

# Access to Tax Treaty Dispute Resolution Mechanisms in Cases of Abuse

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*Reaching a common understanding of the interpretation and enforcement of tax treaties is a desirable policy goal. It results in higher certainty and helps to increase their effectiveness thus enhancing all the purported objectives of these international agreements. In this regard, dispute resolution mechanisms within international tax law fulfil a relevant coordinating function through the amicable assessment of frictions and mismatches in tax treaty provisions. Notwithstanding, access to these remedies is sometimes denied when the tax authorities consider that the case involves tax abuse even though anti-tax abuse measures usually pose some of the most complex interpretation challenges within tax treaties. Even after the post-BEPS wide implementation of broad-based treaty anti-abuse rules – such as the principal purpose test – countries are reluctant to grant unrestricted access to dispute resolution remedies. This contribution aims at depicting the rather asymmetrical state of affairs on the access to dispute resolution remedies in instances of tax abuse. Additionally, it purports to demonstrate that there are compelling policy reasons to support granting access to both mutual agreement and arbitration procedures in these cases and to criticize the incoherencies that originate from the existing restrictions.*

**Keywords:** Tax treaties, dispute resolution, mutual agreement procedure, arbitration, MLI, tax abuse, GAAR, PPT.

## I INTRODUCTION

Tax treaty dispute resolution mechanisms allow for an amicable assessment of interpretation conflicts generated as a result of the enforcement of these instruments. Specifically, almost all tax treaties incorporate regulations on mutual agreement procedures (MAP) that would enable the involved competent authorities to negotiate and eventually find common ground to solve taxation that is not in accordance with the convention.<sup>1</sup> Additionally, an arbitration mechanism may sometimes be found in certain tax treaties.<sup>2</sup> Essentially, arbitration in this context is designed as a last-resort remedy that will be applicable only in those cases in which the competent authorities could not achieve consensus within a certain

timeframe in order to secure that a solution is provided.

These dispute resolution mechanisms fulfil a relevant coordinating function within tax treaties. Their objective is to reduce frictions and mismatches in the interpretation of treaty provisions and their application thus tempering the existence of conflicts that affect both taxpayers and tax administrations.<sup>3</sup> Reaching a common understanding of tax treaties is a desirable policy goal.<sup>4</sup> It results in higher certainty and increases effectiveness thus enhancing all of the purported aims of these international agreements. Due to their relevance, the OECD has attempted to revamp the effectiveness of alternative dispute resolution mechanisms in the context of BEPS Action 14 to counterbalance the proposal of several anti-abuse measures resulting from the

## Notes

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<sup>1</sup> Virtually all tax treaties currently in force include MAP regulations as they have been part of the OECD Model since its first version in 1963. Moreover, the League of Nations models of 1927 and 1928 already included MAP clauses. See an assessment of the evolution of MAP clauses in J. S. Wilkie, *Article 25: Mutual Agreement Procedure*, in *Global Tax Treaty Commentaries* (P. Pistone ed., IBFD 2020), s. 1.2.

<sup>2</sup> A per country account of treaties with arbitration clauses may be found in the peer review reports conducted to evaluate the adoption of BEPS Action 14 minimum standard, <https://www.oecd.org/tax/beps/beps-actions/action14/> (all quoted websites were accessed on 2 Jan. 2022).

<sup>3</sup> OECD, *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review* (OECD Publishing 2020), para. 1. See G. Groen, *Arbitration in Bilateral Tax Treaties*, 30(1) *Intertax* 3, 5 (2002). See also L. J. de Heer, *In for a Penny, in for a Pound: Anti-Tax Avoidance Initiatives and Dispute Resolution*, 56(8) *Eur. Tax'n* 323, 329 (2016). R. Ismer & S. Piotrowski, *A BIT Too Much: Or How Best to Resolve Tax Treaty Disputes?*, 44(5) *Intertax* 348, 353 (2016).

<sup>4</sup> See e.g., K. Vogel & A. Rust, *Introduction*, in *Klaus Vogel on Double Taxation Conventions* (E. Reimer & Alexander Rust eds, Kluwer Law International 2015), paras 89–95. For an account of the literature and arguments on the concept of common interpretation in the field of tax treaties, see C. Pleil & S. Schwibinger, *Confronting Conflicts of Qualification in Tax Treaty Law: The Principle of Common Interpretation and the New Approach Revisited*, 10(3) *World Tax J.* 427 (2018).

other BEPS action points.<sup>5</sup> Moreover, part of the minimum standard resulting from BEPS – that the 141 members of the Inclusive Framework have agreed to implement<sup>6</sup> – is devoted to improving MAP access. It aims at increasing the chances for satisfactory outcomes to be achieved within the involved authorities. In parallel, the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter MLI)<sup>7</sup> incorporates provisions to facilitate the compliance with the indicated minimum standard.<sup>8</sup> It also includes an optional arbitration mechanism to encourage the adoption of this type of dispute resolution instrument.<sup>9</sup>

Despite their relevance and desirability, access to alternative dispute resolution remedies is sometimes denied when the tax authorities consider that the case involves tax abuse, even when anti-tax abuse measures usually pose the most complex interpretation and application concerns within tax treaties. In fact, not even in the aftermath of BEPS and the resulting implementation of several anti-abuse devices – including broad-based treaty anti-abuse rules, such as the principal purpose test (PPT hereinafter), that also form part of the minimum standard<sup>10</sup> – are countries willing to grant unrestricted access to dispute resolution remedies. The underlying context behind such a firm position against tax abuse within alternative dispute resolutions is that the taxpayer should come to the process ‘with clean hands’ as in the equity jurisdiction.<sup>11</sup> The ‘privilege’ to access alternative dispute resolution remedies – and the supposed savings on costs and time that it entails – should not be granted to evaders. Such a view of alternative dispute resolution as a privilege is somehow enhanced by the fact that traditional domestic

remedies – both at an administrative and at a judiciary level – are nevertheless available to the taxpayer. As the denial to access a tax treaty MAP does not sever the right to a fair trial,<sup>12</sup> such an alternative remedy would be considered as a benefit and an advantage that evaders should not enjoy.

In fact, the denial sometimes even comes at the expense of disregarding the existing requisites to access these remedies. In this respect, the minimum standard of BEPS Action 14 refers to the need to:

provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.<sup>13</sup>

However, the issue not only refers to the discretionary denial of access to a MAP. As will be shown, there are numerous exclusion provisions for cases in which abuse may be involved such as measures that impede the access to MLI arbitration in cases involving anti-abuse measures.

This contribution advocates for unrestricted access of tax abuse cases to the MAP and arbitration remedies. It aims at depicting the – rather asymmetrical – current state of affairs on the access to dispute resolution remedies in cases of tax abuse and criticizing the incoherencies that stem from existing restrictions. In parallel with this analysis, it will be shown that there are compelling policy reasons to grant access to all of the mentioned dispute resolution instruments in instances of tax abuse. For

## Notes

<sup>5</sup> See OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015). See also OECD, *supra* n. 3. The 2013 action plan already raised a warning on this issue by stating, ‘The interpretation and application of novel rules resulting from the work described above could introduce elements of uncertainty that should be minimised as much as possible’. See OECD, *Action Plan on Base Erosion and Profit Shifting* 23 (OECD Publishing 2013).

<sup>6</sup> The list of 139 jurisdictions that form part of the Inclusive Framework can be consulted at, <https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf> (accessed 2 Jan. 2022). The minimum standard is a commitment that lacks a legally binding nature. For an analysis of the compromises assumed by the parties, see A. Christians & L. van Apeldoorn, *The OECD Inclusive Framework*, 72(4/5) Bull. Int’l Tax’n 226 (2018). A. Langer, *The Legal Relevance of the Minimum Standard in the OECD/BEPS Project*, in *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (M. Lang et al. eds, Kluwer Law International 2018). L. Schoueri & G. Galdino, *Obligations to MLI Non-Signatories Within the Inclusive Framework*, in *International and EU Tax Multilateralism: Challenges Raised by the MLI* 161–196 (A. P. Dourado ed., IBFD 2020).

<sup>7</sup> Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The text is accompanied by an Explanatory Statement to The Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (hereinafter MLI Explanatory Statement). See OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties. Action 15: 2015 Final Report* (OECD Publishing 2015). See also OECD, *Action 15: A Mandate for the Development of a Multilateral Instrument on Tax Treaty Measures to Tackle BEPS* (OECD Publishing 2015).

<sup>8</sup> Article 16 MLI.

<sup>9</sup> Articles 18–26 MLI.

<sup>10</sup> See OECD, *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances. Action 6: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015), paras 22–23.

<sup>11</sup> See Z. Chafee Jr, *Coming into Equity With Clean Hands*, 47(7) Mich. L. Rev. 1065 (1948). See also R. Ismer, *Article 25 – Mutual Agreement Procedure*, in *Vogel on Double Taxation Conventions* vol. 2 (E. Reimer & Alexander Rust eds, Kluwer Law International 2015), para. 34.

<sup>12</sup> Such a right is recognized as part of any modern rule of law state and forms part of the constitutional chart of several jurisdictions worldwide. It is also recognized at a supranational level inter alia in Art. 47 of the EU Charter of Fundamental Rights and Art. 6 of the European Convention of Human Rights. Compare in the context of the EU, D. de Carolis, *European Union-the EU Dispute Resolution Directive (2017/1852) and Fair Trial Protection Under Article 47 of the EU Charter of Fundamental Rights*, 58(11) Eur. Tax’n 495 (2018). Compare also J. Voje, *The Limits to the Participation of the Taxpayer in Tax Dispute Resolution Procedure Under the Dispute Resolution Directive*, 48(2) Intertax 157 (2020).

<sup>13</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, point 1.2.

instance, the post-BEPS adoption of broad-based, standardized anti-abuse devices within tax treaties should enhance the chances of achieving a common understanding in the approach to interpretation and enforcement by the competent authorities. The authorities retain much more control of the process vis-à-vis the judicialization of conflicts even when tax treaty arbitration is involved. The fallacy of arbitration as a constraint to sovereignty will also be critically scrutinized. Specifically, both the access to the MAP (2.1) and the assessment of tax abuse cases within the intergovernmental stage of the MAP (2.2) will be assessed. The access to tax treaty arbitration (3.1) and arbitration within the MLI (3.2) will also be examined. Critical considerations are intertwined across the described sections. Section 4 concludes with an overview of the arguments posed in favour of granting access to alternative dispute resolution mechanisms in cases of tax abuse.

