

# International Tax Dispute Resolution in Light of Pillar One: New Challenges and Opportunities

**The “Blueprint on Pillar One” relies on effective and binding dispute prevention and/or resolution mechanisms. Key aspects of these mechanisms pose significant challenges to the traditional system of international tax dispute resolution (ITDR). Nevertheless, Pillar One also represents an opportunity to enhance the traditional ITDR regime.**

## 1. Introduction

The OECD has proposed a “Blueprint on Pillar One” for the allocation of taxing rights among countries with regard to cross-border business income. The core element in the proposal is to relocate taxing rights – so-called “new taxing rights” – to market jurisdictions irrespective of the existence of physical presence within those jurisdictions.<sup>1</sup> In order to achieve tax certainty in this process, the Blueprint on Pillar One Report features a prominent reliance on binding and effective mechanisms of dispute prevention and resolution.<sup>2</sup> In this sense, it appears that the Blueprint on Pillar One comes at the right time as the international tax dispute resolution (ITDR) system has just witnessed several major reforms, including Action 14 of OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative<sup>3</sup> as well as Council Directive 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union (the “EU Arbitration Directive (2017/1852)”) (see sections 2.2. and 2.3., respectively). Nonetheless, the question may still arise as to the efficacy of the current ITDR system in assisting Pillar One, which may pose new challenges to the tax dispute prevention and/or resolution processes. At the same time, the institutional trajectory of the ITDR system may also cast light on the question of how far the suggested dispute prevention and/or resolution mechanisms Blueprint on Pillar One can be introduced into this system.

This article focuses on examining key aspects of international tax dispute prevention and/or resolution in the context of Pillar One, taking into account these reforms to the ITDR system. Section 2. provides a brief outline of the ITDR system, followed by an outline of Pillar One and its dispute prevention and/or resolution features in section 3. Section 4. analyses the key aspects of dispute prevention and/or resolution as envisaged in the Blueprint on Pillar One Report. The implications of these aspects for the ITDR system are considered in section 5. This section also explores different ways to enhance the ITDR system. Section 6. proposes an institutional approach to Pillar One dispute prevention and/or resolution as a holistic solution to promote tax certainty. The article’s conclusions are set out in section 7.

## 2. Brief Outline of the ITDR System

### 2.1. The traditional landscape

Treaty-related tax disputes (hereinafter “tax disputes”) are primarily dealt with through the mutual agreement procedure (MAP) mechanism included in tax treaties. Under article 25 of the OECD Model, which is followed by most tax treaties, a taxpayer who considers that it is being taxed inappropriately by one or both of the contracting states may present the case to the competent authority of its resident state.<sup>5</sup> If the competent authority receiving the request is unable to resolve the dispute unilaterally, it should approach the other competent authority for bilateral negotiation, and the two parties should endeavour to settle the dispute.<sup>6</sup>

In addition to this case-specific type of MAP, article 25(3) of the OECD Model provides two other types. Specifically, the competent authorities “shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”. This form of MAP is often termed as being an “interpretative MAP”.<sup>7</sup> The competent authorities may also “consult together for the elimination of double taxation in cases not provided for in the Convention”. This mechanism may be referred to as a “legislative MAP”.<sup>8</sup>

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1. OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2020) [hereinafter *Report on Pillar One Blueprint*].
2. *Id.*, at para. 6.
3. See, for example, OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* (OECD 2015), Primary Sources IBFD [hereinafter *Action 14 Final Report* (2015)].
4. Council Directive (EU) 2017/1852 of 10 October 2017 on Tax Dispute Resolution Mechanisms in the European Union, OJ L 265 (2017), Primary Sources IBFD [hereinafter the EU Arbitration Directive (2017/1852)].

5. Introduced by *OECD Model Tax Convention on Income and on Capital*, art. 25(1) (26 July 2014), Treaties & Models IBFD. Following Action 14 of the OECD/G20 BEPS Project (see *Action 14 Final Report* (2015), *supra* n. 3), *OECD Model Tax Convention on Income and on Capital*, art. 25 (21 Nov. 2017), Treaties & Models IBFD provides that a MAP request can be made to either competent authority (see section 5.1.4.).
6. Art. 25(2) *OECD Model* (2014).
7. R.A. Green, *Antilegalistic Approaches to Resolving Disputes between Governments: A Comparison of the International Tax and Trade Regimes*, 23 *Yale J. Intl. L.* 1, p. 96 (1998).
8. Green, *supra* n. 7 and J.F. Avery Jones et al., *The Legal Nature of the Mutual Agreement Procedure under the OECD Model Convention*, *Brit. Tax Rev.* 22, p. 333 et seq. (1979).

Article 25(5) of the OECD Model (2008)<sup>9</sup> included an arbitration clause. The provision states that where the competent authorities are unable to resolve the dispute through the MAP within the two-year timeframe, any unresolved issues should be submitted to arbitration on the request of the taxpayer concerned.<sup>10</sup> The arbitration was instituted as an extension of the MAP, with an intention to encourage competent authorities to exercise more endeavour in dealing with MAPs. Nevertheless, and despite the steps that have been made to promote international tax arbitration, including the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (the MLI or “Multilateral Instrument”)<sup>11</sup> and the EU Arbitration Directive (2017/1852), most existing tax treaties have not adopted arbitration clauses and, arguably, the mechanism can be considered to be underused to date.<sup>12</sup>

## 2.2. Action 14 of the OECD/G20 BEPS Project

Since 2013, the OECD, in partnership with the G20, has undertaken the BEPS Project with a view to countering aggressive tax planning by multinational enterprises (MNEs) and enhancing the integrity of the international tax rules. The OECD/G20 BEPS Project, which was called the most fundamental rewrite of international tax rules in the past century, includes 15 Actions.<sup>13</sup> Among these, Action 14 aims to strengthen the ITDR system. Originally, Action 14 was intended to promote the universal adoption of tax arbitration among countries, but it transpired that only 20 countries, all of them OECD member countries, expressed an interest in such a mechanism.<sup>14</sup> Accordingly, the MAP has become the focus of Action 14. This development features a minimum standard for MAP practice and a peer-based monitoring mechanism undertaken by a working body under the OECD, with a view to ensuring the compliance of countries with the minimum standard.<sup>15</sup> A number of best practices regarding the MAPs were also enumerated in the Final Report on Action 14, but only as recommendations and not subject to the peer-review process.<sup>16</sup>

Despite the lack of consensus regarding the universal adoption of tax arbitration, a more elaborated and refined arbitration provision was included in Part VI of the MLI,

the development of the Multilateral Instrument being a core theme in Action 15 of the OECD/G20 BEPS Project, which could be adopted by countries on an optional basis.<sup>17</sup> In particular, Part VI of the MLI provides more detailed rules on two major types of tax arbitration: (i) independent-opinion arbitration; and (ii) final-offer arbitration.<sup>18</sup> Under the independent-opinion approach, arbitrators are provided with extended discretion in arriving at any solution they consider appropriate, followed by legal reasoning as in conventional adjudication. In contrast, arbitrators under the final-offer approach are bound to choose only in between the solutions proposed by the two tax authorities.<sup>19</sup> The general perception is that the final-offer approach encourages the disputing parties to take more reasonable positions, thereby encouraging pre-trial settlements.<sup>20</sup> This situation arises as each party may realize that if their final offer is too extreme, and, therefore, the panel would choose the opponent’s offer.<sup>21</sup> On the other hand, contrary to the independent-opinion approach, final offer arbitration usually falls short of well-reasoned decisions, as typically decisions under the final-offer approach merely state a number without any additional information or comments from the panel.<sup>22</sup>

## 2.3. The ITDR in an EU context

In 1990, the Council of the European Communities signed the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises (90/463/EEC) (the “EU Arbitration Convention (90/463)”),<sup>23</sup> which entered into force in 1995.<sup>24</sup> As with the OECD Model (2008) onwards, the EU Arbitration Convention (90/463) also features a MAP supplemented by an arbitration mechanism, the use of which has only become significant in the past decade.<sup>25</sup>

In 2017, as an important step in implementing the OECD/G20 BEPS Project, the European Council adopted the EU

9. OECD Model Tax Convention on Income and on Capital, art. 25(5) (17 July 2008), Treaties & Models IBFD.  
 10. Art. 25(5) OECD Model (2014).  
 11. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (7 June 2017), Treaties & Models IBFD [hereinafter the MLI or Multilateral Instrument].  
 12. H. Mooij, *Tax Treaty Arbitration*, 35 Arb. Intl. 14, p. 195 (2018); H.M. Pit, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, 42 Intertax 6-7, p. 448 (2014); and C. Burnett, *International Tax Arbitration*, 36 Austl. Tax Rev. 3, p. 174 (2007).  
 13. OECD, *OECD/G20 Base Erosion and Profit Shifting Project: Information Brief* p. 3 (OECD 2015).  
 14. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at para. 41 and *Discussion Draft: Make Dispute Resolution Mechanisms More Effective* p. 1 (OECD 2014), Primary Sources IBFD.  
 15. The Forum on Tax Administration (FTA) MAP Forum is in charge of the peer-review process. See OECD, *Action 14 Final Report* (2015), *supra* n. 3, at paras. 11 and 38.  
 16. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at para. 12.

