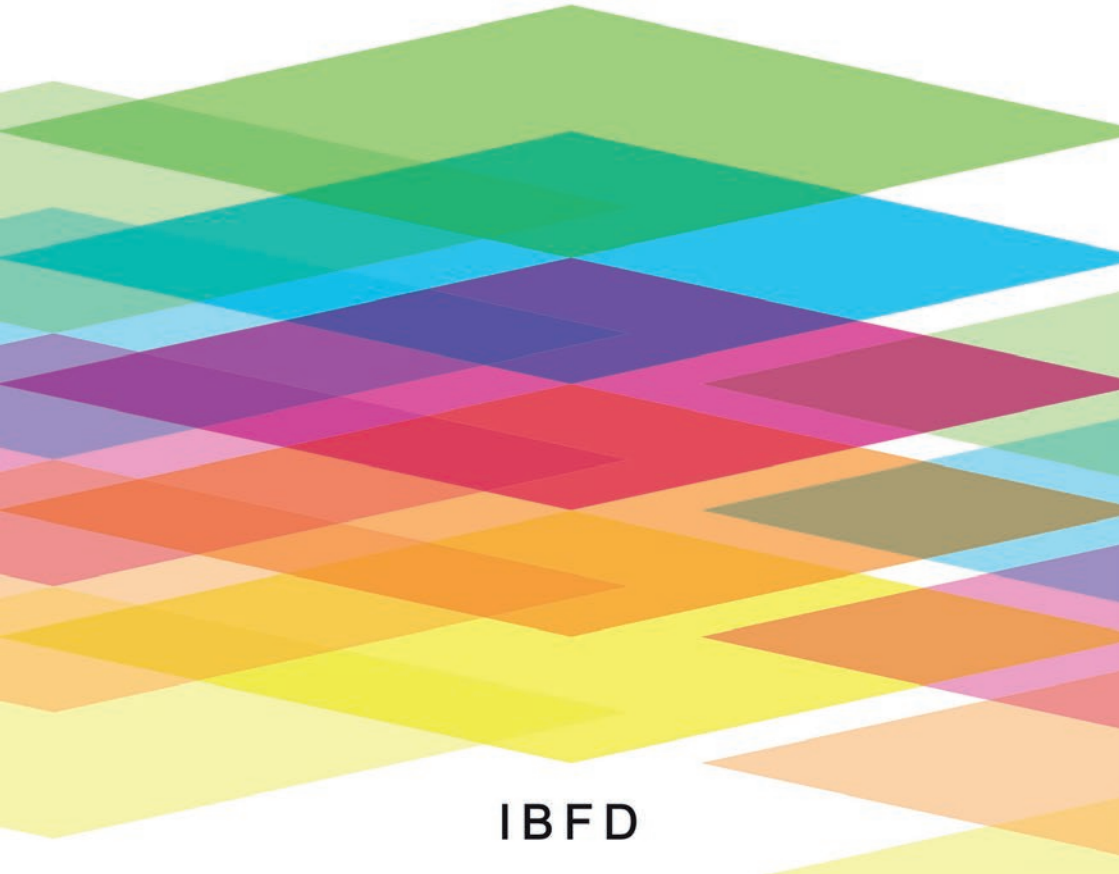
Editors: Pasquale Pistone
and Jan de Goede

Flexible Multi-Tier Dispute Resolution in International Tax Disputes



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Flexible Multi-Tier Dispute Resolution in International Tax Disputes

Why this book?

This book contains the output of the collaborative research project "Flexible Multi-Tier Dispute Resolution in International Tax Disputes", which has brought together researchers from 11 countries and 10 partner institutions under the coordination of IBFD Academic. This book is the first of its kind to abridge the whole phenomenon of cross-border tax disputes, from their prevention to their settlement.

The book is structured along the lines of the key articulations of the flexible multi-tier dispute resolution theoretical model and provides contributions ranging from the prevention of tax disputes drawn from selected domestic experiences, addressed in Part 1, to the facilitation of the settlement by a third party, addressed in Part 2. In this regard, Part 2 focuses, in particular, on the use of mediation in the domestic tax context in several countries as well as on the possible prospects, from a policy angle, of the use of mediation in cross-border settings. Part 3 of the book contains contributions regarding models relying on the actual settlement of tax disputes by a third party, providing a critical analysis of the recent developments in the use of arbitration in tax treaty disputes and to the currently applicable EU international tax dispute resolution framework.