## 2 ACCESS OF TAX ABUSE CASES TO MAPs CONTEMPLATED IN TAX TREATIES

### 2.1 Access to Tax Treaty MAP in Instances of Tax Abuse

Tax treaty provisions equivalent to Articles 25(1) and 25(2) of the 2017 OECD Model Tax Convention (hereinafter OECD MTC) as well as Articles 16(1) and 16(2) MLI establish the personal, substantive, and formal requirements that must be met to access a specific-case MAP.<sup>14</sup> Specifically, these types of provisions allow a person who considers that the actions of one or both contracting states result or will result in taxation not in accordance with the provisions of the treaty to present his case to the competent authority irrespective of the remedies provided by domestic law. The case must be presented within a certain period – the standard is three years – from the first notification of the action resulting in taxation against the convention. From a substantive viewpoint, access to a MAP requires that taxation has occurred that is not in accordance with the provisions of the tax treaty. This formulation excludes issues of domestic law not connected with the applicability of the treaty itself. Yet, domestic

law impacting tax treaty provisions or access to the treaty are similarly undoubtedly covered. In fact, the denial of treaty benefits by means of an anti-abuse rule is a paradigmatic example of potential taxation not in accordance with a tax treaty. Hence, the applicability of either treaty-based anti-abuse rules – such as the PPT<sup>15</sup> or the limitation on benefits rule (LOB hereinafter)<sup>16</sup> – and domestic anti-abuse devices, both of a general or special character, should be covered by a MAP. Undoubtedly, a misapplication of these rules could lead to taxation against the convention as they may impact the access to the treaty itself or the applicability of its rules. If all other requirements are satisfied, the access to a MAP in cases of tax abuse must be allowed unless a specific provision included in the tax treaty prohibits it.

Notwithstanding, sometimes the tax authorities unilaterally proscribe access to a MAP in cases of tax abuse. To illustrate this issue, one of the most recent examples of this practice discussed before a court of law is the Spanish Supreme Court *SGL Carbon Holding* decision (2021).<sup>17</sup> Briefly, the case concerns SGL Carbon, a German multinational group. The German parent incorporated SGL Carbon Holding SL in Spain. This newly created Spanish subsidiary purchased the shares of SGL Carbon foreign subsidiaries with the proceedings of an intra-group loan. The intention was to benefit twofold. The first would be the Spanish participation exemption regime that is applicable to dividends received from foreign subsidiaries. The second involved the compensation of financial expenses derived from the intra-group loan through consolidation – fiscal unity – with a profitable Spanish operational subsidiary that formed part of the SGL Carbon group. The tax authorities considered that abuse existed in this case and applied the Spanish general anti-abuse rule (hereinafter GAAR)<sup>18</sup> and denying the deductibility of both the financial expenses and the impairment of one of the foreign subsidiaries' shares. At the time, the tax authorities communicated their decision to apply the GAAR, and the taxpayer filed a MAP request invoking Article 24 of the Germany-Spain tax treaty<sup>19</sup> as well as the remedies enshrined in the EU Arbitration Convention.<sup>20</sup> The taxpayer filed the same request before the German authorities. The Spanish authorities denied access to the MAP

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<sup>14</sup> All references to the MAP in this contribution refer to the specific-case MAP – which regards interpretation issues referred to tax treaties – and not to other types of MAPs enshrined in Art. 25 OECD MTC unless otherwise specified.

<sup>15</sup> Provisions equivalent to Art. 29.9 OECD MTC, including Art. 7(1) MLI.

<sup>16</sup> Provisions equivalent to Art. 29(1)–(8) OECD MTC, including Art. 7(9)–(10) MLI, and provisions equivalent to Art. 22 of the US Model Income Tax Convention, 2016 version.

<sup>17</sup> ES: Supreme Court [Tribunal Supremo], 22 Sept. 2021, ECLI:ES:TS:2021:3572. For a critical examination of the decision that was appealed before the supreme court, i.e., that of the national court, see R. García Antón, *The Right to Initiate the Mutual Agreement Procedure in a Tax Fraud Case – Challenges Ahead*, in *Tax Treaty Case Law Around the Globe: 2020* (M. Lang et al. eds, IBFD 2021). The reference of the case is ES: National Court [Audiencia Nacional], 22 Apr. 2019, ECLI:ES:AN:2019:1885.

<sup>18</sup> ES: Art. 15 of the General Tax Code [Ley General Tributaria], Law [Ley] 58/2003, of 17 Sept. 2003.

<sup>19</sup> Convention Between the Federal Republic of Germany and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (Germany-Spain Tax Treaty hereinafter).

<sup>20</sup> EU Arbitration Convention (90/436/EEC).

because the assessment of abuse was based on a domestic rule – the Spanish GAAR – that allegedly does not pose divergencies or discrepancies with the indicated treaty. The Spanish tax authorities leaned on the OECD guiding principle that advocates for the compatibility of domestic GAARs and tax treaties. They concluded that ‘the applicability of domestic anti-abuse rules do not generate taxation against what it is established in the Convention and thus, the start of the MAP process is denied’. They did so even though the tax treaty itself contained a rule that explicitly allows for domestic anti-abuse regulations to be applied in tax treaty scenarios.<sup>21</sup> The court agreed with the reasoning of the tax authorities. More specifically, in the *ratio decidendi*, the court bluntly affirms that instances of tax abuse to which the domestic GAAR apply concern domestic law exclusively, hence it is not possible to invoke the tax treaty nor request access to a MAP.<sup>22</sup>

The *SGL Carbon Holding* case may serve to highlight several of the inconsistencies in the argumentation employed to deny access to a MAP in cases of abuse. First, the analysis of the terminology of the provisions defining the MAP scope is completely overlooked. MAP provisions require that a person ‘considers’ that the actions of at least one of the contracting states will result in taxation contrary to the convention.<sup>23</sup> Hence, the taxpayer’s mere reasoned opinion should be adequate to initiate the process if the rest of the requirements are met. Since no requisites regarding the existence of abuse are established in the MAP provisions, the taxpayer should be afforded the possibility to bring the case before the relevant tax authority.<sup>24</sup> Second, if an anti-abuse device is invoked to block access to a tax treaty, the result may undoubtedly be taxation against the convention if that anti-abuse rule was applied inappropriately. This lies at the core of the *raison d’être* of the MAP, specifically to channel conflicts of interpretation due to a misapplication of rules that results in taxation that contradicts the treaty. Blocking access to the benefits of the treaty through a domestic rule is one of the clearest cases of taxation potentially against the treaty. Third, in the court’s reasoning, there appears to be a misunderstanding of the effect of the GAAR on the requisites to access a MAP. The

OECD guiding principle may allow domestic GAARs to block access to treaty benefits when ‘obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions’.<sup>25</sup> While it is difficult to determine how an abusive structure would be contrary to the object and purpose of specific allocation provisions – what is the object and purpose of Article 10 or 11, aside from allocating taxing rights on dividends and interest income following their wording? – it is impossible to see how the object and purpose of the MAP provisions would be disturbed. Stated differently, the guiding principle should not justify the denial of access to a MAP. The mentioned arguments lead to concluding that denying access to a tax treaty MAP in cases of abuse contradicts the requirements posed in the provisions regulating this dispute resolution procedure.

The OECD already dealt with the issue of recalcitrant states denying access to MAP in the 2007 OECD Manual on Effective Mutual Agreement Procedures (hereinafter MEMAP). In this report, it was stated that ‘the mere assertion that a domestic anti-avoidance provision may apply to a particular case is not enough to justify excluding from MAP the question of whether there is or may be taxation in contravention of the Convention’.<sup>26</sup> Accordingly, the MEMAP contains a best practice point under the title ‘Consideration of MAP assistance for cases described as “tax avoidance”’. It suggests granting assistance in MAP cases when an action taken by a tax administration is done under anti-avoidance provisions, and the requirements of Article 25(1) are met. Moreover, the OECD further stated that the outright denial of competent authority assistance in these cases may have an ‘unintended and added punitive effect’.<sup>27</sup>

The OECD again raised the issue under the auspices of the BEPS Project. BEPS Action 14 dealt with the improvement of the dispute resolution mechanisms. Its declared objective was to enhance the effectiveness of the MAP in resolving treaty-related disputes.<sup>28</sup> BEPS Action 14 forms part of the minimum standard and comprises twenty-one elements supplemented by twelve good practices. The most relevant component of the minimum

## Notes

<sup>21</sup> In accordance with Art. 28.1.a) of the Germany-Spain Tax Treaty, ‘This Convention shall not be construed so as to prevent a Contracting State from applying the provisions of its domestic law on the prevention of tax evasion or tax avoidance’.

<sup>22</sup> With this decision, the supreme court overrides decisions that followed a different line of reasoning that are posed in decisions such as *Iniciativas Culturales de España, SL*, ES: National Court [Audiencia Nacional], 30 June 2021, ECLI:ES:AN:2021:3202 and the *Ferrovial* case, ES: National Court [Audiencia Nacional], 30 Oct. 2017, ECLI:ES:AN:2017:5144. In these decisions, the national court compelled the tax authorities to grant access to the MAP as double taxation may otherwise persist. See A. J. Martín Jiménez, *Spain: Taxpayers’ Rights, Corresponding Adjustments and the Right to Initiate MAPs and Arbitration*, in *Tax Treaty Case Law Around the Globe: 2018* (E. C. C. M. Kemmeren et al. eds, IBFD 2019).

<sup>23</sup> Specifically, the wording of Art. 25(1) OECD MTC begins as follows (emphasis added): ‘Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention’.

<sup>24</sup> OECD MTC Commentaries on Art. 25, par. 26. See Ismer, *supra* n. 11, para. 37. See also Wilkie, *supra* n. 1, s. 2.5.1.