17. OECD, *Action 15 Final Report 2015 – Developing a Multilateral Instrument to Modify Bilateral Tax Treaties* (OECD 2015), Primary Sources IBFD.  
 18. Pt. VI MLI.  
 19. J. Kollmann & L. Turcan, *Chapter 2: Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges, in International Arbitration in Tax Matters* p. 33 (M. Lang et al. eds., IBFD 2016), Books IBFD.  
 20. B.A. Tulis, *Final-Offer Baseball Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Ent. L. 1, p. 89 (2010) and R. Petruzzi, P. Koch & L. Turcan, *Chapter 6: Baseball Arbitration in Comparison to Other Types of Arbitration*, in Lang et al. eds., *supra* n. 19, p. 140.  
 21. Tulis, *supra* n. 20.  
 22. Petruzzi, Koch & Turcan, *supra* n. 20, p. 155.  
 23. Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ, L 225 (1990) and OJ, C 160 (2005), Primary Sources IBFD [hereinafter the EU Arbitration Convention (90/463)].  
 24. A. Bernath, *The Implications of the Arbitration Convention: A Step Back for the European Community or a Step Forward for Elimination of Transfer Pricing Related Double Taxation*, unpublished, pp. 20-22 (Jönköping University).  
 25. Bernath, *supra* n. 24, at pp. 47-48; L.B. Terr et al., *Resolving International Tax Disputes: APAs, Mutual Agreement Procedures, and Arbitration*, 41 Tax Mgt. Intl. J. 9, pp. 485-486 (2012); S-O. Lodin, *The Arbitration Convention in Practice*, 42 Intertax 3, pp. 173-175 (2014); and H.M. Pit, *Preface in Dispute Resolution in the EU: The EU Arbitration Convention and the Dispute Resolution Directive*, IBFD Doctoral Series vol. 42, pp. 117-145 (IBFD 2018), Books IBFD.

Arbitration Directive (2017/1852) to strengthen further the dispute resolution mechanisms in the EU Arbitration Convention (90/463) and in the bilateral tax treaties between Member States.<sup>26</sup> Compared with the ITDR system under the EU Arbitration Convention (90/463), the EU Arbitration Directive (2017/1852) can be distinguished in several major aspects.<sup>27</sup> First, the EU Arbitration Directive (2017/1852) forms a part of EU law, and, therefore, has a superior legal status to the EU Arbitration Convention (90/463).<sup>28</sup> Second, the EU Arbitration Directive (2017/1852) applies to all taxpayers subject to taxes on income and capital, whereas the EU Arbitration Convention (90/463) is limited to disputes regarding transfer pricing cases.<sup>29</sup> Third, the procedures under the EU Arbitration Directive (2017/1852) are more refined than those of the EU Arbitration Convention (90/463). On the one hand, more clearly defined and enforceable timelines make the procedures under the EU Arbitration Directive (2017/1852) more robust. On the other hand, the inclusion of an alternative dispute resolution (ADR) method purports to increase the flexibility of procedures under the EU Arbitration Directive (2017/1852).<sup>30</sup>

### 3. Overview of the Blueprint on Pillar One and Dispute Prevention and/or Resolution

In January 2020, following a proposal made by the OECD Secretariat,<sup>31</sup> the Inclusive Framework agreed on an outline of the architecture of a “Unified Approach” for Pillar One<sup>32</sup> so as to relocate taxing rights to market jurisdictions irrespective of the existence of a physical presence within those jurisdictions and to promote tax certainty in the digitalized economy.<sup>33</sup> Since January 2020, the members of the Inclusive Framework have worked together on the technical development of all of the building blocks that make Pillar One and as a result, in October 2020 the Blueprint on Pillar One Report was adopted.<sup>34</sup>

In order to ensure tax certainty in the allocation of the newly introduced taxing right, the Blueprint on Pillar One Report establishes the following two-tier profit allocation

mechanism, whereby the following two types of taxable profit could be allocated to a market jurisdiction:

- (1) Amount A: a share of residual profit allocated to market jurisdictions no matter, whether or not there are physical presences within those jurisdictions. Amount A is derived by using a formulaic approach applied at an MNE group level with regard to its in-scope business. Amount A epitomizes the new taxing rights mentioned in section 1.<sup>35</sup>
- (2) Amount B: a fixed remuneration for baseline marketing and distribution functions that take place in the market jurisdiction, in line with the arm’s length principle (ALP).<sup>36</sup>

The Blueprint on Pillar One Report also introduces novel processes to improve tax certainty by way of effective dispute prevention and/or resolution mechanisms. This situation emphasizes the role of binding and effective international tax dispute prevention and resolution (ITDPR) mechanisms in implementing Pillar One, as “tax certainty is a key component of Pillar One and is core to this Blueprint which provides for innovative dispute prevention and dispute resolution mechanisms”.<sup>37</sup>

Furthermore, the Blueprint on Pillar One Report proposes a new multilateral convention to be negotiated so that all jurisdictions can implement the contents of Pillar One – including its dispute prevention and/or resolution mechanisms – in a consistent and synergized way.<sup>38</sup> In contrast to the MLI, such a new multilateral instrument would not only supersede the relevant provisions of existing tax treaties, but would also apply between jurisdictions that do not currently have a bilateral tax treaty in place.<sup>39</sup>

### 4. Key Aspects of Dispute Prevention and/or Resolution under Pillar One

#### 4.1. Introductory remarks

Several key aspects of dispute prevention and/or resolution under the Blueprint on Pillar One can be identified, namely: (i) the variation of the level of the readiness of the members of the Inclusive Framework to promote new tax certainty processes beyond Amount A; (ii) the emphasis on dispute prevention; (iii) the multilateral character of the procedures; (iv) and the tension between tax certainty and dispute prevention and/or resolution. These aspects have significant bearings on the assessment of the ITDR system, which are considered in sections 4.2. to 4.5.

26. Preamble EU Arbitration Directive (2017/1852).  
 27. For detailed analysis of the EU Arbitration Directive (2017/1852) and its improvements on the EU Arbitration Convention (90/463), see S. Govind, *The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive*, 27 EC Tax Rev. 6, p. 309 (2018) and H.M. Pit, *The Changed Landscape of Tax Dispute Resolution Within the EU: Consideration of the Directive on Tax Dispute Resolution Mechanisms*, 47 Intertax 2, p. 745 (2019).  
 28. Preamble EU Arbitration Directive (2017/1852) and European Commission, *Resolution of Double Taxation Disputes in the European Union (Taxation and Customs Union)* (19 Oct. 2016), available at [https://ec.europa.eu/taxation\\_customs/business/company-tax/resolution-double-taxation-disputes\\_en\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/resolution-double-taxation-disputes_en_en) (accessed 5 May 2019).  
 29. *Id.*  
 30. *Id.*  
 31. OECD, *Secretariat Proposal for a “Unified Approach” under Pillar One* (OECD 2019) [hereinafter the *Secretariat Proposal*].  
 32. OECD, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy* (OECD 2020) [hereinafter the *Inclusive Framework Statement*].  
 33. OECD, *Secretariat Proposal*, *supra* n. 31, at paras. 4-6.  
 34. OECD, *Report on Pillar One Blueprint*, *supra* n. 1.

35. *Id.*, at para. 10.  
 36. *Id.*, at paras. 11-15.  
 37. *Id.*, at para. 16.  
 38. *Id.*, at para. 824.  
 39. *Id.*

## 4.2. Dispute prevention and/or resolution under Pillar One

### 4.2.1. Dispute prevention and/or resolution for Amount A

One of the most important elements of the Blueprint on Pillar One Report is associated with the introduction of a novel mandatory and binding dispute prevention and/or resolution system in respect of Amount A. This development is based on the introduction of:

- Review Panels formed by the administrations affected to pursue amicable settlements with regard to pending disputes via consensus; and
- Determination Panels formed by individual panelists to provide solutions to pending disputes that have not been settled amicably in the Review Panel process.

Specifically, the dispute prevention and/or resolution process for Amount A comprises the following five elements and/or stages:<sup>40</sup>

- (1) the completion and filing of a standardized Amount A self-assessment return by the coordinating entity with its lead tax administration or (optionally) filing a request for early tax certainty by an MNE group with its lead tax administration;
- (2) the validation of the self-assessment return, or the request for early tax certainty, by the leading tax administration, with an optional initial review to determine whether a panel review is required and its circulation to all of the administrations affected;
- (3) the constitution of the Review Panel, formed by the affected administrations, and the Review Panel Process, i.e. a multilateral MAP-like process, so that all of the administrations affected can pursue an amicable settlement by way of consensus;
- (4) the constitution of the Determination Panel, formed by individual panelists, and the Determination Panel Process to resolve disputes that were raised prior or during the Review Panel Process, which have not been settled amicably; and
- (5) the presentation to the MNE group affected of the final outcome for the group either to accept it, thereby resolving the pending dispute, or to deny it so as to be able to seek protection using domestic procedures.

