

**BEPS MLI Arbitration - a panacea?  
- complementing MAP with SDR mechanisms**

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**Protecting Intra Group, Cross Border Transfers of  
Intangible Assets from Excess Tax Conference**

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- Context – International Tax Disputes
- BEPS Action 14 – outcomes and initiatives
- BEPS MLI Arbitration – where are we?
- Holistic approach
- SDR/ADR mechanisms
- CDR Programme – detail
- UN Position
- Way forward and next steps

- Tax disputes and double taxation increasingly inhibit cross-border investment
- MAP disputes have more than doubled in seven years
- Over 900 EU disputes involved €10.5bn tax at end 2014
- Governments are adopting more aggressive tax audits and unilateral tax policies to manage tax avoidance and profit shifting
- Governments need to show multinational enterprises that there is an effective and efficient mechanism and procedure in place to resolve a cross border tax dispute if they are to win the support of the business community to BEPS changes

- Strengthen effectiveness and efficiency of Treaty MAP Process
- Minimise risks of uncertainty, and unintended double taxation
- Effective and timely resolution of disputes
- Political commitment to timely resolutions
- Three elements:
  - Minimum Standard – 17 measures
  - Best Practices – 11 recommendations
  - Peer-based Monitoring Mechanism: FTA MAP forum
  - Terms of reference and assessment methodology, published October 2016
- MLI: Multilateral Instrument
- Mandatory binding MAP arbitration

- Provision similar to Article 25(5) of Model Treaty
- Model provision Commentary just revised; footnote removed
- 20 countries involved in BEPS discussion
- No obligation to sign; needs ratification
- Taxpayer can instigate if no CA agreement
- 2 year time limit, unless taxpayer is
  - litigating, or
  - not provided the necessary information
- Decision is put aside where
  - taxpayer rejects decision or litigates, or court declares it invalid

- Countries can make “free form” reservations; and reserve back if other country’s reservations unacceptable
- Reservations could include: specific articles (e.g. factual issues), no anti-abuse, old cases, cases that CA’s agree are “unsuitable”
- MOU needed; see revision in OECD Commentary (23<sup>rd</sup> November)
- Type of Arbitration process:
  - final offer (baseball) is default; state can request reasoned opinion
  - reasoned opinion prevails; but final offer state can reject, and
  - no arbitration ... unless two states agree a method!

- Subject 1: International Tax Dispute Resolution Mechanisms
- 39 National Reports
- Not “disputes”; but “issues”
- Positive collaborative approach
- MAP Processes – “tool kit” okay: challenge is “workmen” using it
- Panel conclusions:
  - “Need a holistic look to avoid the dispute arising” and introduce “other programmes to avoid MAP” and use “non-binding dispute resolution mechanisms”

But ... no detailed proposals

- BEPS Action 14 - Effective and timely resolution of disputes ...
- ... requires holistic approach to dispute resolution:
  - In MAP:

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

*The period between when an "issue" is identified, usually first by the multinational taxpayer, as being one with bilateral (or multilateral) consequences, often as part of a domestic audit in one only of the countries potentially involved, and long before the prospect of formally activating that MAP process is considered*
- CDR Programme to complement MAP and allow earlier engagement

- 2004 OECD Report “*Improving the Process for Resolving International Tax Disputes*”
- JWP Proposal: mandatory **submission** of unresolved cases to SDR
- 2007 OECD Report – follow up work:
  - Evaluate forms of SDR in situations for which suitable
  - Time frame for “triggering” submission
  - Taxpayer role and direct participation in process
  - Operational and procedural details including form and publication and relationship with domestic law remedies

OECD Manual on Effective Mutual Agreement Procedures, 2007

## “3.5.2 Mediation

*Process-related assistance such as the use of a mediator or facilitator could help provide a perspective on the discussions, identify process hindrances, and in some cases bring more of a problem solving focus to the discussions.*

*A mediator’s role may offer an opportunity for the competent authorities to view a specific case, or the MAP process itself, from a much different perspective. .... mediation may assist in resolving some of the more systemic issues of a MAP relationship.”*

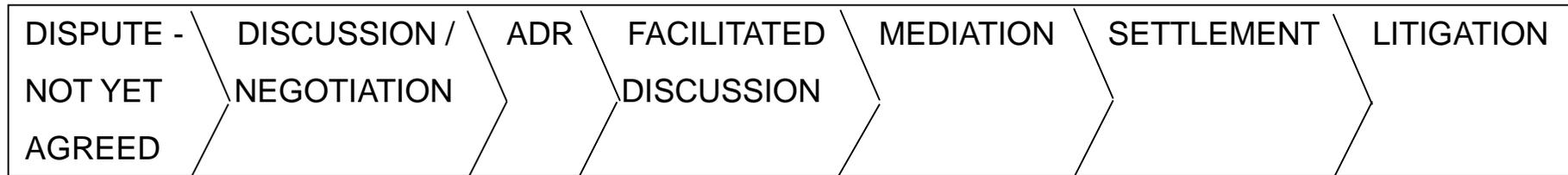
OECD Commentary to Article 25; paragraphs 86 and 87

- use of supplementary dispute resolution mechanisms:  
mediation and expert determination

More guidance needed! What it is; where to find it!

