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SPECIAL REPORT

Proposal for a New Institutional Framework for Mandatory Dispute Resolution

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In this article, the authors propose a model for an amended article 25 (alternative B) of the U.N. Model Double Taxation Convention between Developed and Developing Countries that includes amendments such as a proposed alternative dispute resolution clause and a revised mandatory dispute settlement clause.

This article has been prepared by research staff at the Vienna University of Economics and Business as part of the Global Tax Policy Center project ''International Tax Disputes: Improving MAP and Mandatory Dispute Settlement.''[1] The goal of the three-year project is to generate new approaches to tax dispute resolution through high-quality, cutting-edge research that will help ensure that the conceptual and practical concerns of non-OECD countries are addressed. The project brings together contributions from leading academics, private-sector experts, practitioners, and policymakers from organizations such as the OECD, U.N., World Bank, Commission on Taxation of the International Chamber of Commerce, and European Commission.

Two meetings were held at WU in January and October 2015 as part of the project. (Prior coverage: *Tax Notes Int'l*, Mar. 30, 2015, p. 1189.) The proposal in this article draws on the discussions that took place during these meetings. A book (*International Arbitration in Tax Matters*) featuring contributions by the group of experts on the most important issues surrounding arbitration was also published in January.

As part of a broader project to minimize and resolve international tax disputes, our proposal in this article is intended to provide a basis for discussions on the adoption of mandatory dispute settlement clauses in tax treaties. We outline a model for a new article 25 that is based on article 25 (alternative B) of the U.N. Model Double Taxation Convention between Developed and Developing Countries but has several important differences. Among the proposed amendments to the article are the additions of an alternative dispute resolution (ADR) clause and changes to the mandatory dispute settlement clause.

Our proposal also offers further options for countries that are not yet willing to adopt a mandatory dispute settlement clause but are similarly unwilling to

[1] *See* WU Institute for Austrian and International Tax Law, ''International Tax Disputes: Improving MAP and Mandatory Dispute Settlement,'' *available at* https://www.wu.ac.at/taxlaw/institute/tax-policy/current-projects/international-tax-disputes-improving-map-and-mandatory-dispute-settlement.

(Footnote continued in next column.)

Flexible Time Frames

Competent authorities are given more options and flexibility in their choice of procedure under the new article 25 (a choice between mutual agreement procedure (MAP), ADR, and mandatory dispute settlement). Under the proposed provision, competent authorities are in principle granted a two-year period in which to attempt to resolve double taxation disputes before mandatory dispute settlement must be pursued. However, the duration of these procedures can be prolonged or shortened as the competent authorities see fit. In this way, alternative means of resolving the dispute can be pursued sooner if it becomes clear that both parties will not budge in their positions and an agreement will not be reached. If an agreement seems imminent, the new approach allows the parties to continue their negotiations without having to initiate a mandatory dispute settlement procedure. In each dispute, the duration of the procedures can be extended by only one year in total to prevent them continuing indefinitely. The extension can be applied during any of the three stages of proceedings (the MAP, ADR, and mandatory dispute settlement stages).

limit their opportunity to do so in the future. These options are proposed as alternatives to the new article 25 and are intended to be included in the commentary to the U.N. model convention. The alternatives include: an optional dispute settlement clause as a possible replacement for the new article 25 (alternative B)(5) and several models for most-favored-nation (MFN) clauses for mandatory dispute settlement, optional dispute settlement, and a multilateral instrument. The proposed provisions are complemented by a set of detailed procedural rules designed to address the concerns of developing countries.

I. Proposed Amendments to Article 25

A. Overview of Proposed Changes

The suggested wording of the new article 25 is based on article 25 (alternative B)(5) of the U.N. model convention. Three main differences between the wording of the U.N. model convention and the OECD model convention can be observed:

- Under the U.N. model convention, only competent authorities can request mandatory dispute settlement, while under the OECD model convention, only the taxpayer can request it. The new provision proposed in this article would allow both the taxpayer and competent authorities to request that the dispute be submitted to mandatory dispute settlement. The intention behind the change is to allow all affected parties to pursue resolution by this means.
- The U.N. model convention allows competent authorities to deviate from the panel's determination if they agree on a different solution within six months after the decision has been communicated to them. This option is preserved in the proposed provision, since one of the main goals of the new framework is to grant competent authorities ample opportunity to reach an agreement on their own terms. Panel determinations should not prevent competent authorities from reaching such an agreement, provided their solution eliminates all taxation that is not in accordance with the convention. To ensure this is the case, the proposed provision provides a new recourse mechanism for taxpayers in situations when agreements between competent authorities do not meet this standard. No such mechanism is provided in article 25 (alternative B) of the U.N. model convention.
- The third major difference between the two model conventions is that the U.N. model convention provides that mandatory dispute settlement must be sought if the case cannot be resolved by the competent authorities within three years, whereas the relevant period under the OECD model convention is two years. Under the proposed new provision, the competent authorities are granted more flexibility under a separate paragraph that provides for less strict time frames.

The new article 25 also takes into account the proposals in the OECD's final report on action 14 of its base erosion and profit-shifting project. More specifically, the new provision allows the request for mandatory dispute settlement to be submitted to either competent authority to ensure that disputes are not prevented from reaching the mandatory dispute settlement phase.[2]

B. Text of the Amended Article

Italicized text indicates changes made by the authors to the existing wording of article 25 (alternative B) of the U.N. model convention to produce the new article 25. Text in brackets ([]) indicates optional language that contracting states can consider adopting.

Article 25 (alternative B)

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may,

[2]OECD, ''Making Dispute Resolution Mechanisms More Effective, Action 14 — 2015 Final Report'' (Oct. 5, 2015).

