

# Designing an Inclusive and Equitable Framework for Tax Treaty Dispute Resolution: An Indian Perspective

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*Tax treaty dispute resolution is neither efficient nor equitable at the moment. This is particularly problematic in light of countries' adopting aggressive tax policies to tackle base erosion and profit shifting practices, resulting in an increase in disputes.*

*The MAP has had limited success, while discussions on new mechanisms to supplement the MAP (such as tax treaty arbitration) have proved controversial and have failed to bring developed and developing countries to a consensus. India has been one of the countries in vocal opposition to tax treaty arbitration, even as it staggers under the sheer volume of international tax disputes.*

*Against this backdrop, this article proposes a workable means of tax treaty dispute resolution, with specific focus on the concerns expressed by India. The authors first analyse available domestic and international mechanisms in India for resolving disputes, including the MAP under tax treaties. The authors then evaluate the pros and cons of non-binding or binding solutions to supplement the MAP under tax treaties. Next, they examine concerns raised by developing countries, with specific reference to Indian constitutional and legal concerns as regards a binding dispute resolution regime. In light of this analysis, the authors propose a possible institutional framework for tax treaty dispute resolution tailored for India that takes into account these concerns and attempts to be both inclusive and equitable.*

## I INTRODUCTION

We need a more efficient and inclusive method of resolving international tax disputes.

It is clear that this would not just benefit the international community as a whole, but also be of particular assistance to developing and emerging economies, which suffer more on account of the non-performance of existing international tax rules in the new economy. These countries also bear the brunt of the skewed distributive allocations in existing double taxation conventions (DTCs or

tax treaties), which are increasingly being recognized as inequitable and not reflective of developing country concerns.<sup>1</sup>

The governments of developing countries, like the governments of countries around the world, face increasing pressure to tax cross-border income, as foreign direct investment and economic activity in these countries both keep increasing.<sup>2</sup> Often, the response of governments, and particularly those in the 'BRICS' countries i.e. Brazil, Russia, India, China and South Africa, is to adopt unilateral

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<sup>1</sup> P. Pistone, *Tax Treaties with Developing Countries: A Plea for New Allocation Rules and a Combined Legal and Economic Approach*, in *Tax Treaties: Building Bridges between Law and Economics* (M. Lang et al. eds, IBFD 2010); K. Brooks, *International Tax Policy in The Counter-Story Presented by the BRICS' in BRICS and the Emergence of International Tax Coordination* (Y. Brauner & P. Pistone eds, IBFD 2015). See also S. Ashley, *How BRICS can Impact your Transfer Pricing*, 23 Int'l Tax Rev., BRICS special (2013). See also E. A. Baistrocchi, *The International Tax Regime and the BRIC World: Elements for a Theory*, 33(4) Oxford J. Legal Stud. (2013) for a discussion on how the fundamental bases of OECD tax policy were framed after World War I, the model for which was based on the relationship between capital-exporting (creditor/imperial) and capital-importing (debtor/colony) countries.

<sup>2</sup> In 2015, 13.15% of the total world inward foreign direct investment was directed towards the five BRICS countries. Further, the foreign direct investments into the developing Asia region have been increasing by the year and were significantly in excess of investments into Europe and North America between 2013 and 2015. Of USD 16.2 trillion of global merchandise trade, developing economies contributed to 42%. Of USD 4.68 trillion of commercial trade, developing economies contributed to 36%. Of this, BRICS countries alone contributed to 10% of global commercial trade – valued at greater than USD 50 billion. 22% of global GDP was contributed by BRICS countries in 2015, with China, India, and Brazil among the top ten countries by overall GDP. See International Monetary Fund, *Coordinated Direct Investment Survey* (2016), <http://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&ss=1410469433565> (accessed 25 Apr. 2017); Ch. 1, World Investment Report 2016 by the United Nations Conference for Trade and Development (UNCTAD), *World Investment Report* (2016), [http://unctad.org/en/PublicationChapters/wir2016ch1\\_en.pdf](http://unctad.org/en/PublicationChapters/wir2016ch1_en.pdf) (accessed 25 Apr. 2017); World Trade Organization, *World Trade Statistical Review* (2016), [https://www.wto.org/english/res\\_e/statis\\_e/wts2016\\_e/WTO\\_Chapter\\_02\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wts2016_e/WTO_Chapter_02_e.pdf) (accessed 25 Apr. 2017).