Litigation and Settlement Strategy (refreshed 2012 and 2017)

- 50 pages of guidance – “best practice”
- UK Tax Authority has “collection and management of revenue” responsibility
- discretion but no “deals”



MINDSET      TRADITIONAL      ALTERNATIVE APPROACH:  
“ACROSS THE      3<sup>RD</sup> PARTY CATALYST  
TABLE”

*“Meetings conducted expressly on equal terms recognising the dispute as a shared issue which the parties have a shared interest in resolving.”*

*“The essence of ADR is that a third party is brought in with the agreement of both parties to facilitate a bilateral agreement”*

*“A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated settlement of a dispute...with the parties in ultimate control of the decision to settle and the terms of resolution.”*

Centre for Effective Dispute Resolution (CEDR)

- Mediator/Facilitator controls the process
- Parties control the outcome

- Entrenched positions can produce intractable dispute
- Interests and needs may not be irreconcilable
- Mediator can help unlock the deadlock
- Challenge assumptions; strengths / weaknesses
- Encourages parties to look forward; not backwards
- Catalyst for:
  - Re-engaging discussion
  - Getting to heart of real issues in dispute and unlocking them
  - Explore facts and evidence
  - Holding up mirror
  - Developing level of trust

Various obstacles were identified at a Freshfields round table on 10 March 2017:

- lack of collaborative engagement between CAs, audit colleagues and the taxpayer
- lack of resource and experience and “level playing field” issues amongst CAs
- need for more taxpayer involvement and openness and engagement in the process and the lack of efficiency

Concerns were also expressed about issues of timing:

- too many disputes taking too long to get into MAP
- by which time positions had become entrenched and misunderstandings arisen in respect of facts
- compounded by personnel changes both at the CA and audit level
- taxpayer resource required

- Holistic approach to dispute resolution
  - Not just in MAP
  - Whole dispute resolution process (pre-MAP)
- Foster a more positive, collaborative and collegiate relationship:
  - between competent authorities; and
  - with taxpayers
- Collaborative Dispute Resolution (CDR) programme
- Complements MAP; allows earlier engagement

- Forum on Tax Administration (FTA)
- “*Multilateral Strategic Plan on MAP: A vision for continuous MAP improvement*” published October 2014
- Areas of strategic focus:
  - Resources
  - Empowerment
  - Relationships and Posture
  - Process Improvements
  - Relationship with Audit Functions
- BEPS Action 14 peer monitoring process
  - FTA MAP Forum role
  - Terms of Reference and Assessment Methodology, October 2016

- Collaborative working environment between CAs and taxpayers
- Best practice protocol from when “dispute” first identified
- Full range of SDR / CDR/ ADR techniques
- Training, educational and support programme
- Access to third party mediators and trained facilitators
- Helps identify what is in “dispute”
- Non-binding process

- To foster a more positive, collaborative and collegiate relationship:
  - between competent authorities; and
  - with taxpayers
- To improve efficiencies and use of existing resources, with both time and cost savings
- To reduce / avoid need for litigation and arbitration
- To encourage better support for BEPS Programme from business community

- SDR Process Protocol
  - between Competent Authority and ... taxpayer
  - bilateral and/or multilateral
  - voluntary non-binding process, subject to SDR Process Agreement
  - identifies and manages issues – decision tree approach
  - menu of techniques – facilitation, non-binding expert determination, mediation, arbitration (single/ multiple issues)
  - facilitated structured discussion
  - third party independent facilitator – single, or one for each party
- Article 25 compliant, and not dependent on MAP arbitration clause
- Article 26 – exchange of information
- OECD/FTA MAP Forum together with external support develop CDR Programme

- UN Tax Sub-Committee on International Tax Dispute Resolution procedures and the use of Non-Binding Dispute Resolution (NBDR) mechanisms – October 2016:
  - NBDR benefits of using neutral third party:
    - Increased efficiency in the process
    - More level playing field
    - More principled decisions
    - More predictability for future
    - Helps MAP negotiators justify their “concessions” to own administration
    - Amicable solution more acceptable and sustainable than “win-lose” outcomes
    - Fiscal sovereignty preserved
    - Less costly than arbitration
    - Need a holistic look to avoid the dispute arising
- UN Tax Sub-Committee .. – April 2017:
  - Consensus on changes to UN Model Tax Treaty and Commentary
  - Article 25, UN Model Treaty 2017 version recommendation to add:
    - (para 4) “.. *Including, where considered appropriate, non-binding dispute resolution procedures such as mediation*” and (note if recommendation not followed) “*could delay the process*”
  - UN Guide to MAP to include guidance on use of NBDR mechanisms
  - UN Handbook on Dispute Resolution – outline to be prepared

# Towards a holistic approach

- Next steps?
  - ICAP (International Compliance Assurance Programme) Pilot
  - Cross Border Dialogue (CBD) initiative
- Give SDR a try!
  - Competent Authorities, with
  - Taxpayers
- Pilot study
  - FTA MAP Forum, or
  - Bilateral agreement
- Panel of Independent Facilitators
  - e.g. TRIBUTE, PCA (Permanent Court of Arbitration)