ADR Clause

A separate paragraph is included in the amended article 25 to institute an ADR mechanism that the competent authorities can agree to use (or not) as they see fit. The ADR clause is designed with the purpose of allowing competent authorities to try different options before proceeding to a mandatory dispute resolution mechanism. The procedural rules for mediation procedures under the ADR clause are discussed in Section III.D of this article.

irrespective of the remedies provided by the domestic law of those States, present his case to *either of the competent authorities of the Contracting States.*[3] The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case *by avoiding taxation not in accordance with the Convention* pursuant to paragraph 2 within *two years*[4] from the presentation of the case to *either of the competent authorities of the Contracting States,*

any *remaining issues leading to taxation not in accordance with the Convention* in the case shall be submitted to *mandatory dispute settlement* if *the person or*[5] either competent authority so requests. *[However, if the mandatory dispute settlement is requested by a competent authority, the person must first agree to that request.][6] The* unresolved issues *leading to taxation not in accordance with the Convention* shall not, however, be submitted to mandatory dispute settlement if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the mandatory dispute settlement decision or unless both competent authorities agree on a different solution within six months after the decision has been communicated to them, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States, *as if it were a final judgment of a domestic court of these States. If the competent authorities deviate by mutual agreement from the dispute settlement panel decision, this agreement must lead to the avoidance of taxation not in accordance with the convention. Otherwise it may be challenged by the taxpayer by the submission of another request for mandatory dispute settlement pursuant to this paragraph to the same dispute settlement panel. Any finding of the panel that the mutual agreement does not achieve the avoidance of taxation not in accordance with the convention shall lead to the automatic annulment of the mutual agreement and the implementation of the previous panel decision. The mode of application of this paragraph shall follow the procedural rules included in the Protocol.*

6. 20 months after the case has been notified in accordance with paragraph 1, the competent authorities of the

[3]This change is based on the suggestions in the OECD BEPS final report on action 14; *see id.*

[4]This addition is inspired by article 25 of the OECD model convention. An average time frame of two years for the completion of the MAP process was also suggested in the BEPS final report on action 14.

[5]This addition is inspired by article 25 of the OECD model convention.

[6]This optional wording can be adopted by contracting states that seek to offer additional protection to their taxpayers.

Contracting States shall, unless they otherwise agree, submit these issues to an alternative dispute resolution mechanism administered by the [institutional body to be determined], as represented by the independent and neutral third person chosen by the Contracting States as if it were a final judgement of a domestic court of these states, who shall propose and provide to the competent authorities non-binding means, including mediation, conciliation or expert evaluation, for the purpose of assisting the parties in reaching an agreement. Such an alternative dispute resolution process would be concluded within 120 days of the date the neutral third person was appointed, unless the competent authorities agree on a different timeframe pursuant to paragraph 8 but at the latest with the initiation of mandatory dispute resolution pursuant to paragraph 5.

If an agreement is reached pursuant to this process and insofar as a person directly affected by the case does not reject the mutual agreement, the result will be implemented notwithstanding any time limits in the domestic laws of the Contracting States, and the case will no longer be eligible for mandatory dispute settlement. If a person directly affected by the case rejects the whole or part of the mutual agreement, then the rejected parts shall not be implemented. Nevertheless, the case shall no longer be eligible for mandatory dispute settlement, except as provided under paragraph 7. The mode of application of this paragraph shall follow the procedural rules included in the Protocol.[7]

7. If the mutual agreement reached pursuant to paragraphs 2 or 6 does not resolve the case by avoiding taxation not in accordance with the Convention, the remaining issues leading to taxation not in accordance with the Convention shall be submitted to mandatory dispute settlement, if a request pursuant to paragraph 5 has been submitted.

8. The competent authorities may agree to accelerate or delay the date that alternative dispute resolution or mandatory dispute settlement proceedings would ordinarily begin or end. Postponement of a date in one type of process provided for in this Article does not automatically affect the timeline in another type of process. The time frame for the processes pursuant to this Article may, at most, be extended by one year for the case in dispute.

The request for extension of the time frame may only be submitted and notified only by one competent authority to the other. The competent authority who has requested the extension shall immediately notify the persons directly affected by the case in writing of any agreement to change the time frame as well as the new deadline for submission of requests pursuant to paragraphs 5 and 7. Should the competent authorities fail to notify the persons, then any request pursuant to paragraphs 5 and 7 must be accepted, if it was submitted within the default time frame. Should the notification occur less than 3 months before the expiration of the respective deadline, then the deadline shall be extended automatically to 3 months after the persons directly affected by the case have received the written notification concerning the change in the time frame.[8]

II. Proposed Amendments to Commentary

A. Overview of the Proposed Changes

The commentary to the U.N. model convention could include three further alternatives to the proposed article 25.

1. Optional Dispute Settlement Clause

One alternative to the new article 25 proposed in the framework would make the dispute settlement procedure optional instead of mandatory. Both competent authorities would have to agree to submit their case to dispute settlement under this option.

2. Different Types of MFN Clauses

The second alternative is an MFN clause, which is designed to incorporate by reference further-reaching dispute resolution provisions that are being concluded with third states. The MFN clause could also serve as the basis for a multilateral instrument, since it could be implemented as the lowest common denominator among countries pushing for mandatory dispute settlement and those reluctant to agree to it.

3. Delayed Mandatory Dispute Settlement Clause

The third possible alternative follows the suggestion in the commentary to the U.N. model convention that states unwilling to commit to arbitration can include an arbitration clause in their double tax treaties and postpone its entry into force until they agree to implement it. The effect of the third alternative would be similar to that of the MFN clause in that it would allow states reluctant to consider arbitration to avoid giving effect to the clause while still acknowledging their treaty partners' desire to pursue arbitration. The third alternative has the added advantage that it does not require any cumbersome and time-consuming renegotiation of the treaty to be effective. Instead, a simple exchange of diplomatic notes would be sufficient to ensure that the arbitration clause enters into force. As such, the third alternative would be more expedient and easier to apply than the MFN clause(s). On the

[7]The paragraph was amended to function independently of the mandatory dispute settlement, and the duration of the procedure was capped to prevent overly long procedures.