aggressive tax policies to tackle the challenges that arise from base erosion and profit shifting. This tangle of unilateral approaches was sought to be improved upon and legitimized by the G20 spearheaded Base Erosion and Profit Shifting (BEPS) project which tried to introduce international consensus regarding such tax responses. However, consensus is not easy, and the BEPS project, while lofty in its aspirations to bring developed and developing country interests together, failed to make meaningful changes to the existing inequities in allocation of taxing rights between developed and developing countries and produced recommendations which have been criticized as being broad, vague and leading to heterogeneous implementation.

Further, while the BEPS project did make proposals on improving cross-border dispute resolution, some were met with vocal rejection from developing and emerging economies (including India), on account of perceived inequities. Such responses indicate a trust deficit and fundamental disagreements in approaches to dispute resolution. If the international community does not focus attention now, it is inevitable that this potent mix of increasing cross-border activity, increased pressure to tax, heterogeneous, inequitable tax rules and inadequate dispute resolution fora will result in increasing friction and disputes. It is therefore, vital and urgent that we find a more inclusive and equitable framework to resolve international tax disputes.

As Indian researchers, the authors believed that this issue was worth focusing on because India has struggled with taxation of increased cross-border activity more than most others – courtesy its status as a BRICS country and a large emerging economy that is amongst the top 10 in terms of foreign direct investment inflows.<sup>3</sup> For example, India has more transfer pricing rulings (over 1,800 reported rulings) than almost any other country in spite of the Indian law being introduced very late, in 2001. As Annexure 1 demonstrates,<sup>4</sup> Indian transfer pricing litigation over the past ten years consistently shows an upward trend, with the number of audits nearly doubling in the past five years. In each year, authorities have made adjustments in more than 50% of cases.

Aside from transfer pricing, India is an active litigant in cross-border disputes involving characterization of income, particularly in the context of intangibles and cross-border services, disputes relating to determination of source, particularly in a capital gains or permanent establishment context, and conflicts in determination of residency and/or legal status of a taxpayer. The introduction of the general

anti-avoidance rule (GAAR) which has recently become effective is also likely to increase tax disputes.

Pursuing these adjustments requires an allocation of resources that may not always be possible.<sup>5</sup> The Indian domestic adjudicatory system is reeling with issues of case pendency and backlog (see section 2.1 of § 2), and significant efforts have been invested internally to improve domestic adjudication mechanisms.<sup>6</sup> Most Indian tax treaties allow for the mutual agreement procedure (MAP), where competent authorities of two opposing states attempt to bilaterally resolve a dispute by agreement to ensure compliance with the tax treaty. However, the MAP has seen limited success in India due to taxpayer concerns with their efficacy and predictability (paragraph 2 of section 2.2 of § 2). Few other options are available, leading to an excessive reliance of taxpayers on domestic adjudication processes.

Against this background, this article attempts to construct a framework for alternative dispute resolution (ADR), which is inclusive, equitable and workable to supplement the MAP in tax treaties. As proposals for international tax ADR have frequently been rejected on the basis of domestic law, this article focuses on India and how ADR may improve the functioning of the MAP in Indian tax treaties. However, the authors believe that the approach adopted in this article should also enable other countries which are apprehensive about international tax ADR to evaluate key issues, and therefore, assist in building consensus.

The article begins with an overview of the existing framework for dispute resolution in India (§ 2), reflects upon international experience with such supplementary solutions (§ 3) and considers Indian concerns (§ 4) before providing what the authors believe is a measured proposal for a mandatory, but largely facilitative dispute resolution procedure to supplement the MAP in Indian tax treaties (§ 5).

