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International Tax Disputes: Between Supranational Administration and Adjudication

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Summary

The proposals resulting from the G20/Organisation for Economic Cooperation and Development (OECD) project on Base Erosion and Profit Shifting (BEPS) include a drive for mandatory binding arbitration of international tax disputes, strongly supported by business. This issue should be considered in the context of the reasons for and nature of international tax disputes. The bulk of such conflicts concern 'economic' double taxation, resulting from divergent interpretations by different tax authorities of the standards for attributing profits to affiliates within a corporate group, so that the firm as a whole may be taxed on more than 100 per cent of its worldwide profit. Such divergences result from transfer pricing rules that treat the affiliates within a TNC group as if they were an independent entity dealing 'at arm's length' with each other, and requiring subjective judgements by each tax authority on the profits attributable to each. Hence, it is not surprising that the number of such conflicts has grown steadily, especially in the past decade, as countries have applied the rules more vigorously. Arbitration has been advocated not because it can provide objective adjudication, but as a fall-back in order to pressurise tax authorities to resolve cases by negotiation rather than submitting to a third party decision. In fact, although binding arbitration has been available among European Union (EU) members as well as some other states since 1990, only a handful of the continually growing number of conflict cases have actually been referred to arbitration. The newer approach of 'last best offer' (LBO) arbitration, widely regarded as more successful, aims to pressurise tax authorities to give up positions that are likely to be considered unorthodox. The Mutual Agreement Procedure (MAP), including arbitration, is essentially a supranational administrative procedure for coordination of the application of international tax rules. Its improvement should form part of a wider process of reform of both the institutions and the substantive rules of international taxation.

Keywords: international tax; multinationals; disputes; mutual agreement procedure; transfer pricing.

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Acronyms

ADR	Alternative dispute resolution
BEPS	Base Erosion and Profit Shifting
BIT	Bilateral investment treaty
CA	Competent authority
EU	European Union
G20	Group of 20 world leaders
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HMRC	Her Majesty's Revenue and Customs
ISDS	Investor-state dispute settlement
JTPF	Joint Transfer Pricing Forum
LBO	Last best offer
MAP	Mutual Agreement Procedure
MBA	Mandatory Binding Arbitration
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
PCA	Permanent Court of Arbitration
TIOPA	Taxation (International and Other Provisions) Act
TNC	Transnational corporation
TTIP	Transatlantic Trade and Investment Partnership
URA	Uganda Revenue Authority
WTO	World Trade Organisation

Introduction: the current context

The final outputs of the G20/OECD project on Base Erosion and Profit Shifting (BEPS), published on 5 October 2015, included *Action 14: Making Dispute Resolution Mechanisms More Effective*. Improving the procedures for resolving international tax disputes was regarded as a key issue during the consultations, especially by tax advisers for transnational corporations (TNCs), who are the persons mainly affected by the BEPS project.[1] The project's main outputs are proposals for measures which, once implemented, would considerably strengthen the powers of tax authorities to combat the tax avoidance techniques that have become increasingly prevalent among TNCs. Although these measures will be to some extent coordinated, their implementation in national law will inevitably leave scope for divergent interpretations. Also, many of the proposals will result in highly complex rules, which will leave considerable scope for discretion and subjective judgement.[2] Understandably, therefore, corporate tax advisers are fearful that they will lead to an increase in inconsistent, and perhaps conflicting, decisions, and hence excessive tax claims by states, or 'double taxation' (OECD 2015b).

It was due to these fears that corporate tax advisers strongly advocated a system of mandatory binding arbitration (MBA) of tax disputes in the consultations on BEPS project proposals (OECD 2015b). This echoed pressure made from the very beginning of the international tax treaty system by business representatives for some form of adjudication to resolve conflicting claims to tax.[3] Governments long resisted a binding obligation to resolve claims of international double taxation by arbitration (OECD 1984); some became favourable to the idea in the 1990s, and the momentum for it has increased. On this occasion, it was supported by a number of the governmental representatives involved in the BEPS project, although no consensus could be reached (OECD 2015a). Agreement was achieved on a set of minimum standards and best practices, compliance with which will be monitored through an Inclusive Framework covering all states (see Section 3.1 below).

In addition, a significant group, comprising twenty states, did make a commitment to establish mandatory binding arbitration, although its form is still to be agreed.[4] Negotiations have begun on a scheme as part of the multilateral instrument proposed under BEPS Action 15.[5] It remains to be seen what form of arbitration could be agreed upon, and its relationship to existing arrangements, notably the multilateral tax arbitration convention among EU states,

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1 An excellent source for the views of business groups, tax advisers, and specific companies is the comments sent to the OECD on BEPS Action 14 (OECD 2015b); all but four were from such sources, and they were unanimous in urging adoption of binding arbitration. The following comment from the Business and Industry Advisory Council was representative: 'Binding arbitration is a critical part of any solution... we ask all countries involved in the BEPS process to recognize that adopting a binding and universal arbitration framework should be an integral and inseparable part of the BEPS deliverables.' (OECD 2015b: 42). The same view was strongly urged by almost all participants at the public consultation on 23 January 2015, attended by the author (webcast available at <video.oecd.org>, accessed 15 July 2016).

2 For further details see Picciotto (2016), especially Section 4.

3 e.g. by the British National Committee of the International Chamber of Commerce in 1935: see Picciotto (1992: 284), and source there cited. Altman (2005) provides a more detailed history.

4 Twenty were mentioned in the Action 14 report: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. The Action 14 report stressed that the 20 making the commitment are involved in over 90% of tax disputes reported to the OECD at the end of 2013, but they are nevertheless only a third of the states participating in the BEPS process. They did not include the following 14 OECD members: Chile, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Iceland, Israel, Korea, Mexico, Portugal, Slovak Republic and Turkey; the two OECD 'candidate states' which have participated in the BEPS process (Colombia, Latvia); any of the 8 non-OECD G20 members involved in the BEPS project (Argentina, Brazil, China, India, Indonesia, Russia, Saudi Arabia and South Africa); nor the 14 developing countries which had also been allowed to join the project (Albania, Azerbaijan, Bangladesh, Croatia, Georgia, Jamaica, Kenya, Morocco, Nigeria, Peru, Philippines, Senegal, Tunisia, and Viet Nam).

5 Some 94 governments were represented in the inaugural meeting of the Ad Hoc Group for negotiation of this instrument held on 5-6 November 2015 at the OECD in Paris, at which a sub-group was established to work on MBA. The Instrument is expected to be published in the autumn of 2016. It will not be a substantive treaty, but a kind of multilateral protocol to amend existing treaties.

and dispute resolution provisions in bilateral tax treaties. Over 200 of these now include some form of arbitration (see Appendix, Table 8), although the vast majority do not. It seems that the intention is to include a common arbitration provision in the multilateral convention that will facilitate its introduction into existing bilateral treaties, as well as the other changes agreed in the BEPS process. However, it is not clear whether the states that are committed to arbitration will insist on the inclusion of that provision as the price their treaty partners must pay for introducing other changes.

This move towards more formalised procedures for resolution of international tax disputes is in many respects controversial,[6] and raises a number of interesting questions. Arbitration of international tax disputes has been rejected by developing countries, including key ones such as Brazil, China and India, although it was included as an option in the UN model in 2011.[7] The UN Committee of Experts in Tax Matters agreed in October 2015 to set up a subcommittee to examine dispute resolution, but it was stressed that it would not focus only on arbitration.

The emergence of this issue in the area of tax also invites comparison with the development of adjudication procedures to resolve disputes in other areas of international economic regulation, especially the dispute settlement system of the World Trade Organisation (WTO), and arbitration under international investment agreements, both bilateral investment treaties (BITs) and regional (especially the North American Free Trade Agreement (NAFTA)).

However, it is important to consider the issue in the context of the nature of international tax rules and an understanding of the characteristics of conflicts over their application. The bulk of such conflicts concern economic double taxation, especially resulting from divergent application of transfer pricing rules by different tax authorities to the taxable profits of different affiliates within the same TNC corporate group. Such divergences may mean that the group as a whole is taxed on more than 100 per cent of its consolidated profits. This is the inevitable result of transfer pricing rules that treat the affiliates within a TNC group as if they were independent entities dealing with each other at arm’s length, while allowing adjustment of their accounts by different tax authorities. Since the methods for such adjustments are based on subjective and discretionary judgements, it is not surprising that the number of such disputes has grown steadily, especially in the past decade as countries have applied these rules more rigorously.

Arbitration has been advocated not in order to settle disputes by independent and principled adjudication, but to pressurise tax authorities to settle claims themselves through private administrative procedures.[8] All but a handful of cases are resolved by negotiation rather than submitting to a third party decision. In fact, although binding arbitration has been available among EU members and between some other states for over twenty years, and despite the continually growing number of cases, only half a dozen have ever actually been referred to arbitrators (see below). The newer approach initiated by the US since 2006 of last best offer (LBO) arbitration explicitly prohibits the third party adjudicator from providing an independent reasoned opinion. This suggests that arbitration is a palliative for the symptoms rather than a cure for the ills of the international tax system.

This paper aims to contribute to this important debate on how to improve resolution of international tax disputes. It will begin by outlining the context and development of

6 See the comments on the Action 14 Discussion Draft by four civil society organisations (the BEPS Monitoring Group, Christian Aid, Global Financial Integrity and the Trade Union Advisory Committee) in OECD (2015b).

7 The arguments of members of the UN Committee for and against arbitration were included in the Commentary to the 2011 UN Model Convention: 368-370, although without attribution. No developing country was among the 20 listed as accepting a commitment to MBA in the Action 14 report (see Footnote 4 above).

8 This was evident in both the written comments from business and representations made at the public consultation, cited in Footnote 1 above.

international tax dispute resolution, then will analyse its nature in a comparative context, and conclude with some suggestions for both the current policy debates and the future.

1 Tax treaty application and dispute resolution

1.1 Tax treaty principles and the effect of divergent interpretations

Tax treaties have a dual effect. Although they are agreements between states, they also affect individual legal persons, especially corporations. Indeed, they are a remarkable, if under-appreciated, example of the creation of 'hard' rules of international law that are not only binding on states, but also in practice have direct legal effects for individuals and (mainly) corporations. Tax treaty provisions are incorporated directly into domestic law in most countries, by one means or another.[9] This means that they create rights that are directly enforceable in national law for the taxpayers to whom they apply. These are persons or entities with income from activities involving a presence in more than one country, the most prominent being TNCs. In effect, they create a special tax regime that is overlaid on the normal national rules of taxation of corporate income or profits.

The aim of tax treaties is not to harmonise the laws of the contracting states, but to coordinate them as far as possible. Essentially, they agree an allocation of taxation rights between the state parties. Their intended purposes were both to prevent double taxation and 'fiscal evasion'. In practice, however, priority has been given to the former, since the primary aim has been seen as to encourage international investment. States have also treated the rights allocated as including a right **not** to tax – that is, to grant tax exemptions and inducements. For their part, TNCs have encouraged this tax competition, and have created and exploited loopholes in the system. It is only recently that significant concerns have emerged over tax avoidance, or 'double non-taxation', which has been the target of the BEPS project (Picciotto 2016).