[8]The extension of the MAP time frame is inspired by article 25 (alternative B) of the U.N. model convention and para. 5b of the Memorandum of Understanding Between The Competent Authorities of Canada and the United States of America. The possibility of deferring the initiation of mandatory dispute settlement was also put forward in the BEPS draft report on action 14.

other hand, opting to renegotiate the treaty could provide the country that was previously reluctant to adopt arbitration with more leverage in its favor.

B. Text of the Amended Provisions

The following alternatives for article 25 (alternative B)(5) are suggested for inclusion in the commentary to the U.N. model convention.

Italicized text indicates changes made by the authors to the wording of the current article 25 (alternative B) of the U.N. model convention. Text in brackets ([]) again indicates optional language that contracting states can consider adopting. Bold text is used to indicate the alternatives to article 25 (alternative B)(5) to be included in the commentary to the new article and also deviations from the new article 25 (alternative B)(5) suggested in Section I.B.

1. Optional Dispute Settlement Clause

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case *by avoiding taxation not in accordance with the Convention* pursuant to paragraph 2 within *two years*[9] from the presentation of the case to the competent authority of the other Contracting State,

any *remaining issues leading to taxation not in accordance with the Convention* in the case shall be submitted to *a dispute settlement panel* if *the person or*[10] either competent authority so requests **and if both competent authorities agree to submit the case to dispute settlement**. *[However, if the submission to a dispute settlement panel is agreed between the competent authorities, the person must first agree to that request.] The* unresolved issues *leading to taxation not in accordance with the Convention* shall not, however, be submitted to mandatory dispute settlement if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the mandatory dispute settlement decision or unless both competent authorities agree on a different solution within six months after the decision has been communicated to them, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States, *as if it were a final judgment of a domestic court of these States. If the competent authorities deviate by mutual agreement from the decision, this agreement must lead to the avoidance of taxation not in accordance with the convention. Otherwise it may be challenged by the taxpayer by the submission of another request for mandatory dispute settlement pursuant to this paragraph, which shall lead to the automatic annulment of the agreement and the implementation of the previous panel decision. The mode of application of this paragraph shall follow the procedural rules included in the Protocol.*

2. MFN Clause

In some States, national law, policy, or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. In such cases, the Contracting States may replace the current para 5 with the following alternative:

It is understood that in the event that pursuant to an agreement or convention for the avoidance of double taxation concluded with a third country after the date of signature of this convention [or protocol], State X agrees to include a <u>mandatory</u> dispute settlement provision in such agreement or convention containing processes not covered by this Convention (such as processes involving the assistance of neutral third persons), the competent authorities of State X and State Y will start negotiations, as soon as possible, with a view to concluding an amending Protocol that inserts a mandatory dispute settlement provision into this agreement.

In the event that State X agrees to include an <u>optional</u> dispute settlement provision in the agreement or convention concluded with a third country after the date of signature of this convention [or protocol] containing a type of process not covered by this Convention (such as processes involving the assistance of neutral third persons), the competent authorities of State X and State Y will start negotiations, as soon as possible, with a view to concluding an amending Protocol which inserts an optional dispute settlement provision into this agreement.[11]

[9]This addition is inspired by article 25 of the OECD model convention. An average time frame of two years for the completion of the MAP process was also suggested by the BEPS report on action 14.

[10]This addition is inspired by article 25 of the OECD model convention.

[11]*See* H.M. Pit, ''Arbitration Under the OECD Model Convention: Follow-Up Under Double Tax Conventions: An Evaluation,'' 42 *Intertax* 447 (2014). The wording of the semi-arbitration clause is based on article 6 of the protocol to the Russia-Switzerland double tax convention (Sept. 25, 2011). Other similar clauses can be found in the following double tax conventions:

(Footnote continued on next page.)

In the event State X or Y notifies the other of its intention to sign and ratify a multilateral instrument containing provisions for the resolution of tax treaty disputes not covered by or differing from this Convention (including processes involving the assistance of neutral third persons), the competent authorities of State X and State Y will start negotiations with a view to replacing or amending the dispute resolution provisions of this Convention, to the extent necessary or useful.

3. Delayed Mandatory Dispute Settlement Clause

Paragraph 3 of the commentary to the U.N. model convention could be amended as follows:

3. The decision whether to agree in a bilateral convention on a mutual. . . . They could, however, also include arbitration but postpone its entry into force until each country has notified the other that the provision should become effective . . . unless a taxpayer rejects the mutual agreement.

A provision postponing the entry into force of Article 25 B para 5 could have the following wording:

The procedural rules for the application of paragraph 5 shall be finalized by the Contracting States by means of notes to be exchanged through diplomatic channels after consultation between the competent authorities. The provisions of paragraph 5 shall not have effect until the date specified in the exchange of diplomatic notes.[12]

III. Rules for Mandatory Dispute Settlement

As well as the amendments to article 25 (alternative B) of the U.N. model convention and its commentary illustrated above, our proposal also offers a detailed set of procedural rules to determine how the mandatory dispute settlement clause and the ADR clause in the new article 25 function in practice.

The procedural rules are intended to be contained in protocols to treaties between contracting states. The rules are designed to provide the contracting states with a broad array of options ranging from final offer (so-called baseball, or winner-takes-all) arbitration to independent opinion mandatory dispute settlement and ADR. Since contracting states can modify the rules at any time, the proposed rules are intended to serve only as a default option to make it easier to conduct proceedings.

The proposed model protocol on mandatory dispute settlement has three subparts. Section 1 contains definitions of terms and sets out the general procedural rules and necessary institutional framework. The rules in section 1 will apply regardless of the type of mandatory dispute settlement chosen. Section 2 is essentially a baseball arbitration clause based on the Canada-U.S. treaty and the mutual agreement on mandatory dispute settlement between those two countries. Section 3 outlines an independent opinion procedure that draws on best practice from a number of sources; this is intended to be the default procedure.