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Preface

This book contains the output of the collaborative research project "Flexible Multi-Tier Dispute Resolution in International Tax Disputes", coordinated by the Academic Department of IBFD and which has brought together researchers from 11 countries and 10 partner institutions.

To meet the challenges put by an ever-increasing number of international tax disputes, a flexible multi-tier dispute resolution system is recommended to prevent and solve international tax disputes. The research, based on that concept, deals with the various stages of such approach but focusses at this stage in particular on the possible role of mediation, and deals less extensively with the other stages so identified.

The book is structured along the lines of the key articulations of that flexible multi-tier dispute resolution, and provides contributions ranging from the *prevention* of tax disputes drawn from selected domestic experiences addressed in Part I, to the *facilitation* of the settlement by a third party, addressed in Part II. In this regard, Part II focuses, in particular, on the use of mediation in the domestic tax context in several countries as well as on the possible prospects, from a policy angle, of the use of mediation in cross-border settings. Part III contains contributions regarding models relying on the actual *settlement* of tax disputes by a third party, providing a critical analysis of the recent developments in the use of arbitration in tax treaty disputes and to the currently applicable EU international tax dispute resolution framework.

The methodological underpinnings of the project have been outlined in greater depth in the "Introduction", while a critical compilation of the main findings to be derived from the studies included in the book can be found in the "Summary of Findings" (Chapter 18). The single chapters are written by a pool of Authors with a diverse and extensive expertise, drawn from academia as well as practice, some of whom acquired also considerable experience in these topics from their prior functions as officials of governments or international organizations. Due to the structure of the research project, some chapters focus on a specific country or region while other chapters, especially those dealing with international disputes, adopt a general policy perspective. The final "Conclusions and Recommendations" (Chapter 19) condense the main propositions set forth by the Editors in light of the main findings of the project.

The Editors would like to hereby express special gratitude to Prof. Dr Diana van Hout, who, besides contributing several chapters, including the "Introduction" and "Summary of Findings", was instrumental in the initial coordination and stirring of the research project (in this latter role she was succeeded by Dr Alessandro Turina, who also carried out the review of the manuscript and to whom we are also particularly grateful), which eventually made this book possible. The Editors also acknowledge Dr Giovanni Consolo for his help in the review of the manuscript.

Finally, the Editors would like to take this opportunity to pay homage to the memory of the late Dr Melinda Jone, author of the chapter on "Tax Mediation in New Zealand, Australia and the United Kingdom", who untimely passed away while the present book was in production.

Prof. Dr Pasquale Pistone
Prof. Jan J.P. de Goede, econ. drs
Amsterdam, March 2020

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Introduction

Diana van Hout

1. Background and reason of the research

1.1. Growing number of cross-border tax disputes

Nowadays there is a global trend towards an increasing number of international tax disputes.[1] The OECD noted that the actions to counter base erosion and profit shifting (BEPS) are likely to give rise to new rules, new interpretation problems and therefore a higher risk of double taxation. A higher risk of double taxation means more tax cross-border disputes which can jeopardize cross-border trade, foreign investment and economic growth.[2] To counter an excessive growth of international tax disputes it is of utmost important to improve the current international dispute resolution procedures.

International tax disputes can occur when taxpayers are confronted with juridical double taxation because two or more jurisdictions levy tax from the same subject (taxpayer) on the same taxable income, and economic double taxation when two or more jurisdictions levy tax from one or more subjects on income which in legal terms is not the same kind of income but from an economic perspective it is (like in transfer pricing cases). Tax treaties try to avoid juridical double taxation and also economic double taxation in the case of transfer pricing, but due to differences in legal systems, and differences in treaty interpretation, a complete avoidance of double taxation cannot always be accomplished. In case a taxpayer is confronted with double taxation he or she will first start to seek for a remedy at the tax authorities or the judiciary of his or her (presumed) residence. If that does not prevent double taxation, the taxpayers may try to find a remedy at the tax authorities or judiciary of the other contracting state where the double taxation occurs. Subsequently, taxpayers who are still subject to potential double taxation can ask the countries involved to meet together to try to resolve the dispute over the taxing rights.[3] The basis of this international dispute resolution