## 2 EXISTING FRAMEWORK FOR RESOLUTION OF CROSS-BORDER TAX DISPUTES

### 2.1 Indian Domestic Remedies

What are the options available for a taxpayer that seeks to challenge an Indian demand?

The typical preference is for disputes to be resolved through domestic adjudicatory institutions. Briefly, after a demand is made by the first instance tax officer i.e. the

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<sup>3</sup> United Nations Conference for Trade and Development (UNCTAD), *World Investment Report*, *supra* n. 2, figure 1.4.

<sup>4</sup> Annexure 1 has been adopted from Ministry of Finance, Government of India, *Annual Report, 2013–14 and 2014–15*.

<sup>5</sup> According to the latest available data, India's tax collected to GDP ratio is still at around 17%, which is much lower than all OECD countries and lower than even other BRICS economies. See Ministry of Finance of India, Department of Economics Affairs, Economic Division 2016, *Indian Public Finance Statistics 2015-16*, <http://dea.gov.in/sites/default/files/IPFS%20English%202015-16.pdf> (accessed 14 Apr. 2017). Although the lack of a comprehensive indirect tax (such as the newly enacted goods and service tax) contributes to this, factors such as low tax base and lack of voluntary compliance have been cited as factors as well. See M. Butani, *Tax Dispute Resolution – Challenges and Opportunities for India 9* (1st ed., LexisNexis 2016).

<sup>6</sup> Tax Administration Reforms Commission, *Reports*. See <http://pib.nic.in/newsite/PrintRelease.aspx?relid=137486> (accessed 25 Apr. 2017).

assessing officer, the dispute proceeds up the appellate chain, a process which can take several years and sometimes, even decades (see Annexure 2 for an indication as to timelines). Authorities within this structure are overburdened with high pendency rates at each level (see Annexure 3, for instance, on the pendency of over 70% cases before the Commissioner of Income Tax-Appeals over the last five years).

The problem is widely acknowledged and there are efforts to improve this situation. The most significant reporting on this subject is that of the Tax Administration Reforms Commission (TARC), set up with the specific mandate of improving the Indian tax adjudication/administration framework, which contains detailed recommendations to improve the status quo.<sup>7</sup> The TARC reports suggest that even as the number of disputes being filed is constantly increasing, authorities are unable to dispose of them on a timely basis. Since statistics pertaining specifically to international tax cases in India, which would be most relevant to this analysis, are not made available by the Government, the authors analysed the reports of the Comptroller and Auditor General of India, a constitutionally established auditor of all Government accounts, which has released reports that provide reliable information regarding Indian tax disputes in general. Annexures 3, 4 and 5<sup>8</sup> are derived from these reports and demonstrate how billions of dollars are locked up in tax disputes at various levels of the appellate chain.

Over the last two decades or so, there have been domestic alternatives introduced to ease the pressure upon the formal adjudicatory structure. For example, the Finance Act, 1993 introduced an advance ruling mechanism in India primarily aimed at non-resident taxpayers and cross-border transactions by creating the Authority for Advance Rulings (AAR).<sup>9</sup> The AAR is a quasi-judicial authority chaired by a retired judge of the Supreme Court of India, which was intended to provide a judicial analysis of issues and more tax certainty. AAR applications can be made for transactions which have already been undertaken or are proposed to be undertaken. Statutorily, these applications must be disposed of within six months of

filing of the application, which is why the AAR mechanism was viewed as a harbinger of effective ADR procedures. However, with over 500 applications pending before this quasi-judicial body, it is flailing under the pressure. As of today, disposal may take between two to three years.<sup>10</sup>

Similarly, with a view to reduce transfer pricing litigation, an advance pricing agreement (APA) framework was created by the Finance Act, 2012.<sup>11</sup> This was in addition to transfer pricing safe harbours added in 2009 and implemented in 2013, which were also intended to reduce uncertainty.<sup>12</sup> In a nutshell, an APA allows the taxpayer and the tax authority to avoid future transfer pricing disputes by entering into an agreement, generally covering five prospective financial years and four preceding financial years, regarding the taxpayer's transfer prices. This agreement may be on a unilateral basis or on a bilateral basis under the MAP framework. However, no timelines have been prescribed for the conclusion of an APA which could be a matter of concern.