The procedural rules for the model ADR clause proposed in article 25(6) will be contained in a separate protocol. The procedural rules for the ADR clause were designed with mediation in mind but can be adapted to any type of ADR.

A. Institutional Framework

Section 1 of the proposed procedural rules for the mandatory dispute settlement clause proposes significant changes to status quo by suggesting a new institutional framework that might be more suited to the needs of developing countries. The goal of the new framework is to institute a self-standing international tax dispute resolution body under the auspices of the U.N. to which the protocols of the respective treaties would refer.

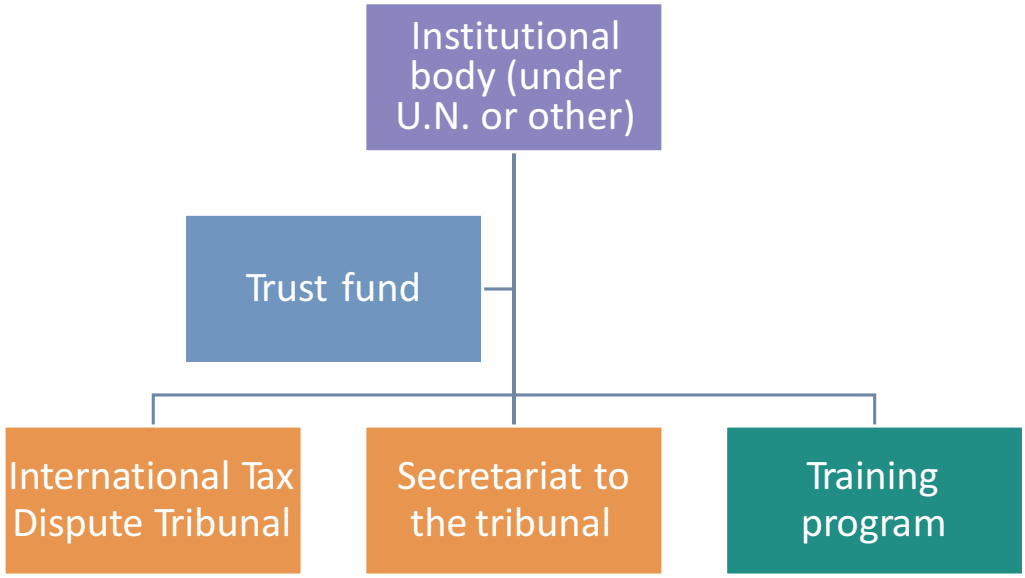
Any panel that conducts mandatory dispute settlement will consist of eligible persons nominated by each member state of the new institutional body. The nominees will be vetted, and the names of successful candidates will be made publicly available in a standing roster of panel members. In any dispute subject to a mandatory dispute settlement procedure, the panel presiding over the dispute will be selected from members on the roster. In other words, the contracting states involved in the dispute cannot appoint independent panel members that are not on the roster. The tribunal will be served by a small U.N. secretariat. (See Figure 1.)

The new institutional framework will also include a mechanism that will provide more transparency in the dispute settlement process: The secretariat will keep a list of cases whose details can be made publicly available, based on the information approved for publication by the parties in each case. A parallel panel of lawyers will also be created to work for developing countries pro bono based upon international models such as the International Criminal Court pro bono legal counsels, the WTO model, and other such systems.

Bulgaria-Switzerland (protocol of Sept. 19, 2012), Czech Republic-Switzerland (protocol of Sept. 11, 2012), Hungary-Switzerland (protocol of Sept. 12, 2013), Ireland-Switzerland (protocol of Jan. 26, 2012), Malta-Switzerland (protocol of Feb. 25, 2011), Mexico-Switzerland (Aug. 3, 1993), Norway-Switzerland (protocol of Aug. 31, 2009), Peru-Switzerland (protocol of Sept. 12, 2012), Romania-Switzerland (protocol of Feb. 28, 2011); Azerbaijan-U.K. (Feb. 23, 1994); Finland-Netherlands (protocol of Dec. 28, 1995), Mexico-Netherlands (protocol of Dec. 11, 2008), Netherlands-Oman (protocol of Oct. 5, 2009), and Netherlands-Saudi Arabia (protocol of Oct. 13, 2008).

[12]The wording of the provision is patterned after article 25(5) of the Italy-U.S. tax treaty (1999) (as amended through the protocol of Aug. 25, 1999); see Pit, *supra* note 11.

Figure 1. The New Institutional Framework



The tribunal would have in place a training program for young professionals from developing countries. The program will involve a series of courses on international tax law with particular emphasis on the needs and constraints of developing countries. The courses could, for example, be connected to the capacity-building initiative of the Committee of Experts on International Cooperation in Tax Matters. The young professionals will also receive practical training through participation in the dispute resolution process as supporting staff for the panel members. In this capacity, the trainees will receive instruction from panel members and gain insight into the dispute resolution process by helping out with the review and preparation of necessary documentation. The training scheme would be financed entirely by a U.N. trust fund comprised of contributions from all members of the institutional body. The fund could also be supplemented by contributions from aid agencies and other sources.

B. Streamlined Procedure

The second part (section 2 of the procedural rules for the mandatory dispute settlement clause) is essentially a baseball arbitration clause modeled after the Canada-U.S. treaty and the mutual agreement on mandatory dispute settlement between those two countries.[13] Nevertheless, some important changes to the procedural rules apply:

First and most important, the procedure can be used only in cases that involve one or more of articles 5, 7, and 9 of the model. The procedure can also be used in cases concerning the determination of residence under article 4 of the model if a dual resident is involved.

The streamlined procedure is intended to serve as a fast and efficient alternative to independent opinion mandatory dispute settlement and could be particularly effective in situations that require added legal certainty and quick resolution. Conventional mandatory dispute settlement will be the default option, with a fully reasoned opinion to be given in each case and the board having freedom to consider the issues. By using the baseball procedure in transfer pricing cases, however, the large number of pending cases (and the deluge of cases expected in the future) can be resolved more quickly.

