries are perceived as having a tough tax environment and with a high rate of unresolved tax disputes.

The international community deserves better, especially as the outcome from this large number of unresolved disputes does not always lead to significant additional revenues. Multinational enterprises have many choices as to where to invest and the tax environment is a factor that may tip the scale in favor or against one country. Multinationals want to invest, but they need to know that they are not going to waste resources dealing with the threat of tax litigation. The ongoing social and political discourse mainly focuses on what is expected from multinationals. They have to become more transparent, more open, more prepared to explain their business models and tax strategies to the revenue authorities and more willing to follow the spirit of the law.

But also tax administrations are required to change. Governments and tax administrations need to be prepared to be transparent and open regarding their policies and expectations and in particular how they will apply new international rules that emerge from BEPS on 5 October 2015. The design of a country's tax system must reflect its current economy and political environment and rules must be applied in a consistent and fair way.

Conflicts may be caused by either different interpretations of a treaty or by factual problems (e.g. due to lack of information) or legal problems (e.g. differing domestic legislations).[1] In order to resolve these issues Art 25 OECD-MC institutes a mutual agreement procedure. Moreover, in 2008, an arbitration provision was added since MAP was perceived as not always being effective.[2]

In developing countries tax administrations often lack experience and resources to deal with MAP or arbitration cases or may not consider those procedures as a priority subject.[3] It might be the case that authorities lack qualified staff or that competent authorities for MAP and arbitration are closely connected to and also influenced by audit authorities.[4] Especially in economies in transition this has turned into a major problem, since the higher inflow of foreign direct investment undoubtedly leads to an increase in cases where a DTC is applicable and, thus, more disputes arise. Data collected by the OECD and IBFD show that the number of MAP cases has almost doubled since 2006 and the vast majority are in the area of transfer pricing (see annex III).

The Impact of BEPS on Tax Disputes

In 2013, the OECD launched the BEPS project[5] in order to address the growing concerns of the public[6] that governments lose substantial corporate tax revenue because of planning aimed at shifting profits in ways that erode the taxable base and that the domestic and international rules on the taxation of cross-border profits are broken.[7] The BEPS report identified 6 key pressure areas that needed to be addressed in order to limit the opportunities for profit shifting.[8] As a second step, the OECD issued an action plan detailing the topics that would be addressed and outlining the direction of the efforts in each particular case. Each topic was assigned a separate action and a schedule for completion.[9]

On 5 October 2015, the OECD has published reports containing the recommendations for a coordinated international approach to combat tax avoidance by multinational enterprises.[11] While the individual measures are uniquely suited to addressing the concerns within each specific area (and thus Action), they could have a negative impact in the area of tax disputes. For instance, the Report on Action 6[12] supports the introduction of anti-abuse clauses such as an LOB-clause in tax treaties as well as the application of domestic anti-abuse rules, both general and specific, in cross-border situations. The Report on Action 1[13] deals with fundamental concepts of international law, such as nexus and the PE concept. Pursuant to the work on Action 5[14] where one of the two Contracting States applies a harmful regime, the other may decide to deny taxpayers their benefits. All measures proposed as a result of the BEPS project have a substantial impact on the application of tax treaties, leading to changes in the wording of the articles of the OECD Model Convention and their interpretation. Taxpayers and tax administrations will need time to adjust to the profound changes envisioned. In the interim, there will be a period of very high uncertainty with tax administrations applying a very strict approach and taxpayers challenging this, leading to numerous disputes. The problem will only be compounded by the differences in interpretation between the individual countries.

Aware that the measures proposed as part of the BEPS project 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, the OECD has decided to address these concerns by means of a separate set of measures.[15] Action 14 of the BEPS Action Plan was introduced specifically to deal with such issues. The changes to the Model Convention and Commentary will be complemented with actions ensuring certainty and predictability for business by improving the effectiveness of the MAP procedure. This is also an opportunity to address some of the existing drawbacks of the current dispute resolution mechanisms,[16] namely the absence of an arbitration provision in most double tax treaties as well as the fact that access to MAP and arbitration may be denied in certain cases.[17] Action 14 will lead to changes in Article 25 of the Model Tax Convention.

BEPS ACTION 14 Make dispute resolution mechanisms more effective

Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.

In a modern complex tax system, you will always get tax disputes and litigation is sometimes a healthy way of clarifying the law. However, unresolved disputes can lead to MNE's reversing their plans to invest in one country. Lower foreign direct investment lowers growth which in turn means that the tax base is smaller than what it should be. The BEPS project offers the G20 countries a unique opportunity to engage in a collective dialogue of whether the current treaty rules are fit for purpose and whether they are able to deal with the complexities of a modern economy and upgrade dispute-resolution processes.

MEASURES TO AVOID DISPUTES

Governments and businesses have a shared interest in minimizing disputes. Prior to describing mechanisms to resolve disputes, it is important to emphasize that measures to avoid disputes in the first place are of primary importance. In this chapter, the emphasis is placed on avoiding disputes at the earliest possible stage.

Disparities in national legislations may sometimes lead to disputes if a taxpayer challenges domestic rules motivated by the fact that there is double taxation. One way to reduce disputes in this regard could be **coordination of national tax laws**. This method is frequently used by the OECD in order to informally coordinate states' approach to certain tax issues.[18] Even though these reports are not legally binding, most tax administrations follow them because they share its content, substance and goals. It should be noted, however, that these types of guidelines are not legally binding and, thus, differences in national legal systems may continue to exist. Additionally, taxpayers may not claim rights accruing from these guidelines before national courts or tax administrations and these guidelines are not supplemented by any kind of dispute settlement bodies.[19]

Another means to avoid double taxation and thus prevent disputes is **clarity and simplicity** in national legislations. Undue complexity and a high rate of amendments to tax law will lead to confusion and to more disputes. It is important that the tax law of a country uses precise language and is well drafted in a technical way. If taxpayers have knowledge about the law and if tax administrations provide easily accessible information, many disputes will not arise. This kind of information may also be used to organize the taxpayers' activities in a way that no double taxation arises and will, therefore, also lower the amount of disputes.[20]

In general, a cooperative relationship between taxpayer and tax authority can avoid conflicts or resolve them in a quick manner. In this regard disputes can also be avoided by the use of **advance rulings** or advance pricing agreements. Under these types of rulings the taxpayer reaches an agreement with the tax authorities regarding future events in order to determine their legal consequences.[21] The taxpayer can achieve certainty concerning the tax consequences of a contemplated transaction and may decide in light of the ruling whether the transaction should be carried out. Advance rulings are not a traditional way of resolving disputes but rather a supplementary procedure to prevent disputes in the first place.

A study conducted by the OECD on taxpayers' rights and obligations emphasizes the importance of the taxpayers' rights to be certain about the tax consequences of their actions. In this respect advance rulings "are attractive for taxpayers since they enable them to evaluate correctly and with certainty the tax consequences of those actions."[22] In this context, the European Commission recently proposed an EU-wide Taxpayers Charter.

Advance agreements need a legal basis in domestic law in order to have a binding character.[23] A big advantage of advance rulings is that they are concluded at such an early stage, that the taxpayer can still prevent possible negative consequences, because he may change his business structure or other circumstances leading to the certain agreement. On the other hand, when deciding to apply for an advance tax ruling the taxpayer needs to consider the cost of this ruling and the strategic effects of this ruling. Since applying for a ruling draws the attention of the tax authority to this taxpayer and, thus, increases the probability of an audit, the taxpayer may decide not to request an advance ruling.[24]

MEASURES TO RESOLVE DISPUTES

The various measures to resolve disputes can be classified in two categories: domestic or international. When examining disputes it has to be kept in mind that the majority of disputes arise between taxpayer and authority but only rarely a breach of a treaty obligation of one state will lead to a dispute with the other contracting state.[25]

Domestic Measures for Dispute Resolution

The most common mechanism for taxpayer-state disputes is bringing the dispute to a **national court** or placing an appeal with the tax administration. Taking an international perspective this method for dispute resolution may still lead to the undesirable result of double taxation due to different national legislations or interpretations.