<sup>25</sup> OECD MTC Commentaries on Art. 1, para. 61.

<sup>26</sup> OECD, *Manual on Effective Mutual Agreement Procedures* 22 (OECD Publishing 2007).

<sup>27</sup> *Ibid.*

<sup>28</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, para. 2.



standard regards the adoption of the rules provided for in Articles 25(1) to (3) of the 2017 OECD MTC in the tax treaty network of the Inclusive Framework members. This is to ensure that a reasonable effort is made to resolve cases of taxation contrary to the provisions of the applicable tax treaty.<sup>29</sup> Furthermore, in accordance with the content of the said provisions, the drafters included additional minimum standard points to ensure proper access to a MAP; two of them merit specific comments.

On the one hand, the minimum standard on MAP access addresses what is known as the gatekeeper problem.<sup>30</sup> The pre-2017 OECD MTC versions allowed taxpayers to present a request before the competent authority of the residence state or, if the case came under paragraph 1 of Article 24, to that of the state of nationality. The taxpayer was not able to request the other involved competent authority to initiate the procedure. Suppose that the residence competent authority firmly considers that the case does not entail taxation against the provisions of the applicable tax treaty. In that case, it could prevent the MAP from moving to an intergovernmental stage without the authorities of the other contracting state even noticing. To prevent this from happening, the minimum standard on Action 14 requires that the competent authorities of both contracting states are aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected.<sup>31</sup> The aim was to reinforce the general principle that access to the MAP should be as widely available as possible and to provide flexibility. This would be accomplished by ensuring that the decision of determining whether a case should proceed to the second stage of the MAP is open to consideration by both competent authorities.<sup>32</sup> Henceforth, countries agreed to amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state. Alternatively, when a treaty does not enable the

taxpayer to present a MAP request to either contracting state, countries must implement a bilateral notification or consultation process for cases when the competent authority to which the request was presented does not consider the taxpayer's objection to be justified. Similarly, to facilitate the modification of tax treaty MAP clauses, Article 16(1) MLI replicates Article 25(1) OECD MTC in its latest version and allows taxpayers to present a case before any of the involved competent authorities. The reservation of the right not to apply this MLI provision requires the implementation of the said bilateral notification or consultation process.<sup>33</sup> Either option allows both contracting states to be aware of the submitted MAP requests and provide their views on whether they should be accepted or rejected and whether the taxpayer's objection is justified.<sup>34</sup> Moreover, the mentioned bilateral notification or consultation process does not even require treaty modifications to be implemented. Instead, it may be agreed based on the existing MAP provision of the applicable treaty, specifically, *ex* Article 25(3).<sup>35</sup>

On the other hand, the minimum standard specifically requires MAP access in cases of disagreement on the conditions for the application of a treaty anti-abuse provision or in which the application of a domestic law anti-abuse provision conflicts with the provisions of a treaty.<sup>36</sup> Unless the wording of a specific MAP clause explicitly excludes abusive cases, taxation against the treaty may undoubtedly occur if the taxpayer is denied access to the benefits of a tax treaty due to an anti-abuse device.<sup>37</sup> Hence, the minimum standard merely reiterates the need to interpret the MAP provisions according to their wording and spirit. Yet, the minimum standard asserts the obvious because of recalcitrant states that deny access to a MAP in bad faith for the reason of fighting tax abuse to punish the alleged abuser even at the expense of violating the tax treaty provisions regulating the MAP.

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<sup>29</sup> Vid. *Ibid.*, para. 10. In order to facilitate compliance with this commitment, the MLI includes these provisions in its Arts 16(1) to 16(3), the content of which is identical to that of the OECD. See also the MLI Explanatory Statement, paras 191–192.

<sup>30</sup> See Ismer, *supra* n. 11, paras 69–70.

<sup>31</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, point 3.1.

<sup>32</sup> OECD MTC Commentaries on Art. 25, para. 17.

<sup>33</sup> Article 16(5)(a) MLI.

<sup>34</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, para. 35.

<sup>35</sup> Article 25(3) OECD MTC states that 'The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention'.

<sup>36</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, point 1.2 of the minimum standard. OECD, *supra* n. 3, para. 13.

<sup>37</sup> OECD MTC Comm. Art. 25 para. 26: 'The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. *The circumstances in which a State would deny access to the mutual agreement procedure must be made clear in the Convention*' (emphasis added). See M. Markham, *Seeking New Directions in Dispute Resolution Mechanisms: Do We Need a Revised Mutual Agreement Procedure?*, 70(1–2) Bull. Int'l Tax'n 82, 93 (2016). See also E. Barret & M. Evers, *OECD Report, in Anti-avoidance Measures of General Nature and Scope – GAAR and Other Rules*, Cahiers De Droit Fiscal International vol 103A, 16 (IFA 2018). Wilkie, *supra* n. 1, s. 2.5.1. Implying the opposite, see J. Monsenego, *Designing Arbitration Provisions in Tax Treaties: Reflections Based on the US Experience*, 42(3) Intertax 163, 165 (2014). de Heer, *supra* n. 3, at 323, 330. B. Arnold, *The Scope of Arbitration Under Tax Treaties*, in *International Arbitration in Tax Matters* (M. Lang & J. Owens eds, IBFD 2016), s. 5.2.5. T. Falcão, *Granting Juridical Autonomy to Article 25(5) of the Tax Treaty Model*, (4) Brit. Tax Rev. 453, 489 (2017).

The adoption of the minimum standard is furthered through a peer-review process to ensure that the commitment to its content is effectively satisfied.<sup>38</sup> It takes place as a two-stage process conducted under the aegis of the FTA MAP Forum.<sup>39</sup> The results constitute a great reference for assessing the current situation of MAP access in cases of tax abuse. Most of the eighty-two jurisdictions subjected to a peer review already complied with the minimum standard at the time the first stage reviews were conducted.<sup>40</sup> Furthermore, the reviews show that none of the tax treaties signed by these jurisdictions contains a clause excluding the applicability of a MAP in cases of abuse. Additionally, none of the reviewed jurisdictions reported cases of access denial due to abuse during the covered years. Most of them did not contain domestic law provisions hindering access to a MAP in cases of abuse while several explicitly state in their legislation or administrative guidance that discussions on the applicability of a tax treaty due to domestic or treaty-based anti-abuse clauses are covered by a MAP.<sup>41</sup> Accordingly, almost all jurisdictions received clearance from the reviewers on this matter already in the first stage of the reviews. The only exceptions – out of eighty-two countries – were Australia, Austria, Korea, Switzerland, and Spain.<sup>42</sup> In the second peer review, all but Spain received clearance as the recommendations posed in the peer-review reports were followed.<sup>43</sup> The success in the implementation of the minimum standard in this field is therefore remarkable.

It has been shown that the minimum standard on MAP access in cases of tax abuse is met by most jurisdictions

worldwide. In the next section, the implications of accessing a MAP in cases of abuse will be critically examined.

## 2.2 Tax Abuse Cases Within the Intergovernmental Stage of the MAP: A Critical Assessment

When a request complies with all of the requirements to access a MAP, the competent authority shall first attempt to arrive at a satisfactory solution unilaterally in the event that the objection presented by the taxpayer appears to be justified.<sup>44</sup> This justification requirement should not be dependent on the discretionary will of the authorities or their views on tax abuse but instead on whether the request effectively meets the requirements to access a MAP. Therefore, the need for the case to appear as justified expressed in Article 25(2) OECD MTC is inexorably linked to the scope defined in Article 25(1) OECD MTC. To state it differently, cases in which the existence of abuse is discussed should, at any rate, be considered justified.<sup>45</sup> Otherwise, the minimum standard assessed in the previous section would be deprived of any content.

If the competent authority receiving the request claims the existence of abuse, a unilateral remedy will logically not be possible. However, if the case was presented to the other competent authority – when possible, as required by the minimum standard – a unilateral solution may be feasible. In fact, the MEMAP suggests that, in cases when the authorized application of domestic anti-avoidance laws prevents relief by one country's competent authority, this should not prevent the other authority from providing any

### Notes

<sup>38</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, para. 60.

<sup>39</sup> FTA is the acronym for Forum on Tax Administration, *see ibid.*, point 1.6 of the minimum standard. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents* (OECD Publishing 2016). Point 2.2 of the minimum standard envisages a compromise of publishing an arbitration profile referred to the MAP regulations applicable in each country. The profiles are, <https://www.oecd.org/tax/dispute/country-map-profiles.htm> (accessed 2 Jan. 2022).

<sup>40</sup> The reviewed jurisdictions were Andorra, Argentina, Aruba, Australia, Austria, the Bahamas, Bahrain, Barbados, Belgium, Bermuda, Bulgaria, Brazil, British Virgin Islands, Brunei Darussalam, Canada, Cayman Islands, Chile, China, Colombia, Croatia, Curaçao, Czech Republic, Denmark, Estonia, The Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hong Kong, China, Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Kazakhstan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malta, Mexico, Monaco, Morocco, the Netherlands, New Zealand, Norway, Oman, Poland, Portugal, Qatar, Romania, Russian Federation, Saint Kitts and Nevis, San Marino, Saudi Arabia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, and Viet Nam.

<sup>41</sup> This is the case, e.g., of Canada, Croatia, Greece, Guernsey, Hong Kong (China), Ireland, Isle of Man, Jersey, Lithuania, Macau (China), China, Malta, Monaco, New Zealand, Oman, Portugal, Qatar, Slovak Republic, Slovenia, South Africa, and Turkey.

<sup>42</sup> The peer review reports may be found in the webpage quoted *supra* at 3.

<sup>43</sup> The second peer-review report regarding Spain recommended the suppression of a domestic regulation allowing MAP access denial when 'there is proof that the taxpayer intended to avoid taxation in any of the states concerned'. This clause was removed in an update to MAP domestic regulations that entered into force on 10 June 2021. *See* ES: Modification of the regulations on mutual agreement procedures referred to direct taxation matters [Reglamento de procedimientos amistosos en materia de imposición directa], enacted in the Royal Decree [Real Decreto] 399/2021 of 8 June 2021. Hence, Spain has complied with the peer-review requirements for clearance on the subject matter.