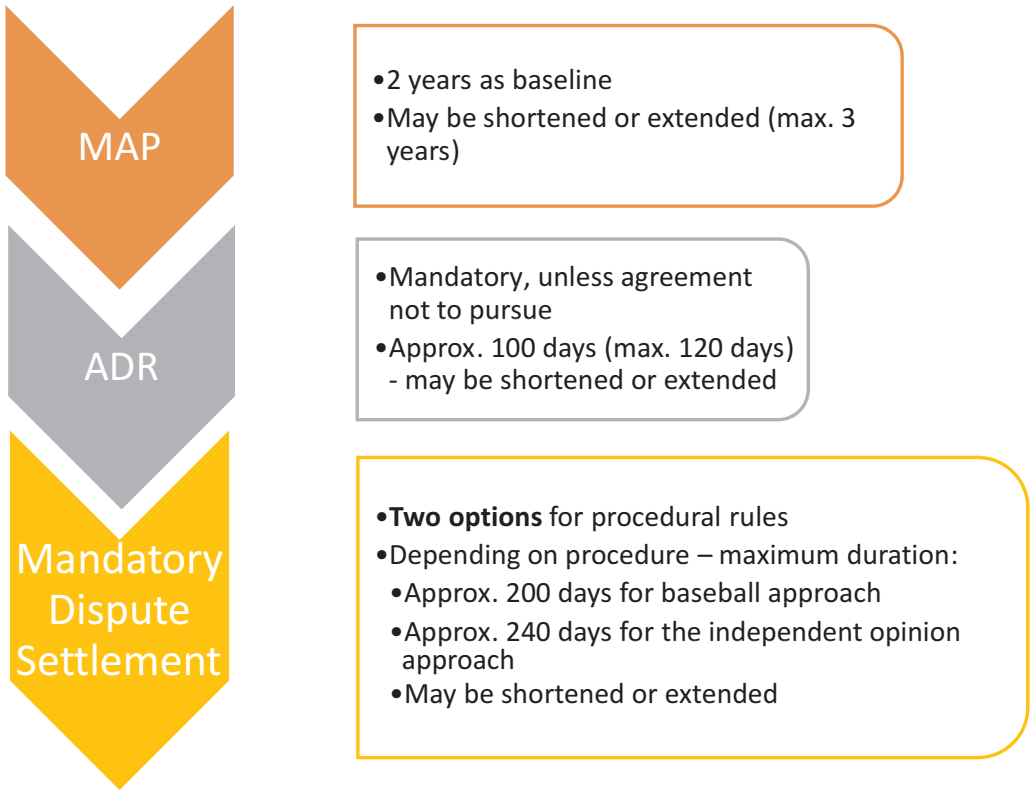
The taxpayer's residence, which significantly determines his or her compliance obligations and tax burden, should also be decided as quickly as possible. Cases that largely concern factual issues (usually those that relate to articles 5, 7, and 9 of the U.N. model convention) are more suited to this type of mandatory dispute settlement than, for example, cases posing general questions of interpretation relating to a double tax convention.

The streamlined procedure is also cost-effective and can be used to keep the financial burden on tax administrations in developing countries as low as possible. The deadlines are significantly shorter, offering taxpayers faster resolution of their case.

Taxpayers would have to specifically request the streamlined procedure when submitting their request

[13] *See* Canada-U.S. MOU, *supra* note 8, and the Arbitration Board Operating Guidelines.

Figure 2. Total Duration of the Dispute Settlement



for mandatory dispute settlement after the MAP has proven unsuccessful, and both competent authorities would have to agree to it. The justification for the opt-out provision is that, because of the reduced number of hearings and short time frame for submitting statements, baseball arbitration requires a very high standard of argument and a strong grasp of the technical issues at hand. Since tax administrations in developing countries sometimes lack the expertise to handle sophisticated transfer pricing cases, they should not be pressured to participate in a procedure they are uncomfortable with. At the same time, taking into account the possibility to deviate from the panel determination, developing countries could try the streamlined procedure without the resolution of the case wholly depending on it.

General information relating to decisions made in the streamlined procedure will be published to enable statistical analyses. Substantive aspects of the decisions, including the name of the taxpayer, will be published only with the consent of the competent authorities and the taxpayer involved. The following information will be published in all cases: the contracting states involved; the type of dispute (including the transfer pricing methods involved, but without detailed calculations); the duration of the dispute; and the total costs.

Ongoing controversy exists over whether (and to what extent) information on cases submitted to mandatory dispute settlement procedures should be made publicly accessible and the degree to which the public should be involved in such procedures. Politically, it is important that the procedure is viewed as transparent and open to public scrutiny. This is especially true when large amounts of tax are involved, since the resolution of major cases could be considered a matter of public policy.

Streamlined Procedure: Key Features

- Only available in cases relating to one or more of articles 4, 5, 7, and 9 of the model.
- Only available if both competent authorities agree; otherwise, the conventional (independent opinion) procedure will be used.
- Shorter deadlines.
- Case information will be published to enable statistical analyses of types of disputes.