Thus, divergences in the interpretation of treaty provisions affect both governments and taxpayers, but in different ways. Some divergences create loopholes, and so may benefit taxpayers. Indeed, many tax avoidance techniques are designed to exploit such gaps, and hence undermine government revenue. An example are the differences under the laws of treaty partner states in the treatment of 'hybrid' legal entities or instruments, which were the target of Action 2 of the BEPS project. This type of divergence does not involve double taxation, but may rather result in double non-taxation. For example, a financial instrument may be treated as a loan in the borrower's country so that the interest is deductible, but as equity in the lender's state so that the payment is treated as a dividend and not taxed. Such divergences are not formally conflicts. Treaties do provide procedures for consultation to try to resolve such interpretive divergences (discussed in Section 1.2.1 below), but they have been used infrequently.

Taxpayers are clearly more concerned when divergent interpretations lead to conflicting tax claims, or double taxation. It is these that have been the main focus of efforts to improve procedures for dispute resolution. Here, it is necessary also to consider the distinction between 'juridical' and 'economic' double taxation. The former occurs when the same legal person is taxed twice on the same income, and the latter when the same income flow is

[9] In some countries (e.g. Germany, USA) ratification of a treaty requires legislative approval, upon which it becomes part of domestic law, although the creation of rights for legal persons depends on whether the provisions are regarded as 'self-executing' (which is the case for tax treaties). In others implementation is by legislation: e.g. in the UK this occurs virtually automatically, as they need only be presented to parliament for approval as subsidiary legislation (Orders in Council), under the Taxation (International and Other Provisions) Act 2010 (TIOPA), s. 2. In this respect, tax treaties are different from trade or investment agreements, for example.

taxed in the hands of two different legal persons (OECD-CTPA 2007, para. 1.1.2). Juridical double taxation could occur, for example, due to a disagreement over the characterisation of an item of a person's income. A classic case concerned payments made to the musician Pierre Boulez for conducting recorded orchestral performances in New York: these were treated in the US as fees for personal services and hence taxable in the US, but as royalties and hence taxable also in Germany where he was resident.[10] In relation to TNCs, examples of juridical double taxation are differences over the country of residence of an entity, or over whether a company resident in one country has a taxable presence (a permanent establishment) in another.

However, most transfer pricing disputes concern economic double taxation, and the rapid increase in conflicts, especially over the past decade, has been due mainly to such allocation cases. Such divergences result inevitably from the 'independent entity' principle which has become increasingly entrenched.[11] Under this approach, each tax authority must start from the tax accounts of the local affiliates of a TNC. Transfer pricing rules allow these accounts to be adjusted, but by comparing the prices for transactions between the affiliates in different countries with comparable transactions between unrelated entities. Unfortunately, however, appropriate comparables do not exist.[12] Although there are frequent complaints of lack of data on appropriate comparables, the underlying reason is the very nature of TNCs as integrated firms, benefiting from the advantages of synergy and economies of scale and scope. For these reasons, the profitability of affiliates of a multinational enterprise will generally be much higher than that of a self-standing firm in the same line of business. Yet, methodologies for evaluation of comparability mainly focus on identifying an appropriate profit margin, based on comparison with such self-standing firms. Either such firms just do not exist, because of the oligopolistic dominance of TNCs, or they are not truly comparable. Furthermore, the methods require identification of the functions performed, assets employed and risks assumed by each entity. This involves analysis of the specific facts and circumstances of each firm's business model, and judgements that are inherently subjective and discretionary. Hence, it is not surprising that, with increasingly stringent enforcement of transfer pricing rules, there has been a growth in conflicting interpretations.

In this context, it is easy to understand both the pressure from TNCs and their tax advisers for harmonised application of the rules, and the reluctance of many tax authorities to accept an obligation to ensure this. However, the position of most TNC tax advisers is self-contradictory. On the one hand, they generally insist on the strict application of the independent entity principle, so that each affiliate is taxed separately, even if that results in taxation of less than 100 per cent of the consolidated profits of the group as a whole. Nevertheless, they demand a guarantee of no double taxation of those consolidated group profits. The governments' position is more logical: under the independent entity approach, their concern is to ensure that the entities within their jurisdiction declare an appropriate level of taxable profits. As the OECD *Transfer Pricing Guidelines* state 'transfer pricing is not an exact science but does require the exercise of judgement' (OECD 2010: para. 1.13). Hence, it is not surprising that governments have been unwilling to guarantee to resolve all conflicts caused by divergent interpretations, especially those which apply to different taxpayers that are supposed to be treated as independent entities.

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10 Discussed in Picciotto (1992: 289); the case was taken up by the competent authorities but they failed to agree, though it seems that the German authority eventually allowed a credit for the US tax paid.

11 For a brief history and analysis see Picciotto (2013).

12 A notable occasion when this was frankly recognised occurred during the consultations in the BEPS process on 'special measures' (19 March 2015), when the Chinese delegate (Xiaoyue Wang, deputy director-general in the International Taxation Department) forthrightly stated that 'the arm's length principle does not work', because in her experience true comparables cannot be found (see <https://www.youtube.com/watch?v=hjuhPtmTx64&feature=youtu.be>).

1.2 The Mutual Agreement Procedure (MAP)

Tax treaties include several provisions to facilitate coordination of their application. Article 26 provides for Exchange of Information and Mutual Assistance, and Article 25 establishes a Mutual Agreement Procedure (MAP). These are essentially of an administrative nature, based on direct contact between tax authorities through a competent authority. Article 25 specifies that the competent authority (CA) of each state should endeavour to resolve, if necessary by mutual agreement, any difficulties caused by divergent interpretations of their provisions. The obligation is to **seek** a solution, not necessarily to find one. The MAP involves two kinds of situation: general issues of interpretation, and individual cases. For both the procedure is between the tax authorities; indeed, the term in French for the MAP is the 'amicable procedure'. However, the taxpayer is given a right under the treaty to initiate an individual case, by applying to a tax authority.[13]

This procedure for access to dispute resolution in international tax cases may be compared and contrasted to those for trade and investment conflicts. Like tax, conflicts over trade rules are generally treated as between governments, notably under WTO agreements. However, the main trading states (including the EU, Japan and the US) have also created internal procedures for legal persons to bring complaints of unfair trade practices, which may lead to an international complaint (Picciotto 2005). This indirect procedure is similar to that of the MAP for tax cases. Bilateral investment treaties, on the other hand, commonly provide a direct right for an investor to demand arbitration of a claim against a state for breach of their provisions. However, this investor-state dispute settlement (ISDS) procedure has become controversial, and is now very much in flux (UNCTAD 2013, 2015, and see Section 2.3 below).

1.2.1 Interpretive mutual agreements

Both the OECD and the UN model conventions provide for the competent authorities to 'endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention' (Article 25.3). This procedure clearly applies to difficulties resulting in either double taxation or double non-taxation, and hence could be very helpful in ensuring effective working of treaty rules.

In practice, the provision has been used relatively rarely. Tax officials certainly now have many opportunities for contact and discussion, but these generally have an informal character. To the extent that such contacts require a legal umbrella, they are regarded as taking place under the information exchange powers of Article 26. The more formal procedure envisaged by the Article 25.3 provision raises problems of interaction between international and domestic law. Since tax treaties generally take direct effect in national law, as explained above, it is considered in many countries that domestic courts have the primary right and responsibility to interpret them, especially as their provisions may interact with other domestic rules.[14] This difficulty applies even more strongly to the additional possibility provided in the second sentence of paragraph 25.3, to 'consult together for the elimination of double taxation in cases not provided for in the Convention'. This broad discretionary power could be read as giving tax authorities virtually legislative authority to deal with issues beyond the specific provisions of the treaty itself. Hence, this sentence is frequently omitted in actual treaties.

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[13] This may be either to the authority making the disputed decision, or to that in the country of residence of the related affiliate (in a treaty partner) that would suffer double taxation as a result of the decision.

[14] Picciotto (1992: 295-299). This conflict may be less acute in some countries – notably, in France treaty interpretation is considered to be an 'acte du gouvernement', and courts may refer a term requiring interpretation to the Ministry of Foreign Affairs.

A general interpretive mutual agreement can take a variety of forms, ranging from an Exchange of Notes or a Memorandum of Understanding, to no more than an informal statement of intention between administrative authorities. No standard practice has been developed by states, even as to whether such agreements should be published. The OECD Manual on MAP now encourages publication 'unless the nature of the agreement (e.g. certain compliance-related agreements involving procedures for criminal cases) means that its publication would undermine its administrative goal', and subject to maintaining taxpayer confidentiality (OECD-CTPA 2007: 10). It also gives two examples of such agreements, both in 2005: a Memorandum of Understanding between the US and Japan clarifying the meaning of the term 'investment bank' in the interest article, and a Mutual Agreement between the US and Mexico on the criteria and procedures for giving treaty benefits to fiscally transparent entities (OECD-CTPA 2007: 10). Nevertheless, such examples remain rare.

In view of the extensive changes resulting from the BEPS project, and especially its intended aim of ending double non-taxation, it might have been expected that Action 14 would recommend a more important role for interpretive mutual agreements. Regrettably, the report on Action 14 was almost entirely concerned with resolving claims of double taxation, and did not discuss whether and how the MAP could be used to help ensure coordinated interpretation especially of the new treaty provisions resulting from the BEPS project. However, it did make one 'best practice' recommendation on this point, urging countries to establish arrangements for publication of 'mutual agreements which relate to general matters that affect the application of a treaty to all taxpayers or to a category of taxpayers', subject to agreement of both CAs and safeguarding taxpayer confidentiality (OECD 2015a: 29).

1.2.2 Individual cases and the BEPS project proposals

Both the model treaties also provide a right for a taxpayer to present a case to the competent authority of the state where it is a resident, if it considers that the actions of either state 'result or will result' in taxation contrary to the convention (Article 25.1). However, the claim can only proceed if the CA considers it justified, in which case it can resolve the claim itself. If it is unable to arrive at a satisfactory solution, it must endeavour to resolve it by mutual agreement with the other CA (Article 25.2).

This right is clearly stated to apply 'irrespective of the remedies provided by the domestic law of those states'. Where such a treaty provision applies, therefore, taxpayers have an alternative and additional option to the normal procedures under domestic law. This again may in some countries create problems of possible conflicts between the role of domestic courts in applying tax treaty provisions as part of national law, and the right given to taxpayers to seek the alternative remedy. However, most CAs require taxpayers to choose, and suspend pursuit of legal remedies before initiating the MAP.[15]

The MAP is essentially an administrative procedure, authorising tax officials to negotiate directly at the international level without going through diplomatic channels.[16] While government officials may have some scope to interpret the law, it is usually a limited one. The MAP is treated by tax authorities as part of their administrative dealings with taxpayers. Hence, strong confidentiality protections are applied, and almost nothing is revealed publically about MAP cases – not even their existence, let alone the parties or issues involved.[17]

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15 As stated in the OECD Commentary to Article 25 (para. 76). Equally, once a court or tribunal has decided a question, it is not generally possible to initiate the MAP in that state, but it can, of course, be done in the other state.