Alternative Dispute Resolution measures may be used to resolve disputes in a more informal and effective manner without having to go to court. ADR is becoming increasingly popular, since it enables the taxpayer and the tax authorities to handle disputes in a collaborative way. In a broad sense, ADR can refer to any way of resolving disputes outside of the typical appeal system. Typically, however, alternative dispute resolution refers to resolving disputes by negotiation or **mediation**, as described here. Many countries' tax authorities are focusing on an increased use of ADR, in order to reduce compliance cost for both the taxpayer and the authorities as well as to reduce the number of cases reaching tax courts or tribunals.[26] To deal with the increasingly growing amount of cases, flexible procedures are less burdensome for the taxpayer as well as the tax administration. In many cases ADR programs are set up not only to reduce the amount of disputes and to increase the speed of dispute resolution, but also to improve the taxpayer's view of the authorities[27] and to increase the understanding by the tax administration of business models.

Problems in the mediation process can arise if the mediator is a representative of the revenue authority and, as a consequence, the taxpayer mistrusts the process. On the other hand, the use of an "outsider" as mediator may slow down the process. Regarding the confidentiality of mediation, it is important to ensure the taxpayer that information disclosed in ADR will not be used against them in subsequent legal action. It hardly needs to be mentioned that ADR will, thus, be more successful if the taxpayer and the authorities provide full information on the case. Another important point is that ADR is more likely to come to a settlement the earlier it is initiated. The downside of an increased and early-stage use of mediation may be less uniformity since each mediator may apply their own interpretation to very similar cases.[28]

A more cooperative approach based on transparency and trust from the side of the taxpayer and of the tax administration is called **cooperative compliance**.[29] In contrast to the typical relationship between tax administration and taxpayer, which is based on low levels of trust and limited disclosure, this cooperative approach focuses on higher levels of collaboration and disclosure. Moreover, the revenue body is expected to increase their commercial awareness, provide timely advice and also take commercial deadlines into account. The revenue authority benefits from increased transparency and taxpayer cooperation, as well as the assistance of the business in developing commercial awareness.[30] This leads to a win-win situation, providing incentives for taxpayers to be compliant and allowing the revenue body to focus on potentially less compliant taxpayers.

A growing number of countries have already implemented a cooperative compliance system. Taking into account different domestic systems, it is easy to conclude that a multinational enterprise following a cooperative approach in one country is not necessarily seen as cooperative in another country. Therefore it is time to put more emphasis on multilateral cooperative compliance, which is defined by the OECD as *"an arrangement between a taxpayer and two or more revenue bodies in which all parties agree to apply the principles of co-operative compliance to the management of the tax issues that are of common interest to all parties."*[31] The aim of cross border compliance for multinationals is to reduce their overall compliance burden and also to achieve certainty regarding their international operations. Currently there is only little experience in multilateral compliance but, with the spread of multilateralism in the tax treaty world, this may change.

Dispute Resolution at the International Level

There are various mechanisms of dispute resolution at the international level, both for tax and non-tax disputes. Some of the most prominent measures of settling tax disputes are those found in double tax treaties and the EU Arbitration Convention. Nevertheless, it is also important to look at mechanisms for dispute resolution in other areas, such as trade agreements and bilateral investment treaties (BITs), since they can provide valuable practical insights. Under tax treaty law the most important provision is Art 25 OECD-MC, regarding the Mutual Agreement Procedure and Arbitration.

Mutual Agreement Procedures (MAPS)

The main instrument for resolving disputes at the international level is the **MAP**, which is included in almost every DTC following the OECD or the UN Model. Pursuant to Art 25 (1) OECD-MC, a taxpayer may submit a request to the competent authority in his residence state[32] if he considers that the actions of one or both Contracting States have resulted in taxation not in accordance with the provisions of the Convention. This constitutes the first stage of the mutual agreement procedure and takes place exclusively between the taxpayer and the requested Competent Authority. The competent authority is obliged to take the objection into consideration and, if it is justified to take action. If the taxation not in accordance with the Convention is due entirely to its actions, then it must remove the grounds for objection by granting an adjustment or relief. Should it not be able to arrive at a satisfactory solution on its own, because the issue is caused, at least in part, by the actions of the other Contracting State, then it must initiate the second stage of the proceedings, the mutual agreement procedure proper, as soon as possible.[323]

Article 25 (1) sets a time limit of 3 years from the notification of the action for the submission of the request. This is intended to protect tax administrations against late objections and must be regarded as a minimum.[34]

The importance of the MAP stems from the fact that it provides taxpayers with an alternative to tax litigation, which can be cumbersome and uncertain, especially since it needs to be taken up in both of the Contracting States in order to provide an effective relief for double taxation.[35] It also entails a timing advantage, since the taxpayer is not obliged to wait until the taxation has been charged or notified to him in order to set the procedure in motion. It is sufficient if he establishes that the actions of one or both Contracting States will probably result in taxation not in accordance with the Convention.[36]

While working on a broader project to improve the functioning of existing international tax dispute procedures and to develop supplementary dispute resolution mechanisms, which eventually lead to the inclusion of the arbitration clause into the 2008 OECD-MC, the OECD also developed the online Manual on Effective Mutual Agreement Procedures (MEMAP). The MEMAP is intended as a guide to increase awareness of the MAP process and how it should function by providing tax administrations and taxpayers with basic information on the operation of MAP and a set of best practices for MAP. It does not impose binding rules.[37]

The MEMAP also offers guidelines for MAP procedures. Among the suggestions for improvement offered are the following:

- Involvement of key personnel in all stages of the MAP
- Readily available access to the competent authority[38]
- Equip the competent authority with sufficient human, financial and other resources
- Ensure the independence and autonomy of the competent authority
- Improve efficiency by means of regular performance reviews.

The UN has also released a MAP Guide as part of its capacity-building initiative. While the Guide is based on the MEMAP, it pays special attention to the specific needs of developing countries and is tailored to the specifics of the UN-MC.[39]

The intention of the OECD Model is to provide broad **access to the MAP**, which is why the Commentary specifies that there is no general rule denying taxpayers the right to request a MAP in situations perceived as abusive. Even for severe violations of domestic law, the circumstances in which the Contracting States wish to restrict access should be negotiated into the bilateral treaty.[40] However, in practice, the use of the MAP is often restricted due to **constitutional** and other **domestic law** provisions. For instance, final court decisions, to which the tax authorities are obliged to adhere by virtue of the constitution, could prevent them from granting relief. As the OECD Model Commentary points out, it a generally recognized principle of international law[41] that even constitutional domestic law does not justify the failure to meet treaty obligations. Moreover, the terms of the Convention itself generally do not provide grounds to justify the denial of access.[42]

While Article 25 (1) stipulates that the access to MAP is available "irrespective of the remedies provided by domestic law", in practice the opposite seems to be the case. As the OECD Commentary points out, most countries adopt a practical approach pursuant to which the MAP and domestic remedies cannot be pursued simultaneously. If the domestic procedures are still available, the taxpayer must first exhaust them or agree to waive his right to them. If the domestic remedies are pursued first, then a MAP can only be pursued in order to obtain relief in the other State.[43] This greatly restricts the scope of application of the MAP and its attractiveness.

There is a second type of MAP besides those initiated as a result of a taxpayer request. According to Article 25 (3) OECD-MC, the competent authorities are free to initiate proceedings in order to eliminate difficulties concerning the interpretation and application of the treaty as well as double taxation. This applies to legal as well as factual matters of a general nature, which concern a category of taxpayers.[44] More precisely, it allows the competent authorities to:

- Completely clarify the definition of a term in the Convention;
- Settle difficulties arising from changes in national law; and
- Determine the conditions under which interest may be treated as dividends as a result of domestic thin cap rules
- Deal with cases of double taxation not within the scope of the Convention.[45]

As is the case for taxpayer-initiated MAP, the agreements reached under Article 25 (3) are binding.[46]

Article 25 (2) imposes the duty to negotiate on the competent authorities. Nevertheless, they are not under a requirement to achieve results, but merely to use their best endeavors. Thus, it might be the case that they do not reach agreement on all points or that no agreement at all is achieved.[47] This is why the addition of an arbitration clause is so important.