### 4.2.2. Dispute prevention and/or resolution beyond Amount A

Despite the common determination of the members of the Inclusive Framework to promote new tax certainty processes in respect of Amount A, the case is not the same for disputes beyond Amount A. Consequently, states have different views as to the extent to which Pillar One should incorporate new approaches for dispute prevention and/or resolution beyond Amount A.<sup>41</sup> In order to resolve these different views, the Blueprint on Pillar One

Report explores an approach based around the following four elements:<sup>42</sup>

- (1) implementing a mandatory and binding dispute resolution process in respect of all disputes relating to transfer pricing and permanent establishment (PE) adjustments as a last resort tool for in-scope taxpayers, when such disputes are not already covered by existing mandatory and binding dispute resolution mechanisms;
- (2) developing mandatory and binding as well as mandatory but not binding (advisory) dispute resolution processes coupled with peer review for other taxpayers;
- (3) establishing mandatory and binding dispute resolution in respect of Amount B disputes as a last resort for taxpayers following the exhaustion of all other existing prevention and resolution tools; and
- (4) promoting alternative mechanisms for developing economies, including elective and binding dispute resolution mechanisms, in respect of disputes beyond Amount A.

With the implementation of this more lenient approach for matters beyond Amount A, states appear to be able to benefit, on the one hand, from more freedom in deciding their level of commitment in delivering advanced tax certainty over time, without, on the other, hindering the overall Pillar One dispute prevention and/or resolution system.

## 4.3. Dispute prevention

Under Pillar One, dispute prevention has a role to play as important as, if not more, than that of dispute resolution. The adopted in the Blueprint on Pillar One Report of early tax certainty processes, including the circulation of particular self-assessment returns and the establishment of Reviewing and Determination Panels in respect of unresolved matters, indicates the aim of the members of the Inclusive Framework to provide:

a clear and administrable mandatory binding dispute prevention process of that would provide early certainty, before tax adjustments are made, to prevent disputes related to all aspects of Amount A.<sup>43</sup>

At the same time, arguably, fewer disputes can be expected to arise with regard to Amount B. This situation is so, given the particular nature of Amount B, which is founded on a fixed rate of return on base line marketing and distribution activities.<sup>44</sup>

In addition, in order to further improve dispute prevention processes in respect of matters beyond Amount A, the Blueprint on Pillar One highlights a number of measures to be considered by the members of the Inclusive Framework. These measures include:

- promoting the application of a voluntary International Compliance Assurance Programme (ICAP)-

40. Id., at paras. 713-791.

41. Id., at paras. 792-793.

42. Id., at paras. 800-803.

43. Id., at para. 706.

44. Id., at para. 11.

like programme to enable a coordinated risk assessment to facilitate greater certainty for MNE groups;

- supporting early coordinated interventions in the form of joint audits by the administrations affected;
- promoting bilateral and multilateral advance pricing agreements (APAs);
- promoting the use of standardized benchmarks in common transfer pricing situations; and
- promoting the suspension of tax collection for the duration of pending disputes.<sup>45</sup>

#### 4.4. Multilateral processes

To a large extent, the emphasis on dispute prevention is associated with the multilateral character of the ITDPR process. As the Statement on the Inclusive Framework originally recognized, “any dispute between two jurisdictions over Amount A will likely affect the taxation of Amount A in multiple jurisdictions.”<sup>46</sup>

Even before the proposals associated with Pillar One, there has already been an emerging trend for taxpayers to seek multilateral dispute prevention and/or resolution for their global operations.<sup>47</sup> Nonetheless, the great majority of cases are handled in a bilateral manner.<sup>48</sup> Even multilateral cases are often resolved through a series of bilateral processes rather than a single multilateral process.<sup>49</sup> This is particularly true for transfer pricing cases, where the typical methods of arriving at an arm’s length price – for example, comparable uncontrolled price (CUP), cost plus and resale price minus – are principally applied on a (bilaterally) transactional basis.<sup>50</sup>

In contrast, the imperative of having multilateral processes in respect of dispute prevention and/or resolution under Amount A was confirmed by the recent Blueprint on Pillar One Report and the introduction of the new dispute prevention and/or resolution processes. (This situation was highlighted in the early reports of the members of the Inclusive Framework,<sup>51</sup> as the formulaic approach under this type of profit allocation begins with the consolidated group financial accounts of MNEs and also for disputes beyond Amount A.) As demonstrated in the remainder of this article, such a multilateral feature may give rise to significant challenges to the current ITDR system.

#### 4.5. Tension between tax certainty and dispute prevention and/or resolution

The widened scope of dispute prevention and/or resolution formulated in the Inclusive Framework Statement gives rise to an apparent paradox. On the one hand, one of the alleged major advantages of the profit allocation mechanism characterizing the Blueprint on Pillar One is the realization of greater tax certainty. On the other hand, each type of profit allocation must be assisted by dispute prevention and/or resolution on a case-by-case basis. One way to resolve this paradox is to enhance the robustness of the prevention and/or resolution mechanisms. At the same time, as is argued in section 5.5., this paradox highlights the significance of publishing decisions derived from tax dispute prevention and/or resolution processes.

### 5. Assessing the ITDR System in Light of the Blueprint on Pillar One

#### 5.1. MAPs

##### 5.1.1. Opening comments

As most tax disputes to date are finalized by way of a MAP, it is reasonable to take this procedure as the starting point of Pillar One dispute prevention and/or resolution.<sup>52</sup>

##### 5.1.2. Assessment of MAPs: A review of the literature

In general, the MAPs are recognized as an effective means of resolving vast majorities of tax disputes, and are perceived to be a flexible and cost-efficient alternative to arbitration or adjudication.<sup>53</sup> Nevertheless, the procedure has long been criticized for potentially being drawn out, the lack of transparency and the uncertainty regarding the accessibility of the procedure.<sup>54</sup> Broadly, these criticisms revolve around two major obstacles to the timely resolution of MAPs.<sup>55</sup> The first is an opportunistic problem. The procedure is dominated by competent authorities, which are typically affiliated to national tax administrations. It follows that these authorities may “shirk” in the process, or even may deliberately obstruct the procedure from the beginning, considering that tax administrations may be more concerned about revenue maximization than the timely elimination of double taxation.<sup>56</sup> The second problem relates to bargaining difficulties. A pair of competent authorities may find it difficult to agree on how to distribute the taxation in question, even if they enter into a MAP in good faith.<sup>57</sup> This bargaining difficulty can be

45. Id., at para. 794.  
 46. OECD, *Inclusive Framework Statement*, *supra* n. 32, at para. 18.  
 47. OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* para. 478 (OECD 2017), Primary Sources, also available at [https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017/the-arm-s-length-principle\\_tpg-2017-5-en](https://read.oecd-ilibrary.org/taxation/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2017/the-arm-s-length-principle_tpg-2017-5-en) (accessed 24 June 2019) [hereinafter *Transfer Pricing Guidelines* (2017)] and Terr et al., *supra* n. 25, at p. 439.  
 48. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47 and Terr et al., *supra* n. 25, at pp. 435 and 438–439.  
 49. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47 and Terr et al., *supra* n. 25, at pp. 435 and 438–439.  
 50. Similar views are expressed in OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47, at pp. 478–479.  
 51. OECD, *Inclusive Framework Statement*, *supra* n. 32, at para. 13.

52. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at Annex A.  
 53. Burnett, *supra* n. 12, at p. 176.  
 54. For representative literature, see Kollmann & Turcan, *supra* n. 19, at pp. 25–32; Burnett *supra* n. 12, at pp. 178–180; and H.J. Ault, *Improving the Resolution of International Tax Disputes*, 7 Fla. Tax Rev. 3, pp. 139–142 (2005).  
 55. Q. Cai, *A Package Deal Is Not a Bad Deal: Reassessing the Method of Package Negotiation Under the Mutual Agreement Procedure*, 46 Inter-tax 10, pp. 745–748 (2018).  
 56. Q. Cai & P. Zhang, *A Theoretical Reflection on the OECD’s New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring*, 21 J. Intl. Econ. L. 4, pp. 874–875 (2018) and Cai, *supra* n. 55, at p. 746.  
 57. Cai, *supra* n. 55, at pp. 746–747.