Figure 3. Opportunities to Reach a Mutual Agreement

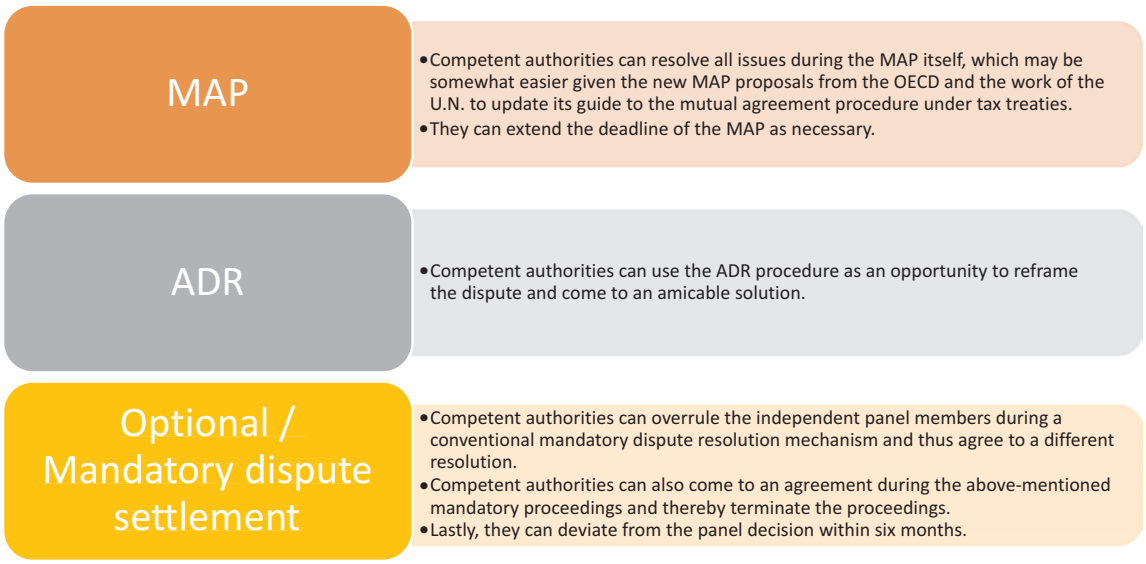
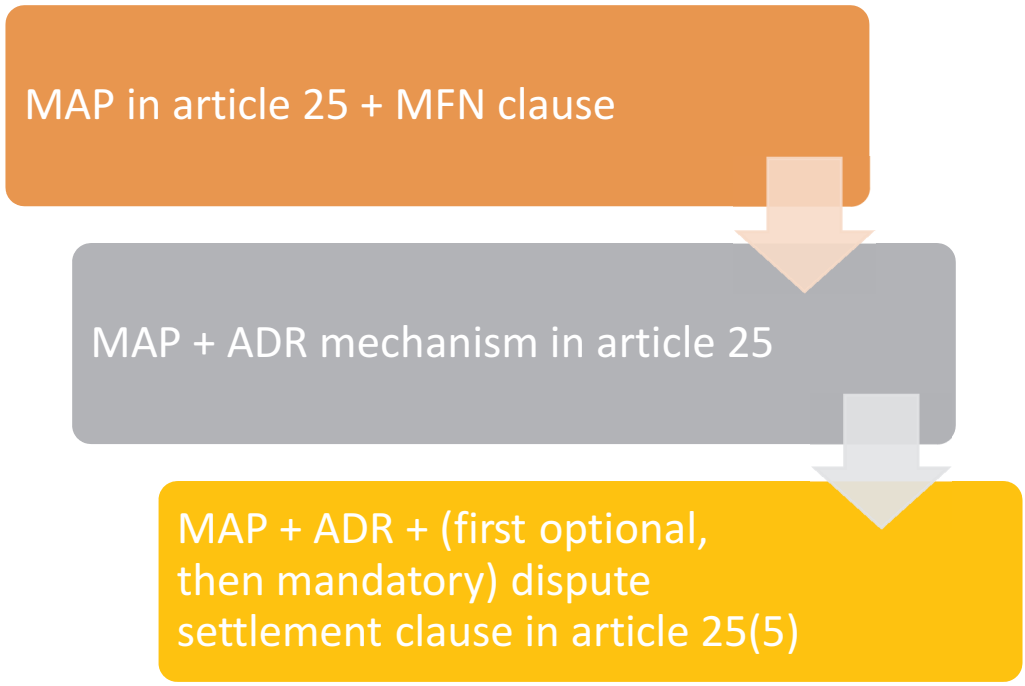


Figure 4. Different Options for the Dispute Settlement Article in the Tax Treaty



Most aspects of the current dispute resolution procedure are shrouded in secrecy. No data are available on how many cases have been resolved through mandatory dispute resolution, let alone how many have been decided in the favor of one side or the other. Taxpayers have a vested interest in keeping important business secrets confidential. The nature of these disputes (especially transfer pricing disputes, given the significant amount of documentation required) makes it difficult to redact confidential trade secrets while keeping the nature of the dispute discernible. Since no reasoned opinion is given, publishing the details of any monetary award or the identity of the prevailing party could be misleading and put undue pressure on the

Independent Opinion Procedure: Key Features

- Some information on types of cases will be published to enable statistical analyses.
- Panel comprised of four representatives from the competent authorities and three independent members.
- Increased participation from taxpayers and third parties.
- Legal costs are capped.

competent authorities. Publishing more detailed case information could prevent such misinterpretation and provide incentives for the competent authorities to resolving disputes over double taxation.

Our proposed solution could strike a middle ground. The need to provide public information is satisfied by all mandatory dispute resolution procedures, in that at least basic case information is made available, while taxpayer information is protected by strict confidentiality requirements. Competent authorities will not be placed under public pressure, since details on the resolution of the case will not be released. Access to more anonymous case information would also benefit practitioners, who could, for example, determine which competent authorities have experience dealing with mandatory dispute settlement cases. Information could be released to the public in an aggregated manner to protect confidentiality.

The suggested procedure displays the key advantages of baseball arbitration: few hearings; restricted written submissions; and short time frames to encourage the competent authorities to adopt more moderate positions. Taxpayers do not have official standing in the procedure. At most, taxpayers could be questioned by the panel, but they would not attend any hearings and would have no right to make written submissions.

C. The Independent Opinion Procedure

Section 3 of the procedural rules for the mandatory dispute settlement clause details an independent opinion procedure, intended as the default procedure, that draws on best practice from several sources. The provisions are mainly based on the European Union's proposal for mandatory dispute settlement in the context of the Transatlantic Trade and Investment Partnership (TTIP).[14] Other sources examined include the EU arbitration convention (90/436/EEC), the United Nations Committee on International Trade Law Rules on Transparency, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the 2015 International Chamber of Commerce Draft, the TRIBUTE proposals, and the U.N. Secretariat Paper on Alternative Dispute Resolution in Taxation, which was discussed at the U.N. Tax Committee Meeting in Geneva.[15]

Although based on the procedures recommended in these other instruments, the independent opinion procedure contains some significant differences.