<sup>44</sup> *See* Art. 25(2) OECD MTC and Art. 16(2) MLI.

<sup>45</sup> OECD MTC Commentaries on Art. 25, para. 31.1: 'It is appropriate to consider that the objection is justified where there is, or it is reasonable to believe that there will be, in either of the Contracting States, taxation not in accordance with the Convention'. Compare the discussion on the matter posed by J. Salom & P. Duss, *The Mutual Agreement Procedure: A Swiss Perspective on Aspects of Action 14 of the OECD/G20 Base Erosion and Profit Shifting Initiative*, 72(9) Bull. Int'l Tax'n 535, 536–539 (2018).

relief considered as appropriate.<sup>46</sup> Still, if the issue refers to tax abuse, the authorities should be willing to consult each other on the subject matter. Hence, the most probable outcome is that the second stage of the MAP process, referred to as the intergovernmental stage, will be initiated in such a setting.<sup>47</sup>

In this stage of the MAP, the competent authorities must endeavour to resolve the case. A reasonable effort in good faith must be undertaken to achieve a common understanding of the case under review in order to solve taxation not in accordance with the convention. Indeed, the MAP aims at facilitating a friendly solution of interpretation issues that may lead to taxation that is contrary to the treaty.<sup>48</sup> Therefore, a lack of interest in engaging the other competent authority to determine common ground to honour the tax treaty commitments should be considered a display of bad faith that goes against the *pacta sunt servanda* principle,<sup>49</sup> even in instances of tax abuse.

The unwillingness to negotiate a common understanding of the applicability of anti-abuse rules shows either the lack of trust in the judgment of the counterpart or apathy in providing arguments to support such a stance. Both options would equally be in opposition to the purpose of the MAP. Ultimately, granting access to a MAP just to display bad faith or lack of interest in the conversations with the authorities of the other contracting state is as reprehensible as not granting access to the MAP in the first place. It is actually even more unfavourable as time and resources are wasted with the lack of a meaningful outcome.

In instances of tax abuse, the duty to endeavour to resolve the case that exists in the intergovernmental MAP stage requires an authority – or authorities – who is willing to apply an anti-abuse mechanism to reasonably justify why, under the facts of the specific case at hand, the rule would restrict the benefits of the tax treaty. Yet, as it is well known – and often criticized – unless arbitration applies, the parties are compelled to reach an agreement but are not obligated.<sup>50</sup> Thus, the outcome may be unsatisfactory from the attainment of the compromises

acquired by the signatory parties to the applicable tax treaty.

Still and all, the intergovernmental stage simply requires a common ground to be achieved by both competent authorities. The resulting agreement does not necessarily have to be one in which double taxation is eliminated at any rate. The involved authorities may agree on the applicability of an anti-abuse rule if this is an outcome considered in accordance with the tax treaty even if double taxation persists. It must be emphasized that the attainment of the primary aim of tax treaties, namely the elimination of double taxation, has its limits precisely in the specific configuration of the tax treaty itself. Therefore, a purported general aim of eliminating double taxation to infer obligations that cannot be derived from the text of the treaty itself cannot be supported. Stated differently, a double taxation outcome may be derived from a common understanding of the application of tax treaties in certain instances even if this could be considered contrary to the alleged aim of tax treaties *in abstracto*.<sup>51</sup> In fact, this is a likely result in cases of tax abuse if both competent authorities achieve consensus on the enforcement of an anti-abuse device that impedes the applicability of tax treaty rules on the restriction of taxing rights.

Moreover, in the aftermath of BEPS, the chances for an agreement on the enforcement of anti-abuse devices are greater than ever due to the adoption of significantly wide anti-abuse rules that prevent the enjoyment of tax treaty benefits. For instance, the minimum standard comprises the commitment to include (1) only a PPT – the most widely adopted clause option –; (2) a PPT and either a simplified or detailed LOB provision; or (3) a detailed LOB provision that is supplemented by a mechanism that would deal with certain conduit arrangements.<sup>52</sup> Both the OECD MTC and the MLI include rules to facilitate the update of tax treaties in this respect.<sup>53</sup> The scope of the PPT is significantly broad, being this a feature that should reduce disagreements on its applicability. It applies when it is reasonable to conclude that obtaining

## Notes

<sup>46</sup> OECD, *supra* n. 26, at 22.

<sup>47</sup> The initiation of the intergovernmental stage is the moment in which the dispute becomes an international tax treaty dispute between states. See Groen, *supra* n. 3, at 4.

<sup>48</sup> Article 25 OECD MTC in its French version is referred to as the *procédure amiable*, the 'friendly procedure'.

<sup>49</sup> See Art. 26 of the Vienna Convention in the Law of Treaties (hereinafter VCLT): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith' and Art. 27 VCLT: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

<sup>50</sup> See critical remarks, e.g., in L. Hinneken, *The European Tax Arbitration Convention and its Legal Framework – I*, (2) Brit. Tax Rev. 132, 139 (1996). C. Burnett, *International Tax Arbitration*, 36(3) Austl. Tax Rev. 173, 178 (2007). Ismer & Piotrowski, *supra* n. 3, at 353. In contrast, Brauner sustains that 'the softness of this procedure may have been its strength since it seemed to pose little threat to the sovereignty of states and hence perhaps could have been tolerated better than other, more formal procedures'; see Y. Brauner, *The Latin American Opposition to Mandatory Arbitration in Tax Treaties: Origins, the Calvo Doctrine, and a Reappraisal*, 22(3) Fla. Tax Rev. 866, 868 (2019).

<sup>51</sup> Actually, Art. 25(3) expressly provides that '(The competent authorities) may also consult together for the elimination of double taxation in cases not provided for in the Convention'. Its existence is logical if it is taken into account that the specific case of a MAP envisaged in Art. 25(1) and (2) exclusively refers to interpretation issues, and interpretation can only occur within the boundaries of the content of the wording of the tax treaty being interpreted as Art. 31(1) VCLT clearly states. See A. Navarro, *International Tax Soft Law Instruments: The Futility of the Static vs. Dynamic Interpretation Debate*, 48(10) Intertax 848, 855 (2020).

<sup>52</sup> OECD, *Action 6: 2015 Final Report*, *supra* n. 10, para. 22.

<sup>53</sup> Article 29 OECD MTC and Art. 7 MLI. See C. Bergedahl, *Anti-Abuse Measures in Tax Treaties Following the OECD Multilateral Instrument – Part 1*, 72(1) Bull. Int'l Tax'n 11 (2018). See also V. Chand, *The Principal Purpose Test in the Multilateral Convention: An In-depth Analysis*, 46(1) Intertax 18 (2018). B. Kuźniacki, *The Limitation on Benefits (LOB) Provision in BEPS Action 6/MLI: Ineffective Overreaction of Mind-Numbing Complexity – Part 1*, 46(1) Intertax 68 (2018). A. Cuoco, *The Principal Purpose Test as Introduced*

the benefits of the treaty was one of the principal purposes of any arrangement or transaction unless it is established that granting it would be in accordance with the object and purpose of its relevant provisions.<sup>54</sup> Additionally, as the outcome of applying the PPT results in the denial of the benefits of the tax treaty, it entails less complexity than other GAARs that require the application of the rule that would have been applicable if abuse had not existed.<sup>55</sup>

Additionally, since 2003, the OECD advocates for a fairly relaxed standard to allow the applicability of domestic anti-abuse rules impacting tax treaties irrespective of the potential existence of a treaty override. The OECD claims that the benefits of a double taxation Convention should not be available where (1) a main purpose for entering into certain transactions or arrangements was to secure a more favourable tax position and (2) obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.<sup>56</sup> Such standard has been criticized for being self serving and circular, resulting in a fairly low abuse threshold.<sup>57</sup> Hence, given the broad standard of abuse defined by the PPT and the guiding principle, the slightest existence of abuse markers on a given case should leave little room for disagreement. Otherwise stated, if the fear of recalcitrant authorities who are reluctant to negotiate with their counterpart is to afford a margin of freedom to taxpayers engaging in abusive transactions, such fear is more fictive than actuality.<sup>58</sup> Moreover, it is unlikely that the competent authorities of one state discuss the

conditions for the applicability of the domestic anti-abuse rules of the other state.

Due to the aforementioned, conflicts of interpretation would more likely arise in the interpretation of specific anti-abuse rules or the interaction of the different levels of anti-abuse devices at a specific and a general level, either domestic or treaty-based. For instance, the interaction between controlled foreign corporation (CFC) rules with the tax regime of hybrid entities at a domestic level combined with the requirements of beneficial ownership and the potential applicability of the PPT at a treaty level are truly difficult to grasp.<sup>59</sup> Considering the high number of existing tax treaty anti-abuse devices after the implementation of the results of the BEPS Project, there are more reasons than ever to amicably address the issues of their interaction by the authorities representing the contracting states,<sup>60</sup> and the need for a common ground of interpretation to preserve certainty is significantly pressing.<sup>61</sup> Ultimately, the MAP acts as a coordination procedure referring to rules that are, as stated by Wilkie, 'objective and agnostic regarding the behaviour of the taxpayer, however this may be coloured'<sup>62</sup> as the split of the tax base is an objective process that should take place in an unbiased manner. The assessment of anti-abuse rules should be conducted in the same way, i.e., dispassionately, and following their definitions and requirements to determine the existence of abuse. Anti-abuse devices are subject to interpretative issues that may be exacerbated due to the existence of multiple agents assessing them, specifically the taxpayer and the tax authorities of the involved jurisdictions. Hence, precisely due to the evident risk of

## Notes

by the OECD MLI: *Is It Time for a Compromise With EU Tax Law?*, 47(10) Intertax 869 (2019). A. Mithe, *Critical Analysis of the Principal Purpose Test and the Limitation on Benefits Rule: A World Divided But It Takes Two to Tango*, 12(1) World Tax J. 129 (2020).

