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first explains how MDS works in practice, then examines the different positions that have been put forward and finally sets out some guidelines for countries that want to move in this direction.

7.2. Legal Basis

7.2.1. Concept of MDS to supplement MAP

Although MAP has generally been successful in resolving a majority of cases brought in countries with an active MAP program ¹, **some States have shown a preference towards supplementing MAP with mandatory**

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for in the OECD Model Commentaries as well, a large part of which has been referred to in the UN Model Commentary on Article 25.

The treaty-based changes proposed by the BEPS project have been implemented through a multilateral instrument (MLI). The MLI is a multilateral treaty under public international law with its own direct effect, but it only stands to modify only the application of bilateral treaties between the parties to the MLI to the extent of the treaty changes proposed in the BEPS Project and to the extent as mutually agreed between the two parties to the treaty. Accordingly, the text of the MLI was adopted on 24-25 November 2016 and since the first signing ceremony on 7 June 2017, as of 1 August 2017, 70 jurisdictions have signed the MLI and have already begun the ratification process.

The MLI contains an option for mandatory binding arbitration in Part VI that 28 jurisdictions have signed up for as of April, 2018 and will remain optional for all MLI signatory jurisdictions to adopt. This provision is more detailed than the provisions in the Model Conventions since detailed rules have been added in the provision itself on access to arbitration, information requests and timelines, appointment of arbitrators and costs, mode of conduct of arbitration, independence, transparency and confidentiality rules. The MLI arbitration provision also allows for flexibility in approach i.e. choice between last best offeror independent opinion or other approach, open-ended reservations as regards the type of cases that each jurisdiction wants this procedure to apply to, options to substantively follow OECD or UN Model approach for arbitration (except for access directly to taxpayers) etc. Last best offer arbitration is sometimes referred to as ‘baseball’ arbitration as well. In this type of arbitration, both competent authorities are required to propose a solution.

Some States have taken the view that legal and constitutional concerns should not arise in MDS since sovereignty is legally ceded to the extent of the tax treaty and the dispute resolution mechanism in a treaty merely enforces such provisions. Some other States also rely on their experience with arbitration and mandatory dispute settlement in treaties in other areas such as trade and investment to cite that sovereignty concerns do not arise. Further, they claim that impartial decisions by arbitrators from all backgrounds, including from developing countries, may help overcome lack of experience of developing countries. Finally, such States also believe that the costs arising may not be too high owing to the limited number of cases that may go to arbitration, the ability to structure an efficient arbitration process and to put a cap on the compensation of arbitrators.¹⁴

Some States have also opined that the MDS would help reinforce taxpayer faith in applying the MAP, thereby reducing reliance on sometimes inefficient and unilateral domestic remedies. The alternative for the taxpayer to take the case to Court may not be the best solution for the tax administration either since it might be more cost efficient for the tax administration to go for arbitration as opposed to prolonged judicial processes.

7.4. Procedural Guidelines for the implementation of MDS by opting countries

7.4.1. General Overview

In general, for countries opting for MDS, the competent authorities are free to design procedural rules as regards conduct of proceedings under the MDS clause. As endorsed by the model Conventions and the MLI, competent authorities may enter into, and will need to in order to practically implement arbitration, a competent authority agreement as regards such proceedings. However, since procedural rules may not just directly impact the effectiveness of the provision, but also play a key role in alleviating the concerns described above as regards MDS, States should pay careful attention to the procedural rules prescribed in each of its treaties that allows for MDS.

7.4.2. Initiation of MDS proceedings

¹⁴ The experience of the EU Arbitration Convention where very few cas-219(U)-1 Tf2F810(h)6(e)-15(bee(tio)-3(n)626)-15(u) trtx

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- 13) A statement indicating whether the taxpayer's request for MAP assistance involves issues that are currently or were previously considered by the tax authorities of either Contracting State as part of an advance pricing arrangement, ruling, or similar proceedings;
 - 14) A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);
 - 15) If the taxpayer has not already provided consent for a person to act as its authorized representative, a signed statement that a representative is authorized to act for the taxpayer in all matters connected with the MAP request.
- 16) The taxpayer's view on any possible basis on which to resolve the issues;

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7.7. Case study in MDS

[To be reviewed, updated]

IMPORT CO. commissioned a transfer pricing study that established an arm's length range of €50 to €60 per tonne for its related party commodity transactions with its subsidiary SUPPLY CO., based upon long-term bulk contracts for the same commodity. IMPORT CO., located in Country E, imports this commodity in bulk from its subsidiary SUPPLY CO. in Country S.

In Year 1, IMPORT CO. paid SUPPLY CO. €52 per tonne for the commodity. However, Country S has upwardly adjusted SUPPLY CO.'s income, and assessed add

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