Some relevant aspects of case determinations under the independent opinion procedure will be published to enable statistical analyses of case outcomes. The information made public will be the same as under the streamlined procedure. The result of the dispute resolution process will not be published without the consent of the competent authorities and the taxpayers involved.

In the model of the EU arbitration convention, the panel will be comprised of four representatives from the competent authorities plus three independent members (including the chair). The composition of the panel is thus altered from that under the current independent opinion procedure under the U.N. model. The purpose of the representatives is thus not only to ensure that the panel understands the case and the competent authorities' arguments but also to continue efforts to resolve the case amicably, if possible. The participation of the representatives also legitimizes the panel's determination and could avert some concerns over loss of sovereignty.

The independent opinion procedure allows increased participation of taxpayers and third parties, who can take part in hearings, make written submissions, and access documents issued by the panel and the competent authorities.

Awards for legal costs under the procedure will be capped so that the parties cannot be entirely reimbursed for their expenses. The cap will set a maximum amount of daily legal costs that can be refunded. The aim of the cap is to level the playing field between underfunded competent authorities and those that can afford the best legal counsel. This cap comes in addition to increased opportunities for developing countries to receive financial and logistical assistance during the proceedings, as detailed under the general institutional framework.

[14]See EU, ''Textual Proposal: Dispute Settlement (Government to Government),'' *available at* http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf.

[15]See U.N. Tax Committee, ''Secretariat Paper on Alternative Dispute Resolution in Taxation,'' E/C.18/2015/CRP.8 (2015).

ADR Mechanism: Key Features

- In line with the negotiation paradigm of the MAP but dependent on the resources of the institutional framework, since the mediators must be chosen from a roster of previously vetted potential panel members.
- Operates by way of an opt-out mechanism; the process is mandatory unless the competent authorities agree not to proceed with it.
- Competent authorities can choose which issues are submitted to be determined under the process.
- Competent authorities can choose the type of ADR.
- Must be completed within 120 days, unless the parties agree to an extension.

D. The ADR Procedure

The sample procedural rules for the ADR clause were developed for use in mediation procedures. The rules were adapted from EU dispute settlement proposals under TTIP and guidance from the U.K.'s HM Revenue & Customs on ADR.[16] While mediation is just one example of a supplementary procedure that can be used, it is appropriate to detail the relevant procedural rules, since addressing multiple types of mechanisms would go beyond the scope of this article.

The ADR procedure will be carried out as part of the MAP, meaning competent authorities will have full control of the process. The procedure is an integrated part of the institutional framework since the competent authorities can select and appoint a third party of their choosing from the roster of panel members vetted by the institutional body.

The competent authorities can choose which issues to submit to ADR; they could submit all open issues or only some. The mediator is not authorized to address any issues besides those submitted to ADR. Any issues on which an agreement is reached during ADR are inadmissible for arbitration purposes. Nevertheless, if unresolved issues involving double taxation remain after mediation is concluded, these issues can be submitted to mandatory dispute settlement at the request of the taxpayer or one of the competent authorities.

The procedural rules allow competent authorities to choose which type of ADR to pursue. Paragraph 3 of article 6 (on mediation proceedings) merely states, ''The mediator *may* offer advice and propose a solution for the consideration of the competent authorities. The competent authorities may accept or reject the proposed solution or agree on a different solution'' (emphasis added). Facilitative mediation, evaluative mediation, and even nonbinding neutral evaluation would be compatible with this provision.

Facilitative mediation procedures involve an independent external mediator who attempts to bring the parties together but offers no opinion on the merits of the arguments put forward. In evaluative mediation procedures, the mediator attempts to reach a resolution in the same way as in facilitative mediation but also provides their views on the dispute as a subject-matter expert. Nonbinding neutral evaluation procedures involve a third-party expert in a particular field who provides a nonbinding opinion on the matter.[17] The most important aspect of the mediation process is that any opinions issued by the mediator are not binding on the competent authorities or the taxpayer. As a result, decision-making is left entirely to the competent authorities.

IV. Functioning of the New Rules

While the proposed mechanisms provide countries with a wide variety of options to choose from, the procedures are designed to function as part of an overarching framework with two primary goals.

The first is to ensure the competent authorities have ample opportunity to reach an agreement on their own terms.

To illustrate how the framework functions in practice, Figure 2 outlines the maximum time frames allotted for the different parts of the dispute resolution process under the procedural rules.[18]

During each procedure under the framework, the competent authorities have ample opportunity to reach a mutual agreement, as illustrated in Figure 3.