16 For a wider discussion of international regulatory networks of this type see Picciotto (2011: ch. 3.2.5).

17 The US has published some statistics since the 1970s, and some other countries more irregularly. For the past decade or so the OECD has begun to collect some data, while the European Commission has collected data on cases under the Arbitration Convention, included in reports to its Joint Transfer Pricing Forum. See Appendix for compilations from some of these sources. The issue is discussed among practitioners at meetings and conferences, especially of the

There is no obligation to reach an agreed outcome through the MAP under Article 25, nor in general under other provisions of the treaties. An exception is in relation to deciding the residence of an individual: Article 4 of the models lays down successive tests, and then provides that if all of them fail 'the competent authorities shall settle the question by mutual agreement'. No doubt such a firm obligation is easy to accept in this context since the treaty specifies clear criteria, and failure to resolve the issue could result in juridical, not economic, double taxation. In relation to legal entities (i.e. companies), the BEPS Action 6 report now recommends a new Article 4(3), which leaves it to the competent authorities to resolve cases of dual residence. This uses the non-binding term 'shall endeavour', but it provides that in the absence of an agreement the entity shall not be entitled to any relief or exemption under the treaty. This is an important innovation, as it recognises that differing interpretations need not be resolved if the result is double non-taxation.

The initial requirement that a MAP claim can only proceed if accepted as justified obviously creates an obstacle for the taxpayer. Access to the MAP procedure depends on whether the country accepts[18] that the claim presents a case of 'taxation not in accordance with the provisions of [the] Convention'.[19] In relation to economic double taxation, the model treaties include an obligation in paragraph 9(2) that if one state has made a transfer pricing adjustment in accordance with the arm's length principle of Article 9(1), the other state shall make an appropriate corresponding adjustment. However, many states do not accept Article 9(2), so it is often omitted in treaties. In its absence, some states have taken the view that there is no obligation either to make a corresponding adjustment, or to admit claims to access the MAP resulting from another state's transfer price adjustment.

The minimum standard put forward in the BEPS Action 14 report (OECD 2015a) requires states to accept the MAP procedure and to implement its outcomes, as provided for in the OECD model and as interpreted by its Commentary. There is still some continuing reluctance by states to grant automatic access to the MAP and to guarantee implementation of its outcomes, particularly in economic double taxation cases. The report states that in general such taxation is not in accordance with the object and purpose of the convention, and 'will likely' frustrate it (OECD 2015a: para. 11). Hence, it is intended as part of the next revision to the Commentary to the Convention, to clarify 'the circumstances in which a Contracting State may deny access to the mutual agreement procedure' (OECD 2015a: para. 17).[20] These changes may be included in the proposed multilateral instrument that will facilitate implementation of the treaty changes resulting from the BEPS project.

These guarded statements are reinforced by inclusion of a best practice recommendation (OECD 2015a: para. 43) that states should include Article 9(2) in their treaties. Nevertheless, under the current interpretation of this paragraph in the Commentaries, it does not create an obligation to make a corresponding adjustment automatically. The requirement is to do so only if the state accepts that the initial adjustment was in accordance with the treaty 'both in principle and as regards the amount'.[21] This is the allocation issue that the MAP procedure

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International Fiscal Association, which is a source of some information. Altman (2005, ch.2) provides a helpful survey and analysis of the data then available.

18 This is generally a decision for the competent authority, although it may be possible under domestic law for a taxpayer to bring a case to require reference of a claim to the MAP: Altman cites three such cases, one in the US that was rejected, one in Israel that was successful, and one in Germany, where the court decided not to compel the claim to go forward because it would be unlikely to succeed (Altman 2005: 253, fn. 896; see also Hadari 2009: 6-7).

19 This may even include cases where there is no double taxation, e.g. if one state may be taxing contrary to the treaty but the income would be exempt in the other state; or if the effect of a transfer price adjustment is to reduce tax losses. Hence, many treaties limit the MAP to the relief of double taxation.

20 It also proposes (OECD 2015a: 22) that all countries should either ensure that all claims can be made to either competent authority (by changing the model treaty), or adopt (by changes to the Commentary) a bilateral notification and consultation process for cases considered to be unjustified.

21 This phrase is used in the Commentaries to both Articles 7 (attribution of profits to a PE) and 9 (2014 edition of the OECD Model Convention: 148 and 184).

should resolve, and there is still no firm obligation automatically to refer cases to the MAP, or to ensure that agreement is reached to resolve every one.

The cautious attitude of tax authorities towards the MAP is understandable, especially in allocation cases. A claim under the MAP to the competent authority requires the reconsideration of a transfer pricing adjustment made in an examination by specialist staff applying the internationally approved standards as they interpret them.[22] Transfer pricing audits require highly skilled staff, and providing for review of such decisions by a separate group of CA staff puts a further stress on scarce skilled resources. Tax authorities have been reluctant to provide a guarantee to resolve any claimed conflict resulting from separate judgements by each tax authority of the appropriate level of profit to be attributed to an entity within their jurisdiction. A re-evaluation of these judgements implies consideration of the relative profits attributed to related entities, which runs counter to the independent entity principle. Finally, providing such a guarantee would remove much of the downside risk from transfer pricing strategies, while leaving the upside benefits of such strategies untouched.

1.2.3 Emergence and rise of MAP cases

The growth of individual cases under the MAP is relatively recent, and has occurred mainly among OECD countries. It seems to have resulted mainly from the increased formalisation and more rigorous application especially of transfer pricing rules, as well as the greater sophistication of the techniques devised for TNCs to exploit them. Until recently tax authorities adopted a very cautious attitude to the MAP, and companies also have preferred, if possible, not to resort to the procedure, at least in cases involving economic double taxation. It was estimated that only a small proportion of transfer pricing adjustments resulted in a MAP claim, perhaps some 10 per cent (Altman 2005: 118).[23] Commentators such as Altman considered this a low proportion, and infer that the MAP was under-used because it was unsatisfactory. However, this gives insufficient weight to the reasons why it might be undesirable, unavailable or unnecessary.

First, the TNC might decide not to contest an adjustment either in the courts or by requesting a MAP if it accepts the adjustment as legitimate, or at least acceptable. Secondly, many adjustments are likely to be in relation to affiliates in low- or zero-tax countries with which there may be no treaty, so the MAP is not available. Thirdly, whether or not it accepts the decision, the TNC may be able to deal with the consequences through self-help (Cole and Maher 2012). For example, the accounts of the related company can be adjusted if they have not yet been submitted; a corresponding adjustment may be requested; or it may be possible to claim a credit for the additional foreign taxes paid due to the adjustment. Such expedients are likely to be considered preferable to embarking on a more formal procedure which, although usually less costly than a legal case, would invite closer examination of the taxpayers' accounts.

However, such opportunities for self-help have been reduced as states have formalised their procedures for transfer pricing, and for corresponding adjustments consequent to a transfer pricing audit by another state. Recourse in individual cases began to be significant only after 1970, when the US adopted procedures for using the MAP to resolve transfer pricing conflicts following the introduction by the US of the first transfer pricing regulations in 1968. Use of the procedure with US treaty partners was then greatly boosted by US regulations of 1976 denying a US tax credit for foreign taxes unless all practicable administrative and legal remedies had been pursued with the treaty partner, including a MAP claim. The effect of this rule is to require a MAP claim whenever an adjustment is made affecting an affiliate of a US

22 See comments by Carol Dunahoo, who was the US Competent Authority 2000-2003, in Bell (2004: 272).

23 Based on US data; a more comprehensive estimate is not possible, since few countries issue data on the number of transfer price adjustments.

TNC in a US treaty partner, unless the foreign adjustment is clearly in line with US standards.[24] Other states have followed suit, which is likely to have contributed to the growth of MAP claims.[25] Another factor, which seems to have come into play especially in recent years, is that some adjustments have involved very large amounts. Some involve tens or even hundreds of millions of dollars, which is clearly too significant to deal with by other means.[26]

By the 1980s, dissatisfaction began to grow from TNCs or their tax advisers. Their main concerns were that: the MAP did not guarantee to eliminate double taxation; cases could take a long time; they were not necessarily given an opportunity to present their case; and cases were not necessarily considered on their individual merits but negotiated as a package deal. The solution proposed was that if cases could not be resolved for a specified period, they should be referred to binding arbitration. However, when the OECD Committee on Fiscal Affairs first reviewed these arguments it firmly rejected them (OECD 1984). It found that although the MAP was ‘less than perfect’, it was an ‘efficient and flexible instrument’; cases were relatively infrequent, although admittedly regulation of transfer pricing was quite recent, so the fears of increased conflicts should not be exaggerated. To guarantee elimination of double taxation could make transfer pricing manipulation riskless, and it was not clear whether arbitrators would be expected to decide on a pragmatic or principled basis. Instead, it recommended some improvements to the MAP.

There was nevertheless a continued growth in MAP cases. The OECD began to collect data a decade ago, and these show that cases have more than doubled in that time to around 2,000 per year (making some allowance for double counting), with the backlog growing slightly faster (see Appendix). Responses to the regular surveys by Big Four firm Ernst & Young indicate that between 2003 and 2010 only some 18 per cent of the 877 companies responding had referred a case to the MAP in the previous four years (Ernst & Young 2010: 12), but by time of the 2013 report (Ernst & Young 2013) this had grown to 28 per cent (in 2010-2012). At the same time, it is important to note that these surveys also indicate that TNCs are even less likely to have recourse to domestic litigation than to use the MAP.

Much of this growth is likely to be due to the introduction or strengthening of transfer pricing enforcement, especially when based on the OECD methods. Another likely factor is the greater sophistication of tax planning techniques, going beyond the use of classic tax havens. Since these generally do not have tax treaties, the MAP is not available with them. TNCs have since the 1990s increasingly resorted to tax-driven restructuring, fragmenting their operations and supply chains, so that affiliates in high-tax countries are deemed to assume low risks and must pay royalties for intangibles, and hence earn low or no profits under OECD rules. OECD countries such as Ireland, Luxembourg and the Netherlands have offered facilities designed to facilitate such structures, and others have followed suit with schemes such as the ‘patent box’. This has put greater strain on the OECD transfer pricing rules, which rely on subjective judgements about the value attributed to different functions.

The bulk of MAP cases have occurred among the main OECD countries, and so far little use has been made of the procedure in developing countries. A significant exception is India, which introduced transfer pricing regulations based on the OECD Guidelines in 2001. Their enforcement led to a rapid rise in disputes, many due to the subjective nature of the

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24 This applies whether the additional foreign tax results from an adjustment by the foreign authority or by the US IRS, see Cole and Maher (2012: 72).

25 The UK guidelines for MAP state that such a unilateral adjustment reducing a UK tax liability is unacceptable (HMRC 2011: para. 52).

26 The UK’s HMRC have reported the yield from transfer pricing inquiries over five years as varying between £436 million and £1,595 million: <https://www.gov.uk/government/publications/transfer-pricing-statistics-2013-to-2014/transfer-pricing-statistics-2013-to-2014>. The report in 2012 mentioned that fluctuations from year to year are ‘principally due to the effects of a small number of very large cases’.

judgements involved in applying the arm's length principle (Vijayaraghavan 2012). It is estimated that by 2007-8, after seven years' enforcement, adjustments worth a total of $16 billion had been made, with $9 billion in that year alone, resulting in a backlog of 3,000 cases in the tax tribunals by 2012 (Supekar and Dhadphale 2012); they are now estimated at double that number.