The mutual agreement reached is binding on the competent authorities and must be **implemented into domestic law**. Since the obligation to implement the agreement is clearly stated in the Article 25 (2), domestic law cannot provide a justification for a failure to implement the agreement.[48]

A much discussed aspect of MAP is the issue of **taxpayer rights**. The OECD Commentary addresses this aspect and states that it is the duty of the competent authorities to give taxpayers whose cases are brought before the joint commission essential guarantees namely:

- The right to make oral or written representations and
- The right to be assisted by counsel.[49]

Nevertheless, the Model Commentary does not require that taxpayers be granted access to the papers in the case.[50] Annex II to this note sets out the proposals in the BEPS Action 14 to improve MAP, many of which are based upon the MEMAP.

Arbitration

While the MAP provides a generally effective and efficient method of dispute resolution, it is sometimes unable to resolve disputes among governments in a timely manner or at all.[51] The **arbitration** clause of Art 25 (5) OECD-MC provides a solution when the competent authorities are unable to reach an agreement within 2 years from the presentation of the case.[52] It allows the issues to be settled by means of an independent decision. The arbitration is an integral part of the MAP and does not constitute an alternative to it.[53] The arbitration decision is binding with respect to the issues submitted. Contrary to the EU Arbitration Convention,[54] the competent authorities are not allowed to depart from the decision even if they can agree on a different solution.[55]

Since its introduction into the OECD Model in 2008, Article 25 (5) has been added to a number of bilateral tax treaties, sometimes in the form of an amendment of an older treaty. As can be seen in Annex I, at the moment 140 DTCs contain some form of an arbitration provision.[56] Several of the treaties were concluded prior to the inclusion of the arbitration clause in the OECD-MC and some of the others do not follow the OECD-MC. Their provisions have a different wording and do not grant access to arbitration under the same conditions as Article 25 (5) OECD-MC. Some treaties allow the submission of a case to arbitration on all issues related to the interpretation or application of the treaty, but only if both competent authorities and the taxpayer agree to do so, so that the procedure is not mandatory for the competent authorities. A condition is also that the taxpayer agrees to be bound by the arbitration decision. Other treaties only allow the submission of the case to arbitration only if one of the competent authorities request so. Under other treaties the submission of the case to arbitration is mandatory, unless both competent authorities agree that the case is not suitable for determination by arbitration.[57]

Nevertheless, the treaties containing an arbitration clause remain in the minority. Therefore, it is important to note that even where such a paragraph is not included in the bilateral treaty, an arbitration process can be implemented by means of a MAP between the competent authorities.[58]

An essential aspect of the effectiveness of the arbitration clause is the fact that it is compulsory. The submission of unresolved issues is not dependent on a prior authorization by the competent authorities. On the contrary, once the specified conditions are met, they are under a duty to submit. Moreover, as long as there is still at least one issue on which there is disagreement, the competent authorities cannot unilaterally decide to close the case.[59] On the other hand, even though it might seem desirable from a taxpayer's perspective, arbitration is not an alternative or additional recourse. In other words, where the competent authorities have reached an agreement on all issues, there is no room for the application of Article 25 (5) OECD-MC. Contrary to other forms of commercial or government-private party arbitration the jurisdiction of the arbitral panel does not extend to resolving the whole case, but only to the issues where no agreement has been reached between the competent authorities.[60]

The arbitration clause is only applicable for MAPs initiated by the taxpayer, meaning that a MAP under Article 25 (3) cannot fall within its scope.[61] Arbitration is also only available for cases where the taxation not in accordance with the Convention has already occurred. Cases where such taxation might result in the future can be submitted to MAP but not to arbitration.[62]

As is the case for the MAP, access to arbitration could be denied on the grounds of **constitutional barriers** preventing arbitrators from deciding tax issues or other national law considerations.[63] Moreover, where the MAP itself is unavailable, the arbitration clause is also inapplicable.[64] Member States of the EU must co-ordinate their obligations under the bilateral treaties with those under the European Arbitration Convention.[65]

Another significant drawback of Article 25 (5) is that it is not applicable if the matter has already been decided by a court or administrative tribunal of either state. The reason for this stipulation is the need to avoid the risk of conflicting decisions and ensure the effectiveness of the process, as well as the fact that most countries have adopted a similar approach for the MAP.[66]

Besides the OECD Model, also the ILADT[67] convention contains in Art 16 (4) a provision about arbitration: On the request of the taxpayer disputes shall be submitted to mandatory arbitration if the competent authorities did not reach any agreement on the elimination of double taxation resulting from the interpretation or application of the convention. This provision is similar to the provision contained in Art 25 (5) OECD-MC, but focusing more on procedural aspects, like the composition of the arbitration tribunal or the cost of arbitration.

Art 16 (4): If, within two years from the presentation of the case by the taxpayer, the competent authorities of the Contracting States are not able to reach an agreement to eliminate double taxation, they shall submit the dispute to binding arbitration if the taxpayer so requests. The arbitration tribunal shall consist of one representative of each Contracting State and chaired by a president elected by agreement between the Contracting States and the taxpayer. The arbitration procedure shall guarantee the right of the taxpayer and of the Contracting States to expose their arguments. The arbitration procedure shall conclude with a decision eliminating double taxation, which shall be binding on the Contracting States. The costs of arbitration shall be borne by the party whose claims are rejected.

The OECD Commentary also suggests the use of supplementary dispute resolution mechanisms such as mediation and expert opinions (alongside arbitration or instead of it) as part of the MAP.[68]

In the course of the 2011 update of its Model Convention, the UN also introduced an arbitration provision in Article 25B (5) UN-MC. This provision broadly follows Article 25 (5) OECD-MC. However there are 4 major differences.[69] Firstly, the time span required for the initiation of arbitration is three years from the presentation of the case instead of two as provided in the OECD-MC. Secondly, arbitration must be requested by the competent authority of one of the Contracting States instead of the taxpayer. Thirdly, as is the case in the EU Arbitration Convention, the competent authorities may depart from the arbitration decision. However, they must agree to do so within 6 months. Finally, the arbitration clause is only included in one of the two alternatives for Article 25. Article 25A UN-MC does not provide for arbitration, taking into account that some countries do not wish to include such a provision.

EU Arbitration Convention

The EU Arbitration Convention[70] establishes dispute resolution procedures for cases of double taxation occurring between associated enterprises of EU Member States or between an enterprise of a Member State and its permanent establishment in another Member State.[71] The Convention originated in a proposal by the Commission proposal for a directive to eliminate double taxation in the case of transfers of profits between associated enterprises in different Member States[72] and the White Paper of 1985 on the completion of the Internal Market. It was signed on 23 July 1990 and was initially in force from 1 January 1995 until 31 December 1999. In 1999 it was amended by a Protocol[73] that provides for an automatic extension of the Convention by periods of five years unless a Contracting State opposes. The Arbitration Convention currently applies in all EU Member States except Croatia.[74]

The Arbitration Convention sets out the principles of profit attribution as follows:

- Associated enterprises shall be treated as independent enterprises
- A permanent establishment will be attributed the profits it might be expected to make if it was a distinct and separate legal entity.[75]

Article 6 of the Arbitration Convention regulates the MAP as follows:

> *Art 6 (1): Where an enterprise considers that, in any case to which this Convention applies, the principles set out in Article 4 have not been observed, it may, irrespective of the remedies provided by the domestic law of the Contracting States concerned, present its case to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. The case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1(...) .*
>
> *Art 6 (2): If the complaint appears to it to be well-founded and if it is not itself able to arrive at a satisfactory solution, the competent authority shall endeavor to resolve the case by mutual agreement with the competent authority of any other Contracting State concerned, with a view to the elimination of double taxation on the basis of the principles set out in Article 4. Any mutual agreement reached shall be implemented irrespective of any time limits prescribed by the domestic laws of the Contracting States concerned.*

The mandatory arbitration is stipulated in **Article 7**:

> *Art 7 (1): If the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6(1), they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question.*

While the provisions governing the MAP and arbitration in the EU Arbitration Convention are very similar to those in Article 25 OECD-MC, there are some differences. Article 25 (2) broadly refers to "taxation which is not in accordance with the Convention", while the EU Arbitration mentions only double taxation, thus narrowing the scope of the provision. The Preamble of the Convention also emphasizes the importance of eliminating double taxation. On the other hand, pursuant to Article 8 of the Convention, access to a MAP or arbitration can be excluded if legal or administrative proceedings have resulted in a final ruling that an enterprise is liable to a serious penalty. This would cover abuse cases where penalties are imposed.

