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Unlike the decisive steps that have been made in the international investment and trade regime to promote efficient resolution of pending disputes, in the international tax field, the conventional tax dispute resolution system of state negotiations has vastly remained unchanged ever since its establishment in the beginning of the twentieth century despite the heavy criticism against it by the international business and tax community. Nevertheless, after the introduction of the Anti-Base Erosion and Profit Shifting (BEPS) Project and the recent discussion for the implementation of the Global Anti-Base Erosion (GloBE) Project to further address base erosion and profit shifting and of a novel Unified Approach to address the taxation of the digitalization of the economy, a rapidly changing international tax environment calls for reconsideration of states’ stance towards the implementation of stricter dispute resolution systems in general and of international tax arbitration in particular. By analysing the political objectives of states within the International Tax Dispute Resolution (ITDR) system opposed to the international investment and trade regime through a comparative analysis, this article aims to explore the potential of a gradual evolution of the ITDR in a way that addresses both tax-authorities’ and taxpayers’ interests in a modern economy.

Keywords: Tax, investment, trade, WTO, MAP, arbitration, international dispute resolution, convention, double taxation, BEPS, unified approach, Pillar One, Pillar Two

I INTRODUCTION: INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT AND THE SPECIAL CASE OF INTERNATIONAL TAX DISPUTE RESOLUTION

In order to reduce the barriers of international investment and trade, from the beginning of the past century until today, the number of bilateral and multilateral treaties that regulate investment, trade, and tax matters has been increasing exponentially. In addition, in order to resolve controversies that arise from the interpretation and application of these international agreements, states have established a variety of international dispute resolution systems. The establishment of international investment arbitration for investor-state disputes as well as the jurisdiction of WTO panels and of the Appellate Body under WTO law are characteristic examples that highlight states’ determination to provide a high rate of compliance with their international commitments in order to promote investment, trade, and capital flow in the globalized economy.

However, unlike the decisive steps that have been made in the fields of international investment and international trade, in the international tax regime, the traditional dispute resolution system of state negotiations (known as the Mutual Agreement Procedure) established in the beginning of the twentieth century, has evolved very little ever since. In addition, this has been the case despite the numerous initiatives to improve the international tax dispute resolution system and the heavy criticism that has been imposed on the traditional Mutual Agreement Procedure (MAP) system from the international tax and business community for its inadequacy to guarantee efficient resolution of tax disputes. This is due to the system’s lack of an obligation imposed on states to reach a final

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3 See WTO, Dispute Settlement Understanding, especially Arts 6, 11 and 17.
4 Altman, supra n. 1, at 1.
5 Altman, supra n. 3, at 1.
solution to the occurring disputes, the extremely long periods that such dispute resolutions can take, and the minimal participation rights that are granted to the affected taxpayers.

Nevertheless, due to the rapid developments that have occurred over the last years in the international tax field, especially after the launch of the OECD/G20 BEPS Project and the current discussion for the implementation of the Unified Approach to address the taxation of the digitalization of the economy and the GloBE proposal under Pillar Two to further address base erosion and profit shifting, an expected exponential growth of tax disputes and the evolving nature of international taxation call for much needed improvement of the current ITDR system.

In this article, the author argues that, in order to provide a successful improvement to the current ITDR system, the particular characteristics of bilateral and multilateral tax disputes as illustrated from a comparative analysis of the international tax regime with the international investment and trade regime, the political interests of states when handling tax matters, and the advanced need of taxpayers for enhanced tax certainty in modern economy must all be addressed in a delicate balance.

After responding to states’ ‘sovereignty’ argument against the introduction of a stricter legalistic dispute resolution system for tax disputes (section 2), the author will highlight the differences between disputes raised in the international tax field and the disputes put forward in the international investment regime. These differences indicate that the total privatization of ITDR system is an unfavourable option for states (section 3) but cannot nevertheless explain states’ hesitation against built-in MAP state arbitration (section 4).

In section 5, by comparing the differences between the international tax and the WTO regimes, the author suggests that the bilateral nature of tax treaties and the conventional lack of an adequate incentive for tax authorities to further promote the resolution of tax disputes have been the main reasons for states’ traditional hesitation against a stricter state dispute resolution system. In the second part of this article, the author provides that a greater need for enhanced tax certainty in the post-BEPS era and a potential trajectory of the traditionally bilateral international tax system towards more multilateral structures (illustrated by a potential introduction of the new Unified Approach) require the reconsideration of a careful implementation in the ITDR system of particular elements of the existing dispute settlement systems in the international investment and trade regime (section 6).

In this context, the aforementioned expected changes in the international tax system call for both a broader implementation of improved built-in MAP arbitration provisions and a strategic update of Article 25 (5) of the OECD Model Tax Convention on Income and on Capital (OECD Model) that better promotes taxpayers’ rights in the international tax field (section 7) and a further evolution of tax arbitration to address multistate disputes on a multilateral level (section 8).

2 THE SOVEREIGNTY ARGUMENT

Despite the traditional claims by many tax authorities that the inclusion of stricter legalistic systems for resolving tax disputes would threaten states’ sovereignty rights, in the author’s view, these claims do not pose a legal per se argument but, rather, conceal other political and pragmatic concerns of states. Indeed, while states’ sovereignty arguments have consistently been used against the arbitrability of tax disputes, it is also true that, under any democratic legal system, taxpayers have every right to litigate taxation conflicts – including disputes of an international nature or those that arise from a breach of Double Tax Convention (DTCs) – before the domestic courts without any restrictions. In such cases, indeed, independent courts hear and decide cases for the correct interpretation and application of domestic laws and international agreements without infringing the states’ sovereignty rights and pursuing the same case in the

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5 An extreme example is of a dispute between Luxembourg with another OECD country that was closed in 2009 that took sixteen years and four months to be decided: See OECD, MAP Program Statistics for the 2015 reporting period, Country: Luxembourg (2015), http://www.oecd.org/ctp/dispute/MAP%20PROGRAM%20STATISTICS%20FOR%202015%20LUX.pdf (accessed 10 July 2019).


8 See also Committee of Experts on International Cooperation in Tax Matters, supra n. 9; at 19–22, where it is indicated that, even in the few cases in which states’ domestic legal systems forbid the introduction of any international legalistic dispute resolution system, a change of the domestic system depends on the political will of governments.

9 Quiñones Cruz, supra n. 9, at 533; See also Committee of Experts on International Cooperation in Tax Matters, supra n. 9, at 19.

international arena and before an international independent body should not change that fact on its own.\textsuperscript{13}

In this context, it is also clear that many states that are hesitant to establish an international legalistic dispute resolution system for tax disputes have nevertheless agreed to subject other types of economic disputes to supranational dispute resolution when they consider that this would promote their political interests.\textsuperscript{14} The establishment of international arbitration for investor-states disputes\textsuperscript{15} as well as the jurisdiction of WTO panels and the Appellate Body for international trade disputes\textsuperscript{16} are examples showing that states are indeed willing to sacrifice part of their political control over investment and trade matters in order to protect their long term interests in the globalized economy.

In a similar fashion, in the international tax field, states exercise their sovereign rights by signing DTCs in order to better promote their national interests.\textsuperscript{17} By doing so and while anticipating long term benefits, they decide to sacrifice some of their freedom of unilaterally deciding tax matters, and the existence of an independent body that would review states’ compliance of such agreements would simply be the expression of the principle of \textit{pacta sunt servanda}.\textsuperscript{18} The decision, therefore, to agree on the establishment of an independent body that would review states’ international commitments is a natural, calculated choice rather than a breach of states’ sovereignty rights.\textsuperscript{19}

Therefore, the real reasons why governments have thus far been hesitant to implement a dispute resolution system for tax disputes that is similar to the investment or trade regime are associated with the fact that, in the international tax field, states have traditionally considered that such a sacrifice of their political control in tax disputes would not grant them with sufficient political and financial advantages to cover the potential losses.