<sup>54</sup> See a critical analysis of the PPT inter alia in A. Báez Moreno, *GAARs and Treaties: From the Guiding Principle to the Principal Purpose Test. What Have We Gained from BEPS Action 6?*, 45(6/7) Intertax (2017). See also Chand, *supra* n. 53. D. G. Duff, *Tax Treaty Abuse and the Principal Purpose Test-Part 1*, 66(3) Can. Tax J. 619 (2018). D. G. Duff, *Tax Treaty Abuse and the Principal Purpose Test-Part 2*, 66(4) Can. Tax J. 947 (2018). C. Elliffe, *The Meaning of the Principal Purpose Test: One Ring to Bind Them All?*, 11(1) World Tax J. 47 (2019). S. van Weeghel, *A Deconstruction of the Principal Purposes Test*, 11(1) World Tax J. 3 (2019). R. J. Danon, *The PPT in Post-BEPS Tax Treaty Law: Is It a GAAR But Just a GAAR?*, 74(4/5) Bull. Int'l Tax'n 242 (2020). M. Lang, *The Signalling Function of Article 29(9) of the OECD Model: The 'Principal Purpose Test'*, 74(4/5) Bull. Int'l Tax'n 264 (2020).

<sup>55</sup> See an analysis in B. Kuźniacki, *The Principal Purpose Test (PPT) in BEPS Action 6 and the MLI: Exploring Challenges Arising from Its Legal Implementation and Practical Application*, 10(2) World Tax J. 233, 272–274 (2018). See also A. Báez Moreno, *How Do 'The Old' and 'The New' Live Together? The Principal Purpose Test and Other Anti-avoidance Instruments in Tax Treaties*, 49(10) Intertax 771, 781–782 (2021).

<sup>56</sup> OECD MTC Commentaries on Art. 1, para. 61. More generally, see the reasoning posed in paras 54–81.

<sup>57</sup> See B. J. Arnold, *Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model*, 58 Bull. Int'l Fiscal Documentation 244, 249 (2004). See also and J. J. Zornoza Pérez & A. Báez Moreno, *The 2003 Revisions to the Commentary to the OECD Model on Tax Treaties and GAARs: A Mistaken Starting Point*, in *Tax Treaties: Building Bridges Between Law and Economics* 156 (M. Lang et al. eds, IBFD 2010).

<sup>58</sup> Compare P. Brown, *Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions*, in *International Arbitration in Tax Matters* (M. Lang & J. Owens eds, IBFD 2016), s. 4.2.2.2.

<sup>59</sup> See V. Chand, *The Interaction of the Principal Purpose Test (and the Guiding Principle) With Treaty and Domestic Anti-avoidance Rules*, 46(2) Intertax 115 (2018). See also L. Parada, *Hybrid Entities and Conflicts of Allocation of Income Within Tax Treaties: Is New Article 1(2) of the OECD Model (Article 3(1) of the MLI) the Best Solution Available?*, (3) Brit. Tax Rev. 335, 349–357 (2018).

<sup>60</sup> See G. Groen, *The Nature and Scope of the Mandatory Arbitration Provision in the OECD Multilateral Convention*, 71(11) Bull. Int'l Tax'n 607, 612 (2017). See also P. Pistone, *General Report*, in *Tax Treaty Arbitration* (M. Lang & et al. eds, IBFD 2020), s. 1.3. H. Mooij, *Chapter 14: MAP Arbitration in Tax Treaty Disputes* in: *Flexible Multi-tier Dispute Resolution in International Tax Disputes* (P. Pistone & J. de Goede eds, IBFD 2021), s. 14.3.3. P. Pistone & J. de Goede, *The Flexible Multi-Tier Dispute Resolution Framework and Our Final Conclusions and Recommendations*, in *Flexible Multi-Tier Dispute Resolution in International Tax Disputes* (P. Pistone & J. de Goede eds, IBFD 2021), s. 19.4.3.3.2.

<sup>61</sup> In fact, the increasing number of anti-abuse devices is considered one of the reasons for what is known as the 'tsunami of disputes' that designates the growth in the MAP inventory from 2,352 cases in 2006 to approximately 7,000 cases at the end of 2019. See the MAP statistics published by the OECD at, <https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm> (accessed 2 Jan. 2022). See also S. E. Malamis, *The Future of OECD Tax Arbitration: The Relevance of Investment Treaty and WTO Dispute Settlement Practice in Promoting a Gradual Evolution of the International Tax Dispute Resolution System*, 48(11) Intertax 966, 975 (2020) and references quoted therein.

<sup>62</sup> See Wilkie, *supra* n. 1, s. 2.5.1.



interpretative mismatches, anti-abuse rules should never be excluded from alternative dispute resolution mechanisms. Thus, giving access to a MAP and engaging in intergovernmental discussions in good faith in cases of tax abuse should be supported and encouraged. Furthermore, this conclusion will be maintained even in scenarios where tax arbitration may become a factor, as will be shown in the next section.

### 3 TREATY ARBITRATION AND TAX ABUSE

Tax arbitration is a relatively uncommon dispute resolution mechanism in the context of tax treaties.<sup>63</sup> It only turns applicable when, after a certain period,<sup>64</sup> the competent authorities cannot reach an understanding in the intergovernmental stage of the MAP. The lack of agreement would be settled by a third party.<sup>65</sup> Accordingly, the aim of arbitration is to serve as a last resort method to guarantee finality, i.e., to provide a solution to the conflict. This configuration incentivizes the involved authorities in reaching a timely agreement.<sup>66</sup> Hence, it addresses the two main hurdles of the MAP, namely, an excessive delay of the process and the lack of an obligation to reach consensus. Even though its adoption is not widespread, the business community, a growing number of countries, and the OECD consider that mandatory binding arbitration is the most efficient way of ensuring that tax treaty disputes are effectively resolved through a MAP.<sup>67</sup> The BEPS Action 14 final report accentuates that the group of countries committed to adopting and implementing mandatory binding arbitration accounted

for more than 90% of outstanding MAP cases at the end of 2013.<sup>68</sup> All these countries, except for the United States – that still counts several arbitration clauses in its tax treaty network – have signed the MLI and opted in for the application of its Part VI referring to the adoption of an arbitration mechanism. In this section, the access to arbitration in cases of tax abuse will be analysed from both the perspective of bilateral tax treaties and the MLI.

#### 3.1 Tax Arbitration Clauses in the OECD and the UN MTCs. Critical Remarks on the Prejudices Against Their Adoption

The OECD has only recently endorsed tax arbitration.<sup>69</sup> The arbitration provision of the OECD MTC, specifically Article 25(5), was introduced in its 2008 version. This clause specifies that, in the context of a specific case MAP conducted under Articles 25(1) and 25(2), if the competent authorities are unable to reach an agreement to resolve the case within two years, any unresolved issues shall be submitted to arbitration upon the taxpayer's request. As stated, arbitration constitutes an extension of the MAP and not an independent procedure. Therefore, access to arbitration depends on two factors. First, the case must have reached the intergovernmental stage of the MAP. In section 2.2 above, it was shown that, in the context of tax abuse cases, the grant of access to a MAP in cases of tax abuse stemming from the minimum standard on Action 14 necessarily leads to the initiation of the intergovernmental MAP stage.<sup>70</sup> This applies unless one of the contracting states decides to solve the issue

#### Notes

<sup>63</sup> Annex A of all of the peer review reports conducted (<https://www.oecd.org/tax/beps/beps-actions/action14> (accessed 2 Jan. 2022)) contains a chart describing the features of the tax treaty network of the reviewed country regarding a MAP and arbitration. The last column of the chart reflects whether each specific treaty contains an arbitration clause. A glimpse at any of the charts clearly reveals that these clauses are rather infrequent.

<sup>64</sup> Article 25(5) OECD MTC proposes two years counted from the date when all of the information required by the competent authorities to address the case has been provided to both competent authorities. See OECD MTC Commentaries on Art. 25, para. 64.

<sup>65</sup> The rationale of tax arbitration is very different from that of investment or commercial arbitration. For an account of the differences, see inter alia R. A. Green, *Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes*, 23(1) Yale J. Int'l L. 79 (1998). J. Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*, 35(2) Va. Tax Rev. 149 (2016). J. Godolphin, *Resolution of Tax Disputes in International Arbitration*, 4(1) McGill J. Disp. Resol. 86 (2017).

<sup>66</sup> See Burnett, *supra* n. 50, at 180. M. Lennard, *Transfer Pricing Arbitration as an Option for Developing Countries*, 42(3) Intertax 179 (2014). J. Kollman & L. Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in *International Arbitration in Tax Matters* (M. Lang & J. Owens eds, IBFD 2016), s. 2.3.2.2.3.

<sup>67</sup> OECD, *Action 14: 2015 Final Report*, *supra* n. 5, para. 62.

<sup>68</sup> The countries that expressed their interest in committing to tax arbitration at the time of the release of the final report on BEPS Action 14 were Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

<sup>69</sup> See OECD, *Proposals for Improving Mechanisms for the Resolution of Tax Treaty Disputes. Public Discussion Draft 4–21* (OECD Publishing 2006). See also OECD, *Improving the Resolution of Tax Treaty Disputes*, at 3–25 (OECD Publishing 2007).