further exacerbated by the complexity of the dispute to be settled.<sup>58</sup>

### 5.1.3. Action 14 of the OECD/G20 BEPS Project and its efficacy in enhancing multilateral MAPs

As noted in section 2.2., the major reform to the MAP mechanism provided in Action 14 of the OECD/G20 BEPS Project is the introduction of a peer-based monitoring mechanism undertaken by the Forum on Tax Administration (FTA) MAP Forum.<sup>59</sup> As its name suggests, this monitoring mechanism primarily targets the opportunistic problem of MAPs, where the inclination of the competent authorities to obfuscate the process must be monitored. While this soft-law method can largely be explained by the political obstacles to a hard-law approach, it also reflects a belief that, if dealt with under good faith – which can be encouraged by the peer-review pressure – the MAP processes can operate expeditiously and efficiently given its procedural flexibility. As one commentator notes, the length and inefficiency of a MAP “seems to be a function of the bureaucratic exigencies of the states involved rather than anything intrinsic in the MAP process”.<sup>60</sup> It is true that, frequently, the bargaining difficulty may come to the fore. Nevertheless, two competent authorities with a high inventory of MAPs may adopt a more flexible approach to achieve an overall balance in their pending cases. This is not to justify a much-criticized practice referred to as a “package deal”, whereby two competent authorities have several cases to be resolved at the same time and engage in horse-trading over the cases.<sup>61</sup> Nonetheless, a certain degree of flexibility for the competent authorities should be permitted, and, in practice, does play an important role in expediting MAP processes and maintaining amicable relationships between the authorities.<sup>62</sup>

Under multilateral MAPs, however, both opportunistic problems and bargaining difficulties are compounded. Specifically, the multilateral procedure is akin to a process of joint production or teamworking, under which the individual contribution of each worker becomes increasingly difficult to isolate and measure as the number of workers grows. As a prerequisite for an effective monitoring mechanism is the ability of the system to measure the performance of the agents being supervised, the efficacy of Action 14 of the OECD/G20 BEPS Project in constraining the opportunistic problems that might arise is discounted where multilateral MAPs are concerned.<sup>63</sup> Multilateral negotiations also increase the difficulties for parties to find a commonly accepted solution to the distributive conflicts arising from the cases in question, thereby aggravating bargaining problems. The leeway of

the parties to adopt a flexible approach in characterizing bilateral negotiations may also be less in a multilateral scenario. Besides the opportunistic problems and the bargaining difficulties, administrative “hassle” may be evident in relation to multilateral MAPs. For instance, it may become more cumbersome to organize a face-to-face meeting attended by multiple parties.

In order to provide a solution to the anticipated advanced complexity of MAPs under Pillar One in respect of Amount A, the Blueprint on Pillar One Report promotes a more hard-law approach with the introduction of the Determination Panel Process for matters that could not be resolved through negotiations among the administrations affected (*see* section 4.2.1.).<sup>64</sup> In this regard, it would appear that, as in bilateral built-in-MAP arbitration, a stricter legalistic approach would not only guarantee that no deadlock could be reached in providing early tax certainty, but also arguably could promote a more reasonable negotiation MAP-like Review Panel process. Such a situation would apply where states anticipated that, in the case of the absence of a final settlement, the dispute in question would be decided by a Determination Panel.<sup>65</sup>

On the other hand, with regard to issues beyond Amount A, a similar hard-law approach is not yet commonly adopted. For such disputes, therefore, it would seem that the efficacy of Action 14 of the OECD/G20 BEPS Project in enhancing multilateral MAPs may be significantly compromised, although in the context of the 2020 review of Action 14, the FTA MAP Forum and Working Party (WP) 1 are currently exploring the addition of a number of elements to add to the Action 14 minimum standard, which could promote MAP processes even for disputes beyond Amount A. These proposals include:<sup>66</sup>

- the introduction of an obligation to establish a bilateral APA programme for jurisdictions with more or excessive transfer pricing MAP cases;
- the introduction of special training programmes, such as the Global Awareness Training Module;
- providing criteria for determining whether access to a MAP should be given (*see* section 5.1.4.);
- the introduction of an obligation to the effect that tax collection is suspended during the period in which a MAP case is pending;
- promoting the situation that penalties and/or interest charges are aligned in proportion to the outcomes of MAP processes;
- promoting the effective implementation of final outcomes, notwithstanding the expiry of domestic time limits; and
- permitting the request of taxpayers, in certain circumstances, which are within the time periods pro-

58. J. Kim & J.T. Mahoney, *Property Rights Theory, Transaction Costs Theory, and Agency Theory: An Organizational Economics Approach to Strategic Management*, 26 *Managerial & Dec. Econ.* 4, p. 235 (2005).

59. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at para. 11.

60. Burnett, *supra* n. 12, at p. 179.

61. *Id.*

62. OECD, *Manual on Effective Mutual Agreement Procedures (MEMAP) – Index* para. 11 (OECD), available at [www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm](http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm) (accessed 18 Mar. 2018).

63. Cai & Zhang, *supra* n. 56, at pp. 876-878.

64. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at Annex A.

65. H.D. Rosenbloom, *Chapter 7: Mandatory Arbitration of Disputes Pursuant to Tax Treaties: The Experience of the United States*, in Lang et al. eds., *supra* n. 19, at p. 166; 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 *Intertax* 11, p. 972 (2020); and OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at para. 797.

66. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at para. 796.

vided for by tax treaties for multiyear resolution through MAPs in respect of recurring issues with regard to filled tax years, where the relevant facts and circumstances are the same.

#### 5.1.4. *The issue of access*

A particular issue regarding MAPs is access. As the determination of the admissibility of MAP requests is in the hands of the competent authorities receiving the request, a concern is that such authorities may exercise their discretion in an arbitrary or abusive manner.<sup>67</sup> Restricted access to MAPs undermines the effectiveness and boundness of the Pillar One dispute prevention and/or resolution system. In order to reinforce the accessibility of MAPs, the minimum standard in Action 14 of the OECD/G20 BEPS Project introduces a checks-and-balance mechanism with two options for countries.<sup>68</sup> The first option is for the countries to amend article 25(1) of the OECD Model to permit a MAP request to be made to either competent authority of the contracting states – traditionally such requests can only be presented to the competent authority of the taxpayer's resident state. Under the second option, the competent authorities of both contracting states are required to evaluate jointly the merit of a taxpayer's objection in the case of any controversy over the access to a MAP.<sup>69</sup>

In contrast, the EU Arbitration Directive (2017/1852) provides for a stricter approach to the issue. Specifically, when all but one state has rejected a taxpayer's request for a MAP, an Advisory Commission may be formed to decide the admissibility of the request, on the initiative of one state alone.<sup>70</sup> Even when all of the contracting states have rejected a MAP request, the taxpayer affected would have the right to challenge the decision of each of the tax authorities before the domestic courts of each state. In the event that the domestic court of one state found in favour of the taxpayer affected, the taxpayer would have the right to pursue the formation of an Advisory Commission to decide whether the contracting states should initiate MAP proceedings.<sup>71</sup>

It can be seen that, while the EU Arbitration Directive (2017/1852) provides for a more robust access to MAP, the solution in Action 14 of the OECD/G20 BEPS Project may elicit more political support from countries. It follows that the ultimate choice of rule design regarding the access to Pillar One dispute prevention and/or resolution may unavoidably depend on a political calculation. At the same time, regardless of whatever approach is adopted, the multilateral feature of Pillar One dispute prevention and/or resolution may imply a considerable nuisance from an administrative perspective. For illustrative purposes, under a bilateral MAP, it is typically the competent authority that receives a MAP request that is respon-

sible for approaching the other competent authority, if the first competent authority is unable to resolve the case unilaterally. However, in a multilateral situation, it would appear to be onerous and inefficient for one competent authority to establish which of the other tax authorities might be affected by the dispute in question and to invite them to participate in the multilateral process. This situation is particularly true in a scenario in which the issue of whether the business in question falls within the scope of Amount A that is in dispute, as a market jurisdiction becomes relevant for Pillar One purpose only when the relevant income arises from an in-scope business.

As a result, the practice that is currently promoted in the Blueprint on Pillar One for Amount A, whereby the "leading tax authority" of the MNE is determined to be the most appropriate entity to arrive at early tax certainty,<sup>72</sup> may raise questions regarding the efficiency of early tax certainty tools. At the same time, this practice, in the authors' opinion, would appear to give unnecessarily one of the disputing administrations (which quite possibly could have to provide tax relief to its taxpayers after the application of Amount A) with an advanced position with regard to the other tax administrations. Such a position potentially gives rise not only an imbalance while negotiating a particular case, but also to a potential political obstacle in promoting the efficient resolution of pending disputes. These dangers are associated not only with potential delays in the proceedings due to the possible lack of will or capability on the part of the leading tax administration to lead the proceedings<sup>73</sup> as well as to inform and coordinate all of the tax authorities and taxpayers affected, but also due to the potential exercise of their excessive rights in an abusive manner. For instance, consider the scenario of the filtering out of "lower-risk groups" during an initial review<sup>74</sup> or concluding that a panel's review is not required. In these circumstances, specific criteria would have to be met for the Review Panel to be formed.<sup>75</sup>

In turn, such blocking or abusive tactics could affect not only the Review Panel Process, but also the Determination Panel Process, as, under the envisaged approach in the Report, a Determination Panel would only address issues that had previously been considered by a Review Panel, in respect of which the tax administrations concerned had failed to reach consensus regarding settlement.<sup>76</sup> These administrative, as well as the political, problems raise the question of the institutional approach to Pillar One dispute prevention and/or resolution.