1. *See* for example the International Fiscal Association, *Dispute Resolution Procedures in International Tax Matters* (IFA Research paper 5, 24 Mar. 2014.
2. International Chamber of Commerce, Commission on taxation, OECD 16 Jan. 2015, doc.no. 180-542.
3. J. Owens, OECD Observer, May 2004, available at http://www.oecdobserver.org/news/archivestory.php/aid/1290/Resolving_international_tax_disputes:_The_role_of_the_OECD.html (accessed 1 Sept. 2020).

system can be found in the particular treaty provision that corresponds to article 25 of the OECD Model Tax Convention on Income and on Capital (hereinafter: OECD Model) or article 25 of the United Nations Model Tax Convention (hereinafter: UN Model). Article 25(1) and (2) of the OECD Model and article 25(1) and (2) of the UN Model require that the competent authorities of the contracting states shall endeavour to resolve cases by mutual agreement. On 23 November 2015 the OECD reported statistics regarding the number of outstanding Mutual Agreement Procedures (hereinafter: MAP) of its Member countries. Over time, these statistics revealed an increase of a MAP caseload of 130.57% compared to the reported period of 2006 until 2014; with an increase by 18.77% of both new cases and pending cases in 2014.[4] Since 2006, new and pending cases have more than doubled.[5] At the end of 2014 the total number of open MAP cases was 5,423 and the average time for OECD countries for completing MAP cases, grew from 22.10 months in 2006 up to 23.79 months in 2014.[6] This means that even the MAP gets flooded by the dramatic growth of cross-border tax disputes. When it comes to adopting a broader geographical representation encompassing all countries that have joined the Inclusive Framework, the most recent statistics show 6,924 cases as "start inventory" at the beginning of 2018; the average time for completing MAP cases appears to having remained steady, with 23.5 months as an average (and a remarkable gap between transfer pricing cases, that on average take 33 months to complete and other types of disputes, that on average require 14 months for completion).[7]

Although the MAP seems a very good solution in dealing with double taxation, in the literature the MAP is criticized and considered as an ineffective procedure. One of the most important criticisms is its lack of finality because it does not oblige contracting states to resolve the dispute[8] and the fact that some competent authorities cannot deviate from domestic court decisions.[9] This means that some authorities do not have enough discretion-

4. Mutual Agreement statistics 2014, available at http://www.oecd.org/ctp/dispute/map-statistics-2014.htm (accessed 1 Sept. 2017). Please note that the MAP cases involving two OECD Member countries are double-counted in this total.
5. CFE's Tax Top Five, Key Tax News of the week, 23 Nov. 2015. Available for example via: http://www.nob.net/sites/default/files/content/article/uploads/cfes_tax_top_5_key_tax_news_of_the_week_23_november_2015.pdf (accessed 1 Sept. 2017).
6. Mutual Agreement statistics 2014, available at http://www.oecd.org/ctp/dispute/map-statistics-2014.htm (accessed 1 Sept. 2017).
7. *See* Mutual Agreement Statistics 2018, retrievable at the following link: https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm (accessed 20 Jan. 2020).
8. J.S. Wilkie, *Article 25: Mutual Agreement Procedure - Global Tax Treaty Commentaries*, sec. 1.1.1., Global Topics IBFD.
9. UN MAP Guide, para. 71, *See also* OECD MEMAP, sec. 4.1.

ary authority to settle cases within the MAP. Another important criticism is that the MAP only offers a limited opportunity for taxpayers to participate in the procedure.[10] Basically it is a procedure between the affected states,[11] leaving almost no room for taxpayers to participate in it;[12] but the taxpayer is allowed to initiate the MAP[13] and eventually has to accept the outcome of the MAP or reject it and may then remain exposed to a taxation not in accordance with the convention.

Article 25(5) of the OECD Model and article 25(5) of the UN Model (alternative B), provide the possibility to submit a case to binding arbitration, if the competent authorities are unable to resolve the case.[14] In the OECD Model this can be requested by the taxpayer and in the UN Model this can only be requested by one of the contracting states. In practice only a handful of tax treaties offer the possibility of arbitration and even if the treaty offers the possibility of arbitration it is still little used.[15] In order to address the growing number of cross-border tax disputes the OECD promoted a better use of the MAP and inclusion in the tax treaty network via BEPS Action 14, of which the measures regarding MAP are a minimum standard for members of the Inclusive Framework. On the other hand, under the Multilateral Instrument, 30 jurisdictions agreed to arbitration.[16] The EU Commission set forth a Council directive on Double Taxation Dispute Resolution Mechanisms in the European Union[17] and on 23 May 2017 the European Council agreed on this new system. This means that, effectively, the scope of disputes will be extended to all article 25(1) and 25(2) type

