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NBDR has been used by a number of tax administrations, with varying degrees of success, to facilitate the resolution of domestic tax disputes. The evolution of such techniques for use in the unique circumstance of treaty-based MAP could be useful. The purpose of this chapter is to provide guidance on forms of NBDR that could be adapted for resolving MAP cases.

While many forms of NBDR exist in the commercial world, this chapter focusses on elements of such procedures that are believed to be appropriately utilized in the specific MAP context – expert advice and mediation. For appropriate use in the CA process, such procedures need to be adapted to the specific needs of the parties. As so adapted, the procedures may differ in material respects from procedures used in commercial contexts.

Expert advice is a NBDR mechanism that consists of a technical expert reviewing evidence presented by the parties (or a party unilaterally). This procedure could involve an independent third party acting as an expert and rendering advice. In such a procedure, the inputs of the expert would be advisory in nature.

Mediation is a form of process-related assistance that involves the use of a mediator or facilitator to aid in providing a perspective on the discussions, identify issues that prevent resolution of a conflict, and bringing a problem-solving focus to the negotiating table.<sup>8</sup> The degree of activity of the mediator can range from a rather passive to a more active role, depending on the needs of the parties and the nature of the dispute.

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would have occurred if there had been no restructuring; and (iii) an alternative position asserting a capital gain on the disposition of the LocalCo business. In the absence of a successful MAP process, LocalCo and BusCo will incur double taxation,

Accordingly, BusCo and LocalCo sought MAP relief under the Country A – Country B Tax Convention on the basis that there was taxation not in accordance with the Convention. In discussions with the Country B tax authority, LocalCo was advised that the authority had limited experience in either MAP proceedings. Similarly, the Country A authorities advised BusCo to be patient with the process due to the lack of experience of Country B.

After three years in a MAP process, BusCo and LocalCo were frustrated with the lack of progress. Seeing no likelihood of successful resolution, the CAs agreed to undertake some type of NBDR process to facilitate a mutually acceptable resolution of the prior year assessment.

The inability to achieve closure of MAP cases in the situation of the BusCo Case Study is a reality faced by many countries and MNEs. The inquiry of BusCo and LocalCo about potential alternative processes is understandable. In the event that either, or both, of Country A and Country B are open to considering such procedures, there will be a variety of practical considerations to be addressed.

#### **6.2.1. NBDR Framework.**

An initial consideration will be whether the countries in question require a separate domestic legal framework to be able to have NBT24-5a2 12 Toas aposibility with nga

efficiency. On the other hand, a disadvantage could be inflexibility, especially if the rules cannot be amended.

It would also be possible to achieve a mixture by agreeing on a general framework with a set of default rules, allowing the countries to negotiate specific terms applicable to a specific case (such as for the specific areas of disagreement in the BusCo Case Study)

### **6.2.2 Issues to be Addressed in a CAA.**

The issues that could be addressed in a CAA authorizing the parties to utilize NBDR as an element of their process, always retaining complete decision-making authority, could include the following:

Nature of the procedure: expert advice or mediation, or the option to combine both (as discussed below).

Timing of NBDR within the timeframes of MAP.

Is utilization of NBDR procedure optional or mandatory?

Manner of determination of the issues to be discussed (e.g., through so-called to be agreed at the outset of the NBDR procedure).

Mandatory or optional stages of the procedure (e.g., determination of Terms of Reference, procedural discussions, written submissions, oral discussions, possibility of non-binding recommendations).

Interaction with other procedures, notably domestic administrative or court proceedings and tax treaty arbitration (if available) -- e.g., is mediation a precursor to arbitration?

Default timelines.

Means of selection of the expert or mediator

Role, function and attributions of the Neutral Third.

Interplay between more than one Neutral Third (e.g., mediator + expert).

Eligibility, qualifications, conflicts of interest (and disclosure thereof), vetting, and appointment of Neutral Third.

Impartiality obligations and rules on the safeguarding of independence of the Neutral Third.

Confidentiality obligations of the Neutral Third and regime applicable to disclosed information (e.g., is the Neutral Third considered to be part of each CA for domestic law purposes? How can sensitive taxpayer information effectively be protected? To what extent would exchange-of-information rules apply)?



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From Country B's standpoint, such a process provides an external check on its internal

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resulting from stalemate in negotiations. This increase of efficiency is often underestimated by disputing parties.

The effectiveness of tax mediation depends largely on the role played by the mediator in the process. While it may be thought that the most important thing to carry out this role effectively is a specific technique to reach the agreement between the parties, the field experience reveals that creating awareness in the parties about what mediation is and how it works is a key issue. For this purpose, the mediator's role is fundamental.

By taking into account these premises, the parties may understand that compromising their respective positions opens a real possibility of achieving an agreement controlled by themselves.

Mediation could be adapted to the MAP process in specific situations. It could be especially useful between countries with different levels of experience. As discussed above, it is a reality of the current world of cross-border tax dispute that many countries, especially LDCs, have limited experience in MAP processes. Mediation and other forms of NBDR can be helpful in building confidence and experience in the handling of such disputes to protect the tax base of the respective countries.

An illustration of mediation utilization in the BusCo Case Study follows:

### **BusCoCase Study**

Armed with such input, Country B is confident that its assessment has a reasonable basis, though understanding that such issues are subject to material differences of opinion in specific situations (even among seasoned experts).

When Country A and Country B continued the MAP process, Country B presented the results of its expert advice process, which Country A found very interesting. Country A had resisted any suggestion that LocalCo may have developed a marketing intangible. Country B advised of its continuing belief that its position was a reasonable application of pertinent a

As a result of the mediation process, an agreement was reached which was acceptable to Country A, Country B, and the taxpayers. Accordingly, the appropriate treaty processes were undertaken to implement the agreement, including correlative relief.

In a situation like the BusCo Case Study, the role of the mediator may offer an opportunity for the CAs to view a specific case, or the MAP process itself, from a different perspective. Such

issues, which could highlight elements of the case or procedural context that are not possible to be recognized when seen from the perspective of a tax administration defending its taxing powers, adjustments, or the provision of relief from double taxation; or from the perspective of a MNE seeking to protect its own interests. Mediation may be the key in finding a solution for some of the more systemic issues of a MAP negotiation.

**Role of the Mediator:** Special importance should be given to the role of the mediator who normally acts as a facilitator to aid parties to overcome their differences, providing guidance in identifying issues, engaging in joint problem-solving, and exploring creative settlement alternatives. Depending on the nature of the dispute, parties may require the mediator to go beyond this role and act as an evaluative mediator, providing factual and even legal evaluation of the case; yet, parties retain the full control of the decision to settle the dispute and specify the terms of resolution.<sup>16</sup>

**Unanticipated Problems:** In any such mediation process, it should be anticipated that unforeseen issues will arise. For example, in the BusCo Case Study a disagreement on a factual issue concerning the local market warranty program developed by LocalCo. This could also evolve into a technical problem in the sense of whether the program could or should be characterized as a marketing intangible for transfer pricing purposes.

In such a situation, the goal of a mediator would be to identify the key controversies and the issues surrounding them, seek a convergence of views of the two countries, and help the parties resolve critical misalignments that b

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allow the mediator to have separate discussions with the expert, if the mediator feels that he needs more information in order to better orientate the discussions.

Combining mediation and expert evaluation allows for much flexibility. Engaging both a mediator and an expert at the same time is certainly costlier than engaging either one of these.

#### **6.7. NBDR as a Precursor to Arbitration.**

NBDR could be envisaged either as an alternative to arbitration<sup>20</sup> or as a supplementary means of dispute resolution, preceding arbitration.

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