By understanding these political and pragmatic concerns of states with a comparative analysis of tax disputes’ characteristics opposed to the investment\textsuperscript{20} and trade\textsuperscript{21} disputes’ characteristics and states’ interests at stake, it would be easier not only to explain the traditional stance of states towards a standard legalistic tax dispute resolution system but also to argue in favour of a gradual evolution of the ITDR system in a modern economy in a manner that addresses states’ concerns.

3 \textbf{DIFFERENCES BETWEEN INVESTOR-STATE DISPUTES AND INTERNATIONAL TAX DISPUTES: POLITICAL CONTROL, DIPLOMATIC RELATIONS AND PROCEDURAL COSTS}

While examining the possibility of the creation of a stand-alone dispute resolution system for tax disputes, it could be argued to favour a system in which taxpayers could bring cases of DTCs’ breach against states before international courts or arbitral panels,\textsuperscript{22} in the same manner as in investor-state disputes, where investors are provided the right to sue a foreign state before an independent panel for breaching a provision of the relevant Bilateral Investment Treaty (BIT). This argument could even be supported by the statement that there are particular similarities among the international investment and the international tax regimes since, in both cases, bilateral treaties between states are concluded in order to protect a private party\textsuperscript{23} and, therefore, a taxpayer-vs-state’s arbitration system could potentially also be a successful system for addressing occurring tax disputes.

A more critical analysis, however, would indicate that a private party-vs-state’s arbitration system as in investment treaty practice is not as suitable for addressing the political concerns of states in the international tax system.

3.1 \textbf{The Historic Depoliticization of International Investment Disputes}

In order to better understand the forces that resulted to the introduction of a legalistic private party-vs-state dispute resolution system in the international investment regime, it is advantageous to conduct a brief historic analysis. Indeed, while it is true that international investment

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\textsuperscript{55} \textit{Ibid.}, at 299.
\textsuperscript{56} \textit{Brown}, supra n. 8, at 105.
\textsuperscript{57} \textit{Dolzer \& Schreuer, supra n. 2, at 229–233}.
\textsuperscript{58} \textit{See WTO, Dispute Settlement Understanding, especially Arts 6, 11 and 17}.
\textsuperscript{59} \textit{Brown}, supra n. 8, at 105.
\textsuperscript{60} \textit{Q. Cai, Behind Sovereignty: Concerns About International Tax Arbitration and How They May Be Addressed}, 4 Brit. Tax Rev. 443 (2018), \textit{See also Brown}, supra n. 8, at 105.
\textsuperscript{62} \textit{See s. 5}.
\textsuperscript{63} \textit{See s. 5}.
Dispute Settlement Practice

arbitration was primarily introduced to provide investors with greater legal certainty and to further promote investment and capital flow,24 there is also one more parameter that relates to the dangers associated with the remedy of diplomatic protection that was previously available to investors that made the adoption of a stand-alone arbitration system in the international investment regime easier than it would be in the international tax field. Before the introduction of investment arbitration and under traditional international law, investors depended solely on diplomatic protection by their home states that would pursue the claims of their nationals as their own. This mechanism was not only insufficient from the investors’ perspective25 but also created serious disadvantages for the concerned states. More specifically, under that regime, investors’ governments could exploit a complaint of one of its residents as an opportunity in order to promote irrelevant political interests in other states, originally leading to all sorts of abuses of diplomatic protection especially from developed countries against developing countries.26 At the same time, even when such political interests did not exist, and states in good will would attempt to promote their nationals’ interests and rights, such actions could pose risks to the states’ good diplomatic relations only because of a dispute between one of their nationals and the other state without expecting any direct benefits in return. The depoliticization, therefore, of investment disputes by affording investors the opportunity to protect their rights under the relevant BITs in their name and before an independent arbitral tribunal was based on the concept that transforming an investor-state dispute to a state-state dispute would unnecessarily damage the good diplomatic relations of the latter.

3.2 Advanced Challenges in Privatizing International Tax Disputes

Contrary to the reality in the international investment regime, the privatization and depoliticization of international tax disputes would arguably be a much more difficult and complicated task due to the particular interests of states and the nature of tax disputes.

3.2.1 Control Over the Dispute

First of all, unlike international investment disputes in which disputes arise between an investor and a foreign state, international tax disputes, despite greatly burdening the taxpayers’ position, are in reality state-state disputes that arise from a conflict with regards to the interpretation or application of a DTC, the resolution of which can indeed affect (both27) contracting states’ powers in deciding their tax policy, tax legislation, and tax collection over which the latter want to have maximum political control.28 In this context, it is evident that, while states might not theoretically suffer as much from a tax dispute being left unresolved,29 they could indeed be significantly affected from a panel’s decision to which taxpayers would have access at all times and might even be contrary to the contracting states’ mutually agreed interests or a bilateral agreement on a diplomatic level.30

3.2.2 Amicable Resolution Through Negotiations

In addition, contrary to international investment dispute resolution, where states would ideally avoid coming into contact with each other in order to protect their good diplomatic relations, in the international tax regime resolving tax disputes through amicable negotiations promotes the good relations of states much more efficiently than would the forced adjudication of adversarial nature.31 More importantly, such good relations are recognized to be of great importance, especially in the globalized economy in which state cooperation is crucial for tackling tax evasion and tax avoidance.32 Providing a taxpayer (who would arguably be interested only in his own short-term interests33) with the right to challenge these negotiated solutions, therefore, would convert states from allies to adversaries, possibly damaging

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25 Since they depended on the political will and discretion of their governments. Dolzer & Schreuer, supra n. 2, at 229–233.
26 I. Fl Shihata, Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MAIKA, 1 ICSID Rev. – Foreign Inv. L. J. 1 (1986).
27 And not just one of the states as in the international investment field.
28 Altman, supra n. 1, at 244–245.
29 Since, in a worst-case scenario, they would be able to provide unilateral relief to their respective taxpayers.
31 Altman, supra n. 1, at 248–249.
their relationships and inhibiting the quality of their cooperation.

3.2.3 Sword v. Shield

Moreover, when comparing international tax disputes with international investment disputes, the asymmetry of the relationship between the affected private parties and the states in the two regimes must be taken into account. Indeed, while it is a state that allegedly made the first aggressive move in occurring investor-state disputes by breaching a provision of the relevant BIT against the interests of an investor – who has access to arbitration ‘as a shield’ in order to defend against political risk – in international tax disputes, the first seemingly aggressive move is made by the taxpayer in many occasions. Indeed, states’ denial to provide relief from double taxation, is in many occasions, part of states’ defensive mechanisms against aggressive tax planning strategies of taxpayers who allegedly applied provisions of the DTCs and domestic laws in a way that was not intended by the domestic and international legislators. It has, therefore, been argued that taxpayers who are more aware of their tax optimization strategies could potentially use such a mechanism as a ‘sword rather than a shield’ to further exploit the existing gaps of DTCs and states’ domestic laws by bringing such cases before an independent tribunal that would apply the DTCs’ provisions in a strictly legal manner.

3.2.4 Nature of Transfer Pricing Disputes

Furthermore, contrary to the case of international investment dispute resolution when arbitral tribunals apply specific legal provisions, conventions, or international standards (e.g. fair and equitable treatment, minimum standard, etc) to resolve disputes, in the international tax field, a significant number of tax disputes cannot be resolved from the application of a legal provision. More specifically and especially with regards to transfer pricing disputes, many conflicts arise due to states’ disagreements of which of the different, equally acceptable accounting methods for calculating the appropriate arm’s length transfer price to be paid between affiliated companies, where any solution would be either the outcome of bargaining and negotiations among states or the result of economic and fact-intensive analysis by experts.