10. K. Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD Doctoral Series, Vol. 28, last reviewed: 30 Aug. 2013, p. 227 (MAP) and pp. 239-241 (international double taxation in general), Books IBFD.
11. *See also OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* paras. 56-62 (2008, 2010 and 2014), Treaties & Models IBFD.
12. Except for para. 60 *OECD Model: Commentary on Article 25* (2008, 2010 and 2014) where the participation is first allowed regarding a joint commission and then limited in para. 61 *OECD Model: Commentary on Article 25* (2008, 2010 and 2014).
13. Paras. 31-35 *OECD Model: Commentary on Article 25* (2008, 2010 and 2014).
14. P.K. Sidhu, *Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?*, 68 Bull. Intl. Taxn. 11, sec. 3.1. (2014), Journal Articles & Papers IBFD.
15. Z.D. Altman, *Dispute Resolution under Tax Treaties* p. 105 (IBFD 2006), Books IBFD.
16. OECD (2015), *Making Dispute Resolution Mechanisms More Effective*, *Action 14 - 2015 Final Report*, OECD/G20 *Base Erosion and Profit Shifting Project*, OECD Publishing, available at http://www.oecd-ilibrary.org/taxation/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report_9789264241633-en, p. 11 and see for a list of countries that committed to adopt mandatory arbitration on p. 41.
17. The Council will be adopted once the European Parliament has given its opinion Member States will have until 30 June 2019 to transpose the directive into national laws and regulations.

of MAP cases instead of just transfer-pricing disputes as under the EU Arbitration Convention.[18]

Many developing countries have strong reservations with respect to mandatory binding arbitration. Nowadays arbitration is in practice still very rare in international tax dispute and there is still some doubt among some OECD and G20 countries to commit themselves to arbitration.[19] One of the reasons is the will to respect the sovereignty of states. Therefore, the United Nations stated that not only arbitration but also Alternative Dispute Resolution (hereinafter: ADR) should be analysed and researched in greater detail.[20]

1.2. Flexible multi-tier solutions for international tax disputes

In international tax disputes the main difficulty is that the traditional legal remedies of a taxpayer cannot assure a consistent outcome in both states as there is no international tax judicial body overarching the national judiciary of both states involved; thus, in the end, such disputes can only be resolved between the two states. The sovereignty of states excludes the possibility of a single judiciary to decide over the case. Moreover, in cross-border tax disputes there are two jurisdictions involved and it involves at least three parties: the two contracting states and the taxpayer (multiparty dispute).[21,22] In some disputes such as transfer pricing cases between related companies there are even more parties involved: at least two contracting states and at least two taxpayers, likely a parent company and its subsidiary. As mentioned, the MAP does not guarantee a solution of the dispute if there is no mandatory arbitration in the treaty and many states are not yet prepared to accept the latter. Although the taxpayer is affected by the mutual agreement it is necessary to realize that it is a procedure between the two states in which the taxpayer is not a party and thus if arbitration is included it

18. For an in-depth analysis of Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, reference can be made to Chapter 17 in the present book.
19. OECD, *supra* n. 16, at p. 12.
20. Committee of Experts on International Cooperation in Tax Matters, *Secretariat Paper on Alternative Dispute Resolution in Taxation*, Tenth Session Geneva, 19-23 Oct. 2015, E/C.18/2015/CRP.8, published on 8 Oct. 2015 and available at http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf (accessed 1 Sept. 2017).
21. For the difficulties about system design in multi-party *and* international dispute resolution, *see* C. Menkel-Meadow, *Complex Dispute Resolution* (edited, in 3 volumes, Foundations, Multi-Party and Democratic Deliberation and Decision Making, and International Dispute Resolution), Ashgate Press 2012.
22. Perrou, *supra* n. 10, at p. 211.

is meant to settle the dispute between the two competent authorities. In this research we respect the sovereignty of states but we also note that it is beneficial for governments if they can offer both legal certainty and the avoidance of double taxation as regards to the solution of tax treaty disputes because it creates a much better business climate for foreign companies and individuals. We therefore consider mandatory forms of cross-border dispute resolution, and especially mandatory arbitration, desirable but more as an *ultimum remedium*. This also means that we underline the conclusions of the United Nations that ADR should be researched and explored as well because ADR offers various opportunities to help reaching agreement in cases of MAP without binding arbitration while maintaining the autonomy of all disputing parties (including the taxpayer).