<sup>70</sup> Compare the following is a puzzling statement by the OECD Commentaries on Art. 25, para. 68: 'Where the mutual agreement procedure is not available, for example because of the existence of serious violations involving significant penalties (see paragraph 26), it is clear that paragraph 5 is not applicable'. The referred para. 26 states the following: 'where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure must be made clear in the Convention'. The wording of para. 68 seems to assign discretionary powers to disallow the access to a MAP while the truth is that the exclusion from a MAP for cases in which penalties were involved may only take place if the contracting states included a specific provision allowing for it. These statements generated opposing views among commentators; see the references *supra* n. 37.

unilaterally. Second, arbitration will occur only if the competent authorities cannot reach an agreement within the period specified in the arbitration clause. In fact, the OECD recommends expanding this period until the arbitrator grants the award.<sup>71</sup> Thus, the arbitration award will only become a factor when one of the parties – or both – consider that the outcome of the case results in taxation contrary to the convention. On the other hand, when the authorities agree that taxation by both states has been in accordance with the convention and there are no unresolved issues, the case will be considered as resolved even if the outcome is double taxation.<sup>72</sup>

Allegedly, one of the factors that explain the reluctance to adopt arbitration as a dispute resolution mechanism within tax treaties refers to the loss of control over the MAP process compared to its previous stages.<sup>73</sup> In the context of tax abuse, this fear of not exercising authority over the process refers to the risk that the arbitrator does not share the views of the tax authorities on the existence of tax abuse. The possibility of being reproached in this regard coupled with the risk of being unable to enforce anti-tax avoidance measures and – when applicable – penalties may act as deterrent for certain jurisdictions when considering whether to adopt arbitration clauses. Depending on the design of each of these specific clauses, such worries may be exacerbated. For instance, the OECD modelled clause does not allow the competent authorities to unilaterally decide that arbitration will not occur. Hence, the competent authorities cannot agree on denying the request for arbitration if there are still unresolved issues that were not resolved in the intergovernmental stage of the MAP unless permitted by the treaty. To mitigate such loss of control, the UN Model Convention introduces some changes in the configuration of the arbitration clause it proposes. It was in 2011 when it included

one in its Article 25 in what is referred to as ‘alternative B’ wording that – differently from alternative A – contains an arbitration provision in its paragraph 5. Unlike its OECD homologue, the UN Model requires that either competent authority requests the review of unresolved issues by an arbitrator instead of the taxpayer. Moreover, the competent authorities may agree on a different solution within six months after the award was communicated. The time span for the initiation of the tax arbitration stage is broader with three years instead of the two years proposed by the OECD MTC. These features decrease the chances for tax abuse cases to access arbitration in the context of tax treaties modelled after the UN MTC vis-à-vis the configuration of the OECD MTC.

Above all, the main aspect that entails a loss of control in the process may be described as the original sin of tax arbitration, namely, the fact that a third party may end up providing a – binding – solution that is not aligned with the interests of the country. Often, this feature – which is the distinctive earmark of arbitration vis-à-vis other dispute resolution mechanisms – is inextricably identified with a loss of sovereignty.<sup>74</sup> A decision not adhering to the postulates of the authority that ‘loses’ in the process seems unacceptable for those considering that taxes are at the core of the sovereignty of a state whatever the concept entails. This is especially noticeable in the context of developing countries<sup>75</sup> perhaps due to the impact of certain defeats on investment arbitration processes.<sup>76</sup> For instance, the latest international development on tax arbitration, i.e., the proposal on the adoption of mandatory binding arbitration in the context of Pillar One of the OECD Unified Approach, encountered significant resistance from certain developing countries.<sup>77</sup>

## Notes

<sup>71</sup> OECD MTC Commentaries on Art. 25, Annex: Sample Mutual Agreement on Arbitration, para. 44. A similar configuration may be found in Art. 25(9)(d)(i) of the US Tax Treaty Model.

<sup>72</sup> *Ibid.*, para. 71.

<sup>73</sup> See Groen, *supra* n. 3, at 3.

<sup>74</sup> A 1984 assessment of tax arbitration by the OECD stated this idea very bluntly: ‘the setting up of such a scheme would involve an unprecedented surrender of fiscal sovereignty’. See also OECD, *Transfer Pricing and Multinational Enterprises: Three Taxation Issues* (OECD Publishing 1984), para. 55. See E. Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, 9(8) Fla. Tax Rev. 703, 709 (2009). More recently, in a 2014 G-20 meeting, the Indian Minister of State for Finance at that time, Nirmala Sitharaman, affirmed that tax treaty arbitration ‘not only impinges on the sovereign rights of developing countries in taxation, but will also limit the ability of the developing countries to apply their domestic laws for taxing non-residents and foreign companies’. See <https://www.livemint.com/Politics/rutMHggqQOm2htzcrI9K71/India-opposes-global-plan-to-make-tax-arbitration-binding.html> (accessed 2 Jan. 2022).

<sup>75</sup> See Kollmann & Turcan, *supra* n. 66, s. 2.3.2.5.3.

<sup>76</sup> See L. E. Trakman, *The ICSID Under Siege*, 45(3) Cornell Int’l L.J. 603, 606–625 (2012). See also Q. Cai, *Behind Sovereignty: Concerns About International Tax Arbitration and How They May Be Addressed*, (4) Brit. Tax Rev. 441, 452–453 (2018), as well as the references quoted *supra* n. 65. In fact, some of the investment arbitration cases have referred to taxation matters. The most prominent of those regard the retrospective taxation of indirect transfers of shares in India. The cases concerned Vodafone International Holdings, Cairn Energy, and Vedanta Resources and led to awards against India for failing to meet its fair and equitable treatment obligations under the 1994 India-UK Bilateral Investment Treaty. On the Cairn Energy case, see A. Vora, *Cairn Energy Plc and Cairn UK Holdings Private Limited V the Republic of India: Retroactive Tax Legislation When It Ceases to Meet the Fair and Equitable Treatment Standard*, (3) Brit. Tax Rev. 287 (2021).

<sup>77</sup> See e.g., G-24, *Comments of the G-24 on the Pillar One and Pillar Two proposals being discussed by OECD/G20 Inclusive Framework on BEPS*, 17 May 2021, [https://www.g24.org/wp-content/uploads/2021/06/Comments-G-24-to-BEPS-IF-SG-May-2021\\_FINAL.pdf](https://www.g24.org/wp-content/uploads/2021/06/Comments-G-24-to-BEPS-IF-SG-May-2021_FINAL.pdf) (accessed 2 Jan. 2022). Paragraph 10 states: ‘We welcome the efforts of the OECD Secretariat to find alternative to arbitration, since many developing countries are not ready to commit to mandatory and binding dispute resolution mechanisms’. See also ATAF, *ATAF’s Opinion on the Inclusive Framework Pillar One (Including the Unified Approach) and Pillar Two Proposals to Address the Tax Challenges Arising from the Digitalisation of the Economy*, 2021 (no date provided), [https://events.ataftax.org/index.php?page=documents&func=view&document\\_id=44](https://events.ataftax.org/index.php?page=documents&func=view&document_id=44). On p. 4, it is stated that ‘we do not support the suggestion (sic) that global adoption of mandatory binding arbitration should be available if there are disputes regarding the amounts allocated under the unified

Notwithstanding, the sovereignty argument does not resist rational scrutiny. The factor that surrenders sovereignty is not arbitration but the tax treaty itself, as its main provisions serve to allocate taxing rights by imposing limits to domestic tax regulations.<sup>78</sup> The confusion between arbitration as a procedure to solve interpretation disputes and the actual allocation of taxing rights is best exemplified in a statement by ActionAid. It recommends that developing countries should not adopt the MLI arbitration section as ‘the threat of arbitration risks discouraging countries from fully using their taxing rights’.<sup>79</sup> Contrary to this view, arbitration is merely a last resort remedy that may be applicable when the parties do not appropriately fulfil their task of reaching a common understanding of the international agreement they agreed to honour. As Mooij states, ‘it is designed to be used – not to be used’,<sup>80</sup> i.e., it serves as a nudge for the authorities to reach an agreement.<sup>81</sup> In fact, the scope of the decision of the arbitrator is limited to interpreting the existing agreement.<sup>82</sup> Thus, the content of the treaty – the ‘terms of the treaty’ as per the VCLT – demarcates the interpretative process that the arbitrator should not surpass.<sup>83</sup> Such content was already assessed and approved by the representative institutions of the signatory states.<sup>84</sup>

Moreover, from a purely convenience perspective, the existence of tax arbitration is positive for the involved states. Even if the competent authorities lose a certain degree of control in the process – in the context that a third party may decide an outcome that is not in accordance with the views of the tax

authorities – they still retain broad powers in all other aspects of the arbitration stage.<sup>85</sup> This is especially valid when compared to the taxpayer who is practically excluded from the proceedings.<sup>86</sup> This wide control does not take place only from a procedural viewpoint – e.g., selection of arbitrators, configuration of the arbitration process, suspension grounds, implementation timing – but often also from a substantive one, i.e., on the content of the decision to be adopted by the arbitrator. This is especially evident in cases in which a ‘final offer’ approach – also known as baseball arbitration – is adopted to determine the outcome of the arbitration process.<sup>87</sup> Contrary to an ‘independent opinion’ approach, in baseball arbitration, each competent authority would be required to provide the arbitration panel with a proposed resolution of the issue involved. The arbitration panel would subsequently decide between the two proposals that were presented to it. This form of arbitration significantly limits the scope of action of the arbitrators and hence prevents issues related to their potential bias, an issue that has been continuously raised in the field of investment arbitration.<sup>88</sup> Overall, it is evident that the control the parties retain under tax arbitration procedures is much wider when compared to ordinary legal procedures before the courts of each involved country. In addition, as Brauner claims, a domestic court may find that the interpretation of the competent authorities is against the applicable treaty, and no one would claim that such constitutes a violation of

## Notes

approach proposal. Many of our members are strongly opposed to mandatory binding arbitration as they consider it impinges on their sovereignty’. Ultimately, 137 countries have agreed on granting ‘dispute prevention and resolution mechanisms, which will avoid double taxation for Amount A, including all issues related to Amount A (e.g., transfer pricing and business profits disputes), in a mandatory and binding manner’. The agreement is thus significant if compared to the mentioned reticence points. The only nuance is configured as follows: ‘an elective binding dispute resolution mechanism will be available only for issues related to Amount A for developing economies that are eligible for deferral of their BEPS Action 14 peer review 4 and have no or low levels of MAP disputes’. See OECD, *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors. Italy, October 2021* 11 (OECD Publishing 2021).

<sup>78</sup> M. Züger, *Arbitration Under Tax Treaties: Improving Legal Protection in International Tax Law* 32 (IBFD 2001). Compare M. Hearson & T. N. Tucker, ‘An Unacceptable Surrender of Fiscal Sovereignty’: *The Neoliberal Turn to International Tax Arbitration*, Persps. Pol. 1 (2021).