3.2.5 Concerns of Procedural Costs

Finally, a pragmatic argument against the introduction of stand-alone, private party-vs-state arbitration for tax disputes concerns the alleged substantial procedural costs that such systems are usually associated with, including expenses for legal representation, judges/arbitrators’ fees, and institutional/administrative costs. According to a 2012 study by the OECD on Investor State Dispute Settlement (ISDS), the legal and arbitration costs in investor-state disputes have averaged over USD 8 million in recent cases with costs exceeding, in some cases, USD 30 million. From these costs, 82% are connected with legal representation fees that accrue not only due to the fact that most cases are characterized by an extensive level of complexity but also due to the excessive amounts of money that are usually at stake.

This fact combined with the reality that legal counsels and arbitrators usually profit from a more adversarial nature of the proceedings leads parties to invest enormous amounts of money in a must-win-by-all-costs legal showdown. From the remaining costs, 16% are associated with arbitrators’ fees – many times surpassing USD 1 million in total – while the remaining 2% of arbitration related costs entail institutional and administrative costs paid to institutions such as the International Centre for

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54 Cai, supra n. 18, at 454.
55 Ibid., at 455.
56 For example, with a limitation of benefits clauses. See also Action 6 of OECD/G20 BEPS Action Plan.
58 Green, supra n. 6, at 85, 134–135; Cai, supra n. 18, at 454–455.
59 Cai, supra n. 18, at 454–455.
60 Dolzer & Schreuer, supra n. 2, at 135–185.
61 J. Paumgarten, Baseball Arbitration To Resolve International Law Disputes: Hit or Miss?, 22 Fla. Tax Rev. 64 (2018).
62 Altman, supra n. 1, at 422–423.
63 UN Model (2011): Commentary on Art. 25, para. 4.
64 M. Lennard, Transfer Pricing Arbitration as an Option for Developing Countries, 42(3) Intertax 181 (2014); see also Owens, supra n. 6, at 617.
66 Cai, supra n. 18, at 451–452.
Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), and others for the administration of the proceedings and for providing the necessary secretariat. In the international tax field, introducing a conventional legalistic dispute resolution system to which a taxpayer could have access to at all times has the potential of burdening states with substantial financial costs that are similar to the investor-state dispute resolution system. This is because complex and highly technical issues also arise in tax disputes that require expert counselling and, at the same time, enormous funds can be at stake for which taxpayers and at least two tax authorities have an interest.

Taking the above into consideration combined with the fact that, according to the OECD MAP statistics, only in 2018, 2,385 MAP cases were introduced (compared with only seventy-six international investment arbitration cases initiated in 2018[4]), it is evident that the pragmatic argument of the potential procedural costs of a stand-alone private party-state arbitration system is not to be disregarded.

4 A DIFFERENT APPROACH: STATE ARBITRATION TO ENHANCE RATHER THAN SUBSTITUTE THE MAP

Over time, as the number of the already pending and new tax disputes began to increase, in an attempt to promote a more practical enhancement of the ITDR system, while also addressing the aforementioned political objectives of states, multiple international initiatives developed to promote the inclusion of state-to-state arbitration provisions for disputes that cannot be resolved amicably, in order to enhance rather than substitute the traditional MAP system.[53] In this context, the MAP is generally divided in two stages: one of amicable negotiations between the competent tax authorities and one of state arbitration proceedings when the latter fail to reach a settlement.[54]

In the first stage after a complaint has been submitted by a taxpayer to the competent tax authorities, the latter must negotiate in order to reach an agreement for the resolution of the dispute either on a case by case basis or through package deals. In addition, when states reach an agreement for the resolution of the dispute, the affected taxpayer would not have the right to challenge it before an arbitral tribunal but would only be able to either accept it or reject it and seek protection with the domestic courts.[55]

In the event, however, that states cannot reach an amicable solution within a reasonable time period, taxpayers would have the right to request the initiation of the second stage in which each state would appoint one independent person[56] with experience in international tax matters[57] as arbitrators who would subsequently elect an additional third member as a chairperson.[58] In turn, this arbitral panel would decide the unresolved dispute.[59]

Finally, as a submitted case is being heard by the arbitral tribunal and even within a reasonable time period after a final decision is handed out, states would still be able to reach a different settlement to the dispute. Either that alternative agreement or – in the absence of it – the tribunal’s final decision would then be presented to the affected taxpayer to either accept it or reject it.[60] If the taxpayer accepts the solution, the dispute would be considered resolved, depriving him of the right to seek an alternative solution with the domestic courts. If, on the other hand, the taxpayer declines the proposed solution, the only recourse he would be left with would be with the domestic courts of each jurisdiction. This novel approach

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48 Gaukrodger & Gordon, supra n. 45, at 19.
49 Cai, supra n. 18, at 451.
52 See Art. 25 (5) OECD Model (2017); Action 14 of the OECD/G20 BEPS Action Plan, The MLI.
53 See also Moniz, supra n. 30, at 738.
54 Owens, supra n. 6, at 611–613.
55 See e.g. Art. 25 (5) OECD Model (2017).
56 The independence test would provide that arbitrators should be individuals who are independent of the competent authorities, tax administrations, and ministries of finance of the contracting states who have not been involved in prior stages of the case submitted to arbitration or who have a direct interest in the dispute ad hoc. See also OECD Model (2017), Commentary on Article 25, para. 17.
57 See OECD Model (2017), Commentary on Article 25, para. 16.
59 Since, under this proposed system, it is the states that remain the main parties to the dispute, the affected taxpayers would not have the right to appoint arbitrators. This is indeed common among all of the international and regional initiatives to include arbitration as an inherent part of the MAP. See also R. Codorniz Leite Pereira, Arbitration in International Tax Law and Taxpayers’ Rights: A Comparative and Critical Approach in: OECD Arbitration in Tax Treaty Law 710 (A. Magdanzka & L. Turcan eds, Lund 2018) for a comparative analysis.
60 e.g. six months; See e.g. OECD Model (2017), Commentary on Article 25 (5), Sample Mutual Agreement on Arbitration, Mutual agreement on the implementation of para. 5 of Art. 25, para. 12.
61 See e.g. Art. 25 (5) OECD Model (2017).
seemed to indeed address all of the states’ aforementioned political concerns.

First, it protects states’ political control and significant level of flexibility while addressing tax disputes by granting the right to resolve their disputes through bilateral agreements not only during the negotiation stage but even during or after a final decision is handed down by an arbitral panel and, therefore, also safeguards their political interests even when a taxpayer would allegedly attempt to exploit arbitration as a ‘sword’ to promote aggressive tax planning strategies.

Second, it enhances states’ good diplomatic relations—which would be at stake under conventional adjudication—by affording tax authorities not only the right but also an incentive to reach an amicable resolution in order to avoid an independent judgement of a panel. At the same time, contrary to the previous tax treaty practice when, due to the lack of a legal obligation for states to resolve a dispute through negotiations, stronger states were able to place tremendous pressure on states with weaker economies to accept unrealistic demands or provide taxpayers with unilateral relief under the proposed approach, states’ negotiations would have the tendency to become more reasonable, in order to avoid the dispute reaching an arbitral tribunal. In this context, concessions by both sides would indeed be more feasible, potentially resulting to an enhancement of states’ cooperation both short-term and in the long-run.

Furthermore, it addresses the argument of the substantial procedural costs of arbitration. Indeed, by making recourse to arbitration not available at all times to the taxpayer but rather as a final resort for cases that cannot be resolved amicably, states can indeed save a significant amount of financial resources since the cases that would actually reach an arbitral panel would only be a fraction of the ongoing international tax disputes.