India does not publish data on its MAP cases. However, a conflict is reported to have erupted between the Indian and US officials responsible for the MAP, leading to the replacement in July 2013 of the Indian official (Parillo 2013).[27] Following the election of a new government with a more favourable policy towards foreign investors, in January 2015 the US and Indian CAs signed a Framework Agreement under the MAP procedure. This agreement had the stated aim of facilitating resolution of some 200 conflicts relating to the information technology sector, and a year later it was reported that about half had been resolved.[28]

In contrast, Brazil has experienced few, if any, claims despite, or more likely because of, the fact that it applies a system of fixed margins for transfer pricing, regarded as unorthodox by the OECD. Argentina does not yet have a procedure for invoking the MAP (Grondona forthcoming), but China has seen a recent growth in cases according to data reported to the OECD (see Appendix, Table 1).

Now many have expressed the concern that, as developing countries have also been strengthening the enforcement of international tax rules, especially on transfer pricing, there will be a further increase in conflicts (OECD 2015b). Indeed Jeffrey Owens, the former head of tax at the OECD, has been quoted as forecasting a 'tsunami of disputes' (Kollman et al. 2015: 1190). Although at present developing countries have had very few MAP cases, they are beginning to emerge,[29] and may increase, especially if those countries adopt interpretations that may be considered unorthodox.

1.2.4 The introduction of arbitration

Despite the views in the 1984 report, by 1990 some OECD states began to introduce arbitration procedures.[30] This occurred in some bilateral tax treaties, and notably among EU member states in a multilateral Convention agreed in 1990, which came into force in 1995. It should be noted that this covers only disputes relating to attribution of income, and not other treaty interpretation issues.[31] The OECD model convention was revised in 2007 to include arbitration, and the revised UN model issued in 2011 included an alternative version B of Article 25 with an arbitration provision a little different from that of the OECD. There has been a rapid spread of treaties including different versions, mainly of the OECD model (for a detailed comparison see Pit (2014)). A recent count by Martin Hearson found some 205 (see

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27 The US data (Appendix Table 4) show a big jump in MAP requests due to foreign-initiated adjustments in 2013, and a growing backlog, some of which is likely to be due to cases with India.

28 See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=135867>.

29 Notably, two MAP claims have been made as a result of assessments made by the Uganda Revenue Authority (URA), which were discussed in a recent professional conference, but the sources cannot be quoted. Both involve telecommunications companies. Although the details cannot be verified, a MAP claim appears to have been made in South Africa by MTN, due to disallowance by the URA of management fees paid to an affiliate formed in Mauritius but claiming residence in South Africa. The other claim resulted from the application of capital gains taxes to the acquisition of Zain by Bharti (Airtel); the Uganda High Court decided in September 2014 that Uganda had jurisdiction to tax the transaction; the issue is still under consideration by the URA, but Bharti has brought an MAP claim in the Netherlands, where the share transfer took place. Uganda's tax treaty with South Africa of 2001 does not provide for arbitration, but that with the Netherlands of 2004 does, at the request of either tax authority, if an MAP claim has not been resolved within two years. The MTN dispute involves $200 million, that with Zain $85 million - considerable sums, especially for a poor country. The similar high-profile conflicts involving Uganda and oil firms Tullow and Heritage did not result in MAP claims, since the transfers took place in countries without tax treaties; however, claims were made under BITs (Finance Uncovered 2015; Mbanga 2015).

30 Various alternatives have been formulated, especially as regards the degree of compulsion, which will be analysed below.

31 For a detailed analysis, see Pit (2015).

Appendix, Table 8), negotiated especially by countries which aim to offer 'treaty shopping' facilities, and including a number with developing countries (Hearson 2015).

The common feature of all these arrangements is that arbitration does not replace the MAP but aims to supplement it, essentially as a spur to ensure resolution of cases by agreement between the CAs. Under all versions of the procedure the CAs must first attempt to resolve the conflict by agreement, and reference to arbitration occurs only if they fail to do so within a specified period. Usually this is two years, although the UN model has three years, and in several versions the CAs may by agreement extend it. Indeed, in some versions their consent is required for a case to be referred, in which case, of course, arbitration is not mandatory. In addition, all versions apply the same strict secrecy to the arbitration as to the MAP. Some, especially the EU convention, allow publication of the award, provided that it is agreed by both the parties and the taxpayer – but this has never occurred.

The procedures differ mainly on how and by whom a reference to arbitration takes place, and hence to what extent and in what way it is mandatory. A reference may require: (i) the agreement of both CAs; (ii) a request by either CA (the UN model); (iii) a request by the taxpayer (the OECD model); or (iv) can be automatic if the CAs have failed to resolve the case within a specified period (in the EU Convention, after 2 years). The consent of the taxpayer may be added to the other requirements – indeed, in the current US model the taxpayer can end the procedure at any stage. For some – for example, almost all UK treaties – the taxpayer can reject the MAP decision and rely on domestic law (Pit 2015: 92; HMRC 2011: para. 22).

The other common feature is that very few arbitrations have actually taken place. This can be attributed to the reluctance of states to submit such cases to external decision. This is most evident where arbitration requires agreement of both CAs, hence in effect is not mandatory. Several experienced commentators have said that this is hardly surprising, since if the CAs have failed to reach agreement it would be because neither is willing to compromise, so they would be unlikely to agree to accept a third party's decision.[32] Even under the EU Convention, which mandates reference to arbitration if the CAs have failed to agree within two years, there have been at most half a dozen known arbitrations in twenty years.[33] The rarity of reference to arbitration has indeed been praised as the merit of the procedure, on the grounds that its success is seen in the pressure placed on the CAs to reach agreement.[34]

Building on this experience the US has adopted a new model,[35] which has now emerged with considerable support in the international tax community – although less so among academic commentators, at least outside the US (see Altman 2005: 427, Pit 2015: 16, OECD 2015b). This has three main features (Brown 2015). First, it lays down a strict timetable: the arbitration procedure must begin no later than two years after the case commenced, and its timetable ensures completion within one more year. Secondly, the arbitrators do not give their own independent opinion, but must choose between the last best offers tabled by the state parties.[36] This is made explicit in the US model treaty provision:

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32 See Brown (2015), and Dunahoo, in Bell (2004); Lodin (2014) reports that in his experience as a member of two arbitral commissions under the EU convention, and that of others to whom he has spoken, they have never seen any sign of willingness to compromise from the tax authorities.

33 Lodin, who has been involved in two, states that there have been five (Lodin 2014). The experience of the first one, between France and Italy concerning Electrolux, was reported to and discussed in the EU's Joint Transfer Pricing Forum and elsewhere; the procedure apparently took 18 months due to logistical problems and its costs were disproportionate to the sums at issue (Pit 2015: 19; D'Alessandro 2009: 1160).

34 See the arguments put forward by UN Committee members in favour of arbitration, included in the Commentaries to the 2011 Model: 369.

35 Negotiated mainly with Canada, although actually implemented first in the protocol of 2006 with Germany (Brown 2015); this amended the US-German treaty of 1989, which itself was the first modern bilateral treaty to include arbitration, although with the voluntary version.

36 Also described as 'baseball arbitration', because it is sometimes used for deciding salaries for major league baseball players in the US.

> The determination reached by the arbitration panel in the arbitration proceeding shall be limited to one of the proposed resolutions for the case submitted by one of the competent authorities of the Contracting States for each adjustment or similar issue and any threshold questions, and shall not include a rationale or any other explanation of the determination. The determination of the arbitration panel shall have no precedential value with respect to the application of this Convention in any other case.[37]

Thirdly, the decisions are not published – indeed, the entire procedure, including the existence of a case, is subject to strict confidentiality. Informed commentators suggest that perhaps ten or a dozen arbitrations have taken place in the nine years since the first such treaty, mainly between the US and Canada, and that the US has so far won all of them.[38]

2 The MAP and international tax administration

2.1 The rejection of adjudication

The MAP is essentially an administrative procedure, and the addition of arbitration has not changed this. The main aim of introducing arbitration has been to reinforce the MAP by ensuring a guaranteed outcome, preferably to a strict timetable. There seems less support from either tax authorities or most tax advisers for a procedure for international resolution of tax treaty disputes by the principled decision of an independent adjudicator.

The procedural models adopted for arbitration have few of the features of third party adjudication. This is explicitly so in the case of the model which appears to have been most successful and is currently most favoured – LBO arbitration. This requires no hearing or process of fact-finding as in judicial proceedings, and formally precludes the arbitrators from deciding on the basis of their own judgement. Some consider that the main advantage of this procedure is that it encourages the parties to seek a compromise, since if the conflict reaches the arbitrators they are likely to prefer the offer of the party which conceded most (Brown 2015); while others suggest that it deters the adoption of unorthodox positions likely to be rejected by arbitrators. All the models also exclude other features of adjudication: in particular there is no attempt to ensure that like cases are treated alike. Indeed, the aim is quite the contrary, as the procedure is entirely secret. This precludes reference to a previous case, although no doubt tax advisers may have knowledge of cases with which they have previously been involved on behalf of another client. The LBO procedure, in particular, is deliberately designed to avoid creating legal principles or precedent (Brown 2015).

The EU convention procedure is a hybrid. Unresolved conflicts are referred to an advisory Commission, with an even number of ‘independent persons of standing’, but also including representatives of each CA – who are hardly independent arbiters. However, it allows the enterprises concerned to appear or be represented before the Commission, which suggests that the procedure is a hearing. It also provides for production of a reasoned Opinion, which may be published by agreement of both states involved as well as the taxpayer, but in practice this has never occurred. The CAs are then obliged within six months to take a decision that eliminates the double taxation. This need not necessarily follow the

[37] US Model Income Tax Convention 2016, Article 25.9.j.

[38] See Rosenbloom in Lang and Owens (2015: 163), who gives a lower estimate; my own unverified information comes from off-the-record private discussions, and is included here only because of the dearth of better sources.

Commission's Opinion, although such a deviation seems unlikely. A report from experts who have served as independent members of Commissions has recommended moving towards a more adjudicative model, by excluding national representatives from the decision stage and establishing publication as the norm (European Commission 2013).

However, the Convention procedure is regarded as at best a limited success, not least because of the evident reluctance of the CAs to allow cases to reach the arbitrators. Consultations are now taking place on revision of the procedures. There seems likely to be an attempt to introduce at least the possibility of a US-style LBO procedure, perhaps as an option. Such a revision of the Convention would require a conference and agreement among all the state parties. However, the Commission may decide to initiate a new approach under European law rather than a separate convention. This would raise wider issues, since it could give jurisdiction to the European Court of Justice in the last instance.

2.2 The role of expertise

The main characteristic of the MAP is that it has been the preserve of a small and exclusive group of international tax specialists. This has been reinforced by the 'revolving door', which in a number of countries allows or even encourages movement between the public sector and private practice. As a result many former officials, some with experience as competent authorities, now practice with international tax firms, especially the Big Four, and international law firms such as Baker McKenzie. Arbitrators are also very likely to be drawn from this community. There are, of course, safeguards to prevent bias in any individual case, but the overall result is that the process takes place among a small group of like-thinking insiders. Indeed, it may be regarded as a strength of the system that there is such an epistemic community with shared technical expertise, on the basis of which consensus may be easier to achieve. Indeed, many of the proposals in the BEPS Action 14 report aim to reinforce this, calling for the CA to be independent from both policy and audit functions within the tax authority (recommendations 2.3 and 2.4), and proposing a strengthening of collective standards through the MAP Forum of the OECD Forum on Tax Administration.