In the field of ADR there is already a lot of academic research available:[23] recent perspectives show that there is no "universal conflict resolution theory" or one system that is applicable to all kinds of disputes.[24] Menkel-Meadow states that modern system design involves the development of many different kinds of conflict resolution processes that should be applied to the various kinds of disputes that occur in the iterative settings. She mentions that the UN, the World Bank, the International Monetary Fund, the Red Cross and the NAFTA already created their own internal justice systems offering a full panoply of dispute resolution processes due to the lack of legal status or enforcement mechanism in the international legal regime.[25] We feel that cross-border tax disputes are faced with comparable problems,

23. E.g.: C. Menkel-Meadow, L. Love & A. Kupfer Schneider, *Mediation: Practice, Policy and Ethics*, Wolters Kluwer 2020; C. Menkel-Meadow ed., Complex Dispute Resolution, Volumes I-III, Ashgate Press 2012; F.E.A. Sander, *National Conference on the Causes of Dissatisfaction with the Administration of Justic*e (1976), reprinted in F.E.A. Sander, *Varieties of Dispute Processing*, in *The Pound Conference: Perspective on Justice in the Future* (A.L. Levin & R.R. Wheeler eds., West Publishing Co. 1979). L.L. Fuller, *Mediation – Its Forms and Functions*, 44 Southern California L. Rev. 2, at 325 (1971). For more literature about mediation and mediation in tax law, *see* M.B.A. van Hout, *Is Mediation the Panacea to the Profusion of Tax Disputes?*, 10 World Tax J. (2018), Journal Articles & Papers IBFD.

24. C. Menkel-Meadow, *Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes* (23 Mar. 2015), Chapter 50 in *The Handbook of Conflict Resolution: Theory and Practice*, 1-28 (P.T. Coleman, M. Deutsch & and E.C. Marcus, eds. Wiley 2014); UC Irvine School of Law Research Paper No. 2015-26, available at SSRN: https://ssrn.com/abstract=2584188, p. 21, C. Menkel-Meadow, *Introduction, Foundations of Dispute Resolution* Vol. I of *Complex Dispute Resolution* (5 Sept. 2012), Ashgate Publishing Company 2012; UC Irvine School of Law Research Paper No. 2012-67, available at SSRN: https://ssrn.com/abstract=2141965 p. xii, C. Menkel-Meadow, *Historic Contingencies of Conflict Resolution*, Georgetown University Law Center, 2013, available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2299&context=facpub pp. 33 and 44 (accessed 1 Sept. 2017).

25. Menkel-Meadow, *Historic Contingencies of Conflict Resolution*, id., at p. 45.

although it involves other areas of law. Therefore, we are of the opinion that a comprehensive, multi-tier advanced and flexible system that offers "tailor-made" instruments for dispute resolution could be more appropriate for preventing and dealing with international tax disputes. More pluralism in procedures can be accomplished by learning from the initiatives and experiences in several domestic tax law regimes. Countries like the United States, South Africa, Canada, Belgium, Australia, the United Kingdom and the Netherlands already took domestic measures to improve the effectiveness of their instruments for appeal procedures. Some of them with great results and some of them with disappointing results. We feel that we can learn from this knowledge and experience and relate this to the research and experience that is already available in the field of instruments for domestic dispute resolution. Sander holds the view that designing an alternative dispute resolution system can easily result in a system that just allocates disputes from one system to another system[26] with the risk of no efficiency in dealing with disputes.[27] We therefore emphasize that a new dispute resolution system in international taxation should aim to avoid bureaucracy and the creation of all kinds of new procedural rules and delay the effective resolution of MAP within any set time limits (like in BEPS Action 14 and in the EU Directive). Furthermore, it should be simple, flexible and avoid vagueness. This could be accomplished, for example, by using available procedures in specific circumstances and relate these to clear principles of (international) tax law.