A significant difference is the fact that compulsory arbitration is prescribed for cases where the competent authorities fail to reach an agreement that eliminates double taxation. This constitutes a substantial deviation from Article 25 (5) OECD-MC, which only applies where the tax authorities fail to reach an agreement on all issues. Pursuant to the wording of Article 7 of the Convention, a case must be submitted to mandatory arbitration even if the competent authorities have reached an agreement, as long as this agreement does not eliminate the double taxation involved. This gives the provision significantly more weight, since it not only increases its scope but also ensures that the purpose of the Convention (elimination of double taxation) is reached. Moreover, the Convention also ensures the speediness of the proceedings by requiring that the arbitration body deliver its opinion within six months from the submission date and that the decision be implemented within six months of its delivery.[76]

However, as previously mentioned, the decisions of the advisory commission[77] are not binding upon the competent authorities. Article 12 of the Convention allows a deviation from the decision of the commission if an agreement is reached. The impact of this provision is substantially lessened by the requirement that this agreement must nevertheless lead to an elimination of double taxation. In other words, the effectiveness of the arbitration is not jeopardized since even a deviating decision would still grant the taxpayer satisfaction and be in line with the purpose of the Convention.

There is currently debate within the EU of converting the convention into a directive which would give it more force and would also give a role to the ECJ in contentested cases.

Dispute Resolution in Non-Tax Agreements

Non-tax related agreements may also include tax issues or be applicable to tax cases. A rather recent development in international law is the increase in **bilateral investment treaties** (BITs) and also multilateral investment treaties like free trade agreements (FTAs) and the Energy Charter Treaty.[78] Even though there are many different wordings of BITs, the aim of the treaty in general is always to protect the investments, to abolish legal limitations and to create a basis for non-discrimination and equal treatment.[79] Disputes under BITs can include taxation matters because it is often tax incentives that drive foreign direct investment into a country. Those disputes might be similar to the ones arising under DTCs. One big difference to DTCs is the method of dispute resolution: Investor-state dispute settlement under BITs is not concluded by competent authorities, but can be brought to courts of the host state or directly to an arbitration tribunal, where taxpayers may have more influence than with MAP. This means that under investment protection agreements the taxpayer may initiate proceedings himself and he may also be present at court hearings, being guaranteed a right to fair and independent treatment.[80] Especially in cases with developing countries where competent authorities for MAP are lacking experience or are often not independent, an arbitration tribunal especially set up for investment arbitration[81] may be of substantial advantage for the taxpayer. Another advantage of the dispute settlement rules in BITs is that the taxpayer may take action himself to defend his rights accruing from the BIT and that it is a claim of the investor himself and not of the contracting state.[82]

It has, however, to be kept in mind that in a number of cases BITs exclude their applicability to taxation matters or give priority to DTCs as *lex specialis*.[83] Only under exceptional circumstances, this means when taxation is qualified as abusive and can be seen as expatriation, arbitration under BITs is possible.[84] Other BITs only partially exclude their applicability to tax matters and so it can be possible that the most favored nation clause or the provisions about non-discrimination apply. Another crucial point regarding this matter is that BITs do not explicitly define what a tax is so the arbitration tribunal may set a determination.[85] Furthermore, it might be easy to judge that a practice stipulates a breach of agreement and that the investor may claim remedies. But the problem is if a – finally reached – settlement can fiscally qualify as taxable compensation, or if damages have to be calculated including tax benefits.[86] One can see that even though through BITs the taxpayer may directly have access to arbitration panels, it is often not possible and also far from easy to solve a taxation matter. Arbitration in investment treaties will remain a sensitive topic in current political and legal matters, as the latest discussion about the EU-US free trade agreement show.

BINDING MANDATORY ARBITRATION AND THE MULTILATERAL INSTRUMENT

Background

In the course of the Base Erosion and Profit Shifting (BEPS) Project, treaty-related recommendations have been developed in order to deal with the improvement of dispute resolution mechanisms,[87] which includes the development of a provision on mandatory binding arbitration. The implementation of these tax treaty-related recommendations requires the modification of more than 3,000 bilateral tax treaties for the avoidance of double taxation. As the amendment of tax treaties has proven to be in many cases a cumbersome and long process, the OECD has proposed in BEPS Action 15 developing a multilateral instrument to modify bilateral tax treaties.[88] The objective of such a multilateral instrument is to achieve the coordinated and swift modification of tax treaties in order to implement all BEPS treaty-related recommendations. The multilateral instrument will not replace or supersede the tax treaties in force.

Flexibility

Although in the course of BEPS only 20 countries[89] have agreed (until now) to adopt binding mandatory arbitration as part of the mutual agreement procedure, developing a provision on this matter is part of the mandate given to the ad hoc Group that will negotiate and draft the multilateral instrument.[90] In this sense, **opting-in** mechanisms can serve to achieve some level of flexibility in the multilateral instrument, so that countries that for policy reasons do not agree with binding mandatory arbitration may still join the instrument. Effectively, countries that desire to adopt arbitration in their tax treaties may sign an additional protocol committing to it. Therefore, the multilateral arbitration would apply only in cases concerning contracting states of the multilateral instrument that have also signed the additional protocol. Another mechanism that can be used for creating some level of flexibility in the multilateral instrument is selecting some **provisions that should be core, and therefore implemented by all countries, and others that will be only optional, among which the binding mandatory arbitration could be included.**

Multilateral Scope of the Binding Mandatory Arbitration

The Final Reports on Action 15 and on Action 14 recommend the adoption of a multilateral mutual agreement procedure and, further, binding mandatory arbitration. This means that the mutual agreement procedure provided in the multilateral instrument would apply to **contracting states concerned with a case involving one or more taxpayers active in their jurisdictions**.[91] In the case of the binding mandatory arbitration, it would only apply to the contracting states that have also agreed to it.

The adoption of a multilateral arbitration can be beneficial in the context of the multilateral instrument in two cases. The first would be to **resolve cases involving several jurisdictions**, as for example in triangular cases or in transfer pricing cases, in which the relevant associated enterprises are residents of three or more contracting states. The existence of a previously signed tax treaty might be a requirement for resolving this type of cases in a multilateral arbitration. The second would be to **answer which is the most appropriate interpretation of a provision of the multilateral instrument**. In this situation all interested contracting states could be invited to participate, as the decision might have impact on future cases in their own jurisdictions. Therefore, the existence of a previously signed tax treaty would not be a requirement for participating in this type of cases of multilateral arbitration.

The issue of a common interpretation arises in the context of the multilateral instrument because one of its main purposes is to implement uniform wording of provisions across the treaty network. Thus, even though awards may not be binding for the rest of the contracting states of the multilateral instrument, those awards may shed light on the interpretation of provisions of that instrument that afterwards can be consulted or used as a reference by other arbitral tribunals or even by domestic courts. Thus, participation by all contracting states that have also agreed to the mandatory binding arbitration is desirable in cases in which the award deals with the interpretation of the provisions of the multilateral instrument and does not merely deal with facts or bilateral tax treaties.