<sup>79</sup> ActionAid, *ActionAid briefing on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* 3, <https://actionaid.org/sites/default/files/20170601taxbriefing2.pdf> (accessed 2 Jan. 2022). See H. Mooij, *MAP Arbitration in Tax Treaty Disputes*, in *Flexible Multi-Tier Dispute Resolution in International Tax Disputes* (P. Pistone & J. de Goede eds, IBFD 2021), s. 14.2.9.

<sup>80</sup> H. Mooij, *Tax Treaty Arbitration*, 35(2) Arb. Int’l 195, 219 (2019).

<sup>81</sup> See P. Nikolaou, *Mandatory Binding Arbitration: Avoiding Stalemates Over the Tax Chessboard*, 49(12) Intertax 974, 979 (2021).

<sup>82</sup> As stated by Quiñones, ‘the sovereign right of Congress to choose the appropriate tax policy for the country would be left untouched by arbitration’. See N. Quiñones Cruz, *International Tax Arbitration and the Sovereignty Objection: The South American Perspective*, 51(6) Tax Notes Int’l 533, 536 (2008).

<sup>83</sup> See Navarro, *supra* n. 51, at 848, 853–854 and literature quoted therein.

<sup>84</sup> See Quiñones Cruz, *supra* n. 82, at 540. See also L. E. Schoueri, *Arbitration and Constitutional Issues*, in *International Arbitration in Tax Matters* (M. Lang & J. Owens eds, IBFD 2016), s. 8.4.2.2. Cai, *supra* n. 76, at 442–443.

<sup>85</sup> See Lennard, *supra* n. 66, at 186–187, who depicts a variety of proposals to retain higher levels of control with the aim of balancing the fears of developing countries when assessing the convenience of adopting arbitration within their tax treaties.

<sup>86</sup> See M. Desax & M. Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal*, 23(3) Arb. Int’l 405, 410 (2007). See also Nikolaou, *supra* n. 81, at 975.

<sup>87</sup> OECD MTC Commentaries on Art. 25, Annex: Sample Mutual Agreement on Arbitration, para. 2. Article 23 MLI. See R. Petrucci, P. Koch & L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration*, in *International Arbitration in Tax Matters* (M. Lang & J. P. Owens eds, IBFD 2016), s. 6.2.2.1. See also G. Zeyen, *When Taxation Meets Arbitration: Recent Initiatives to Introduce and Promote Arbitration in International and European Taxation*, 45(11) Intertax 722, 727–728 (2017). S. Govind, *The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument With the EU Dispute Resolution Directive*, 27(6) EC Tax Rev. 309, 318–319 (2018). J. Owens, *Mandatory Tax Arbitration: The Next Frontier Issue*, 46(8/9) Intertax 610, 615 (2018). L. F. Neto, *Baseball Arbitration: The Trendiest Alternative Dispute Resolution Mechanism in International Taxation*, 2(8) Int’l Tax Stud. 8 (2019).

<sup>88</sup> See Cai, *supra* n. 76, at 446–447 and references quoted therein.

sovereignty. Hence, why is a differing interpretation by an arbitrator so offensive?<sup>89</sup>

Still, the claim of sovereignty loss is an embellished manner of concealing a trust issue<sup>90</sup> that is displayed by the fact that several countries do not want to surrender their control over the outcome of the MAP. From the perspective of tax abuse cases, the need for control may be relevant for countries unwilling to cede their power for denying an effective remedy to the breach of tax treaty obligations caused by a disproportionate enforcement of anti-abuse devices. The fear of delegating the decision to a third party that may not share the views of these countries may be a reason that is strong enough to reject embracing tax arbitration. This aspect is especially palpable in the context of the MLI as there are several exclusions to the tax arbitration mechanism embedded in this instrument that refer to tax abuse cases as will be shown in the next section.

### 3.2 Specificities of Tax Arbitration in the MLI and Critical Remarks on the Limitations Posed to Instances of Tax Abuse

With the BEPS Project, the OECD attempted to encourage the adoption of arbitration as a dispute resolution mechanism. Its adoption did not form a component of the minimum standard of Action 14 because several jurisdictions – primarily developing ones – are against incorporating arbitration into their tax treaty network.<sup>91</sup> Notwithstanding, the adoption of arbitration in the MLI facilitated the update of several bilateral tax treaties of those countries willing to embrace this dispute resolution mechanism. Specifically, Part VI of the MLI contains a set of arbitration provisions that apply only to those signatory states willing to adopt them.<sup>92</sup>

The central aspect that impacts the access to MLI arbitration in cases of tax abuse refers to the possibility of formulating one or more reservations that would allow narrowing the scope of eligible cases.<sup>93</sup> With this option, parties committing to arbitration are afforded significant of flexibility to tailor the scope of arbitration in accordance with their policy choices. The rationale behind granting such an option is to allow reticent jurisdictions to opt-in for arbitration under their own terms, at least concerning its substantive scope of application.<sup>94</sup> Additionally, to increase the tailor-made character of arbitration in the MLI, it was agreed that, if a party for which Part VI would be applicable raises objections on the reservations adopted by another party, the entirety of Part VI would not apply between them.<sup>95</sup>

The OECD has published thirty arbitration profiles of jurisdictions applying Part VI on Arbitration of the MLI<sup>96</sup> which is a compilation of the reservations selected by each party.<sup>97</sup> A review of this documentation shows that several jurisdictions made use of the said prerogative to exclude from arbitration those cases of tax abuse and/or cases in which double taxation does not arise. However, as there are no standardized formulations on the definition of the cases that may be subject to exclusion from arbitration, the scope varies from country to country. Hereinafter, the exclusions that may impact instances of tax abuse are categorized in five groups that are classified in accordance with their scope.

The first type of reservation to be mentioned – and the most disbursed – enshrines the right to exclude from arbitration those cases for which domestic anti-abuse rules are applicable. If one or more of the domestic anti-abuse rules listed in the exclusion clause are applicable, then access to arbitration is denied.<sup>98</sup> Certain countries expand the scope of the clause to encompass cases involving the enforcement of domestic anti-avoidance rules of

#### Notes

<sup>89</sup> Brauner, *supra* n. 50, at 866, 880.

<sup>90</sup> See also Nikolaou, *supra* n. 81, at 983.

<sup>91</sup> See an assessment of this issue in Lennard, *supra* n. 66.

<sup>92</sup> To date, the jurisdictions that have opted in for Part VI MLI are Andorra, Australia, Austria, Barbados, Belgium, Canada, Curacao, Denmark, Fiji, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Mauritius, the Netherlands, New Zealand, Papua-New Guinea, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. See OECD, *Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, Status as of 29 Jun. 2021*, [www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf](http://www.oecd.org/tax/treaties/beps-ml-signatories-and-parties.pdf).

<sup>93</sup> Article 28(2)(a) MLI. See Groen, *supra* n. 60, at 611–612.

<sup>94</sup> MLI Explanatory Statement, para. 265. See OECD, *BEPS Action 14: Make Dispute Resolution Mechanisms More Effective – Public Discussion Draft 21* (OECD 2014), option 23: 'Limitations to the scope of MAP arbitration could include, for example: provision for MAP arbitration only with respect to cases involving specific treaty articles; provision for MAP arbitration only in cases of actual double taxation; or exclusion from the scope of arbitration cases involving the application of treaty or domestic law anti-abuse rules' (emphasis added). See also Markham, *supra* n. 37, at 92–93.

<sup>95</sup> MLI Explanatory Statement, para. 268. An example is that of Canada filing an objection to one of the reservations made by Denmark on the scope of issues eligible for arbitration. The reservation dealt with the status of the chair of the arbitration panel and the publication of extracts of arbitration decisions. As a result, Part VI of the MLI does not apply between Canada and Denmark. See the MLI arbitration profile of Canada, 3 (as of 25 Mar. 2021), <http://www.oecd.org/tax/treaties/beps-ml-arbitration-profile-canada.pdf> (accessed 2 Jan. 2022).

<sup>96</sup> The jurisdictions are those listed *supra* n. 92 except for Denmark.

<sup>97</sup> The arbitration profiles may be accessed on the website quoted *supra* n. 92. For a recent comparative analysis of arbitration in a selection of countries, see M. Lang et al., *Tax Treaty Arbitration* (IBFD 2020).

<sup>98</sup> Australia, Austria, Ireland, Mauritius, New Zealand, and Singapore incorporate such a clause in their list of reservations.



either contracting jurisdiction.<sup>99</sup> Others broadly refer to cases in which an anti-abuse rule laid down in domestic law of either contracting state or in a tax treaty is applicable.<sup>100</sup> Such exclusions enhance the view of arbitration as a privilege that should be denied to evaders even in cases when the appropriateness of the use of domestic anti-abuse devices in tax treaty contexts is conflictive.

The second relevant group of reservations refer to instances in which penalties or criminal charges apply as may happen often in cases of tax abuse. The formulation of these clauses may be grouped into three categories comprising the exclusion from arbitration of cases in which administrative penalties were imposed,<sup>101</sup> cases involving criminal offences,<sup>102</sup> or the exclusion of both administrative penalties and criminal offences.<sup>103</sup> Such carve-out clauses should be criticized because the imposition of penalties is a matter beyond the scope of tax treaties. The objective scope of these international agreements refers to taxes on income and – sometimes – to capital taxation while penalties are clearly not corresponding to any of these two categories.<sup>104</sup> Briefly, sanctions are not taxes but the outcome of the punitive power of the state that is applied as a result of an infringement. Such power is built over principles pertaining to criminal and administrative punitive regulations and not those of the taxation realm. Therefore, potential sanctions that are imposed against tax abusive behaviour can never be the subject of the dispute resolution mechanisms analysed in this contribution. The probable cause for the exclusion from arbitration of cases in which penalties were imposed refers to the incidence of the outcome of a dispute resolution mechanism in the appropriateness of the penalty or criminal offence.<sup>105</sup>

Specifically, if the fault requirement is missing due to the inexistence of tax abuse as determined in the context of a MAP, imposed penalties would become unfitting in many jurisdictions. This would distinctly occur in those that require the existence of fault as a *condition sine qua non* for the exercise of the punitive power of the state. Hence, certain countries may dislike the fact that, because of a MAP, penalties cannot be imposed on taxpayers that engaged in ‘abusive’ behaviour even in those cases in which abuse does not exist after all.