## 5.2. APAs under MAPs

### 5.2.1. *Overview of APAs*

International tax dispute prevention mainly takes the form of APAs. APAs are defined by the OECD "Trans-

67. Kollmann & Turcan, *supra* n. 19, at pp. 26-27.

68. Govind, *supra* n. 27, at p. 311.

69. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at paras. 21-26.

70. Art. 6(1)(a) and (2) EU Arbitration Directive (2017/1852).

71. Art. 5(3) EU Arbitration Directive (2017/1852). See also S. Piotrowski, R. Ismer & P. Baker, *Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation*, 47 *Intertax* 8-9, pp. 678 and 682 (2019).

72. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at para. 717.

73. *Id.*, at para. 719.

74. *Id.*, at para. 735.

75. *Id.*, at paras. 741 and 743.

76. *Id.*, at para. 771.

fer Pricing Guidelines for Multinational Enterprises and Tax Administrations” (the “Transfer Pricing Guidelines”) as follows:

An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.<sup>77</sup>

An APA is formally initiated by a taxpayer and requires negotiations between the MNE concerned and one or more tax administrations.<sup>78</sup>

### 5.2.2. Legal framework of MAP APA

The Transfer Pricing Guidelines recommend that, whenever possible, an APA should be concluded on a bilateral or multilateral basis between competent authorities by way of a MAP under the relevant tax treaty.<sup>79</sup> The Transfer Pricing Guidelines also provide in the annex specific guidelines for conducting MAP-based APAs.<sup>80</sup> By incorporating an APA into the MAP mechanism, it would appear that the effectiveness and boundness of Pillar One dispute prevention can be ensured, taking into account the recent reforms that are intended to strengthen MAPs. Nonetheless, the legal framework of a “MAP APA” is questionable, thereby implying uncertainties regarding the robustness of APAs.

In general, bilateral or multilateral APAs can be very difficult to apply to a specific-case MAP, which is predicated on a given probability of inappropriate taxation that would be imposed upon the taxpayer in question. The Transfer Pricing Guidelines suggest that an interpretative MAP and a residual MAP are more relevant to APAs.<sup>81</sup> Specifically, in the sense that, on many occasions, APAs arise from cases in which the application of transfer pricing principles to a particular category of taxpayer gives rise to doubt and difficulties, an interpretative MAP may apply.<sup>82</sup> The Transfer Pricing Guidelines note that a residual MAP may provide a better basis for an APA, as both have the objective of avoiding double taxation.<sup>83</sup> However, the problem is that most of the rule design of a MAP, together with the recent reforms to MAP procedure, revolves around the a case-specific MAP. Accordingly, it is unclear whether those measures that are aimed at strengthening a MAP can also apply to an APA, although Action 14 of the OECD/G20 BEPS Project does recommend that, as non-binding best practice, countries should implement bilateral APA programmes.<sup>84</sup>

Two issues that are particularly relevant to the effectiveness and certainty of APAs deserve special attention. The first issue concerns the accessibility of APAs. It is not clear whether an interpretative MAP and a residual MAP

should be initiated on the taxpayer’s request, and, if the taxpayer so requests, whether such a request benefits from the same accessibility as a specific-case MAP. According to the Transfer Pricing Guidelines, the willingness of a competent authority to enter into a MAP APA depends on, *inter alia*, “the particular policy of a country”.<sup>85</sup> While some countries do consider the issue to fall within article 25(3) of the OECD Model, such countries require the initiation of the procedure to be conditioned on there being “difficulties or doubts arising as to the interpretation or application of the Convention”.<sup>86</sup> As a result, “the desire of the taxpayer for certainty of treatment is therefore not, in isolation, sufficient to pass the above threshold.”<sup>87</sup> It is true that, even under a specific-case MAP, the competent authorities still possess a certain degree of discretion in determining the access to MAP. Nevertheless, the general intention of the recent reforms to MAPs is to require the competent authorities to enter into consultations for dispute resolution. As the Commentary on Article 25 of the OECD Model unequivocally states:

the undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith (Emphasis added).<sup>88</sup>

The second issue relates to the question of whether MAP arbitration applies to an APA. The Transfer Pricing Guidelines leave this issue open, perhaps deliberately. On the one hand, Transfer Pricing Guidelines note the benefits of MAP arbitration.<sup>89</sup> On the other hand, in the annexed guidelines on MAP APAs, the Transfer Pricing Guidelines confirm that the taxpayer or tax administrations in question may withdraw from the MAP APA process “at any time”, and that such a withdrawal should not imply any obligation among the parties to the case.<sup>90</sup> In this regard, the use of the Determination Panel Process and of tax arbitration would have a “heavy lifting” role to play in enhancing the robustness of Pillar One dispute prevention and/or resolution (*see* section 5.3.).

### 5.2.3. Proposal for a MAP APA under Pillar One

The lack of the specific nature to an APA can somehow be justified in its own sake, considering the precautionary nature of the mechanism. However, the robustness of dispute prevention is imperative under Pillar One. Consequently, it would be desirable to clarify the legal framework of a MAP APA under Pillar One. In particular, those rules that are intended to reinforce the mandatory and binding character of MAPs – such as the broadened access to MAPs and the supplementary use of arbitration – should also apply to APAs. Accordingly, the discussion of the remaining topics including Determination Panels and/or arbitration (*see* section 5.3.), mediation (*see* section

77. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47, at p. 214.

78. *Id.*

79. *Id.*, at para. 225.

80. *Id.*, at paras. 471-500.

81. *Id.*, at para. 218.

82. *Id.*

83. *Id.*, at paras. 218-219.

84. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at paras. 30-31 and *Transfer Pricing Guidelines* (2017), *supra* n. 47, at p. 214.

85. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47, at p. 476.

86. *Id.*

87. *Id.*

88. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* para. 429 (21 Nov. 2017), *Treaties & Models* IBFD.

89. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47, at p. 226.

90. *Id.*, at para. 492.

5.4.), the publication of decisions (*see* section 5.5.) so as to arrive at an institutional framework that should apply to both dispute prevention and resolution on an equal footing.

### 5.3. Determination Panels and/or tax arbitration

#### 5.3.1. Advantages of arbitration in tax dispute prevention and/or resolution

The role of arbitration in enhancing the ITDR process has long been recognized. Specifically, in the sense that a third-party neutral is bound to deliver a binding opinion on a case within a defined period of time, the opportunistic problems and bargaining difficulties that hinder the timely resolution of MAPs can be overcome. Many believe that the mere inclusion of an arbitration provision in tax treaties may provide a strong incentive for competent authorities to handle MAPs in a timely manner.<sup>91</sup> In recognizing that these benefits of tax arbitration may become more prominent under the Pillar One context, under which multilateral MAP processes would imply a greater level of opportunistic and bargaining problems, the Blueprint on Pillar One Report takes a significant step towards enhanced tax certainty with the introduction of the Determination Panel Process in respect of Amount A and the consideration of similar arbitration-like dispute prevention and/or resolution processes regarding certain disputes beyond Amount A (*see* section 4.2.2.).<sup>92</sup>

#### 5.3.2. The political aspects of tax arbitration

Despite the advantages of tax arbitration, in a consultation meeting hosted by the OECD in relation to the original “Unified Approach”,<sup>93</sup> the BEPS Monitoring Group warned that business representatives would be in “a dream world” if they believe that all countries would embrace mandatory binding arbitration. This warning should not be regarded as baseless if it is considered the OECD’s setback in promoting a universal adoption of tax arbitration among countries at the outset of Action 14 of the OECD/G20 BEPs Project (*see* section 2.2.). Accordingly, mandatory binding arbitration for all disputes under Pillar One would appear to be a “policy trap” – a course that was already disliked by many countries during the formation of Action 14, which would now be served again in the “Pillar One dish”.

However, these authors take the view that the Pillar One dish does have the potential to make tax arbitration appear more to be palatable, even beyond Amount A. In particular, developing countries with large markets appear to be major beneficiaries of the Pillar One reform, which relocates taxing rights to market jurisdictions. The cost-benefit analysis for developed countries, which are

usually exporters of capital and commodities, may be less straightforward. Nevertheless, it seems these countries would have less ground, compared to conventional bilateral tax treaties, to reject mandatory and binding arbitration under Pillar One, given their general commitment to the same mechanism in the MLI, and, within the EU context, the EU Arbitration Directive (2017/1852).

As a result, the approach that has been adopted by the Blueprint on Pillar One Report that introduces the Determination Panel Process for Amount A as well as the four-element suggestion for disputes beyond Amount A (*see* section 4.2.2.), is arguably a well thought out approach that promotes an effective mandatory and binding arbitration-like system for a certain core of Pillar One disputes. It also provides for a voluntary arbitration-based solution for countries that are still resistant to mandatory arbitration.

It is true that a major problem of voluntary arbitration is its vulnerability to procedural obstruction. In other words, when a real dispute arises, one side usually has second thoughts regarding its commitment to a binding resolution.<sup>94</sup> Nonetheless, in a situation of dispute prevention, such as that in respect of a MAP APA, the possibility of disputes has not been materialized at the outset of the MAP, and, therefore, each competent authority would have less vested interest in denying the supplementation of an arbitral procedure in cases where the MAP negotiations are languishing.