At the same time, the procedures of the negotiation stage under the proposed dispute resolution system would have the tendency to be less expensive than in traditional practice, since the incentive of states to quickly resolve their tax disputes within specific time periods in order to avoid a potential recourse to arbitration, can prove to be helpful for decreasing current MAP-related expenses. These expenses include costs associated with extensive and inefficient negotiations, multiple performances of audits, and delivery of data and communications when, the longer these procedures last, the more that costs accumulate especially for states with insufficient technology and lack of experienced personnel, databases, and funding. In addition, even when a case reaches an arbitral panel, the arbitration proceedings would be significantly faster and more cost efficient than in conventional adjudication due to the already collected necessary documentation, relevant information, and clarifications from all parties during the negotiation stage.

Moreover, by introducing procedural rules that include—among others—specific caps on arbitrators’ fees, the total arbitration-related costs can easily be limited from EUR 12,000 to EUR 60,000 as suggested by the proposal made by TRIBUTE in January 2015 in response to the OECD Public Discussion Draft on BEPS Action 14, a number that is considerably lower than the current average of over USD 1 million that parties usually pay in arbitrators’ fees in investor-state disputes. This can easily be accomplished, for example, by combining a cap of arbitrator’s compensable days (e.g. three days of preparation and two meeting days) and a fee cap of, e.g. EUR 1,000 per arbitrator per day.

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62 OECD Model (2017), Commentary on Article 25 (5), Sample Mutual Agreement on Arbitration, Mutual agreement on the implementation of para. 5 of Art. 25, para. 12.
63 Cai, supra n. 18, at 454–455.
64 Gollery et al., supra n. 31, at 64–66; Altman, supra n. 1, at 253–255.
65 As stated by H.D. Rosenbloom, Mandatory Arbitration of Disputes Pursuant to Tax Treaties: The Experience of the United States, in International Arbitration in Tax Matters 166 (M. Lang et al. eds, IBFD Publications 2015): ‘the objectives of any arbitration provision is that no arbitration should ever take place’.
67 in order to retain what is necessary for their own interests foreign investments and a good trade environment See Altman, supra n. 1, at 257.
68 See UN Model (2011), Commentary on Article 25, para. 3.
69 See Altman, supra n. 1, at 208–209.
71 Trankman, supra n. 47, at 662.
74 Gunkelrudig & Gordon, supra n. 45, at 19.
75 See also UN Model (2011), Commentary on Article 25 (5) (Alternative B), Sample Mutual Agreement on Arbitration, Mutual agreement on the implementation of para. 5 of Art. 25, provision 5.
Finally, in order to further administer states’ political concerns, an alternative to the Independent Opinion Approach to arbitration (in which panels have increased discretion in providing any solution they consider to be appropriate followed by legal reasoning while deciding the disputes ad hoc) has been promoted among states with the implementation of the Final Offer Approach for which panels are bound to choose only one of the solutions to the dispute that are suggested by the tax authorities.

In this context (and while Independent Opinion arbitration is more suitable for addressing threshold or classification questions or disputes that are associated with the interpretation of a particular provision within a DTC, where legal analysis is essential in order to promote tax and legal certainty) Final Offer Arbitration is usually preferred for disputes that arise when tax authorities have a disagreement with regards to a numerical question, as in transfer pricing disputes, the efficient resolution of which usually requires effective state negotiations and fact-intensive economic analysis by experts, rather than extended procedures of legal nature.

The manner in which final offer arbitration works on a bilateral level in the scenario, for example, when state A disagrees with state B as to what arm’s length transfer price company C (resident of state A) would have to pay to its subsidiary D (resident of state B) for products that D sells to C – when the higher the price, the more taxable profits would be shifted to company D, resident of state B – is that each state would need to suggest a specific price from which the arbitral tribunal would have to choose the most reasonable and appropriate for the ad hoc case.

The often cited advantages of this approach to arbitration that provides states with an incentive to abstain from extreme positions in fear of the tribunal adopting the more reasonable suggestion of the other state are associated with the less adversarial nature of the proceedings, the advanced political control granted to states, and the additional provided opportunities to reach an amicable settlement during a procedure when “winning means being more reasonable, which is the key that unlocks the door to settlement”: In this context, not only is amicable resolution more probable during a procedure that could be characterized as the second half of the negotiations stage but, even when reaching a settlement is still not viable, the lack of excessive back-and-forth criticism of each other’s position – which is a typical characteristic of conventional adjudication – can guarantee a significantly less chilling effect of the proceedings.

At the same time, due to its simplified procedures (since choosing between the states’ positions would be much quicker than developing and issuing an independent decision), final offer arbitration would have the tendency to result in a faster and a more cost-efficient dispute resolution. In addition to this further restriction of arbitration-related costs, the total legal expenses of the disputing parties would also arguably be much lower for states than under conventional adjudication since the faster and more simplified proceedings combined with the less adversarial nature of this type of arbitration can

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77 Also known as Baseball Arbitration due to its use in settling salary disputes between players and their teams in the US Major League Baseball, Pauwelyn, supra n. 41, at 45.

78 Which is the default approach under the OECD Model (2017) Sample Mutual Agreement Art. 4.

79 For example, for the existence of a permanent establishment or for the determination of whether a particular profit derives from royalties or trade-related activities.


81 Petrucci, Koch & Turcan, supra n. 80, at 155.

82 Which were the majority of the pending tax disputes at the end inventory of 2018 since the pending transfer pricing disputes were 3513 as opposed to 3092 disputes of other nature. See OECD, Mutual Agreement Procedure Statistics for 2018, http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm (accessed 20 Feb. 2020).

83 Altman, supra n. 1, at 422-423.

84 See Pauwelyn, supra n. 42, at 64.

85 In the above scenario, e.g. state A could suggest that the price should be of 4,00 EYR/unit while state B suggested of 6,00 EYR/unit, instead of 1,80 and 10,00 EYR/unit respectively – which could be their positions under conventional adjudication – that would make it more difficult for the parties to reach a settlement.

86 Since it would be one of the solutions suggested by the disputing states’ that would come to be the final outcome of the dispute; see also Rosenblum, supra n. 65, at 165; Pauwelyn, supra n. 41, at 56.


89 Pauwelyn, supra n. 41, at 616.

90 Ibid., at 75.


92 See Monhait, supra n. 87, at 131–139; See also Devillier, supra n. 91, at 616; See also A. W. Oguttu, Resolving Treaty Disputes: The Challenges of Mutual Agreement Procedures with a Special Focus on Issues for Developing Countries in Africa, 70(12) Bull. Int’l Tax’n 729 (2016).

93 See also Oguttu, supra n. 92, at 729.

94 Devillier, supra n. 91, at 616.
indeed have a positive impact on also keeping the legal counsels’ fees to a minimum.\footnote{See Monheit, supra n. 87, at 131–139.}

As a result, contrary to private party-vs-state arbitration systems, built-in MAP state arbitration had the potential to safely enhance the quality of the ITDR system while addressing states’ political concerns.

5 Minimum Implementation of State Arbitration: Differences between the International Tax Regime and the WTO Regime—Bilateral vs Multilateral Nature and Interests at Stake

Nevertheless, despite the aforementioned advantages of built-in MAP state arbitration, until recently, the latter had only been incorporated into a few DTCs\footnote{See also H. Monheit, Tax Treaty Arbitration 35(2) Arb. Int’l 14 (2018).}, and the establishment of an international, legalistic, state arbitration system has not been efficiently promoted. At the same time, this has been the case in the international tax system despite the fact that in the international trade regime the great success of the World Trade Organization as one of the most influential systems in the international economic field, is accredited according to many to its robust, legalistic Dispute Resolution System, usually referred to as ‘the jewel in the crown of WTO’\footnote{P. van den Bossche & W. Zdouc, I R n. 6, at 127.}

In this context and while examining the possibility of the creation of a strict state-vs-state dispute resolution system for tax disputes and even of the establishment of a permanent body to which states would have access in order to resolve occurring tax disputes, -as in WTO where the Appellate Body and the appointed panels have the authority to resolve trade disputes brought to them by states- one would quickly realize that there are two main reasons that historically have been hindering states from such developments in the international tax field.