This will not be the first time in which a multilateral arbitration is used in international tax law as the European Arbitration Convention already established a procedure of this type. Although the multilateral arbitration provided in the European Arbitration Convention has not been successful enough until now, it does not mean that the idea must be rejected. On the contrary, the European Arbitration Convention can be used as reference in order to determine its mains shortcomings and avoid them in the binding mandatory arbitration procedure adopted through the multilateral instrument.

Conclusion

The Final Report on Action 14 mentions that the countries interested in adopting mandatory binding arbitration through the multilateral instrument are involved in more than 90% of outstanding MAP cases at the end of 2013,[92] although this claim is questionable as the data collected by the OECD refer to only MAP cases between the OECD countries which provide data and takes no accounting of the differing importance of MAP cases in practice. Nevertheless, the multilateral instrument can serve to implement mandatory binding arbitration in a speedy manner, which is in the interest of both governments and business.

USING NEW TECHNOLOGY TO IMPROVE THE TECHNICAL PLATFORM FOR DISPUTE RESOLUTION

Background

In the context of constantly evolving technology, the question arises of whether some of these new technologies could be used to speed up the procedural issues of MAP and arbitration and to facilitate a quicker resolution of disputes.

For the least developed countries, resource constraints still pose the greatest challenge. They lack capacities, databases and funds. If dispute settlement mechanisms are to become more widespread, we will need to find ways in which developing countries are not left behind and tailored solutions for them must be worked out.

Technical tools could be used for:

- Facilitating the contacts and sharing of information between the parties to a dispute
- Improving Efficiency and cutting costs of arbitration
- Fulfilling documentation and filing requirements

Exchange of Information between the Parties to a Dispute

Sharing Information

Technology now offers a **range of tools** that can be used to facilitate the contacts between the parties in a way which makes such exchanges more secure, structured and low cost. by creating a common platform. The common platform may be via **use of private clouds** (i.e. shared platforms that are secure and with controlled access) or shared software (the same software deployed in multiple locations that are able to securely communicate with each other). Either would make it possible to deliver this sort of capability at much lower costs than would have been so in the past. As a shared resource, the financial burden on individual countries will be much reduced.

However, when using these tools, careful consideration should be placed on the topic of securing the information shared in the tools (e.g. in the private clouds or in the shared software). Without a secure system, users would be hesitant (or, even, refrained by any law or regulations in their jurisdiction) to share sensitive information.

Timely Solutions

Technology might help in setting feasible **time schedules** and **deadlines** as well as organizing the workflow of steps and approvals required, which can grant timely solutions of the MAPs.

Cutting Costs of Arbitration through Use of Technology

Simplifying the Dispute Resolution Process

Effective dispute resolution depends on **achieving a common view** of the facts and effective exchange of information and communication between the parties is key to that. Communication technology can, therefore, be a key enabler for dispute resolution.

Using technology as the platform for exchanging information may make it possible to **run a dispute resolution process virtually**, with the parties and arbitrators being connected by the same platform which is used for the information exchange. That could reduce costs and allow the pool of arbitrators to be extended beyond those physically present in a particular country.

In details, **video-conference systems** (e.g. Skype, FaceTime, Microsoft Lync) could allow all members involved in the dispute resolution process to arrange meetings without needing to travel. Real time chat systems could expedite point to point communications without the lag time inherent in email.

Access for All Taxpayers

Technology could provide an **easier access for all taxpayers** to MAPs as well as provide transparency back to them around where their issue resides in the stages of processing. For example, the requests for MAPs can be dealt with electronically and without a high cost for the requesting parties and notifications as key stages are reached could be provided back to the taxpayer.

Fulfilling Documentation and Filing Requirements

Collecting the Relevant Data

A common platform may help to ensure that **relevant data** is structured and presented in a consistent way, easing the process of analysis.

In transfer pricing disputes the **lack of data about comparables** is a common problem in less developed countries. It would help if there was more data to draw on and technology can be of help (see the suggestion of a virtual companies house in Chapter 8 of the FTA report Dealing Effectively with the Challenges of Transfer Pricing: http://www.oecd.org/tax/forum-on-tax-administration/49428070.pdf). The suggestions of shared access to existing comparables data services or the creation of a regional set of comparables database are both feasible with a shared platform in place.

Providing the Relevant Data and Metrics

Providing data in the form of aggregate metrics on the number of disputes, the number of resolutions of these disputes and the specific issues at stake might be facilitated by a common technological platform, which would collect and distribute the relevant data and in doing so capture aggregate metrics.

Fulfilling and Accessing Documentation Requirement

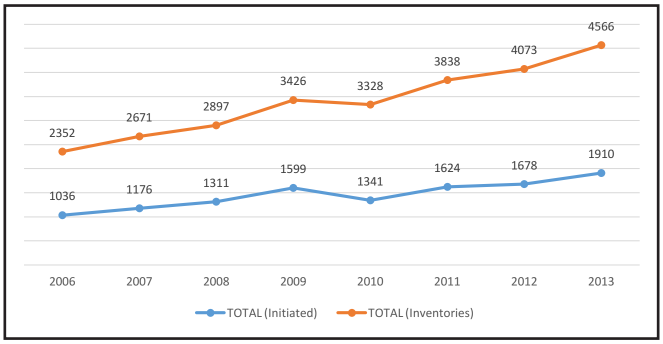
A common shared platform might help, on the one hand, taxpayers to comply with the transfer pricing documentation requirements (including CbCR) and, on the other hand, tax administrations to share the information in a consistent, secure and easy to use manner.

Conclusion

The international tax community has an interest in exploring how new technologies can facilitate the process of resolving cross border tax disputes. WU Vienna University of Business and Economics, working with a number of governments and service providers, is already exploring the use of new technologies to improve tax compliance and country by country reporting and this group could be used to develop some of the ideas referred to above.

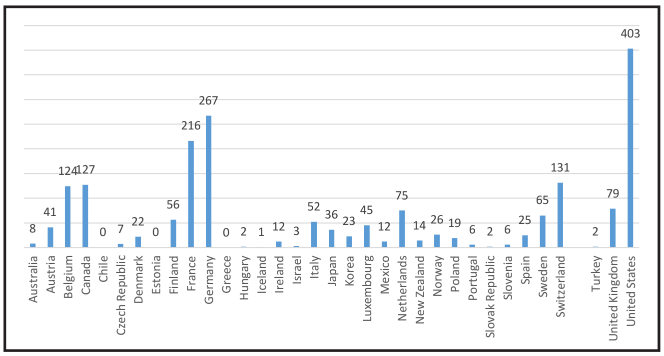
ANNEX I: TRENDS IN MAP CASES

General (OECD Cases)



SOURCE: http://www.oecd.org/ctp/dispute/map-statistics-2013.htm

Specific Countries (OECD Cases): Number of New Maps Cases Initiated in 2013



SOURCE: http://www.oecd.org/ctp/dispute/map-statistics-2013.htm

TP Cases

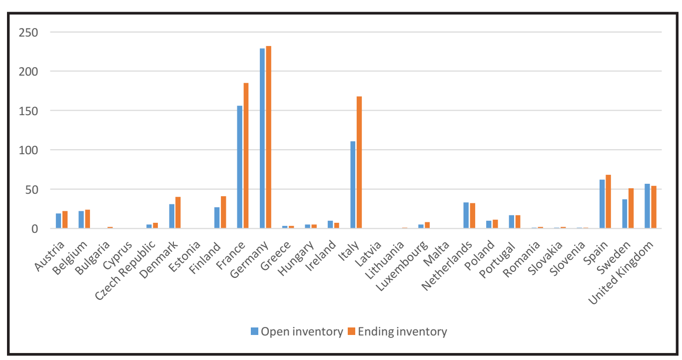
		2013
Americas	Canada	98(1)
	Mexico	4(2)
	United States	266
Asia	China	10-20(3)
	Japan	20-30(3)
	Singapore	3(3)
EMEA	Austria	50-70(3)
	Denmark	20(3)
	Finland	20-30(3)
	Germany	20(3)
	Lithuania	1
	Netherlands	50
	Norway	15-20(3)
	Sweden	20(3)
	Switzerland	13(3)