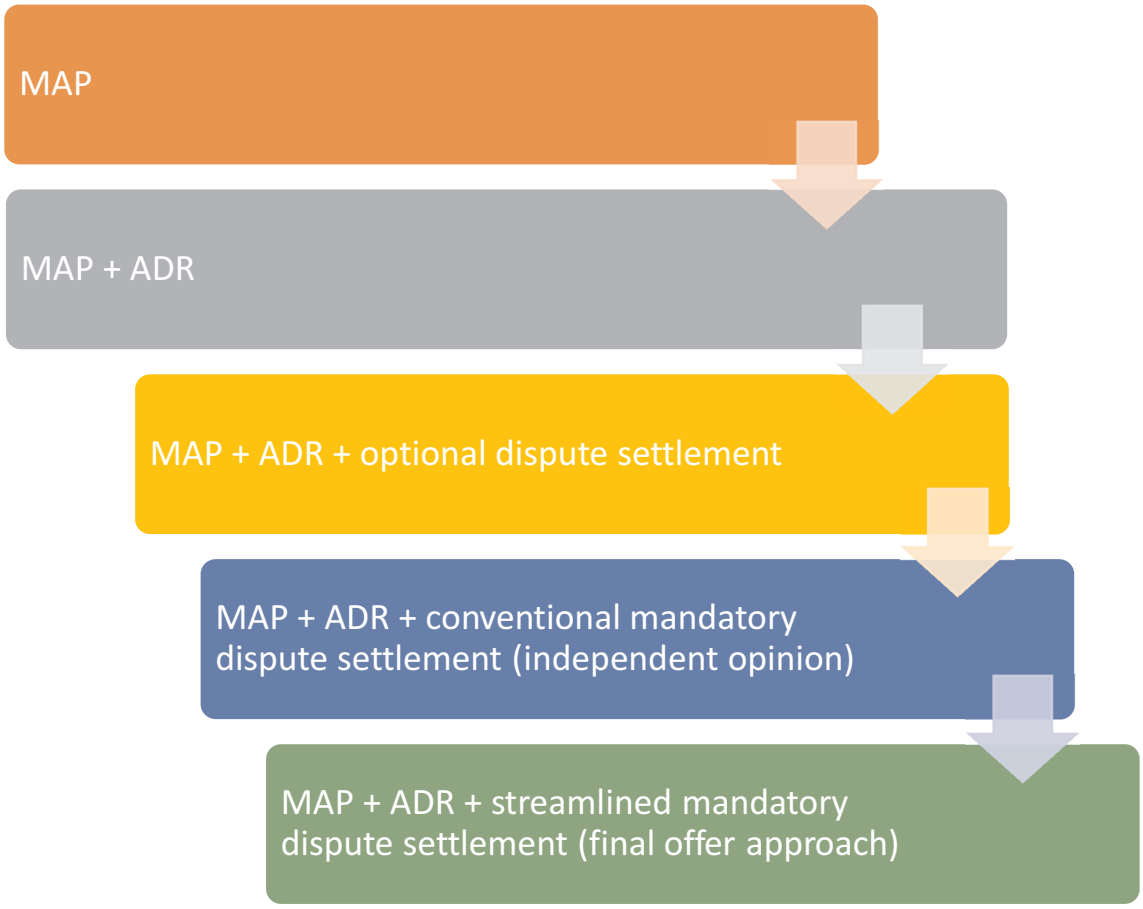
As previously mentioned, the second overarching goal is to enable developing countries to gain experience in mandatory and alternative forms of dispute

[16]See EU proposal, *supra* note 14; HMRC, ''Resolving Tax Disputes — Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in Large or Complex Cases'' (2014). *See also* Jeffrey Owens, Laura Turcan, Jasmin Kollmann, Alicja Majdanska, and Sudin Sabnis, ''What Can the Tax Community Learn from Dispute Resolution Procedures in Non-Tax Agreements?'' 69 *Bulletin for Int'l Taxation* 577 (2015); Kollmann, Petra Koch, Majdanska, and Turcan ''Arbitration in International Tax Matters,'' *Tax Notes Int'l*, Mar. 30, 2015, p. 1189; and Nathalie Bravo, Rita Julien, Kollmann, Majdanska, and Turcan, ''Bilateral Treaties and Their Effect on Taxation,'' *Tax Notes Int'l*, Oct. 12, 2015, p. 187.

[17]The definitions of the different types of mediation are taken from HMRC guidance, *supra* note 16.

[18]For details on the deadlines, see suggested wording of article 25 (alternative B) of the U.N. model convention, sections 2 and 3 of the proposed procedural rules for mandatory dispute settlement, and the procedural rules for mediation.

Figure 5. Different Types of Dispute Resolution Procedures



settlement. The framework therefore contains a built-in learning process that concerns both the content of the dispute resolution article (article 25) in the respective tax treaties (see Figure 4) and the type of dispute resolution process to be applied in enforcing the clauses (see Figure 5).

Conclusion

At the level of tax treaties (see Figure 4), the process of making use of the options available within the new institutional framework would begin with countries including an article patterned after article 25 (alternative A) of the U.N. model convention; in other words, a dispute resolution article that includes only the MAP. Under the framework, they can opt to include an MFN clause in their treaty at this stage, according to which they can later negotiate to include optional or mandatory dispute settlement clauses or ADR clauses in article 25 of their respective tax treaties.

The next step would be for countries to negotiate ADR clauses to include in their tax treaties to provide more options for reaching mutual agreement to eliminate double taxation. If countries believe that the ADR mechanism is insufficient to eliminate double taxation in all disputes, they can include optional dispute settlement mechanisms in article 25 of their treaties. Once they feel more comfortable with dispute resolution, they can gradually progress to mandatory dispute settlement.

The proposed mandatory dispute resolution processes (shown in Figure 5) provide multiple options for the contracting states after they have implemented the ADR and mandatory dispute settlement clauses. States could first adopt the independent opinion approach; this procedure is better suited to countries with little dispute resolution experience, since it gives them more opportunity to prepare and present their cases and does not impose harsh time constraints. If states are confident in preparing and presenting their cases and especially if the disputed issue is very time-sensitive (such as the residence of a taxpayer for treaty purposes), the dispute can be resolved by a streamlined process that offers a quicker solution. Alternatively, the ADR

mechanism could help solve at least some disputed issues in a case or bring the competent authorities closer to a compromise. In practice, having ADR available could thus reduce the number of cases going into mandatory dispute resolution. If the authorities decide that the ADR mechanism only unnecessarily lengthens the proceedings, they could skip this step and move directly to mandatory dispute settlement.

The training program for arbitrators and lawyers from developing countries (see Section III.C.1 for details) is bound to increase confidence in the mechanisms. If competent authorities are confident in their arguments and their technical and procedural knowledge, they are likely to agree to use the streamlined procedure more often; reduce the number of their representatives on the panel during the conventional procedure to two (one for each competent authority); or withdraw them altogether, affording the independent panel members a more prominent role. ◆

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