The first concerns the fact that, contrary to the international trade arena where a legalistic dispute resolution system exists to resolve states’ disputes within a multilateral system while disseminating information about the requirements of the trade regime, promoting cooperation between states,\footnote{Green, supra n. 6, at 110; See also W. A. Cann Jr., Creating Standards of Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism, 26 Yale J. Int’l L. 460–463 (2001).} and protecting them against each-others’ retaliatory actions,\footnote{Green, supra n. 6, at 139.} in the international tax field, a permanent judicial body would not serve the same purpose. This is due to the fact that, in the international tax field where states have been traditionally concluding bilateral agreements, they prefer to resolve their occurring disputes through more informal procedures and flexible interpretation strategies (e.g. with commentaries and suggestions by the OECD, negotiations, and exchange of diplomatic notes\footnote{Brown, supra n. 8, at 105–106.}) without having toredraft their double tax conventions.\footnote{Whichever, at any point, could provide unilateral relief if they consider it necessary to promote their strategic interests.}

The second reason has to do with the fact that, contrary to the adverse effects that the non-resolution of trade disputes has on states in the WTO regime (where it is the states who actually suffer from breaches of WTO law, and the individual merchants, consumers and businesses do so only indirectly), in the international tax field, non-resolution of double-taxation disputes primarily affects taxpayers, and the states are only affected indirectly.\footnote{OECD, Statement by the OECD/G20 Inclusive Framework on BEPS in the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing 2020), https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf (accessed 19 Apr. 2020), Annex 1.} As a result, in the international tax field, there have been fewer incentives for states to pursue the introduction of an independent body to administer the resolution of pending tax disputes.

Nevertheless, as it will further be analysed in the following sections, an unprecedented growth of international tax disputes and a surfaced need for enhanced tax and legal certainty in the international tax field, as well as a gradual trajectory of the traditional international tax system of bilateral nature towards more multilateral structures – as indicated by the recent Unified Approach – call for a reconsideration of states’ view towards binding tax arbitration procedures.

6 A Need for Change

Despite the traditional hesitation of states towards stricter dispute resolution systems, after the launch of the OECD/G20 BEPS Project and the current discussion for the implementation of a Unified Approach\footnote{OECD, supra n. 103, Annex 2.} to address the taxation of the digitalization of the economy and Pillar Two (GloBE proposal) to further address base erosion and profit shifting,\footnote{OECD, supra n. 103, Annex 2.} a reconsideration of states’ stand...
Towards possible improvement of the current dispute resolution system is currently more urgent than ever before.

Indeed, after the launch of the OECD/G20 BEPS Project, a rapidly growing *tsunami of disputes* led the inventory of OECD MAP cases to soar from 2,352 cases at the end of 2006 to 6,605 at the end of 2018, placing extreme pressure on the current ITDR system and resulting in extended tax uncertainty. This growth of disputes was administered mainly from:

- the introduction of stricter anti-abuse clauses in tax treaties;
- the denial of tax benefits in harmful regime cases;
- changes in the interpretation of terms such as ‘residence’ and ‘permanent establishment’;
- the introduction of complicated variations to address hybrid mismatch arrangements;
- the inconsistency between the suggestions to address transfer pricing aspects of intangibles and those to address the challenges of digital economy, and
- the resurfaced tensions concerning the allocation of taxing rights between states.

In addition, a new wave of controversy and an increase of pending disputes is expected in the event of the potential implementation of:

1) the OECD *Unified Approach* Pillar One suggestion for the adoption of an entirely new nexus rule for the taxation of *highly digitalized business models* that would adopt a three-tier profit allocation system in which

- Amount A would allocate a share of residual profits to market jurisdictions using a formulaic approach,
- Amount B would provide a fixed remuneration for defined baseline distribution and marketing functions in the market jurisdiction, and
- Amount C would cover any additional profit when in-country functions exceed baseline activity under amount B.

2) the so called GloBE proposal under the OECD *Pillar Two* to address base erosion with the development of additional rules that would afford jurisdictions the right to ‘tax back’ when the payment to other jurisdictions is subject to low levels of effective taxation by currently focusing on implementing:

- an income inclusion rule that would tax a foreign controlled entity in the event that the imposed effective tax rate was below a minimum,
- an untaxed payment rule for denying deductions when the payment was not above a minimum rate,
- a switch-over rule to permit shifts from the exemption method to the credit method when profits attributable to a permanent establishment are subject to an effective tax rate below a minimum, and
- a subject to tax rule whereby a payment would be exposed to additional taxes at source (withholding or other) and adjusting treaty benefits when the payment was not subjected to a minimum effective tax rate as well as working on all aspects of co-ordination, simplification, and compatibility with states’ international obligations.

Furthermore, the aforementioned developments are expected to result not only in a general increase of pending

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**Notes**

110. See Action 6 of the OECD/G20 BEPS Action Plan.

111. See Action 7 of the OECD/G20 BEPS Action Plan.

112. See Action 2 of the OECD/G20 BEPS Action Plan.

113. See Action 8 of the OECD/G20 BEPS Action Plan.

114. See Action 1 of the OECD/G20 BEPS Action Plan.

115. See Kollmann & Turcan, supra n. 8, at 16–20 for an analysis of the BEPS Project’s impact on the increase of tax disputes.


118. OECD, supra n. 103, para. 10.

119. OECD, supra n. 103, at 27.

tax disputes but also an increase of disputes that affect three and even more jurisdictions on a multilateral level. As a result, the inefficiencies of the current tax dispute resolution system are expected to have a negative impact not only on an increasing number of taxpayers and MNEs but on states as well, the economies of which are directly affected by an uncertain tax environment that could disrupt cross-border trade and foreign investment. States, therefore, having a direct interest in protecting their taxpayers and promoting trade, investment, and capital flow, are pressured today more than ever in reconsidering their stance towards a possible improvement of the current MAP system.

In order to enhance the international tax dispute resolution system and further promote tax certainty in a manner that also addresses states’ political objectives in a modern economy, the author argues that the OECD should consider the potential inspiration from particular elements of the existing dispute resolution systems in the international investment and trade regime.

More specifically, even if taxpayers are not considered as actual parties to the occurring disputes in the international tax regime, a careful enhancement of their access and even participation in the ITDR system (inspired from the international investment-treaty dispute resolution practice) is necessary in order to adequately promote their trust in the international tax system. At the same time, a gradual evolution, legalization, and institutionalization of state arbitration (inspired from the WTO dispute resolution system) needs to be further explored especially to facilitate multistate disputes raised within multilateral regimes such as the Unified Approach.

7 ENHANCING TAXPAYERS’ RIGHTS AND PROMOTING TAX AND LEGAL CERTAINTY: SUGGESTED CHANGES TO THE OECD MODEL AND THE BUILT-IN MAP ARBITRATION SYSTEM FOR BILATERAL TAX DISPUTES

As indicated from the aforementioned analysis, states have a direct interest in addressing the ongoing international tax uncertainty that is caused by the new developments in the international tax field and the inadequate to guarantee tax relief from double taxation dispute resolution systems that threaten their economies due to the unattractive business environment they create. Therefore, it is urgent that they advance their efforts of implementing built-in MAP arbitration provisions into their DTCs. In this regard, the OECD needs to effectively promote mass implementation of carefully designed binding state-state arbitration provisions for disputes that cannot be resolved amicably in a way that indeed guarantees advanced certainty for taxpayers.

Nevertheless, the current suggestions under Article 25 (5) of the OECD Model do not appear to be sufficient to guarantee a significant improvement of the dispute resolution system in their current form. More specifically, in the author’s view, despite the fact that providing states’ with a certain amount of flexibility in deciding the nature of arbitral proceedings is necessary in order to address states’ political objectives while resolving tax disputes on a bilateral level, there are currently three major inadequacies of the OECD Model that must be addressed to provide taxpayers with sufficient tax and legal certainty.

