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Dispute settlement: arbitration issues for developing countries
and possible ways forward

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*

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 Dispu

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

included the so called “classic” MAP. The classic MAP is a procedure03 7c pwee037(b-179(y)

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

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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”, “conventionalBT/ET proa11

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

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 –

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,

delays inherent in reasoned decisions are unnecessary

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 th

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

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 sh

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

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

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*

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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 increm

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

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

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 au111.02 614.74ntrhe quality28butd4 n TJETBTETrs

(b)

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”

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
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> 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.

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 ascer496-3(BT1 0 0 1 7)-59(a)4(nfa)7(ilutsa6-3

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

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 (rejec s control (r- C

(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

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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

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(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]

(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

(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 tand y 1 oh[

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

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, il9(bindi)-3(ng)9( )-22ion

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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 necessarythat

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]

	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

	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

Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**

Litigation	**Traditional MAP (i.e. without a specific arbitration clause)**	**Ad Hoc[92] "expedited" or "First Best Offer" ("Baseball") Arbitration**

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	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.

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