The difficulties and dangers of such a system should, however, also be clear. It places a premium on technical expertise, which requires considerable investment of social, cultural and intellectual capital. This makes it very hard for newcomers to break in to the charmed circle. The shared understanding of the members of such groups can become ossified and closed to different approaches. These are clearly disadvantages for developing countries. Further, the emphasis on technical factors aims to depoliticise decision-making, even in issues such as tax that inevitably affect the conditions of competition between business firms, and raise questions of fairness. Although a technical consensus can be strong it may also be fragile, especially when the assumptions underpinning it come under wider social and political pressure. This, perhaps, explains the need to protect the decisions not only behind the usual veil of technocratic discourse, but a dense cloak of secrecy.[39]

All these problems have been apparent in the MAP, contributing to both the growth of conflicts and the increased difficulty in resolving them. They have become most acutely evident in the clash between the US and Indian tax authorities, although this appears to have been smoothed over (see Section 1.2.3 above). They also account for the resistance of many smaller states, and especially of developing countries, to accepting binding MAP, especially by arbitration. The community of experts is currently dominated by people from OECD countries, and although the expansion of arbitration would offer opportunities for newcomers, the price of entry will inevitably be their acceptance of the existing orthodoxy, even if it is unsuitable for developing countries. Such countries are nevertheless coming

[39] For a more extensive discussion of these issues, see Picciotto (2011, ch. 10.2) and Picciotto (2015).

under strong pressure to accept arbitration, notably in negotiation of bilateral treaties – a number of which now include arbitration provisions (Hearson 2015).

2.3 The interaction with international trade and investment

Although the emergence of arbitration in international tax has some similarities with other areas, such as trade disputes and investment arbitration, it differs in key respects.

Unlike most trade and investment treaties, tax conventions are incorporated into national law and hence give enforceable legal rights to taxpayers. Hence, domestic courts apply tax treaty provisions and in doing so refer to the Commentaries to the model conventions, and often even to the OECD *Transfer Pricing Guidelines*, although they are only international 'soft law'.[40] The MAP provides an additional special remedy for taxpayers involved in international transactions, which may be pursued in parallel with domestic litigation. This creates difficulties, and some countries require a choice to be made – although this may cause its own problems. The problem is greater if international arbitration is introduced, and in many countries domestic litigation must be completed, suspended or abandoned before a case can proceed to arbitration.[41] Such a requirement of exhaustion of local remedies is common for international claims but it is seen as contrary to the aims of the MAP, which seeks a rapid consensual solution. Yet to accord priority to international adjudication would be to allow it to override domestic law. Such concerns about sovereignty are central to the conundrum of international tax dispute settlement.

Nevertheless, over the years some commentators have advocated the judicialisation of international tax disputes (e.g. Lindencrona and Mattsson 1981; Altman 2005; Kollmann et al. 2015). There has indeed been a shift towards the use of arbitration, although, as discussed in Section 2.1, in the tax field this has not taken a judicial form. Specialists in international trade or investment dispute resolution have also become interested in the possible opportunities in the tax field. This includes some connected with bodies such as the International Chamber of Commerce and the Permanent Court of Arbitration (PCA),[42] with a long history of providing arbitration of international business issues. Both trade and investment dispute settlement procedures have become judicialised in the past twenty years, although in different ways, and in both cases this occurred after a long period of being dealt with through primarily political or diplomatic procedures (Picciotto 2011: chs. 5.2 and 8.3).

Indeed there are overlaps, since some tax measures may be contrary to provisions in international trade or investment agreements. In such cases, a tax question may be referred to the more judicialised procedures now available under such conventions. A significant number of such cases have indeed arisen. An early example was the long-running dispute, from 1971 to 1999, over US tax exemptions on income from export sales, which were the subject of complaints by European states under the General Agreement on Tariffs and Trade (GATT). The US Treasury, which led the advocacy on the US side, counterclaimed that the more general exemption of foreign income by many European states also constituted an

40 In the UK, under the TIOPA, see Footnote 9 above. Similar provisions have been made more recently in anglophone African countries, such as Nigeria and Tanzania (even though they are not OECD members): see Tanzania Income Tax (Transfer Pricing) Regulations 2014 s.9. In Kenya, the High Court allowed an appeal against a tax adjustment by Unilever relying on the Guidelines, even though they were at that time not mentioned anywhere in Kenyan law. 'We live in what is now referred to as a "global village". We cannot overlook or sideline what has come out of the collective wisdom of tax payers and tax collectors in other countries. And especially because of the absence of any such guidelines in Kenya, we must look elsewhere' (Judge Alnashir Visram, *Unilever Kenya v. KRA* 2005, 12). A Malaysian court has upheld a transfer pricing method based on the Guidelines, rejecting an adjustment made by the tax authority under local law, which it held to be invalid *MM Sdn Berhad v Ketua Pengarah Hasil Dalam Negeri* Appeal No PKCP(R) 55/2009 (2013) MSTC ~10-046 (2013).

41 See EU Convention, Article 7.3, which allows this if the domestic law of the state does not permit the CA to derogate from the decision of its judicial bodies.

42 Indeed, the PCA has moved with alacrity to establish TRIBUTE, a facility offering a range of procedures to help resolve international tax disputes <http://www.tribute-arbitration.org/>.

export subsidy, insisting that both cases should be heard by the same GATT Panel, and that it should include a tax expert. These tactics partly succeeded, in that the GATT Panel balanced its finding against the US with a rather elliptically-worded ruling against the European measures also (Hudec 1993: 82-3). This led to a compromise under which both reports were accepted subject to an ambiguous `understanding' (ibid. 91-2). This simply sowed the seed for a subsequent renewal of the disputes under the GATT's successor, the WTO.[43]

Unsurprisingly, some consider it inappropriate for trade or investment rules to limit tax sovereignty (Samuels 2008). However, from the perspective of investment or trade law a blanket exclusion of tax issues is also inappropriate. A conflict with trade obligations is more likely to be caused by indirect taxes, indeed trade agreements such as the GATT explicitly apply to such taxes, and the GATT does not include any exclusion or carve-out for tax measures. However, as the GATT disputes show, direct tax regimes can also be considered to constitute trade subsidies or to involve discrimination. This becomes more acute in relation to trade in services. Hence, trade rules need to be taken into account when formulating tax policies, notably in considering cross-border taxation of digital sales.[44]

This tension was played out in the negotiation of the General Agreement on Trade in Services (GATS) in the WTO package of agreements. Taking place soon after the disputes under the GATT, as well as other tax conflicts between the US and European states, the result was the inclusion of carve-outs for tax measures in the GATS.[45] Similar complex provisions have now been been included in the Trans-Pacific Partnership (Herzfeld 2016), and the draft Transatlantic Trade and Investment Partnership (TTIP) agreement. Such provisions governing the interaction of these regimes attempt to prevent normal international tax issues from being decided in other forums, but they are not completely excluded. There is a long history of state actions directed at foreign investors taking the form of taxation measures, which have been treated as indirect expropriation, and some argue that this has become a more acute problem with the expansion of the regulatory state (Wälde and Kolo 2008). In addition, the very broad nature of the non-discrimination provisions in investment agreements can create opportunities for legal arguments that may be unexpected, unless specific exclusions are inserted.[46] Since many such agreements include an investor-state dispute settlement procedure, they provide a possible avenue for TNCs to make a direct claim for arbitration of a tax-related complaint.

To manage this interaction, many BITs include a procedural mechanism which acts as a filter to exclude tax-treaty related issues. This requires a claimant asserting that a tax measure is in breach of investor protection provisions to first notify the competent tax authorities of both states concerned. The claim cannot proceed if those competent authorities agree, within a specified time limit (usually six or nine months), that the tax measure does **not** fall within the investor protection provisions. Such a provision is included in the US model BIT, and in many actual BITs of the US and other states, as well as some multilateral agreements.[47] The US model BIT also specifies that the taxation measures are covered only by the investment

43 See McDaniel (2001), Slemrod and Avi-Yonah (2002) and Herdin-Winter and Hofbauer (2006). For an analysis of the shift towards judicialisation of trade dispute resolution, see Picciotto (2005).

44 This option is discussed in the report on BEPS Action 1, *Addressing the Tax Challenges of the Digital Economy,* which points out that destination-based sales taxes are favoured by trade rules (OECD 2015c: 30); it also points out that imposition of a withholding tax on payments to foreign suppliers for cross-border sales would conflict with trade rules (OECD 2015c:115).

45 Discussed by several of those involved in the negotiation in a Panel at the annual meeting of the American Society of International Law in 2008 (Samuels 2008).

46 The European Commission included a provision (Article 2.4) in its negotiating draft for the TTIP which would exclude decisions on state aid from the definition of investment measures. The US has complained that the use by the Commission of its powers under state aid provisions to attack tax transfer pricing rulings made by some EU states such as Ireland and Luxembourg is discriminatory against US-based TNCs.

47 Kolo (2008). Other BITs do not include the procedural filter, notably those of The Netherlands, which provide only that the non-discrimination obligations of the BIT do not extend to advantages granted under a tax treaty.

measures concerning expropriation and performance requirements, and that in case of an inconsistency tax treaty provisions override those of a BIT, and the competent tax authorities have sole responsibility for deciding whether there is an inconsistency.

Hence, some tax-related cases have been brought under investment agreements. They especially concern claims of discriminatory or retroactive taxation, and windfall or capital gains taxes particularly in extractive industries (Wälde and Kolo 2008; Sidhu 2014; Transnational Institute 2016). The most egregious example has been the long-running dispute concerning the seizure by Russia of the Yukos Oil Corporation, allegedly for tax evasion. This resulted in several claims, mainly under the Energy Charter Treaty, with a final award covering three claims in 2014 (Yukos Claims 2014). Claims under BITs have included Heritage Oil against Uganda, and still pending claims by Vodafone and Cairn Energy against India, all relating to capital gains taxes, and in the Indian cases focusing on retroactivity. Also, a WTO Panel in 2015 accepted some of the complaints by Panama under the GATS against Argentina's regime for blacklisting non-cooperating tax jurisdictions.[48]

The availability of adjudication through parallel regimes may act as a spur for more formalised, or at least more effective, dispute settlement for tax conflicts. However, a shift towards more formal adjudication of international tax disputes would further complicate these interactions. Some concerns have been expressed about the tendencies to fragmentation of international law due to the rise of different but overlapping global regimes. Nevertheless, pluralism, or more pejoratively turf wars, is likely to be a continuing feature (ILC 2006; Young 2012).

The experience of arbitration or adjudication in these related fields may have suggested to some that it could be extended also to tax, but it should be a salutary warning. The ISDS procedure under BITs can now fairly be described as in crisis. Developing countries in particular have reacted against the procedure, leading some, such as Indonesia and South Africa, to cancel many of their BITs, while Bolivia, Ecuador, Indonesia, and Venezuela have denounced the World Bank's Convention for settlement of investment disputes. India issued a new model investment treaty in 2015 that considerably restricted investors' rights, including the exclusion of all taxation measures, and in July 2016 moved to terminate or renegotiate existing treaties (Singh and Ilge 2016).

Criticisms of the ISDS have mounted, focusing especially on the illegitimacy of arbitrators chosen ad hoc, some with conflicts of interest, adjudicating on public policy issues affecting substantial public revenue, often under a cloak of secrecy (UNCTAD 2015: 4). It is not hard to envisage that similar criticisms would be made of international tax arbitration. The WTO system has been much less attacked, no doubt because it is a much more transparent and clearly adjudicative procedure. There are clearly limits to how far conflicts between states involving sensitive areas of sovereignty can be dealt with by delegated powers through administrative action, especially where they concern powerful economic actors such as TNCs.