7.1 Arbitration to Decide the ‘Map-Ability’ of Taxpayers’ Complaints

One major drawback in the structure of the OECD Model is the fact that arbitration is provided as an inherent part of MAP, the initiation of which cannot be forced by an independent panel, but is entirely at the discretion of the competent authorities. As a result, in cases when no special mechanism is available to monitor the potential rejection of taxpayers’ complaints by tax authorities, states that want to block a particular case from reaching an arbitral panel can simply reject initiating the negotiation stage of MAP. This is indeed the result of the fact that, in current practice, states have full discretion to decide whether ad hoc disputes derive from a conflict with regards to the DTCs’ provisions or whether particular

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120 For example disputes that involve permanent establishments in third countries; See also N. Bravo, Mandatory Binding Arbitration in the BEPS Multilateral Instrument, 47(8/9) Intertax 697 (2019).
121 Disputes that arise from the application of the new nexus rule under the Unified Approach for the digitalization of the taxation of economy, see s 8.
122 OECD, supra n. 103, paras 65, 73, 81.
124 Altman, supra n. 1, at 245.
125 IMF and OECD, supra n. 123, at 8; also Oats, Miller & Mulligan, supra n. 37, at 143–144.
126 See also IMF and OECD Secretariat, supra n. 123, at 10–15, 22–23; 52; also Owens, supra 6; at 613; See also S. Blythe, The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties, 47 Int’l L. 287–298 (2013).
127 E.g. choosing the application of either the Independent Opinion or the Final Offer approach, the publication of panels’ findings, the level of panel decisions’ precedential value, etc.
reasons justify declining the initiation of MAP negotiations altogether (e.g. in cases of perceived abuse\(^ {129}\)).

However, when the initiation of the negotiations stage of the dispute resolution system is voluntary,\(^ {130}\) the initiation of the arbitration stage – in cases when negotiations are not fruitful – becomes also de facto voluntary, something that can indeed cause great uncertainty to taxpayers. In addition, the implementation of arbitration clauses without addressing this self-judging nature of the states’ power to reject initiating the MAP\(^ {131}\) can ultimately cause more harm than good to taxpayers with their complaints not even being considered through state negotiations in cases when states can reject initiating the MAP altogether in order to avoid the arbitration stage in absence of an amicable settlement.\(^ {132}\)

To overcome the dangers of this ‘blocking mechanism’\(^ {133}\) it is suggested that, when states reject taxpayers’ complaints, the latter are granted the right to bring these cases to arbitral tribunals that would have the authority to decide whether there was a valid legal reason for states’ denial to initiate MAP proceedings and to also force the initiation of the negotiation stage when no valid reasons of states’ denial were found.

This has indeed been the approach adopted by the EU Arbitration Directive in which it is provided that a taxpayer can seek protection with the Advisory Commission when all but one state rejects his complaint.\(^ {134}\) However, in order to provide full tax certainty, it is suggested that the OECD Model go one step further and include provisions that grant taxpayers the right to request that an arbitral panel decide on the MAP-ability of the dispute regardless of the consensus of even one state. This would not only safeguard taxpayers from tax authorities’ ‘too good relations’ but would also protect states that would be hesitant to promote the resolution of a dispute in fear of aggravating the other contracting state that opposed the initiation of dispute settlement procedures.

With regards to the formation of these arbitral panels to decide on the ‘MAP-ability’ of taxpayers’ complaints, one solution would be to simply follow what is typical in the tax arbitration practice of each state appointing one arbitrator who would subsequently select a third individual as the chairperson. Indeed, this procedure can safely be followed in the second stage of the MAP proceedings when arbitral panels would decide on the substantial part of the pending dispute, after state negotiations have failed to result to a settlement.\(^ {135}\) However, during this pre-MAP stage when states negotiations have not even begun, it seems more appropriate that the appointment of arbitrators is made directly from a monitoring body, e.g. the OECD Director of the OECD Centre for Tax Policy and Administration, in order to promote extended certainty to taxpayers.

In current practice, this is the mechanism that is provided to protect taxpayers against states’ stalling tactics in not appointing arbitrators within sixty days from the date that a taxpayer requested the formation of an arbitral panel to hear the pending dispute that has not been resolved through MAP negotiations.\(^ {136}\) The same mechanism that is applied to this pre-MAP procedure is, in the author’s view, the most practical method to further guarantee that the decision of the arbitral panel for the initiation or not of the negotiations stage of the MAP, would be taken freely and impartially without the arbitrators being pressured by states’ tax authorities to reach a certain conclusion when both contracting states completely reject the initiation of the MAP.

At the same time, when states reject taxpayers’ access to the MAP for a valid legal reason, they have nothing to fear from a panel reviewing their decision at this pre-MAP stage. In addition, including a requirement that taxpayers compensate states partially (or fully in cases of clearly unfounded claims) for the procedural costs of these proceedings in cases when panels find in favour of states’ decision to reject taxpayers’ requests\(^ {137}\) can safeguard governments against unnecessary losses of financial resources.

### 7.2 Strict Time Periods

Another shortcoming of the current OECD Model suggestions is associated with the lack of an imposition of strict time periods without the possibility of them being indefinitely extended for the conclusion of each stage of the MAP system. For instance, while it initially appears that

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**Notes**

129 See OECD Model (2017), Commentary on Article 25, paras (1) and (2), paras 26–32.
130 Requiring the consensus of both tax authorities.
132 Farah, supra n. 128, at 752–753.
133 Ibid., at 734–736.
134 See Arts 6 (1) (a) and 6 (2) of the EU Arbitration Directive.
135 Therefore granting states with advanced political control over the dispute without adversely damaging taxpayers’ interests.
136 See OECD Model (2017), Commentary on Article 25 (3), Sample Mutual Agreement on Arbitration, Mutual agreement on the implementation of para. 5 of Art. 25, para. 3 (2), Owens, supra n. 6, at 615.
137 See also a similar to the aforementioned suggestions, provision of the EU Arbitration Directive, Art. 12 (2).
the OECD Model provides for a two year period (or three in the case of a mutual agreement) for the conclusion of the state negotiations stage, it continues to essentially grant tax authorities the right to indefinitely extend this timeline.\textsuperscript{138}

However, providing tax authorities with such freedom can not only lead to extremely long periods for the resolution of tax disputes \textsuperscript{139} but also to a de facto blockade when tax authorities intend to avoid the resolution of a dispute.\textsuperscript{140} At the same time, the counter-argument that states should be granted the right to further extend these time periods when they are allegedly very close to an agreement can not only lead to abuses but is also not as relevant under a system in which states are able to reach a settlement at any time during the arbitration proceedings and even after a panel’s final decision is handed down.

In order to deal with the aforementioned issue, it is suggested that the OECD Model incorporates stricter time periods for the conclusion of each stage of the dispute resolution system.\textsuperscript{141}

In this context, after a taxpayer’s complaint is submitted to the competent tax authorities, there would be a short time period (e.g. of six to nine months) imposed on tax authorities to decide on the initiation of the MAP. In the event that states decline initiating proceedings, taxpayers would then have the right to request the appointment of an arbitral panel to decide in a reasonable amount of time (e.g. three to six months) of whether states must initiate the first stage of the dispute resolution system.

After the initiation of the negotiations stage (either by a state agreement or by the arbitral tribunal’s decision), states would then have an additional strict time period (e.g. of two to three years) to reach to an amicable solution, in absence of which they would be required — after the taxpayer’s request — to appoint arbitrators for the second stage of the dispute resolution system.

Finally, after the appointed arbitrators reach a decision (in a reasonable time period\textsuperscript{142}), states would then have a final strict time period (e.g. six months)\textsuperscript{143} to reach an alternative settlement to be presented to the affected taxpayer.