It is recognizable that regardless of time (historically) or place (cultural), disputes mainly have three stages (stage 1-3).[28] The most effective way in

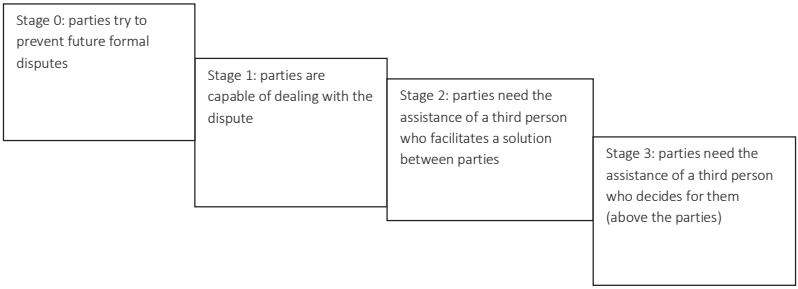
26. F.E.A. Sander, *Dispute Resolution Within and Outside the Courts, an Overview of the U.S. Experience,* in *Dispute Resolution what it is and how it works* p. 123 (P. Chandrasekhara Rao & W. Sheffield eds.), International Centre for Alternative Dispute Resolution 1997. An early version of this paper already occurred in a Harvard paper; *see* V. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11 The Ohio State Journal on Dispute Resolution 1, 1996.

27. M.B.A. van Hout, Mens, *Maatschappij en Mediation. Een theoretisch, rechtsvergelijkend en empirisch onderzoek*, Sdu Uitgevers 2013, pp. 348 and 349. Translation from Dutch: regardless of what ADR can do, it's important to stay concentrated on the tax dispute itself instead of concentrating on the allocation of disputes to the most appropriate procedure by using conflict-management. On p. 359 this recommendation is in English specifically devoted to judges.

28. This in recognizable in conflict management. *See* for example F. Glasl, *Konfliktmanagement* (1980) who was the first person that divided disputes in a stage 1-3. M.C. Euwema & L. van der Velden in C.C.J.M. Koetsenruijter, *Prettig contact met de overheid*, Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (2010), p. 56 (English version: connected this theory of these three stages to dispute resolution between governmental entities and civilians. Furthermore, it is recognizable in several cultures and legal systems through time, that these three different approaches occur in many dispute resolution systems. For an overview of international sources, *see* van Hout, *supra* n. 27, at pp. 58-68.

dealing with disputes is naturally to prevent it. Therefore, we added a stage 0. These stages can be the basis for a more advanced system which aims to offer appropriate dispute resolution for all situations. The multi-tier system does not offer one single solution. It should leave states able to choose one or more procedures which fit best in their situation. The benefit of this flexible system is that it is not forcing states to choose for a certain procedure like arbitration or mediation. It respects the autonomy of the states not only regarding the substantive solution of the dispute but also regarding the procedures they prefer to follow. *See* Diagram 1.

Diagram 1. Flexible multi-tier dispute resolution



In the various tiers several different dispute resolution procedures may be applied, such as, in the case of preventing formal disputes: Advanced Price Agreements, Pre-Filing Agreement Program, Advanced Compliance Agreements, Early Neutral Evaluation, Mini Trial, Fact Finding, etc. Every country has its own interpretation of the several procedures and follows its own arrangements. This means that a procedure like an Ombudsman can be a decision-making process in one country and a facilitating process in another country. Therefore, the third person who participates in stage 2 can be an Ombudsman, mediator, case-manager, Pre-Trial Judge, expert, etc. as long as the third person does not decide for the disputing parties. In other words, the third person leaves the control over the outcome of the dispute at the disputing parties. In stage 3 the third person who decides for the parties is someone such as a judge, arbitrator or a Panel of a binding Mini-Trial. In this third stage the disputing parties hand over the control regarding the outcome of the dispute to someone who decides for them. In this context it can be mentioned that in some countries, for instance, an independent ombudsman can have binding powers on its own country's tax authorities which would imply that there may be situations of transition between stages 2 and 3.