3 The reform of international tax dispute resolution

Too much of the current discussion treats arbitration as the solution, without first analysing the nature of the problem. Reform proposals should first address the causes and

48 *Argentina - Measures Relating to Trade in Goods and Services* WT/DS453/R; the decision is under appeal.

characteristics of international tax disputes, and then consider how to facilitate their resolution. Regrettably such an analysis can at present only be speculative, due to the almost complete lack of published data about the nature of the disputes referred to the MAP, and the reasons for the difficulties that CAs appear to experience in resolving them. Nevertheless, an attempt can be made to evaluate the proposals that have been made against the available evidence.

Perhaps the most extensive set of reform proposals was put forward by Altman (2005). He proposed establishment of a Global Tax Organisation, which would supervise a reformed MAP process. Within this he suggested two types of adjudication: (i) an arbitration system for fact-intensive matters especially transfer pricing ‘allocation’ cases, which in his view should remain secret, and (ii) a full-blown International Tax Tribunal, especially for treaty interpretation issues, providing non-binding advisory opinions to national courts. These ambitious and sophisticated proposals are beyond what currently seems practical, but consideration of the reasoning behind them may be helpful.

3.1 The institutional framework

A global tax organisation could indeed provide a more legitimate framework for international tax administration, which could include dispute resolution. Despite several initiatives, attempts to create such a body have so far foundered.[49] The OECD continues to be by far the best resourced body in this field, especially in relation to international tax treaties and their administration. It will now be open to all states through the Inclusive Framework for BEPS, which aims to recruit any state willing to become a BEPS Associate (OECD 2016). This entails a commitment to implement the minimum standards in the BEPS project package, which will be monitored through the classic OECD procedure of peer review. In exchange they can participate on an equal basis in the BEPS-related work of the Committee on Fiscal Affairs.[50]

The minimum commitments include the recommendations from Action 14 to strengthen the MAP, compliance with which will be monitored through the OECD’s Forum on Tax Administration. The basic commitments are to include in all tax treaties paragraphs 1-3 of Article 25; to create a domestic procedure for complaints to the CA that complies with a number of specified standards; and to accept access to the MAP and implement resulting decisions. The best practice recommendations are also quite extensive, and some envisage changes to the treaty commentary. These include clarifications specifying the circumstances in which a complaint to the CA may be pursued in conjunction with a court case, including that the CA may accept a claim that has not been found justified by a court (OECD 2015a: 33). Although this and other proposals are not part of the minimum standard but best practices, they will apparently be implemented by changes to the treaty model and commentaries.

There will also be important further work on Article 25 and its commentary, including on the nature of the obligation to resolve conflicts (discussed below). This presumably will be done as part of the BEPS project, with the enlarged participation. It is claimed that all states will participate in the Inclusive Framework on an equal basis, although many developing countries will feel that they would remain marginal participants in a process initiated and dominated by OECD countries.[51] They would presumably be obliged to enter reservations to

[49] Notably Tanzi (1999), Zedillo (2001). The latter report resulted in a slight upgrading of the UN body from a Group of Experts to a Committee of Experts (since 2005). Attempts since then to upgrade the body further, notably at the UN conference on Finance for Development in Addis Ababa in June 2015, have failed, due to opposition from some key OECD countries.

[50] It is beyond the scope of this paper to discuss this development or its ramifications.

[51] The Inclusive Framework covers only the issues being dealt with in the BEPS project, and under OECD rules officials servicing the project must at present be nationals of OECD countries.

any changes to the OECD model or its commentaries with which they do not agree, like the OECD states.

The UN Committee, with some 2 per cent of the resources of the OECD,[52] will continue to play a valiant but minor role. It agreed in 2015 to create a subcommittee on dispute resolution, which may take a different, although complementary, perspective. However, the BEPS project has already resulted in changes to the OECD model treaty, and to its commentary. The intention is to introduce these rapidly into actual bilateral treaties through the proposed multilateral convention, which developing countries are also invited to join. It is not clear how far the UN Committee can continue to maintain any independence in its own work on the UN model treaty and commentary in relation to issues being dealt with under the BEPS project, including dispute resolution. This unsatisfactory institutional compromise creates a legitimacy deficit that is hard to overcome. The principled case for a global tax organisation seems overwhelming, but the practical and political obstacles to creating one are equally substantial.

3.2 Arbitration or adjudication

Altman proposed two types of third-party procedure: arbitration and adjudication. This rests on the distinction between 'fact-intensive' issues, which he suggests are suitable for arbitration, and treaty interpretation cases, which could be adjudicated. The role of arbitrators would therefore be as specialist experts capable of determinations on complex factual issues. This could also justify secrecy of the arbitration, on the grounds of the need to protect commercially confidential information. Altman justifies secrecy on the different grounds that publication would open up disputes to wider debate and politicise them, making them harder to resolve (Altman 2005: 424).

However, it does not seem that the problem even in allocation cases is the difficulty of ascertaining or understanding complex facts. Such issues do arise, especially in profit allocation cases, but fact-finding will already have been done by specialist staff in the national tax administrations at the audit stage, and perhaps also by the CA. If the CAs have nevertheless failed to agree, it will be over the appropriate categorisation of the issue. In particular, in allocation cases the conflicts are likely to concern which transfer pricing method to use, and how to apply it. This may involve detailed technical issues, but they are not merely factual. Arbitration procedures in practice aim to avoid leaving it to arbitrators to conduct a fact-finding process, and indeed the LBO version precludes this.

It seems clear that the problem lies rather with the difficulty of reaching agreement on the principles to be applied, and how to apply them. This is greatly exacerbated in allocation cases by the ad hoc nature of the functional analysis required, due to the independent entity principle. This approach means that the all-important issue of how to allocate the profits of a TNC is dealt with by a series of specific decisions on categorisation, which require ad hoc and relatively subjective judgements. Where the CAs disagree, they would understandably be reluctant to have the issue decided instead by the judgement of an independent third party.

This appears to explain why the EU Convention's more adjudicative model has been unsuccessful, while the US seems to have had more success in recent years in reducing its

[52] The Secretary of the UN Committee, Michael Lennard, has frequently pointed out in public that he is that Committee's only full-time professional staff member. Precise staff numbers of the OECD Centre on Tax Policy and Administration are not published. They vary according to the scope of work taken on, not all of which is directly related to the Committee on Fiscal Affairs; nevertheless, its staff can conservatively be estimated as over 50.

backlog of MAP cases.[53] This seems attributable firstly to the introduction of LBO arbitration, and secondly to the rapid resolution of 100 cases with India under the framework agreement of January 2015. These successes do not seem to be due to the contribution of arbitrators in formulating and clarifying the appropriate principles to be applied in individual cases. The LBO method emphasises compromise. This is unlikely to take the form of simple bargaining over monetary amounts, but parties may make concessions over the applicable methodology with regard to the resulting monetary outcome. Similarly, the framework agreement was clearly not a package deal over dollar amounts, but will have established the methodology to be applied to the class or group of cases to be dealt with. Nevertheless, its aim was clearly to facilitate rapid processing of a large number of cases as a package, with both sides keenly aware of the likely monetary outcomes. As always, the concerns of tax authorities for government revenue will be tempered by wider considerations of finance ministries of the effects on foreign investment, reinforced by powerful business lobbies.

On the other hand, treaty interpretation issues do seem more amenable to principled adjudication, as Altman suggests.[54] In his schema, a full blown International Tax Tribunal would have permanent judges (rather than arbitrators chosen ad hoc), who could develop 'a *lex tributum*, an international law for taxes' (Altman 2005: 434). He also proposes that its decisions would not be binding, but only advisory opinions for national courts. This would overcome many of the sovereignty dilemmas, making it easier for governments to sign up to the scheme, as well as avoiding conflicts with national courts by enlisting them in a cooperative process (Altman 2005: 434).

At present, however, CAs seem no more willing to refer this type of conflict to third parties than allocation cases. Nor do any of the main participants in the MAP support the shift to an adjudicative model such a proposal entails. A Tribunal would at a minimum be expected to formulate its decisions as reasoned opinions, and publish them. The EU Convention moved in this direction, by providing that the conclusions of its Commissions should take the form of a reasoned Opinion, which might be published. Yet both CAs and taxpayers involved in cases have not only rejected publication of Opinions but have continued to insist on complete secrecy, to the regret of some of the independent members of Commissions (Lodin 2014: 174).

A shift towards adjudication was also rejected in the consultations on BEPS Action 14 on making dispute resolutions more effective. The Discussion Draft on this action point included a proposal to add a new paragraph to the Commentary of Article 25 of the model treaty (OECD 2014: 6). This would clarify that the obligation in that Article for CAs to endeavour to resolve disputes would mean:

> that the competent authorities are obliged to seek to resolve the case in a principled, fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law.

Comments on these proposals by some civil society organisations spelled out that formalising such a legal obligation would imply a judicialisation of the MAP. The submission to this consultation from the BEPS Monitoring Group commented on this proposal as follows.

> We agree with this objective, but suggest that the implications of these important criteria should be spelled out in more detail in the Commentary. In our view, they are as follows:

53 Appendix Tables 1a and 5 indicate that the US case backlog peaked in 2009, falling by 2012, then rising again (perhaps due to the increase of cases with India), but a rise again in 2015; while Table 6 shows a significant reduction of the overall processing time 2011-2014, and also a rise in 2015.

54 It should also be borne in mind that cases may involve both types of question: e.g. in deciding whether there is a permanent establishment, a key issue is what profits should be allocated to it.

> *principled*: this requires that outcomes should take the form of reasoned decisions, based on analysis of the facts of the case, the applicable rules and how they have been interpreted and applied to the specific case;
> *fair*: like cases should be treated alike, and decisions should be published, to ensure consistency;
> *objective*: decision-makers should be independent of the disputing parties and have no vested interests or conflicts of interest; and rules to be applied should be formulated so as to be easily applicable to specific cases based as far as possible on their facts rather than requiring value-judgements.
>
> The existing Mutual Agreement Procedure (MAP) in tax treaties is far from achieving this standard. At present it typically entails ad hoc agreements that have been kept secret among tax authority representatives and competent authority personnel. The only other privy parties are a small legion of tax advisers and the involved taxpayers. The inside knowledge they gain is a significant, and very inappropriate, commercial advantage for those tax advisers who may be involved frequently in such proceedings.
> (BMG 2015: 1)

It also went on to spell out arguments for publication:

> Reasons for transparency perhaps need to be spelled out, since tax authorities are accustomed to maintaining strict confidentiality of the tax affairs of individual taxpayers. However, confidentiality does not usually extend to disputes which are referred to tax courts or tribunals, and in most countries these decisions are published. Secrecy is even less appropriate for international tax disputes. Firstly, such conflicts often involve very large sums, sometimes in the hundreds of millions or even billions of dollars. Few democratic countries would normally accept that decisions with such major implications should be taken behind closed doors by unaccountable officials. In cases unilaterally resolved or which are not accepted for MAP, the competent authority will have heard representations only from the tax authorities and the companies involved or their tax advisers. In bilateral MAP cases, the only additional parties involved are the other country's competent authority and occasionally an arbitrator who has been sworn to secrecy. Even more importantly, secrecy greatly undermines all three of the criteria listed above. Publication provides the best incentive for the decision-makers to ensure that the outcome they reach is defensible in principle, rather than the result of an ad hoc bargain. It enables the reasons which are provided to be tested and evaluated through public debate. Both the published decisions and the debate around them can therefore contribute to a better general understanding of how the rules should be interpreted and applied. Creating such a wide and public understanding is crucial to ensuring that the way the principles are interpreted and actually applied is consistent and hence accepted as fair. Transparency of the whole process is central to ensuring that it can be seen to be impartial and objective. A final point, of course, is that knowledge of the bases on which decisions have been reached will help MNCs and other taxpayers plan their activities so as to be within the rules for multiple countries and avoid both double taxation and the need for MAP assistance to correct it.
> (BMG 2015: 2).