(1): resolved
(2): in 2012
(3): yearly

SOURCE: EY 2014 global transfer pricing tax authority survey

TP Cases (EU Convention)

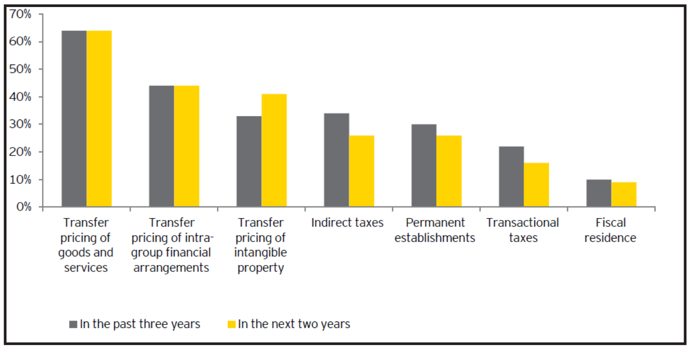
Number of MAP Cases Under the EU Arbitration Convention in 2013



SOURCE: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2014/jtpf_008_2014_en.pdf

Topics Generating Controversies (Before BEPS)

Most Important Areas of Transfer Pricing Controversy



SOURCE: EY 2013 global transfer pricing survey

ANNEX II: BEPS ACTION 14 PROPOSALS TO IMPROVE MAP

Minimum Standards to Improve MAP

- Good faith
- Timely resolution
- Access for all taxpayers
- Periodic review (based, e.g., on statistics)
- Engage into fora (e.g. Forum on Tax Administration MAP Forum)
- Timely and complete reporting of the results
- Peer reviews
- Transparency on positions on arbitration
- Publication of clear rules, guidelines and procedures on MAPs (incl. identification information and documentation to be provided)
- Publication country profiles on shared public platforms
- Authority of staff in charge of MAP process
- Adequate resources dedicated
- Assurance that settlements between tax authorities/ taxpayers do not preclude access to MAP

Best Practices Suggested to Improve MAP

- Include para. 2 in art. 9
- Publication agreements reached
- Development "global awareness"
- Bilateral APA programmed
- Implementation appropriate procedures
- Suspension of collection procedures while MAP pending
- Facilitate recourse to MAP
- Explain relationship MAP vs. domestic remedies
- Facilitate consultation on bona fide taxpayer-initiated foreign adjustments
- Guidance on interest and penalties
- Guidance on multilateral MAPs and APAs

ANNEX III: TAX TREATIES WITH ARBITRATION PROVISIONS

This Annex contains an alphabetical up-to-date list of all the tax treaties containing some form of arbitration clause. The list was generated by means of a search of the IBFD treaty data base conducted on September 29th 2014. The list is grouped by category: treaties between OECD countries, treaties between OECD and non-OECD countries and treaties between non-OECD members. As the second and third category show, non-OECD countries are expanding their network of treaties with arbitration clauses not only as a result of the influence of OECD members, but also acting under their own impulse.

Treaties between OECD member States:

Austria - Germany Income and Capital Tax Treaty (2000) (as amended through 2010)

Austria - Switzerland Income and Capital Tax Treaty (1974) (as amended through 2012)

Belgium - United Kingdom Income Tax Treaty (1987) (as amended through 2009)

Belgium - United States Income Tax Treaty (2006)

Canada - France Income and Capital Tax Treaty (1975) (as amended through 2010)

Canada - Germany Income and Capital Tax Treaty (2001)

Canada - Greece Income and Capital Tax Treaty (2009)

Canada - Iceland Income and Capital Tax Treaty (1997)

Canada - Ireland Income Tax Treaty (2003)

Canada - Italy Income Tax Treaty (2002)

Canada - Netherlands Income Tax Treaty (1986) (as amended through 1997)

Canada - Switzerland Income and Capital Tax Treaty (1997) (as amended through 2012)

Chile - Poland Income and Capital Tax Treaty (2000)

Czech Republic - Switzerland Income and Capital Tax Treaty (1995) (as amended through 2012)

Denmark - Switzerland Income and Capital Tax Treaty (1973) (as amended through 2009) Estonia - Netherlands Income and Capital Tax Treaty (1997) (as amended through 2008)

Finland - Netherlands Income and Capital Tax Treaty (1995)

France - Germany Income and Capital Tax Treaty (1959) (as amended through 2001)

France - Switzerland Income and Capital Tax Treaty (1966) (as amended through 2009)

France - United Kingdom Income Tax Treaty (2008)

France - United States Income and Capital Tax Treaty (1994) (as amended through 2009) Germany - Luxembourg Income and Capital Tax Treaty (2012)

Germany - Sweden Income, Capital, Inheritance and Gift Tax Treaty (1992)

Germany - Switzerland Income and Capital Tax Treaty (1971) (as amended through 2010)

Germany - United Kingdom Income and Capital Tax Treaty (2010)

Germany - United States Income and Capital Tax Treaty (1989) (as amended through 2006) Greece - Mexico Income and Capital Tax Treaty (2004)

Greece - Switzerland Income Tax Treaty (1983) (as amended through 2010)

Iceland - Italy Income and Capital Tax Treaty (2002)

Iceland - Netherlands Income and Capital Tax Treaty (1997)

Ireland - Israel Income Tax Treaty (1995)

Ireland - Mexico Income Tax Treaty (1998)

Ireland - Switzerland Income and Capital Tax Treaty (1966) (as amended through 2012)

Ireland - United States Income Tax Treaty (1997) (as amended through 1999)

Italy - Slovenia Income and Capital Tax Treaty (2001)

Italy - United States Income Tax Treaty (1999)

Japan - Netherlands Income Tax Treaty (2010) (as amended through 2012)

Japan - Portugal Income Tax Treaty (2011)

Korea (Rep.) - Switzerland Income Tax Treaty (1980) (as amended through 2010)

Luxembourg - Mexico Income and Capital Tax Treaty (2001) (as amended through 2009)

Luxembourg - Switzerland Income and Capital Tax Treaty (1993) (as amended through 2012)

Mexico - Netherlands Income Tax Treaty (1993) (as amended through 2008)

Mexico - Switzerland Income Tax Treaty (1993) (as amended through 2009)

Mexico - United Kingdom Income Tax Treaty (1994) (as amended through 2009)

Netherlands - Norway Income Tax Treaty (1990) (as amended through 2013)

Netherlands - Poland Income Tax Treaty (2002)

Netherlands - Slovenia Income Tax Treaty (2004)

Netherlands - Switzerland Income Tax Treaty (2010)

Netherlands - United Kingdom Income Tax Treaty (2008) (as amended through 2013)

Netherlands - United States Income Tax Treaty (1992) (as amended through 2004)

Norway - Switzerland Income and Capital Tax Treaty (1987) (as amended through 2009)

Norway - United Kingdom Income Tax Treaty (2013)

Poland - Switzerland Income and Capital Tax Treaty (1991) (as amended through 2010)

Portugal - Switzerland Income and Capital Tax Treaty (1974) (as amended through 2012)

Slovak Republic - Switzerland Income and Capital Tax Treaty (1997) (as amended through 2011)

Slovenia - Switzerland Income and Capital Tax Treaty (1996) (as amended through 2012)

Spain - Switzerland Income and Capital Tax Treaty (1966) (as amended through 2011)

Spain - United Kingdom Income and Capital Tax Treaty (2013)

Sweden - Switzerland Income and Capital Tax Treaty (1965) (as amended through 2011)

Switzerland - United Kingdom Income Tax Treaty (1977) (as amended through 2009)

Switzerland - United States Income Tax Treaty (1996)

Treaties between OECD members and non-OECD members

Albania - Netherlands Income and Capital Tax Treaty (2004)

Albania - United Kingdom Income and Capital Tax Treaty (2013)

Armenia - Austria Income and Capital Tax Treaty (2002)

Armenia - Italy Income and Capital Tax Treaty (2002)