#### 5.3.3. Procedural issues regarding the Determination Panel Process and/or Pillar One arbitration

It is worthwhile elaborating on certain procedural aspects of tax arbitration under Pillar One in light of the multilateral feature of Pillar One dispute prevention and/or resolution. First, traditional tax arbitration can be dealt with either in an independent-opinion or a final-offer mode. However, the Determination Panel Process, as envisaged in the Blueprint on Pillar One Report, appears to favour a last-best offer approach, under which the Determination Panel chooses between alternative outcomes submitted by the jurisdictions involved in the MAP case as the default rule. This situation applies unless the competent authorities agree that a different approach should be used.<sup>95</sup> In the authors’ view, nevertheless, Pillar One arbitration can only be conducted in the independent-opinion mode.<sup>96</sup> This position arises as final-offer arbitration is characterized by binary offers, such that the panel’s selection of one party’s offer automatically delineates the rights and obligations for both parties. In contrast, in a multilateral case, each competent authority can only propose that it takes its own share of the disputed tax base, and the choice of

91. Rosenbloom, *supra* n. 65, at p. 166 and Malamis, *supra* n. 65, at p. 972. *See also* OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at para.797.

92. *See* OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at paras. 800-803.

93. Independent Commission for the Reform of International Corporate Taxation (ICRICT), *INSIGHT: Fortune 500 Speak Out on Unified Approach* (14 Dec. 2019), available at [www.icrict.com/icrict-in-the-news/2019/12/14/insight-fortune-500-speak-out-on-unified-approach](http://www.icrict.com/icrict-in-the-news/2019/12/14/insight-fortune-500-speak-out-on-unified-approach) (accessed 23 May 2020).

94. W.W. Park, *Income Tax Treaty Arbitration*, 10 *Geo. Mason L. Rev.* 4, pp. 803 and 811 (2001).

95. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at paras. 774 and 803.

96. *See* KPMG, *Comments on the OECD Public Consultation Document on a Unified Approach under Pillar One* (18 Nov. 2019), available at <https://responsibletax.kpmg.com/page/comments-on-the-oced-public-consultation-document-on-a-unified-approach-under-pillar-one> (accessed 24 May 2020).

any single offer cannot settle the positions for the remaining parties.<sup>97</sup>

Second, the administrative burden of arbitration may become acute under the Pillar One context. For instance, as the number of participants in an arbitral procedure increases, it may become more onerous to find a commonly accepted schedule for a hearing. A further problem concerns the function of arbitral and/or Determination Panels. Typically, an arbitral panel under most bilateral tax treaties consists of three members, with two co-arbitrators nominated by the two competent authorities with the chairperson appointed by the two co-arbitrators.<sup>98</sup> However, when three, or any odd number of, jurisdictions are involved, there could be an even-numbered tribunal, which would run the risk of 50/50 split with no one to break the deadlock.<sup>99</sup> This awkward situation highlights the role of an arbitration institute in the appointment of arbitrators in multilateral MAPs. The topic of institutional dispute prevention and/or resolution elaborated on in section 6.

## 5.4. Mediation

### 5.4.1. Overview

In recognizing that some countries may have domestic obstacles to the adoption of mandatory binding arbitration, even before the adoption of the Blueprint on Pillar One Report, the “Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy” initially recommended considering mechanisms that “do not present the same issues and that can be adopted by all members of the Inclusive Framework”.<sup>100</sup> This recommendation, repeated in the Blueprint on Pillar One Report<sup>101</sup> is associated naturally with mediation or other, similar ADR methods. The OECD “Manual on Effective Mutual Agreement Procedures” (MEMAP) identifies the strength of mediation in the following words:

A mediator’s role may offer an opportunity for the competent authorities to view a specific case, or the MAP process itself, from a much different perspective. This perspective, ..., may illuminate elements of a case or of the MAP process that are not perceptible when viewed from the standpoint of an administration defending an adjustment or one that is being asked to provide relief.<sup>102</sup>

This appraisal of mediation primarily focuses on the mechanism’s strength in mitigating bargaining difficulties. It is further argued that the intervention of a mediator may also help contain opportunistic problems, as the competent authorities may realize that their behaviour in the procedure will be “watched” by a mediator. At the same time, the non-binding nature of mediation alleviates the concerns of countries regarding the loss of sovereignty,

as in the case of tax arbitration. Moreover, mediation has increasingly been applied to the resolution of domestic tax disputes. The general perception is that this method not only expedites the dispute settlement, but also enhances the mutual trust between taxpayers and tax administrations.<sup>103</sup>

### 5.4.2. Mediation in the ITDR system

Despite the perceived advantages of mediation and its apparent success in facilitating domestic tax dispute resolution, the mechanism is entirely overlooked in the ITDR system. While more recently the EU Arbitration Directive (2017/1852) included an ADR procedure, this ADR mechanism is as binding as the arbitration mechanism in the same instrument.<sup>104</sup> Specifically, after the Alternative Dispute Resolution Commission has delivered its opinion on a case, the competent authorities are given six months in which to agree on a resolution that may deviate from the original opinion. But if there is no other resolution in this six-month period, the opinion becomes binding on the competent authorities.<sup>105</sup> In contrast to this situation, it is commonly accepted that the hallmark of mediation is its non-binding character.<sup>106</sup>

In the context of the OECD/G20 BEPS Project, the topic of mediation did feature in a 2015 consultation meeting in relation to Action 14. Nevertheless, as one commentator that attended the meeting recalls, a senior OECD official suggested that mediation had no place in the ITDR, as evidenced by the fact that it had attracted little, if any, use.<sup>107</sup> While an investigation into the dormancy of mediation in the ITDR system and the underlying causes are scant in the existing literature, Dalton, an editor of the *International Tax Review*, provides some interesting perspectives based on his interviews with several leading experts on international taxation.<sup>108</sup> First, it may be difficult for countries, particularly small ones, to reach out to international tax mediators.<sup>109</sup> Second, the nature of the competent authority relationship may restrict the efficacy of tax mediation. Specifically, competent authorities dealing with MAPs do not necessarily approach this task from an individual case perspective, “but often from a much broader perspective about the whole relationship between country A and country B”.<sup>110</sup> In particular, the two competent authorities come together to achieve a resolution “in the knowledge that what they give way on for one issue, they are likely to claw back on another issue”.<sup>111</sup> This broader perspective and its effect on MAP negotiation has been discussed in section 5.1.3.

103. Kollmann & Turcan *supra* n. 19, at p. 67.

104. Govind, *supra* n. 27, at p. 320 and Pit, *supra* n. 27, at p. 751.

105. Art. 15(1) and (2) EU Arbitration Directive (2017/1852).

106. A.G. Saler, *Binding Mediation Is No Mediation at All*, Advocate (Jan. 2007).

107. P. Nias, *International Tax Dispute Resolution: Breaking the Impasse*, 27 Intl. Tax Rev. Feb. 2016, pp. 2-3 (2016).

108. J. Dalton, *Unlocking MAP Disputes: Is Mediation the Key?*, 24 Intl. Tax Rev. Sept. 2013, pp. 14-16 (2013).

109. *Id.*, at p. 16.

110. *Id.*

111. *Id.*

97. Malamis, *supra* n. 65, at p. 981.

98. Art. 20(2) MLI.

99. Park, *supra* n. 94, at pp. 814-815.

100. OECD, *Inclusive Framework Statement*, *supra* n. 32, at para. 19.

101. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at paras. 800-803.

102. MEMAP, *supra* n. 62, at para. 28.

### 5.4.3. Mediation under Pillar One

It can be seen from section 5.4.2. that the explanation for the absence of mediation in the ITDR system primarily relates to bilateral MAPs. This situation suggests that Pillar One, which warrants multilateral dispute prevention and/or resolution processes, may imply a different cost-benefit analysis for the use of mediation. First and foremost, as explained in section 5.1.3., the flexibility characterizing bilateral MAP negotiations between two competent authorities that have a large number of tax disputes would be significantly restricted in a multilateral process. It follows that competent authorities may have more difficulties in overcoming the bargaining problems in respect of a multilateral MAP in a “self-help” manner. Accordingly, in order to guarantee the effectiveness and boundness of dispute prevention and/or resolution, it is more attractive for the parties to choose mediation, if not arbitration, in supplementing their MAP negotiations. With regard to the administrative costs of finding a qualified and competent mediator, while it is true that such burden applies to both bilateral and multilateral MAPs, at least the average costs for individual competent authority could be reduced as the number of disputing parties increases. These costs may also be reduced by introducing an institutional approach to the appointment of mediators, as is explained in section 6.1. Based on this analysis, it would appear that Pillar One may provide some new political momentum to the development of international tax mediation.