The arguments for greater transparency were supported by a submission from Christian Aid, while Global Financial Integrity put forward proposals for a full-blown independent adjudication system (OECD 2015b: 135). However, there was a wide gulf between these views and those of the vast bulk of other commentators representing tax advisers and business, none of which favoured publication of decisions.

The final report on Action 14 no longer included the suggestion of clarifying the Article 25 obligation to mean the resolution of cases 'in a principled, fair and objective manner'. Instead, it stated that further work was needed to produce suitable wording in the treaty commentary. It refers to the need for decisions to be principled and fair only in relation to domestic CA procedures, and objectivity is not mentioned. Indeed, the bulk of both the minimum standards and the best practice recommendations are aimed at domestic procedures. Those concerning the MAP consist of a commitment to resolve cases within two years, to work together with others especially through the Forum on Tax Administration's MAP Forum, which will organise the peer review of compliance with these standards, and to be transparent about the country's position on arbitration.

The Action 14 report does, however, include a best practice recommendation for publication of interpretive mutual agreements. This is in line with existing suggestions in the *Manual on Effective Mutual Agreement Procedures* (OECD-CTPA 2007), as mentioned above (Section 1.2.1). The report states that this procedure 'may be an effective tool to reinforce the consistent bilateral application of tax treaties', and that further work will take place to clarify the legal status of such agreements. However, interpretation is essentially left to states. No explicit role seems to be envisaged for any multilateral body to consider divergences in interpretation, let alone to issue authoritative opinions on them. This seems surprising, in view of the concerns expressed by many that the BEPS reforms will lead to a period of uncertainty. The development of some form of multilateral interpretive agreement might provide a flexible procedure for adaptation of some of these complex reforms of international tax rules in the processes of implementation.

The UN Committee considered the issue of arbitration at its meeting in October 2015, based on an introductory paper from the Secretariat (UN Tax Committee 2015). This paper focused only on 'alternative dispute resolution' (ADR), and aimed to widen the scope beyond mandatory binding arbitration to include mediation and conciliation, and other non-binding procedures. However, the aim of the paper seemed to be to smooth the way towards some form of third party decision-making:

> 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.
> (UN Tax Committee 2015: 15)

The paper highlighted the differences between LBO arbitration and the more adjudicative model, which it termed 'short form' and 'long form' arbitration respectively. In weighing these alternatives, it evaluated the advantages and disadvantages of each, and the UN Committee decided to consider the issue more widely, by establishing a subcommittee on the MAP and Dispute Avoidance and Resolution. This reflected the views of many, especially from developing countries, that the focus should be on the problems of the MAP and their causes, rather than arbitration (Protto 2014).

4 Conclusions

It seems clear that the difficulties of the MAP are symptoms of a deeper malaise of the international tax system. Improvements in the dispute settlement procedures may, at best, provide a partial amelioration of the symptoms, but cannot cure the disease. The underlying causes of the problems centre on the lack of clear criteria for defining and allocating the tax base of TNCs. This has resulted not only in the growth of conflicts between tax authorities, but also a lack of public confidence in the legitimacy of the system.

These pressures led the G20 leaders to mandate the BEPS project to reform international tax rules to ensure that TNCs could be taxed ‘where economic activities occur and value is created’ (G20 2013: 4). The package of proposals released in September 2015 was far-reaching, and provided strengthened powers to tax authorities able and willing to use them. Nevertheless, key issues remain unresolved, especially in relation to transfer pricing, and the tax challenges of the digital and service economy. There will be continuing work on these issues in the BEPS project, now with enlarged participation. At the same time countries have already begun introducing unilateral measures, such as the UK’s Diverted Profits Tax, and India’s proposed ‘equalisation levy’ on digital transactions. Although these are devised as far as possible to be compatible with their legal obligations, they will create increased tension.

International tax rules therefore seem likely to remain uncertain, fluid and volatile, at least in the current period. Hence, it is easy to understand the pressure especially from business tax advisers for mandatory binding arbitration. However, it is clear that there is little support among most practitioners for the introduction of an adjudicative procedure. A few, mainly academics, favour some moves in that direction, such as reasoned opinions and greater institutionalisation of arbitration. However, there seems to be broad consensus among practitioners on the need for secrecy.

The measures proposed for reforming the MAP seem aimed mainly at solidifying the distinct international tax expert community. Competent authority officials would be separated from front-line tax examination staff, to encourage them to give autonomous decisions under the CA procedure. The pressure to resolve cases quickly and by agreement will be increased, especially in countries accepting binding arbitration. Monitoring of the system through peer review aims further to strengthen acculturation to the norms of the specialist expert community. Yet the stress on the need for independence of the CA ignores the concerns about the frequent rotation of roles between public officials and private tax advisers.

This approach would also place increasing strain on tax authorities that are already significantly under-resourced. International tax, and especially transfer pricing, demands highly trained staff who are scarce in any tax authority. Creation of a separate competent authority with the skills to review their decisions is hard to justify as cost-effective. There must also be concern that the intention is to delegitimise methodologies and interpretations of tax norms that are regarded as unorthodox or unacceptable to those dominant in the international tax community. Cloaking the procedures in secrecy will inevitably feed criticism that the intention is to close off debate about alternative perspectives.

Above all, the continued maintenance of the blanket of secrecy over the procedure fatally undermines public confidence, which could threaten the whole tax treaty system. The controversy over the ISDS procedure for international investment arbitration has triggered wide concern, endangering negotiation of major agreements such as the TTIP. The tax treaty system is now also under challenge. A number of commentators have questioned its suitability, especially for host countries of TNCs (Baker 2014; Brooks and Krever 2015), and governments from Argentina to Uganda have been reviewing their treaty policies. The BEPS project had been intended to respond to such concerns and repair the system. Yet it seems hard to see how public confidence can be restored without a much higher level of transparency, including about the actual outcome of decisions allocating the profits of TNCs.

A more effective remedy would be to reform international tax rules to make them clearer and easier to apply. This applies in particular to transfer pricing rules, which seem to be the main source of disputes referred to the MAP, and the most intractable cases. Such a reform should aim to allocate the profits of TNC groups based on clear and quantifiable factors reflecting the actual economic activities and value created in each country. This would not only reduce the volume of conflicts, but also ensure that the disputes that do occur can be adjudicated in a transparent, fair and consistent manner.

Appendix

Table 1 MAP cases for OECD countries and for OECD partner countries, 2006-14

Table 1a: MAP cases in OECD member countries: number at the end of annual reporting periods

Country	2006	2007	2008	2009	2010	2011	2012	2013	2014
Australia	16	23	22	23	27	21	21	23	18
Austria	144	152	105	120	106	110	137	156	180
Belgium	81	95	152	265	142	241	305	317	492
Canada	134	153	186	206	225	225	222	235	257
Chile	0	0	0	0	0	0	0	0	0
Czech Rep.	13	13	4	8	13	14	16	21	26
Denmark	82	82	79	86	67	57	55	57	72
Estonia	N/A	N/A	N/A	N/A	N/A	0	0	0	1
Finland	12	22	20	22	32	37	50	103	103*
France	254	233	328	427	490	539	551	618	549
Germany	476	527	519	543	484	702	787	858	1029
Greece	4	5	5*	5*	5*	27	30	30*	35
Hungary	12	9	10	7	8	4	2	4	8
Iceland	1	1	0	0	0	1	1	0	1
Ireland	4	6	7	13	16	17	22	26	25
Israel	N/A	N/A	N/A	13	13	14	17	18	17
Italy	52	63	56	67	80	102	130	174	250
Japan	67	85	82	90	75	61	70	65	77
Korea Rep.	28	30	30	47	44	59	65	80	98
Luxembourg	31	34	35	38	59	109	76	72	123
Mexico	26	23	14	18	12	11	19	14	16
Netherlands	120	151	127	118	97	99	140	123	198
New Zealand	2	4	1	3	1	1	3	13	18
Norway	25	32	42	51	52	44	36	49	48
Poland	26	25	33	32	26	28	29	44	40
Portugal	43	45	47	47	41	42	47	27	27
Slovak Rep	1	4	5	6	7	9	9	15	14
Slovenia	N/A	N/A	3	1	2	4	4	10	16
Spain	55	109	66	76	84	87	82	79	78
Sweden	94	100	125	103	134	163	198	183	186
Switzerland	33	33	88	143	142	187	231	256	271
Turkey	2	3	2	4	8	4	2	4	4
UK	84	109	126	120	131	133	143	160	190
USA	430	500	578	724	705	686	573	732	956
Total	**2235**	**2671**	**2897**	**3426**	**3328**	**3838**	**4073**	**4566**	**5423**

Table 1b: MAP cases in OECD partner countries: number at the end of annual reporting periods

Country	2006	2007	2008	2009	2010	2011	2012	2013	2014
Argentina	-	-	2	3	3	3*	3*	3*	3*
China#	-	-	-	-	-	-	-	43	55
Costa Rica##	-	-	-	-	-	-	-	-	1
Latvia#	-	-	-	-	-	-	-	0	0*
South Africa	-	-	0	1	4	6	6	6	8
Total	**-**	**-**	**2**	**4**	**7**	**9**	**9**	**52**	**67**

NOTES

MAP cases are reported separately by each country, so the totals include considerable double counting.
* If a country did not report the number of outstanding cases at the end of a reporting period, the number of cases reported is that for the end of the preceding reporting period; if that number was not available, the number reported is that at the end of the subsequent reporting period (marked with an asterisk).
# China and Latvia reported MAP statistics to the OECD for the first time for the 2013 reporting period
Costa Rica reported MAP statistics to the OECD for the first time for the 2014 reporting period

Source: OECD <http://www.oecd.org/ctp/dispute/map-statistics-2014.htm>

Table 2 Average completion time of MAP cases between OECD countries, 2006-14 (for reporting countries, in months)

Average completion time of MAP cases between OECD countries

2006	2007	2008	2009	2010	2011	2012	2013	2014
20.10	18.93	22.42	22.82	27.30	25.39	25.46	23.57	23.79