Armenia - Netherlands Income and Capital Tax Treaty (2001)

Armenia - United Kingdom Income and Capital Tax Treaty (2011)

Austria - Bahrain Income and Capital Tax Treaty (2009)

Austria - Bosnia and Herzegovina Income and Capital Tax Treaty (2010)

Austria - Macedonia (FYR) Income and Capital Tax Treaty (2007)

Austria - Mongolia Income and Capital Tax Treaty (2003)

Austria - San Marino Income and Capital Tax Treaty (2004) (as amended through 2012)

Azerbaijan - United Kingdom Income Tax Treaty (1994)

Bahrain - Estonia Income Tax Treaty (2012)

Bahrain - Netherlands Income Tax Treaty (2008)

Bahrain - United Kingdom Income Tax Treaty (2010)

Barbados - Netherlands Income Tax Treaty (2006) (as amended through 2009)

Bermuda - Netherlands Income Tax Treaty (2009)

Bulgaria - Switzerland Income and Capital Tax Treaty (2012)

Canada - Moldova Income Tax Treaty (2002)

Congo (Rep.) - Italy Income Tax Treaty (2003)

Croatia - Italy Income Tax Treaty (1999)

Croatia - Netherlands Income and Capital Tax Treaty (2000)

Egypt - Netherlands Income Tax Treaty (1999)

France - Kazakhstan Income and Capital Tax Treaty (1998)

France - Quebec Income and Capital Tax Treaty (1987) (as amended through 2002)

Georgia - Italy Income and Capital Tax Treaty (2000)

Georgia - Netherlands Income Tax Treaty (2002)

Germany - Jersey Income Tax Treaty (2008)

Germany - Liechtenstein Income and Capital Tax Treaty (2011)

Ghana - Italy Income Tax Treaty (2004)

Ghana - Netherlands Income Tax Treaty (2008)

Hong Kong - Luxembourg Income and Capital Tax Agreement (2007) (as amended through 2010)

Hong Kong - Netherlands Income Tax Agreement (2010) (as amended through 2010)

Hong Kong - Switzerland Income Tax Agreement (2011)

Isle of Man - Luxembourg Income and Capital Tax Treaty (2013)

Italy - Jordan Income Tax Treaty (2004)

Italy - Kazakhstan Income Tax Treaty (1994)

Italy - Lebanon Income Tax Treaty (2000)

Italy - Moldova Income and Capital Tax Treaty (2002)

Italy - San Marino Income Tax Treaty (2002) (as amended through 2012)

Italy - Uganda Income Tax Treaty (2000)

Italy - Uzbekistan Income and Capital Tax Treaty (2000)

Jersey - Luxembourg Income and Capital Tax Treaty (2013)

Jordan - Netherlands Income Tax Treaty (2006)

Kazakhstan - Netherlands Income and Capital Tax Treaty (1996)

Kazakhstan - Switzerland Income and Capital Tax Treaty (1999) (as amended through 2010)

Kuwait - Netherlands Income Tax Treaty (2001)

Latvia - Netherlands Income and Capital Tax Treaty (1994)

Liechtenstein - Luxembourg Income and Capital Tax Treaty (2009)

Liechtenstein - United Kingdom Income and Capital Tax Treaty (2012)

Lithuania - Netherlands Income and Capital Tax Treaty (1999)

Luxembourg - San Marino Income and Capital Tax Treaty (2006) (as amended through 2009)

Macedonia (FYR) - Netherlands Income and Capital Tax Treaty (1998)

Malta - Switzerland Income Tax Treaty (2011)

Mexico - Romania Income and Capital Tax Treaty (2000)

Moldova - Netherlands Income and Capital Tax Treaty (2000)

Netherlands - Qatar Income Tax Treaty (2008)

Netherlands - Russia Income and Capital Tax Treaty (1996)

Netherlands - Uganda Income Tax Treaty (2004)

Netherlands - Ukraine Income and Capital Tax Treaty (1995)

Netherlands - South Africa Income and Capital Tax Treaty (2005) (as amended through 2008)

Netherlands - United Arab Emirates Income Tax Treaty (2007)

Netherlands - Uzbekistan Income and Capital Tax Treaty (2001)

Peru - Switzerland Income and Capital Tax Treaty (2012)

Qatar - United Kingdom Income Tax Treaty (2009) (as amended through 2010)

Romania - Switzerland Income and Capital Tax Treaty (1993) (as amended through 2011)

Russia - Switzerland Income and Capital Tax Treaty (1995) (as amended through 2011)

South Africa - Switzerland Income Tax Treaty (2007)

Treaties between non-OECD members

Bahrain - Isle of Man Income Tax Treaty (2011)

Guernsey - Hong Kong Income Tax Agreement (2013)

Guernsey - Isle of Man Income Tax Treaty (2013)

Guernsey - Jersey Income Tax Treaty (2013)

Hong Kong - Jersey Income Tax Agreement (2012)

Hong Kong - Liechtenstein Income and Capital Tax Agreement (2010)

Isle of Man - Jersey Income Tax Treaty (2013)

Liechtenstein - Malta Income and Capital Tax Treaty (2013)

Liechtenstein - San Marino Income and Capital Tax Treaty (2009)

Liechtenstein - Uruguay Income and Capital Tax Treaty (2010)

Mauritius - Monaco Income Tax Treaty (2013)

Endnotes

[1] Züger, Settlement of Disputes in Tax Treaty Law – General Report, in Lang / Züger (eds) Settlement of Disputes in Tax Treaty Law (2002) 15 (p 17).

[2] Lang / Wiman, Afterword: Conference on Arbitration in Tax Treaty Law – Uppsala University – 22 August 2013, Intertax 2014, 202 (pp 202ff).

[3] Protto, Mutual Agreement Procedures in Tax Treaties: Problems and Needs in Developing Countries and Countries in Transition, Intertax 2014, 176 (pp 176ff).

[4] Protto, Intertax 2014 pp 176ff.

[5] See the OECD BEPS website at http://www.oecd.org/ctp/beps.htm.

[6] BEPS is also on the agenda of the upcoming G20 summit in Australia on 15 and 16 November 2014, see https://www.g20.org/g20_priorities/g20_2014_agenda/tax.

[7] OECD, Addressing Base Erosion and Profit Shifting (2013), p 13.

[8] OECD, Addressing Base Erosion and Profit Shifting (2013), pp 47ff.

[9] OECD Action Plan (2013).

[10] OECD BEPS Recommendations

[11] See OECD Website: http://www.oecd.org/tax/beps-2014-deliverables.htm.

[12] OECD, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances (2015).

[13] OECD, Addressing the Tax Challenges of the Digital Economy (2015).

[14] OECD, Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance (2015).

[15] The need for a comprehensive approach that included a more efficient elimination of double taxation by means of improving the efficiency of the MAP and arbitration provisions was already identified in the BEPS Report, see OECD, Addressing Base Erosion and Profit Shifting (2013), p 10, 53.

[16] See also 3.2. Dispute Resolution at the International Level.

[17] OECD, BEPS Action Plan (2013) p 23.

[18] E.g. OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2010); OECD, Report on the Attribution of Profits to Permanent Establishments (2008).

[19] Pistone, „Soft Tax Coordination: a suitable path for the OECD and the EU to address the challenges of international double (non-)taxation in VAT/GST systems" in Lang, M.et aa.(eds.), Value Added Tax and Direct Taxation – Similarities and Differences, IBFD (2009) pp 1165.

[20] Espejo / Thuronyi, How Can an Excessive Volume of Tax Disputes be dealt with?, IMF (December 2013) pp 6f.

[21] E.g. Advance Pricing Agreements are defined by the OECD Transfer Pricing Guidelines (2010) as following: an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.

[22] OECD, Taxpayers' rights and obligations (1990) p 13.

[23] Ehrke-Rabel in Doralt/Ruppe Steuerrecht II7 (2014) pp 32ff.

[24] Givati, Resolving Legal Uncertainty: The Fulfilled Promise of Advance Tax Rulings, Virginia Tax Review, 2009-2010, 137 (pp 140ff).