## 5.5. Publication of decisions

### 5.5.1. Current position

Traditionally, decisions produced by the ITDR processes, including MAPs and tax arbitration, are not published.<sup>112</sup> Part VI of the MLI, in which procedures of tax arbitration are set out, sheds no light on the issue of publishing arbitral awards. In relation to Action 14 of the OECD/G20 BEPS Project, it is only recommended as a best practice that countries publish agreements realized through interpretative MAPs that “affect the application of a treaty to all taxpayers or to a category of taxpayers”.<sup>113</sup> In contrast, under the EU Arbitration Directive (2017/1852), the competent authorities may agree to publish the final decisions made by the Advisory Commissions and the Alternative Dispute Resolution Commissions, subject to the consent of any person affected by the decision.<sup>114</sup> Even if there is no consensus on the publication among the competent authorities and the persons affected, the competent authorities are still required to publish an abstract of the final decision including “a description of the issue and the subject matter, the date, the tax periods involved, the legal basis, the industry sector, and a short description of the final outcome”.<sup>115</sup>

112. Terr et al., *supra* n. 25, at p. 438.

113. OECD, *Action 14 Final Report* (2015), *supra* n. 3, at para. 29.

114. Art. 18(2) EU Arbitration Directive (2017/1852).

115. *Id.*, at art.18(3).

### 5.5.2. The traditional debate regarding publicity

The benefits of publishing ITDR decisions have long been recognized.<sup>116</sup> As the OECD notes in a 2007 report on ITDR, publishing such decisions would “lend additional transparency to the process”, and would “lead to a more uniform approach to the same issue”.<sup>117</sup> Nonetheless, the confidentiality approach has its followers. It is argued that the publication of ITDR decisions may put business secrets under risks.<sup>118</sup> Certain pragmatic considerations may also come into play. For instance, competent authorities may be worried that the publication of an unfavourable decision would give rise to an adverse precedent for them.<sup>119</sup> A related concern is that MAP agreements are frequently realized through mutual compromise or other flexible approach as was discussed in section 5.1.3., rather than by way of rational assessment or principled reasoning. Last, but not least, it appears to be meaningless to publish a final-offer arbitral decision, which usually contains no more than a statement of a number (*see* section 2.2.).

### 5.5.3. Publicity in the Pillar One context

The issue of publication may imply a different version of cost-benefit analysis in the Pillar One context. First and foremost, publication and the attendant extra transparency to the procedures and providing guidance for future disputes is more crucial in the Pillar One context, in considering the tension between the systemic emphasis on tax certainty, on the one hand, and the ad hoc nature of dispute prevention and/or resolution, on the other, as discussed in section 4.4. Ideally, the publication of decisions could clear ultimately much of the lack of clarity surrounding Amount A and Amount B, such that both types of profit allocation would depend largely on a mechanic approach. Even disputes that, for transfer pricing analysis require a case-by-case basis, could benefit from a growing body of jurisprudence derived from published Pillar One decisions.

At the same time, the multilateral feature of Pillar One dispute prevention and/or resolution would counter the argument that publication could restrict the ability of competent authorities to adopt a more flexible stance in light of the overall balance of the pending cases between them.<sup>120</sup> Moreover, the justification of the confidential approach based on the particular nature of final-offer arbitration makes little sense in the Pillar One context, which warrants, in the authors’ opinion, independent-opinion arbitration.

That being said, the concerns regarding business secrets holds true in the Pillar One context. In this connection, the EU approach, as manifested in the EU Arbitration Directive (2017/1852) is desirable. In these circumstances,

116. Terr et al., *supra* n. 25, at p. 438.

117. OECD, *Improving the Resolution of Tax Treaty Disputes: Report adopted by the Committee on Fiscal Affairs on 30 January 2007* para. 24 (OECD 2007), Primary Sources IBFD, also available at [www.oecd.org/ctp/dispute/38055311.pdf](http://www.oecd.org/ctp/dispute/38055311.pdf) (Accessed 10 Dec. 2020).

118. Terr et al., *supra* n. 25, at p. 438 and Burnett, *supra* n. 12, at p. 185.

119. Burnett, *supra* n. 12, at p. 179.

120. Malamis, *supra* n. 65, at pp. 981-982.

decisions may be published either in full with the consent of both competent authorities and the persons affected, or in a redacted form if no unanimous consent can be achieved.

## 6. A Holistic Solution: An Institutional Framework for Pillar One Dispute Prevention and/or Resolution

### 6.1. Overview

Section 5. focused on the assessment and enhancement of specific ITDR mechanisms in light of Pillar One. However, part of the discussion there pointed to the desirability of a holistic solution, particularly an institutional framework in respect of Pillar One dispute prevention and/or resolution (see sections 5.1.4., 5.3.3. and 5.4.3.). Institutional dispute resolution has long been debated in the literature on commercial dispute resolution, with regard to the choice between ad hoc arbitration and institutional arbitration.<sup>121</sup> Specifically, institutional arbitration refers to arbitral proceedings that are administered by an established body or forum, typically an arbitral institute, which routinely provides disputing parties with secretarial support and other facilities, such as a central place for hosting arbitral proceedings.<sup>122</sup> In contrast, ad hoc arbitration is that where the major aspects of arbitral procedures are determined and managed by the parties.<sup>123</sup> At the first sight, institutional arbitration appears to be a more expensive option, as the parties have to pay an extra fee to arbitral institutes. Nevertheless, as one commentator notes:

the main benefits of ad hoc arbitration, such as speed, efficiency, a higher degree of procedural flexibility and less cost ... will be eroded and the proceedings painfully prolonged if one of the parties proves un-co-operative, trying to obstruct the procedure.<sup>124</sup>

As a result, the extra expenses involved in institutional arbitration should be balanced against the benefits provided by such institutes. More recently, an institutional approach to tax arbitration has garnered growing attention.<sup>125</sup> Arguably, as the number of parties increase in a process of tax dispute prevention and/or resolution, the case for institutional intervention – not only for arbitration, but also for mediation and even MAPs in multilateral situations – would become stronger.

### 6.2. Institutional approach to Pillar One dispute prevention and/or resolution

As stated in section 4.1., some institutional elements have been considered in the Blueprint on Pillar One Report in respect of the proposal on the representative panels under Amount A and the associated working bodies. Nonetheless, this institutional framework is narrow in scope. It is confined to the dispute prevention and/or resolution mechanisms under Amount A and greater emphasis appears to be placed on the overall supervision of these mechanisms rather than on case-level facilitation.<sup>126</sup> This situation can be highlighted, inter alia, by the adopted in the Blueprint on Pillar One - and unreliable in the authors' opinion – approach that envisages the leading administration of MNEs – instead of a central institutional body or Secretariat – as the most appropriate entity to navigate dispute prevention and/or resolution proceedings in respect of Amount A.

This narrow focus is at best insufficient, as: (i) in section 5., the great potential of an institutional approach in enhancing individual processes of tax dispute prevention and/or resolution has been noted; and (ii) taking into consideration the analysis made thus far, it appears to be groundless to think that dispute prevention and/or resolution in relation to not only Amount A, but also for issues beyond Amount A, does not require institutional facilitation. Accordingly, the authors submit that it would be in the interest of the members of the Inclusive Framework to consider the establishment of a central institutional body for Pillar One. This body would, inter alia:

- receive and process the requests of relevant taxpayers and administrations for early certainty, and circulate these requests, as well as self-assessment returns and the related documentation, to all of the competent authorities affected;
- facilitate dispute prevention and/or resolution processes by providing secretarial services, tested procedural rules, management, court facilities and other support;
- establish and maintain a list of experts, from which Determination Panellists and/or arbitrators, as well as mediators, can be drawn by competent authorities, or, especially in the case of multilateral processes, even be appointed directly by the institutional body itself;<sup>127</sup> and
- publish decisions in respect of dispute prevention and/or resolution.

Doubtless, the body's overall supervision of dispute prevention and/or resolution activities, as envisioned in the original Inclusive Framework Statement, as well the Blueprint on Pillar One, is also of critical importance. The authors would further suggest combining this overall aspect with certain research and development (R&D) functions. Specifically, the institute could draw lessons from its recurring dispute prevention and/or resolution

121. For representative studies, see M.L. Moses, *The Principles and Practice of International Commercial Arbitration* 2nd ed., pp. 9-10 (Cambridge U. Press 2012); E. Aliaj, *Dispute Resolution through Ad Hoc and Institutional Arbitration*, 2 Academic J. Bus. 2, p. 241 (2016); and G. Blanke, *Institutional versus Ad Hoc Arbitration: A European Perspective*, 9 ERA Forum, p. 275 (2008).

122. H.L. Arkin, *International Ad Hoc Arbitration: A Practical Alternative*, 15 Intl. Bus. Law. Jan. 1987, p. 5 (1987).

123. Id.

124. Blanke, *supra* n. 121, at p. 282.

125. J.P. Owens, A.E. Gildemeister & L. Turcan, *Proposal for a New Institutional Framework for Mandatory Dispute Resolution*, 82 Tax Notes Intl. 10, p. 1001 (2016); H.J. Ault & A. Majdańska, *Chapter 9: Arbitration and International Institutions*, in Lang et al. eds., *supra* n. 19; and Q. Cai, *Behind Sovereignty: Concerns About International Tax Arbitration and How They May Be Addressed*, Brit. Tax Rev. 4, pp. 455-463 (2018).