Furthermore, we notice that in domestic tax disputes the disputing parties are probably two parties: the taxpayer and the domestic tax authorities. By contrast, on the substantive plane, international tax disputes involve mostly more than two parties, like the taxpayer(s) and the (tax) authorities of the concerned states. We therefore feel that this Flexible Multi-Tier Dispute Resolution should also sufficiently recognize the position of the taxpayer as an affected party instead of a DR system that solely recognizes the disputing states as the parties to the conflict, like up to now the MAP. However, it should be noted that only very limited rights are allocated to taxpayers in the current MAP system and even in the recent EU Directive; in fact, while the Directive gives a procedural approach, no participation rights are expressly acknowledged.[29]

Each tier requires an extensive research before it can actually function as a procedure to deal with cross-border tax disputes. Research regarding stages 0 and 1 requires probably very extensive research. For example, an international research of Ernst & Young in 20 different countries already shows that domestic procedures to prevent and deal with controversies are also related to and resulting from things like the type of relationship between taxpayers and tax authorities (cooperative compliance, compliance assurance process, horizontal monitoring, enhanced relationship, etc.) or a certain perspective on law (rule based or principle based).[30] In case of cross-border disputes, this means that the research questions regarding stages 0 and 1 should not only cover the design of a purely domestic procedure but require a broader perspective.

Research regarding stages 2 and 3 in the case of cross-border conflicts should also not be limited to the traditional domestic procedures but look at the specific context of an international procedure. Since there is already a lot of research about arbitration in cross-border tax disputes, we would like to concentrate in this research on stage 2 and more specifically on mediation.[31] Over the last few years mediation is a procedure that is rapidly being adopted in many domestic tax law systems throughout the world. A wider use of mediation is also an often suggested solution to deal with

29. *See* further on this Chapter 17 in this volume, in particular, sections 17.3.2. and 17.12.

30. *Tax dispute resolution: a new chapter emerges. Tax administration without borders*, EYGM Ltd 2010, available at: http://www.blog.ey.pl/taxweb/wp-content/uploads/2012/01/TAWB_A_new_chapter_in_dispute_resolution_3Dec10_lowres.pdf (accessed 1 Sept. 2017).

31. *See* for example M. (Mario) Züger, *Arbitration under Tax Treaties*, Books IBFD and recently the University of Vienna (Global Tax Policy) began a 3-year research project to discuss and generate new ideas in International Taxation. *See* for the documentation regarding this project: https://www.wu.ac.at/taxlaw/institute/tax-policy/

cross-border tax disputes but the research on this topic is limited.[32] Thus, in this collaborative research we would like to focus on (a comprehensive perspective on) mediation and the possibility of applying that in the specific international procedure of MAP on tax treaties.

1.3. Mediation in international tax disputes

Mediation is a commonly used procedure in all kinds of disputes. Mediation is:

> A facilitative process in which disputing parties engage the assistance of an impartial mediator, who has no authority to make any decisions for them, but who uses certain procedures, techniques and skills to help them to resolve their dispute by negotiated agreement without adjudication.[33]

One of the basic principles of mediation is that it respects the autonomy of the disputing parties. This principle ensures that mediation could also be an appropriate procedure for international disputes because it respects the sovereignty of disputing states. Moreover, international tax law is based on diplomacy[34] and considered as "flexible rule orientated" which means that there is room for negotiation,[35] which can be in the advantage of mediation as well. However, another principle of mediation is interest-based bargaining.[36] This approach differs from a legal approach. In law, conflicts are transferred into legal definitions in order to obtain access to the legal system and to find a (legal) solution. In mediation, the conflict does not receive a legal definition because the real interest of the disputing party's (e.g. legal certainty, shareholders interest, etc.) is the starting point for the solution. Therefore, mediation is called negotiation in the shadow of the law: it basically ignores the legal positions of the disputing parties and just focuses on a solution (which is in accordance with the law). It is a prospective approach of solving disputes instead of a retrospective approach. The latter is common in law and also in tax law. International tax law is even

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international-tax-disputes-improving-map-and-mandatory-dispute-settlement/en/ (1 Sept. 2017) and further: J. Kollmann et al., *Arbitration in International Tax Matters*, Tax Analyst (30 Mar. 2015), pp. 1189-1195.

32. *See* for example Sidhu, *supra* n. 14 and J. Dalton, *Unlocking MAP disputes: Is mediation the key?*, International Tax Review (18 Feb. 2014).

33. H.J. Brown & A.L. Marriot, *ADR Principles and Practice* p. 127 (Sweet & Maxwell 1999).

34. Wilkie, *supra* n. 8, at sec. 1.1.1.

35. Perrou, *supra* n. 10, at p. 206.

36. Presuming the Harvard Model (Harvard Negotiation Project) as standard for mediation.

Notes

Notes

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