### 7.3 Taxpayers’ Participation in the Proceedings

An additional major issue that must be addressed in an updated built-in MAP arbitration system concerns the currently minimal participation rights granted to taxpayers, especially during the arbitration stage of the proceedings.\textsuperscript{144}

In this context, it is true that the participation of taxpayers in the negotiation stage of the MAP shall arguably be limited to presenting their arguments to the competent authorities. This is done so that states are able to enjoy maximum freedom in negotiating an amicable resolution while exchanging sensitive information and ideas without fearing possible implications with regards to other cases,\textsuperscript{145} especially when they negotiate package deals.

Nevertheless, there is not sufficient justification to deny taxpayers from participating in built-in MAP arbitration proceedings when states fail to reach an amicable solution.\textsuperscript{146} More specifically and despite the fact that, under the proposed approach to arbitration, taxpayers cannot be considered actual parties to the dispute,\textsuperscript{147} affording them the right to make submissions to the arbitral panels to express their concerns and interests is essential not only to enhance panels’ access to all relevant information before reaching a decision but to also promote transparency of the proceedings and taxpayers’ trust in the dispute resolution system.\textsuperscript{148} At the same time, doing so would neither change the particular nature of built-in MAP arbitration nor limit states’ right in any way to reach an amicable settlement of the dispute on a

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**Notes**

\textsuperscript{138} See OECD Model (2017), Commentary on Article 25(5), paras 70.1–70.3 where it is provided that, if tax authorities agree, they can extend the time period of two years for the conclusion of the negotiations stage, even beyond the three-year alleged threshold. See e.g. para. 70.1: ‘only after three years. Also States are free to provide, in certain circumstances: a longer period of time …’.


\textsuperscript{141} Towards this direction, contrary to the OECD Model, in the EU field, the recent directive has indeed made great progress providing stricter time periods for the duration of each stage of the dispute resolution system among the Member States.

\textsuperscript{142} For example, in six months for cases decided under Final Offer Arbitration and 12 months under the Independent Opinion approach.

\textsuperscript{143} See OECD Model (2017), Commentary on Article 25(5); Sample Mutual Agreement on Arbitration, Mutual agreement on the implementation of para. 5 of Art. 23, para. 12.

\textsuperscript{144} See Perrou, supra n. 12, at 295; J. F. Avery Jones, Types of Arbitration Procedures, 47(8/9) Intertax 676 (2019).

\textsuperscript{145} Altman, supra n. 1, at 412, 420.

\textsuperscript{146} Perrou, supra n. 12, at 295; Jones, supra n. 144, at 676.

\textsuperscript{147} Therefore, their access to arbitration is limited only for disputes that cannot be resolved through state negotiations. In addition, they cannot appoint arbitrators, and they are also unable, under the Final Offer approach, to promote a solution i.e. different from those suggested by the tax authorities.

\textsuperscript{148} Ibid. See also Nowland, supra n. 22, at 191; S. Piotrowski et al., Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation, 47(8/9) Intertax 685 (2019).
diplomatic level at any time during the proceedings. As a result, enhancing taxpayers’ participation rights in the arbitration stage of the MAP would not threaten states’ political concerns.

Despite the aforementioned, in the current international practice, even this minimum right is far from established since the participation of taxpayers in the arbitration stage is much limited and generally conditioned on states’ approval.199

However, granting taxpayers the right to make submissions and file petitions – and even appear or be represented before the panel when arbitrators allow it200 – without any additional limitations, states’ approvals, or other conditions is essential for enhancing the quality and legal certainty of the arbitration proceedings.201 By doing so, taxpayers would be able to promote the adoption of any state’s suggestion under the Final Offer approach or even their own distinct proposal under the Independent Opinion approach not only with factual and evidential material but, more importantly, with substantial legal arguments for the resolution of the dispute in a manner that addresses their own interests and concerns.202 In this context, it is also important to note that, in order for taxpayers’ participation in such proceedings to be effective, they would also need to have access to and be privy to all arguments, evidence, and information that are circulated within the arbitral panels.203 At the same time and in order to protect potential confidentiality issues that might be raised on a case by case basis, a backstop could be provided whereby the arbitral panels would have the authority to decide the non-disclosure of certain information in order to protect states’ interests in the same way that domestic tribunals decide on such matters.204

In this way, the enhancement of taxpayers’ access and participation rights in the ITDR system would not only further promote transparency, efficiency, and overall quality of tax dispute settlement but could also potentially result in a higher rate of taxpayers’ acceptance and compliance with the final outcome due to their enhanced trust in the ITDR system.205

8 THE UNIFIED APPROACH AND DISPUTE RESOLUTION ON A MULTILATERAL LEVEL

Promoting the implementation and enhancing the quality of built-in MAP arbitration is a practical way to provide greater tax certainty in cases when disputes arise with regards to the interpretation of a DTC while also protecting states’ flexibility in exercising their political control over tax disputes on a diplomatic level.

Nevertheless, the current tax dispute resolution system, even when bilateral arbitration provisions are incorporated in states’ DTCs, would be impractical for accommodating differences raised on a multilateral level, the resolution of which would affect many states at the same time under a commonly established agreement such as the Unified Approach. In this context, it is evident that, under the upcoming Unified Approach, expected double-taxation disputes could not be resolved through the application of an existing credit or exemption method on a bilateral level since the new nexus system would affect the jurisdiction of multiple states206 where each particular member of an MNE would have business activity.

At the same time, disputes that are raised and are associated with, e.g., determining which jurisdiction must provide relief and the amount to the affected taxpayer, could not be efficiently resolved through bilateral procedures.207 In a similar fashion, disputes associated with transfer pricing adjustments among several different states could also not be efficiently addressed under the current bilateral dispute resolution system. Additional disputes affecting more than two states would be expected with regards to a possible interaction especially between Amount A and Amount C for which profits under Amount A could be duplicated in the market jurisdiction based on the argument that some of the profits under Amount A are referable to the functional activity in the market jurisdiction and rewarded by amount C.208

In order to address these challenges, the OECD is currently stressing the importance of developing clear instructions and mechanisms to address potential disputes before they even occur. In addition, especially for the administration of potential disputes under Amount A,
the OECD currently promotes the idea of the creation of representative panels that would perform a review function for disputes with regards to the application of Amount A provisions.\(^{159}\)

Indeed, this suggestion was the result of the consideration that, even when all affected states include bilateral MAP provisions in their DTCs, the greater amount of time that would be required to assess and audit an MNE’s calculations by all jurisdictions, the potential greater number of the mutual agreement procedures that would have to be completed and the inconsistency that could still exist after all of these procedures due to a potential lack of coordination\(^{160}\) would adversely inhibit fast and efficient resolution of occurring disputes. At the same time, this suggestion of the OECD highlighted – what has also been indicated within this article – that the multilateral nature of the new regime calls for a gradual development of structures of dispute resolution mechanisms that are more legalized and institutionalized.

Currently, it is rather doubtful whether the reviews of such panels could indeed have a binding effect on states or whether they could result in any other way to binding agreements among the disputing parties.\(^{161}\)

On one hand, reaching a consensus for the binding nature of such reviews would be a revolutionary moment in the international tax field since, in essence, it would signify the creation of the first multilateral legalistic dispute resolution system for tax disputes.\(^{162}\) This would indeed be a system that, while having many similarities with the current WTO dispute resolution system, would actually go even further than the latter since the disputes under Amount A would not even be raised by the parties but could rather be administered even before their actual occurrence.

If, however – and, in the author’s view, this is the most probable scenario – states fail to reach consensus for the binding effect of panels’ reviews on issues associated with Amount A but it is rather established that the latter would only provide a general overview and only act as guidance for states, it would be necessary to provide alternative mechanisms to administering pending disputes on a multilateral level.