[25] Perrou, Taxpayer Participation in Tax Treaty Dispute Resolution (2013) p 78

[26] e.g. H&M Revenue & Customs, Alternative Dispute Resolution: For SME's and Individuals (June 2013).

[27] Jone / Maples, Mediation as an alternative option in Australia's tax disputes resolution procedures, Australian Tax Forum (2012) 525 (p 550).

[28] Jone / Maples, Australian Tax Forum (2012)(pp 551ff).

[29] OECD, Cooperative Compliance: A Framework (2013).

[30] Owens, Tax Administrations, Taxpayers and their Advisors: Can the Dynamics of the Relationship be Changed?, Bullet for International Taxation (2012) p 516.

[31] OECD, Cooperative Compliance: A Framework (2013) p 33.

[32] If his objection falls under Article 24 (1) OECD-MC (discrimination of non-nationals), he must submit it in the Contracting State of which he is a national. This applies regardless of where the taxation objected to has been charged and whether it has given rise to double taxation, see OECD Model Commentary 2010 Article 25 m.no. 17.

[33] Article 25 (2) OECD-MC; OECD Model Commentary 2010 Article 25 m.no. 31 ff.

[34] Contracting States are free to agree on a longer period. Moreover, the start of the period should be interpreted in the way most favorable to the taxpayer, see OECD Model Commentary 2010 Article 25 m.nos. 20 et seq.. However, it is important to note that the period continues to run during any domestic proceedings unless the states agree otherwise, see OECD Model Commentary 2010 Article 25 m.no. 25.

[35] OECD Model Commentary 2010 Article 25 m.no. 7.

[36] OECD Model Commentary 2010 Article 25 m.no. 14. A change in tax law can also qualify as an action within the meaning of Article 25. In this case, the taxpayer can set the MAP in motion as soon as the law has been amended and he has received the income it pertains to. Another important example is a case where there is substantial doubt that the taxpayer's related party will be granted a corresponding adjustment.

[37] OECD Manual on Effective Mutual Agreement Procedures (2007).

[38] The suggestion involves the publicizing of the delegated officials. For OECD countries, key information on the competent authorities and domestic MAP legislation (country profiles) as well as MAP statistics can be found in the MAP database at http://www.oecd.org/ctp/dispute/mapstatistics20062012.htm

[39] UN Guide to the Mutual Agreement Procedure under Tax Treaties (2012).

[40] OECD Model Commentary 2010 Article 25 m.no. 26.

[41] Pacta sunt servanda, codified in Articles 26, 27 VCLT.

[42] OECD Model Commentary 2010 Article 25, m.no. 27.

[43] OECD Model Commentary 2010 Article 25, m.no. 76.

[44] OECD Model Commentary 2010 Article 25, m.no. 50;Vogel On Double Tax Conventions (1997) Art 25 para 104.

[45] OECD Model Commentary 2010 Article 25, m.no. 52.

[46] OECD Model Commentary 2010 Article 25, m.nos. 54; 55.

[47] For this reason, Gloria likened the MAP to a special form of diplomatic protection for tax cases, see Gloria, Das steuerliche Verständigungsverfahren und das Recht auf diplomatischen Schutz (1988) pp 193ff.

[48] OECD Model Commentary 2010 Article 25, m.no. 29. The Commentary makes a concession for subsequent changes in domestic law that alter the fundamental basis of a mutual agreement stating that such cases call for a revision of the agreement.

[49] OECD Model Commentary 2010 Article 25, m.no. 60.

[50] OECD Model Commentary 2010 Article 25, m.no. 61.

[51] OECD, Addressing Base Erosion and Profit Shifting (2013), p 13.

[52] According to the sample MAP on Arbitration in the OECD Commentary, the period is considered to have commenced only if the particular required information has been provided. This information generally corresponds to the documents required to initiate the mutual agreement procedure, see Annex to the Commentary on Article 25, m.no. 8. In cases where the MAP has been set in motion before the actual taxation has occurred, this does not constitute the start of the 2-year period, see OECD Model Commentary Article 25 m.no. 15.

[53] OECD Model Commentary 2010 Article 25, m.no. 5.

[54] See 3.2.3. EU Arbitration Convention.

[55] OECD Model Commentary 2010 Article 25, m.no. 84.

[56] Results from IBFD Tax Research Platform, Search Request on 29 September 2014: The treaties are listed alphabetically in Annex III.

[57] United Nations, Committee of Experts on International Cooperation, Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the mutual Agreement Procedure, (October 2010) pp 124ff.

[58] OECD Model Commentary 2010 Article 25, m.no. 69. The OECD Commentary provides a model for an arbitration MAP in an Annex to Article 25.

[59] OECD Model Commentary 2010 Article 25, m.no. 63.

[60] OECD Model Commentary 2010 Article 25, m.no. 64.

[61] However, cases arising from specific treaty provisions such as Article 4 (2d) OECD-MC fall within the scope of the clause, see OECD Model Commentary 2010 Article 25, m.no. 73.

[62] OECD Model Commentary 2010 Article 25, m.no. 72.

[63] OECD Model Commentary 2010 Article 25, m.no. 65.

[64] OECD Model Commentary 2010 Article 25, m.no. 68.

[65] OECD Model Commentary 2010 Article 25, m.no. 67.

[66] See 3.2.1. Mutual Agreement Procedures; OECD Model Commentary 2010 Article 25, m.nos. 76 et seq.. if a taxpayer is required to waive his right to domestic remedies, the relief from double taxation should be guaranteed and he should receive sufficient legal safeguards concerning his participation in the arbitration process.

[67] ILADT (Latin American Institute of Tax Law) Multilateral Model Convention for Latin America for the Avoidance of Double Taxation (2012).

[68] OECD Model Commentary 2010 Article 25, m.nos. 86 ff.

[69] UN Model Commentary Article 25 m.no.1.

[70] Convention 90/463/EEC.

[71] Article 1. It applies to profits as well as losses.

[72] Official Journal C 301 of 21 December 1976.

[73] Protocol 1999/C 202/01.

[74] See http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/arbitration_convention/index_en.htm

[75] Article 4.

[76] Articles 11 and 12 EU Arbitration Convention.

[77] The advisory commission is tasked with the arbitration of the case, see Article 7.

[78] Perrou, Taxpayer Participation in Tax Treaty Dispute Resolution p 87.

[79] Heer / Kran, Legal Protection in International Tax Disputes – How Investment Protection Agreements Address Arbitration, European Taxation (2012) 3 (p 4ff)

[80] Heer / Kran, European Taxation (2012) p 5; Perrou, Taxpayer Participation in Tax Treaty Dispute Resolution pp 88ff.

[81] In 2013 62% of the cases were governed by the ICSID Convention and 28% by the UNCITRAL rules. See: UNCTAD, World Investment Report 2014 (2014), pp 124ff

[82] Douglas, The International Law of Investment Claims (2012) p 10

[83] UNCTAD, Bilateral investment treaties 1995-2006: Trends in investment rule making (2007) pp 81ff; see also: US Model BIT of 2004, Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
   - the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
   - within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.
3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.
4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

A similar provision is contained in Articles 3 (4) and (5) and 7(3) German Model BIT.

[84] Heer / Kran, European Taxation (2012) pp 7ff

[85] Walde / Kolo, Investor-State Disputes: The Interface Between Treat-Based International Investment Protection and Fiscal Sovereignty Intertax (2007) 424 (p 429)

[86] Sinomis, BITs and Taxes, Intertax (2014) 234 (p 264)

[87] OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

[88] OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties – Action 15: 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

[89] OECD, Action 14 Final Report, supra n. 1, at 41. The countries that expressed interest in adopting a mandatory binding arbitration include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.

[90] OECD, A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015) and OECD, Action 14 Final Report, supra n. 1, at 41.

[91] See OECD, Action 15 2015 Final Report, supra n. 2, at 23.

[92] OECD, Action 14 Final Report, supra n. 1, at 41.