The third category of reservations refers to cases in which no double taxation arises. Although abuse and absence of double taxation cannot be identified and are not interchangeable concepts, several instances of abuse lead to avoidance of double taxation. The exclusion clauses designed to bar arbitration in cases of no double taxation concern instances in which items of income or capital are not included in the taxable base in that jurisdiction, because they are subject to an exemption, or a zero tax rate is provided.<sup>106</sup>

The fourth type of clause that may indirectly impact cases of tax abuse concern the exclusion from arbitration of cases fitting in the reservations posed by the other contracting jurisdiction.<sup>107</sup> The formulation of these countries’ ‘reciprocal’ clause mimics the exclusions posed by the counterpart. It is quite wide and undoubtedly includes exclusions referred to abuse, the imposition of penalties, and the inexistence of double taxation as described in the previous paragraphs.

The last type of exclusion that is worth mentioning consists of an ‘ad hoc’ agreement by which the competent authorities may discretionarily agree to ban access on a case-by-case basis.<sup>108</sup> Such an agreement shall be reached

## Notes

<sup>99</sup> This is the case of Finland, Greece, and Slovenia.

<sup>100</sup> Canada, Germany, Italy, Portugal, and Spain opted for the referred scope.

<sup>101</sup> Mauritius refers to administrative offences and not criminal ones, as does Ireland, although the latter requires that the penalties are imposed as a result of deliberate behaviour. Hungary, Italy, and Portugal exclude cases where administrative penalties were imposed in relation to the adjusted income or capital for tax fraud, wilful default, and gross negligence. This last exclusion resembles those of the EU Arbitration Convention (90/436/EEC) and the Council Directive (EU) 2017/1852 of 10 Oct. 2017 on tax dispute resolution mechanisms in the European Union.

<sup>102</sup> Finland refers to cases involving conduct for which the taxpayer or a person acting on the taxpayer’s behalf has been found guilty by a court of tax fraud or other tax-related criminal offence in either contracting jurisdiction to a covered tax agreement. Greece reserves the right to exclude from the scope of Part VI cases involving conduct for which the taxpayer or a person acting on behalf of the taxpayer has been found guilty by a court for tax fraud or other criminal offence.

<sup>103</sup> France refers to cases in which a taxpayer is subject to an administrative or criminal sanction for tax fraud, wilful default, or serious breach of a reporting obligation. Spain indicates cases involving conducts for which the person has been subjected, by a final ruling derived from judicial or administrative proceedings, to a penalty for tax fraud, wilful default, or gross negligence, including administrative penalties and criminal offences. Similarly, Germany and Slovenia reserve the right to exclude from the scope arbitration any case involving conduct for which the taxpayer, a person acting on his behalf, or a related person has been found guilty by a court of a tax offence or has been subject to the imposition of a serious penalty. However, Slovenia narrows the scope of serious penalties to those resulting from tax fraud, evasion, or avoidance.

<sup>104</sup> OECD MTC Commentaries on Art. 1, para. 4. See P. Brandstetter, ‘*Taxes Covered: A Study of Article 2 of the OECD Model Tax Conventions*’ (IBFD 2011), s. 3.1.1.3.

<sup>105</sup> *Ibid.*: ‘where taxation is withdrawn or reduced in accordance with a mutual agreement under Article 25, interest and administrative penalties accessory to such taxation should be withdrawn or reduced to the extent that they are directly connected to the taxation (i.e., a tax liability) that is relieved under the mutual agreement’.

<sup>106</sup> France, Germany, Greece, Italy, Portugal, and Slovenia employ this formulation. Spain does too, albeit it restricts the scope of the clause to capture transfer pricing cases only. Finland, on the other hand, employs a different formulation as it reserves the right to exclude from arbitration cases concerning items of income or capital when there is no double taxation. Double taxation in the context of this exclusion means that both contracting jurisdictions to a covered tax agreement have imposed taxes in respect of the same taxable income or capital giving rise to either an additional tax charge, increase in tax liabilities, or cancellation or reduction of losses which that be used to offset taxable profits. In these cases, it is irrelevant whether an abusive arrangement causes the said outcome. Instead, it is the outcome that is relevant, i.e., once the inexistence of double taxation is ascertained, the case would be under the scope of the exclusion clauses defined in this paragraph.

<sup>107</sup> Japan, Malta and Singapore decided to incorporate such a clause in their reservations.

<sup>108</sup> Spain and Sweden introduced this exclusion clause among their reservations.

before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case.

All of the mentioned types of exclusion clauses may be utilized to ban tax abuse cases from accessing MLI arbitration. The variety of formulas – and their accumulation – comprise an asymmetric construction of the access routes to tax arbitration. As stated, this is the result of granting broad control over the definition of its substantive scope to countries that opted in for MLI arbitration. The rationale of this was to overcome existing resistance in adopting this dispute resolution mechanism. Yet, it is astounding that, in the context of an international agreement that incorporates several anti-abuse rules – as the MLI does – including the overtly broad PPT, so many impediments on the access to arbitration in cases of abuse are established.

The existence of arbitration carve-outs referred to tax abuse creates an incentive for tax authorities to issue assessments based on anti-abuse rules to bar the access to arbitration. Alternatively, it also compels the taxpayer to accept settlements that would otherwise be inappropriate.<sup>109</sup> As stated above in section 2.2, the proliferation of anti-abuse rules and the need to interpret them in good faith and in a consistent manner make tax treaty arbitration more necessary than ever.<sup>110</sup> With such broad-based anti-abuse standards, the likelihood of reaching an agreement by the tax authorities that excludes the applicability of the tax treaty in the presence of abuse markers is relatively high. There are many arguments that point towards the convenience of not restricting tax arbitration in abusive scenarios. Despite this, the prejudices based on sovereignty concerns and the willing to censure the behaviour of the taxpayer – described in section 3.1 – continue to be prominently featured in the minds of treaty negotiators.

## 4 CONCLUSIONS

The objective of this contribution was to critically review the current state of affairs in the access to dispute resolution mechanisms present in bilateral tax treaties and the MLI in cases of tax abuse and advocate for an unrestricted access. It was shown that the minimum standard on BEPS Action 14 has contributed to clear obstacles for accessing tax treaty MAPs in cases of abuse, yet this is the only meaningful development to date. Countries may still reject engaging in meaningful discussions on how to assess tax abuse cases as a MAP does not require the involved authorities to achieve an agreed solution. Further, in the tax arbitration stage – when applicable – the panorama is significantly asymmetric. It ranges from the inexistence of requirements – in those arbitration

clauses modelled after the OECD MTC – to the barring of access for cases in which anti-abuse devices are applied. The latter is especially evident in the MLI as most countries that opted in for the arbitration section have established exclusion clauses affecting cases of tax abuse.

The described asymmetrical barriers that prevent cases of tax abuse from accessing dispute resolution mechanisms do not find any plausible justification. The allocation of taxing rights provisions envisaged in tax treaties are agnostic regarding the behaviour of the taxpayer as the split of the tax base is an objective process that should occur in an unbiased manner. The assessment of anti-abuse rules should be conducted in the same way, i.e., dispassionately and adhering to their definitions and requirements to determine the existence of abuse. The stated rules delineate the scope of tax treaties as a whole or, in the case of specific anti-abuse regulations, the scope of particular provisions within tax treaties. They are subject to interpretative issues that may be exacerbated due to multiple agents assessing them, specifically the taxpayer and the tax authorities who are involved. Hence, precisely due to the evident risk of interpretative mismatches, anti-abuse rules should not be excluded from alternative dispute resolution mechanisms.

As a matter of fact, restrictions still exist because several countries do not want to forfeit the possibility to punish the abuser. This factor explains the existence of several clauses hindering the access to tax arbitration in tax abuse cases, especially in regard to the MLI arbitration mechanism. Further, the reluctance to adopt arbitration clauses is often associated with an alleged loss of sovereignty. The fact that a third party may end up providing a – binding – solution that is not aligned with the interests of the country seems to be problematic for some jurisdictions. Notwithstanding, the factor that surrenders sovereignty is not arbitration but the tax treaty itself and particularly its rules distributing taxing rights. Tax arbitration is merely a last-resort remedy that may be applicable when the parties do not appropriately fulfil their task of reaching a common understanding of the international agreement they consented to honour. In fact, the arbitrator powers are limited to interpreting the existing agreement and are thus bound by its content. Moreover, from a pure convenience perspective, the adoption of tax arbitration is positive from the tax authorities' perspective. Even if a certain degree of control may be lost in the process – a third party could decide an outcome that is not in accordance with the views of the tax administration – the competent authorities still retain broad powers in all other aspects of the arbitration stage. Such wide control not only takes place from a procedural viewpoint but often also from a material one and, in any case,

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### Notes

<sup>109</sup> Markham, *supra* n. 37, at 93.

<sup>110</sup> See the references quoted *supra* n. 60.

is much more ample when compared to ordinary legal procedures before the courts of each involved country.

Moreover, in the aftermath of BEPS, the chances for an agreement on the enforcement of anti-abuse devices are greater than ever due to the adoption of significantly broad anti-abuse rules that prevent the enjoyment of tax treaty benefits. Especially regarding the applicability of the PPT and the OECD guiding principle, the likelihood of reaching an agreement by the tax authorities that blocks the benefits of the tax treaty in the presence of abuse markers is relatively high due to their extensive reach. Yet, in the context of the MLI, it is astounding that an agreement that incorporates several anti-abuse rules, including the said PPT, allows countries to

establish impediments on the access to arbitration in cases when anti-abuse devices are enforced. Overall, due to the significant number of existing tax treaty anti-abuse devices after the implementation of the results of the BEPS Project, there are more reasons than ever for the involved authorities to amicably address the issues of their interaction. The need for a common ground of interpretation to preserve certainty is significantly pressing.

In short, as there are compelling policy reasons to grant access to alternative dispute resolution mechanisms in cases of tax abuse – and no significant rational arguments to sustain the opposite – in further reviews of the content of bilateral tax treaties and the MLI, all mentioned restrictions should ideally be removed.