For the administration of such disputes that would still remain and other disputes that would be associated with the application and interaction of Amount A, Amount B, and Amount C, the OECD further considers the promotion of multilateral MAP procedures and even of binding tax arbitration procedures.\(^{163}\) This proposal, in the author’s view, is indeed not only useful but, in reality, necessary for addressing the practical challenges of multistate disputes\(^ {164}\) and also promoting a consistent dispute resolution mechanism that would provide further clarification to the application of the multilateral system.

In addition and while such an arbitration system could be based on the current structure of the OECD Model combined with the features already analysed under section 7,\(^ {165}\) due to the particular nature of multistate disputes under a commonly agreed multilateral system, additional provisions that would arguably further restrict states’ flexibility during the arbitral proceedings would have to be implemented.

This approach to a stricter legalistic arbitration system for disputes raised under the new multilateral Unified Approach would be necessary not only to properly administer the advanced practical challenges of multiparty disputes but also to address the expected shift of a traditionally bilateral system towards new mechanisms of a multilateral nature. In addition, it would provide greater clarity to the provisions of the Unified Approach and further consistency to its application and interpretation, the need of which are indeed greater in the multilateral field. This is in opposition to the bilateral field where states can indeed enjoy greater flexibility in reaching commonly agreed settlements without having to redrafts their DTCs. At the same time, the implementation of commonly agreed, preestablished procedural rules would significantly benefit states in the new multilateral environment due to the enhanced organizational and administrative support that would be provided to them,\(^ {166}\) potentially saving both time and financial resources for the latter.

In this context, there are three issues in particular that would have to be further addressed under a model multilateral arbitration system.

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**Notes**

159 OECD, supra n. 103), para. 71.
160 Ibid., paras 66–70.
161 Ibid., para. 72.
162 However, of limited scope, i.e. disputes that are associated with the application of Amount A of the Unified Approach.
163 OECD, supra n. 103), para 65–82.
164 Since amicable resolution of a dispute among many states would be exponentially more difficult than a dispute among two states due to the conflicting and intersected interests of all affected states.
165 Since the right of taxpayers to ask an arbitral panel of whether proceedings are necessary to resolve pending tax disputes, the imposition of strict time periods and the advanced participation rights to taxpayers would also be essential in these multistate arbitration proceedings.
8.1 Appointment of Arbitrators

First, due to the potential substantial number of the disputing states (and their sometimes common and other times conflicting interests in reaching different solutions to pending disputes), the appointment of arbitrators could not be addressed by the common method of each state appointing their own arbitrator. Therefore, alternative appointing mechanisms would have to be implemented including the establishment of a monitoring body for the appointment of arbitrators.

While this issue could be addressed, for example, by providing the OECD Director of the OECD Centre for Tax Policy and Administration such authorities, it seems that the establishment of a commonly elected secretariat that would select arbitrators among a predetermined list of independent persons of standing would be more practical for facilitating these proceedings more efficiently. In this context and being inspired by the OECD proposal for the establishment of reviewing panels for the application of Amount A of the Unified Approach, it could even be suggested that arbitrator-appointing authorities could be provided to these reviewing panels – in addition to their role of reviewing substantive issues under Amount A – for pending disputes associated with the application of the Unified Approach.

8.2 Minimal Application of the Final Offer Approach

As previously analysed, Final Offer Arbitration is favoured among states as an approach to arbitration, especially due to its advantages in granting states’ advantaged political control over the administration of tax disputes, promoting the quality of state negotiations, and usually resulting in faster and cost-efficient final outcomes. Nevertheless, despite the aforementioned advantages of Final Offer Arbitration, its application to resolve multistate disputes that arise from a multilateral agreement would indeed be minimal or non-existent.

This can be made clearer by taking into consideration the fact that providing arbitrators the right of choosing only among multiple different solutions provided by states (with conflicting or intersected interests) to the pending tax dispute would neither urge states to an amicable settlement nor would it promote quicker resolution of tax disputes. Therefore, the limitation of arbitrators to three, four, or even more solutions would be much less practical than in current practice (e.g. for transfer pricing disputes on a bilateral level). In addition, such administration of occurring tax disputes under the Unified Approach that would block arbitrators from developing a standard method of interpreting the provisions and the established calculation formulas established within the Unified Approach would inhibit states’ interest in developing a system that would promote consistency while disseminating information about the requirements of this multilateral regime and thereby promoting greater certainty among all contracting states.

As a result and while Final Offer Arbitration could indeed still be useful in addressing states’ bilateral tax disputes arising from the interpretation or application of a DTC, under multilateral systems such as the new Unified Approach, the Independent Opinion Approach would arguably be the only viable choice for states.

8.3 Publicity and Precedential Value of Panels’ Decisions

Traditionally, when tax arbitration is included in states’ DTCs, panels’ decisions do not create precedence for future disputes in order to grant contracting states’ maximum control and flexibility while interpreting, applying, and even modifying their bilateral agreements without having to redraft them. At the same time, great flexibility is afforded to states to decide if the findings of arbitral panels would even be published.

Nevertheless, this flexibility that is provided to states under bilateral dispute resolution systems could not be granted at the same level for disputes that would be resolved under a multistate arbitration system such as within the Unified Approach.

In this context and considering that clarifying the requirements of a commonly agreed system and providing guidance for the resolution of future disputes would be in all contracting states’ interests, it would be necessary that the final decisions of arbitral panels – while redacted in order to protect not only states’ but also taxpayers’ confidential information and sensitive data – would have to be published. Doing so would not only enhance tax authorities’ access to legal and tax resources while disseminating necessary information about the
requirements of the new multilateral regime but would also enhance transparency and taxpayers’ trust in the new system.

Similarly, the precedential value provided to these arbitral panels’ findings would unavoidably have to be greater than in current practice in the international tax field in order to promote consistency to the application of the multilateral agreement.

In this context, it could indeed be argued in favour of a strong and strict precedential value of such decisions in order to facilitate this objective within the new multilateral system. In the author’s view, however, provided also that, in practice, it would be very difficult for states to actually reach a consensus in this field, a compromised solution that would promote at least a minimum level of consistency in the system could be provided such that published decisions, while not forming strong precedence for future disputes, would have to at least be taken into consideration in future panels while deciding cases of a similar nature.

In this way, it would seem that gradually promoting commonly established interpretation methods while also granting relative flexibility to future panels in reaching conclusions that are different-than in the past when necessary (preferably followed with appropriate reasoning for their decision to do so) can indeed be the most pragmatic way to enhance tax and legal certainty within multilateral systems such as the Unified Approach.

9 Conclusion

In conclusion, the historical evolution of international dispute settlement in the fields of international investment, international trade, and international taxation significantly depend on the unique political objectives of states under each regime and the evolving requirements of each era.

In the international tax field, the conventional tax dispute resolution system of state negotiations in its original form, despite its historical significance in promoting flexible and amicable resolution of tax disputes on a diplomatic level, currently appears to be unable to deal with the advanced demands of modern economy.

In search of a system that draws a balance between the legitimate political concerns of states’ and taxpayers’ interests in the post-BEPS era, the implementation of a carefully designed two-stage dispute resolution system that provides states with incentives to resolve fast, in an amicable and cost-efficient way, occurring tax disputes on a bilateral level while also safeguarding taxpayers against states’ abusive tactics is, in the author’s view, the most pragmatic way to enhance the quality of bilateral tax dispute resolution.

At the same time, the advanced complexity that the implementation of multilateral systems such as the Unified Approach would create in the international tax field – a traditionally bilateral rather than multilateral system – would require additional evolution of international tax arbitration which, while arguably further restricting states’ control over the resolution of occurring tax disputes, would nevertheless be necessary to facilitate the new requirements of the international tax system.

Notes

175 Since it would greatly limit their powers to argue in favour of the resolution of future disputes in a way that promotes their individual interests.

176 See also Piotrowski et al., supra n. 151, at 687.