Source: OECD <http://www.oecd.org/ctp/dispute/map-statistics-2014.htm>

Table 3 Number of new cases initiated in reporting period 2006-14

Number of new cases initiated in reporting period									
	2006	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
Australia	9	13	8	19	21	10	10	8	10
Austria	29	26	36	30	38	35	61	41	49
Belgium	31	30	71	213	120	120	151	124	205
Canada	76	70	85	103	101	94	87	127	127
Chile	0	0	0	0	0	0	0	0	0
Czech Republic	5	10	5	6	8	12	13	7	12
Denmark	15	18	21	22	20	24	24	22	43
Estonia	--	--	--	--	--	0	0	0	1
Finland	1	11	8	5	11	13	14	56	56*
France	104	100	154	169	135	173	181	216	201
Germany	212	186	177	177	150	306	277	267	374
Greece	1	2	--	--	--	5	3	3*	4
Hungary	4	3	1	2	1	0	1	2	4
Iceland	1	0	0	0	0	1	2	1	4
Ireland	3	3	2	6	7	6	12	12	5
Israel	--	--	--	--	4	9	5	3	3
Italy	14	20	14	31	22	41	45	52	89
Japan	37	49	40	44	34	22	31	36	45
Korea	8	9	13	25	13	24	22	23	33
Luxembourg	22	31	31	25	35	75	39	45	116
Mexico	14	11	5	10	4	5	17	12	4
Netherlands	80	57	--	64	51	34	83	75	87
New Zealand	4	5	2	6	4	4	3	14	28
Norway	15	21	30	21	16	7	10	26	18
Poland	11	7	19	14	7	9	5	19	18
Portugal	10	7	5	14	17	15	17	6	11
Slovak Republic	0	--	1	1	3	4	1	2	2
Slovenia	--	--	3	0	2	2	3	6	11
Spain	18	67	24	24	24	18	36	25	33
Sweden	72	61	104	64	104	111	100	65	91
Switzerland	--	45	99	119	65	112	120	131	109
Turkey	0	2	1	3	4	0	0	2	2
United Kingdom	--	55	44	56	68	54	69	79	117
United States	240	257	308	326	252	279	236	403	354
Total	**1036**	**1176**	**1311**	**1599**	**1341**	**1624**	**1678**	**1910**	**2266**

Source: OECD <http://www.oecd.org/ctp/dispute/map-statistics-2014.htm>

Figure 1 Growth of cases between OECD countries

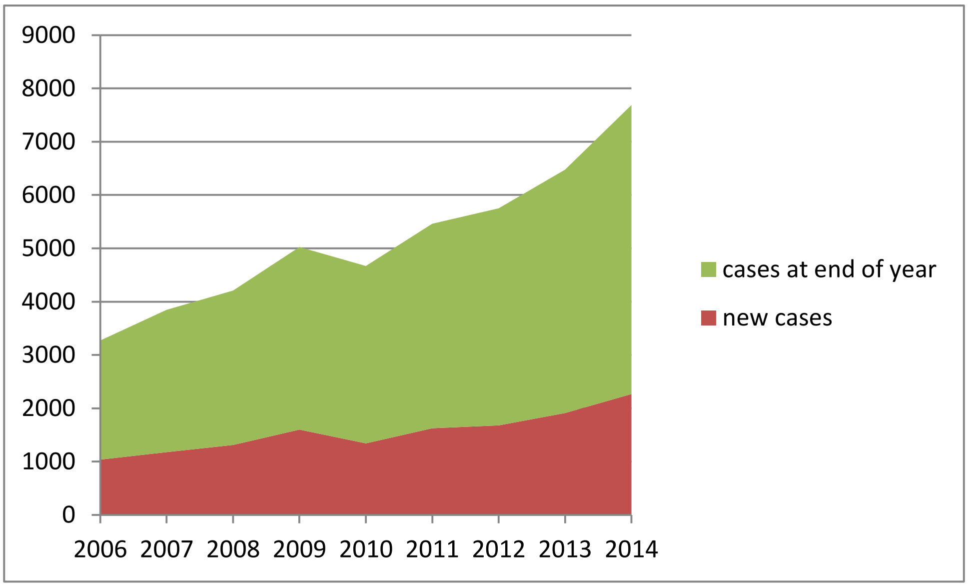

Table 4 US MAP cases received 2010-15

	US initiated adjustments		Foreign initiated adjustments		Combined	
	Allocation	Treaty	Allocation	Treaty	Allocation	Treaty
2010	23	31	77	48	**100**	**79**
2011	25	23	141	48	**166**	**71**
2012	51	18	130	37	**181**	**55**
2013	48	77	218	60	**266**	**137**
2014	86	30	200	38	**286**	**68**
2015	50	15	187	37	**237**	**52**

Source: US Internal Revenue Service, Competent Authority Statistics (2015, 2016)

Table 5 US pending MAP cases 2010-15

	US initiated adjustments		Foreign initiated adjustments		Combined	
	Allocation	Treaty	Allocation	Treaty	Allocation	Treaty
2010	-	-	-		**283**	**198**
2011	-	-	-		**312**	**165**
2012	-	-	-		**403**	**170**
2013	91	91	433	118	**524**	**209**
2014	126	89	592	149	**718**	**238**
2015	152	75	603	168	**755**	**243**

Source: US Internal Revenue Service, Competent Authority Statistics (2015, 2016)

Table 6 US MAP cases average processing time 2010-15 (months)

	US initiated adjustments		Foreign initiated adjustments		Combined	
	Allocation	Treaty	Allocation	Treaty	Allocation	Treaty
2010	25.6	28.4	30.8	24.4	**29.7**	**25.9**
2011	28.2	25.0	27.8	29.0	**27.9**	**27.2**
2012	23.1	24.5	26.6	18.9	**26.0**	**21.0**
2013	23.8	18.4	26.9	20.0	**26.1**	**19.2**
2014	15.0	14.3	25.3	30.2	**21.4**	**19.8**
2015	27.7	28.9	32.7	17.8	**32.1**	**23.3**

Source: US Internal Revenue Service, Competent Authority Statistics (2015, 2016)

Table 7 Cases under EU Convention 2014

			Reasons why cases are still pending 2 years after initiation						
State	Cases initiated in 2014	Cases unresolved after 2 years	2-year point not reached due to CoC 5(b)(i)	Cases pending before court	Time limit waived with taxpayer's agreement	To be sent to arbitration	In arbitration	Settlement agreed in principle, awaiting exchange of closing letters for MAP	Other reasons
Belgium	13	7	1	1	2	1	0	1	1
Bulgaria	0	0	0	0	0	0	0	0	0
Czech Rep.	5	1	1	0	0	0	0	0	0
Denmark	17	10	0	1	9	0	0	0	0
Germany*	129	137	6	26	2	0	0	15	88
Estonia	0	0	0	0	0	0	0	0	0
Ireland	1	1	0	0	1	0	0	0	0
Greece	4	0	0	0	0	0	0	0	0
Spain	38	35	0	10	2	0	0	8	15
France	63	89	0	5	76	1	0	7	0
Italy	86	107	4	32	9	1	0	0	61
Cyprus	0	0	0	0	0	0	0	0	0
Latvia	1	0	0	0	0	0	0	0	0
Lithuania	1	0	0	0	0	0	0	0	0
Luxembourg	0	3	2	1	0	0	0	0	0
Hungary	2	5	5	0	0	0	0	0	0
Malta	0	0	0	0	0	0	0	0	0
Netherlands	28	18	0	4	1	0	0	1	12
Austria	12	15	0	0	0	0	0	0	15
Poland	6	13	4	0	0	0	0	1	8
Portugal	7	16	3	3	0	0	0	0	10
Romania	1	0	0	0	0	0	0	0	0
Slovenia	0	0	0	0	0	0	0	0	0
Slovakia	3	0	0	0	0	0	0	0	0
Finland	36	14	2	7	0	0	0	0	5
Sweden	18	29	0	5	23	0	0	1	0
UK	35	20	1	3	0	0	0	0	16
TOTAL	**506**	**520**	**29**	**98**	**125**	**3**	**0**	**34**	**231**

Source: *Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2014*, DOC: JTPF/008/2015/EN, reported to the Joint Transfer Pricing Forum meeting of October 2015

Notes to Table 7

States report their MAP claims separately, so for the number of bilateral cases the totals should be divided by two. [Information privately communicated by the European Commission].

* Remark by Germany: Please note that the German competent authority (CA) internal case database does currently not allow to record 'initiated' and 'completed' dates following OECD and Joint Transfer Pricing Forum (JTPF) definitions (see also the footnote below Table1). The figures provided here are based on the 'initiated' and 'completed' dates used for internal purposes. Under the definition applied by the German CA, a case is treated as open as soon as the German CA receives a request (regardless of whether it already contains the necessary minimum information or not, which is earlier than under the OECD and JTPF definition of 'initiated'). The 'completed' standard used is now largely in line with OECD and JTPF guidance. The deviating

‘initiated’ definition results in a larger MAP case inventory and makes cases appear older than under OECD/JTPF definitions. This should be borne in mind when comparing the German 2014 figures with statistics provided by other countries.

Of the 88 cases reported under ‘other reasons’, there are10 cases for which the application was received in 2012 and for which the 2-year period had not started yet in 2012 because the German CA requested additional information (2009 Code of Conduct point 5 (b) (ii)). In the remaining 78 cases, the 2-year period had indeed expired on 31/12/2014. In 12 of the cases, settlement appeared imminent at the end of the year, and was in fact reached in the meanwhile (i.e. before end of June 2015). In most of the other 66 cases, sending them to arbitration did not appear meaningful because there had not been an exchange of position papers yet. In roughly half of these cases, the German CA was either still waiting for the first position paper of the CA of the country where the primary adjustment had been made, or had received such first position paper only very recently. In other cases the German side (the CA and/or the local or regional office from which a state statement was expected) appeared mainly or partly responsible for the delay, generally due to resource issues (leaving staff who could not immediately be replaced, longer illnesses, etc.).

Table 8 Tax treaties containing arbitration provisions

Country	N/o arbitration clauses
Netherlands	41
Switzerland	40
United Kingdom	22
Canada	21
Italy	18
Mexico	15
Belgium	12
United States	12
Liechtenstein	12
Luxembourg	12

Source: Hearson (2015)

Table 9 Tax treaties with developing countries containing arbitration provisions

Developing country	Partner	Year	How triggered	Taxpayer opt-in before?	Taxpayer opt-out after?	Competent authorities bound by the result?	Time delay	Court case in parallel?	Taxpayer represented?
South Africa	Canada	1995	Both states	N	N	Y	NA	Y	N
Egypt	Netherlands	1999	Either state	Y	N	Y	5	Y	N
Uganda	Italy	2000	Both states	Y	N	N	NA	N	Y
Congo	Italy	2003	Both states	Y	N	N	NA	N	Y
Uganda	Netherlands	2004	Either state	Y	N	Y	2	Y	N
Ghana	Italy	2004	Both states	Y	N	Y	NA	Y	N
South Africa	Netherlands	2005	Either state	Y	N	Y	2	Y	N
South Africa	Switzerland	2007	Either state	Y	N	Y	3	Y	N
OECD model		2007	Taxpayer	Y	Y	Y	2	Y	N
Ghana	Netherlands	2008	Either state	N	Y	Y	2	Y	N
Namibia	Canada	2010*	Both states	Y	Y	Y	NA	Y	N
UN model		2011	Either state	N	Y	N	3	Y	N
Ethiopia	Netherlands	2012	Taxpayer	Y	N	Y	2	Y	N
Malawi	Netherlands	2015*	Taxpayer	Y	Y	Y	3	Y	N
Kenya	Netherlands	2015*	Taxpayer	Y	Y	Y	2	Y	N
Rwanda	Jersey	2015^	Either state	N	Y	N	3	Y	N
Algeria	UK	2015*	Taxpayer	Y	Y	Y	2	Y	N
Zambia	Netherlands	2015	Either state	N	N	N	2	N	N

*OECD type clause ^UN type clause

Source: Hearson (2015)

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