126. Malamis, *supra* n. 65, at pp. 979-982.

127. For the advantages of having an arbitral institute directly appoint arbitrators, see section 5.3.3.

practice, and thereby optimize the procedural rules on a continuous basis. It could also reflect regularly on its published decisions to develop a coherent body of rules. Through both case- and policy-level intervention in Pillar One dispute prevention and/or resolution, such an institutional approach could provide states and taxpayers with a stronger guarantee for fair, consistent and streamlined dispute prevention and/or resolution, and foster greater tax certainty. In a broader sense, an institutional approach to Pillar One dispute prevention and/or resolution could inspire more institutional initiatives in the general ITDR domain.

The question remains as to the most appropriate international organization to host the ITDPR institution. Intuitively, the best candidate for this role would seem to be the United Nations (UN), which is distinguished for its authority and representation. Nonetheless, the authors favour the G20/OECD Inclusive Framework as the ideal forum, not least because it has already been devoted to the policy development of Pillar One. In addition, its full involvement in the ITDPR procedure may indeed facilitate adaptive learning within the organization. While it is true that the OECD is less formal than the UN, this very flexibility explains, at least partly, the OECD's greater success in leading the global collaboration in tax agendas as compared to the UN. As to the representation issue, the partnership between the OECD and G20 has significantly enhanced the legitimacy of the Inclusive Framework in playing a greater role in global tax governance. Therefore, there seems to be few convincing reasons to divide the Pillar One project and task the segments of the project to different organizations.

### 6.3. Potential concern regarding institutionalization

The development of an institutional approach as envisaged in section 6.2. could encounter the same sovereignty concerns that have hindered the universal adoption of tax arbitration in the course of Action 14 of the OECD/G20 BEPS Project. This concern could become particularly acute when the recent frustration experience by several well-known dispute-resolution institutions in non-tax contexts, including, inter alia, the International Centre for Settlement of Investment Disputes (ICSID), and the World Trade Organization (WTO) are considered. For instance, the WTO Director-General recently announced his resignation amid the trying times for the WTO, when the United States, one of the major trading powers, moved away from the multilateralism underpinning the world trade system.<sup>128</sup> Many years ago, the international investment regime also saw a rising backlash against the ICSID, which is the most important forum for investment dispute resolution. Several former members of the ICSID including, inter alia, Argentina, Bolivia, Ecuador and Venezuela, withdrew or threatened to withdraw from the institute,

128. Global Trade Review (GTR), *WTO Director-General Announces Surprise Resignation amid Trying Times for Trade* (14 May 2020), available at <https://staging.gtreview.com/news/global/wto-director-general-announces-surprise-resignation-amid-trying-times-for-trade/> (accessed 26 May 2020).

grumbling about the system's infringement on their sovereignty.<sup>129</sup> In this context, it would be natural to question the feasibility of having another initiative of institutional dispute prevention and/or resolution in the tax domain. However, the authors take the view that these concerns can be attributed, at least in part, to a misunderstanding regarding the difference between two approaches to dispute resolution, i.e.: (i) institutionalization; and (ii) legalization. A legalistic approach emphasizes the role of a third-party neutral in conducting an objective assessment of the facts and arguments of a dispute.<sup>130</sup> In this sense, tax arbitration is a more legalistic method as opposed to a MAP or mediation. In contrast, an institutional approach primarily relates to the managerial aspect of dispute settlement procedures covering not only arbitration, but also mediation and consultation. Accordingly, institutionalization is generally more "neutral" than legalisation in terms of sovereignty repercussions. This "agreeable" quality of the institutional approach was reflected in the attitude of the Member States towards article 10(1) of the EU Arbitration Directive (2017/1852). This article provides that the competent authorities of the Member States "may also agree to set up an Alternative Dispute Resolution Commission in the form of a committee that is of a permanent nature (a 'Standing Committee')". This reform has attracted very little, if any, objections based on the sovereignty concern. It is said that a particular option that is currently being debated by Member States is to task the Court of Justice of the European Union (ECJ) with the role of the Standing Committee.<sup>131</sup> In a similar vein, it may be unfair to blame the WTO and the ICSID for the groundswell of opinion against the trade and investment system. As one commentator points out, the formal function of the ICSID is to provide a process for the resolution of investment disputes. In other words, it "operates within the radar of its administrative council, and it does not impose itself on those members".<sup>132</sup>

Going further, the authors would argue that the legalistic reform to the ITDR, i.e. the wider promotion of tax arbitration, could benefit from the institutional approach. Specifically, for many developing countries, a particular concern regarding the adoption of tax arbitration relates to their lack of expertise and other relevant resources in both arbitral procedures and substantive tax matters. Coupled with this concern is the fear that international tax arbitrators, which may largely come from developed countries, would have less sympathy for developing countries.<sup>133</sup> In this regard, the advantage of an institutional approach is evident. For one thing, as was discussed in

129. N. Boeglin, *ICSID and Latin America Criticism, Withdrawal and the Search for Alternatives*, Network for Justice in Global Investment (2013), available at <https://www.bilaterals.org/?icsid-and-latin-america-criticisms> (accessed 27 June 2018); L.E. Trakman, *The ICSID under Siege*, 45 Cornell Intl. L. J. 3, p. 603 (2013); and M. Waibel, L. Kyo-Hwa Chung & C. Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, in *The Backlash Against Investment Arbitration: Perceptions and Reality* (M. Waibel ed. Kluwer L. Intl. 2010).

130. Green, *supra* n. 7, at p. 82.

131. Pit, *supra* n. 27, at pp. 750-751.

132. Trakman, *supra* n. 129, at p. 628.

133. M. Lennard, *Chapter 19: International Tax Arbitration and Developing Countries* in Lang et al. eds., *supra* n. 19, at pp. 179-188.

section 6.2., dispute resolution institutes typically maintain access to large databases of experts of diverse backgrounds, thereby alleviating the concern over the issue of representation-deficit. Second, as proposed in the Blueprint on Pillar One Report,<sup>134</sup> a body of Pillar One experts could provide technical assistance to developing countries or those countries with resource constraints. The authors further envisage the creation of an international fund with proportionate state contributions based on the ability-to-pay principle, so that resource inequality among countries in respect of tax dispute prevention and/or resolution could be effectively mitigated. It follows that the institutionalization of Pillar One arbitration may bolster the legitimacy of tax arbitration.

## 7. Conclusions

This article has considered the key aspects of tax dispute prevention and/or resolution under Pillar One. It is very likely that these aspects would pose challenges to the traditional ITDR system. To summarize, the multilateral feature of dispute prevention and/or resolution processes may reinforce the risk of hindering MAP negotiations. Even with tax mediation or arbitration, the nuisances of managing these procedures may become more evident compared to bilateral situations. Moreover, the emphasis on effective and binding dispute prevention highlights the uncertainties regarding the legal framework of a MAP APA.

On the other hand, the Pillar One provides a window of opportunity to further strengthen the ITDR system. In particular, the transparency of decision making could be enhanced. The development of third-party procedures in resolving tax disputes, including, inter alia, arbitration

134. OECD, *Report on Pillar One Blueprint*, *supra* n. 1, at paras. 751 and 798.

and mediation, could gather new political momentum. Furthermore, dispute prevention and/or resolution could be facilitated and streamlined by adopting an institutional approach developed by and within the G20/OECD Inclusive Framework.

To be sure, the final approval of the Pillar One depends on political consensus among countries. Nevertheless, the authors argue that the relevance of this research need not necessarily depend on the final implementation of Pillar One. This is because, arguably, some of the key elements of Pillar One will remain, even if the approach is ultimately rejected. In particular, as some note, Amount A reflects a half-way house approach towards a more revolutionary paradigm of taxing MNEs, i.e. a formulary apportionment approach.<sup>135</sup> Under this new paradigm, the allocation of taxing rights over the business income of MNEs would be entirely based on predetermined formulae, which would reflect the economic substance of each part of the MNEs.<sup>136</sup> While this formulary approach has proved to be too revolutionary to be accepted by the international society as the basis for its transfer pricing regimes, it has been used selectively at a case level by numerous countries, usually through bilateral or multilateral APAs.<sup>137</sup> It follows that regardless of the fate of Pillar One, the emphasis on effective and binding dispute prevention and/or resolution on a multilateral basis will only be reinforced.

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135. M.F. de Wilde, *On the OECD's "Unified Approach" As Frankenstein's Monster and a Dented Shape Sorter* (2019), available at SSRN 3479949 and A.P. Dourado, *The OECD Unified Approach and the New International Tax System: A Half-Way Solution*, 48 *Intertax* 1, p. 3 (2020).
136. T. Rixen, *From Double Tax Avoidance to Tax Competition: Explaining the Institutional Trajectory of International Tax Governance*, 18 *Rev. Intl. Political Econ.* 2, pp. 197 and 211 (2011).
137. OECD, *Transfer Pricing Guidelines* (2017), *supra* n. 47, at p. 39.