According to the Annual Report on APAs released by the Government in April 2017,<sup>13</sup> out of 688 unilateral APA requests,<sup>14</sup> 141 agreements have been signed to date and out of 127 bilateral APA requests,<sup>15</sup> 11 agreements have been signed to date. The data also showed an around twenty-nine month processing time for unilateral APAs and an around thirty-nine month processing time for bilateral APAs which is most definitely a positive sign.<sup>16</sup> Having said this, considering the rising inventory as reported by the Government, a further increase in these timelines may not be surprising.

Another significant step for mitigating transfer pricing disputes was the landmark Framework Agreement signed by the Central Board of Direct Taxes with the Revenue Authorities of the United States in January 2015. This agreement was finalized under the MAP provision contained in the India-US DTC, which sought to resolve about 200 past transfer pricing disputes between the two countries in the Information Technology (Software Development) Services and Information Technology

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<sup>7</sup> Amongst the reasons listed in the report are, (1) inconsistent decisions by tribunals; (2) arbitrary additions/demands made by the revenue authorities, due to policy incentives being linked to revenue target performance; and (3) unnecessary adjournments, frequent rotation of benches resulting in inadequate infrastructure and lack of technical expertise. See Tax Administration Reform Commission, *First Report* 239, (2014), [http://itatonline.org/info/?dl\\_id=1567?](http://itatonline.org/info/?dl_id=1567?) (accessed 25 Apr. 2017).

<sup>8</sup> Ministry of Finance of India, Department of Revenue, *Report of the Comptroller and Auditor General of India for the Year Ended March 2015*, Report no. 3 of 2016, 11, [http://www.cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Direct\\_Tax\\_Compliance\\_Revenue\\_Report\\_3\\_2016\\_Department\\_Revenue.pdf](http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Direct_Tax_Compliance_Revenue_Report_3_2016_Department_Revenue.pdf), (accessed 17 Apr. 2017) In Annexure 3, adjustments are denoted in Rs. crores where 1 crore = 10 million.

<sup>9</sup> Ch. XIX-B of the Indian Income Tax Act, 1961.

<sup>10</sup> The Hindu Business Line, *Over 500 Applications Pending Before Authority for Advance Rulings* (8 Oct. 2015), <http://www.thehindubusinessline.com/economy/policy/over-500-applications-pending-before-authority-for-advance-rulings/article7739126.ece> (accessed 25 Apr. 2017).

<sup>11</sup> Ss 92CC and 92CD of the Indian Income Tax Act, 1961 read with Rules 10G to 10T and 44GA of the Indian Income Tax Rules, 1962.

<sup>12</sup> These safe harbours are divided based on industry and were revised again recently in June 2017 leading to comfort for several taxpayers from uncertainty as regards transfer pricing in India. See The Times of India, *Govt Rationalises 'Safe Harbour' Rates for MNCs* (9 June 2017), <http://timesofindia.indiatimes.com/business/india-business/govt-rationalises-safe-harbour-rates-for-mncs/articleshow/59062412.cms> (accessed 14 July 2017).

<sup>13</sup> Central Board of Direct Taxes, *Advance Pricing Agreement (APA) Programme of India – Annual Report (2016–17)*.

<sup>14</sup> Adjusted down from actual number of 706 owing to combined requests.

<sup>15</sup> Adjusted up from actual number of 109 owing to combined requests.

<sup>16</sup> The data suggests that the unilateral APAs involve associated enterprises from 118 countries while bilateral APAs have been concluded with just 12 countries. Owing to lasting concerns of double taxation or double non-taxation in unilateral APAs, the authors consider the bilateral APA mechanism to be a more preferable option.

enabled Services segments.<sup>17</sup> In 2016, it was reported that more than 100 cases have already been resolved through the MAP under this framework agreement read with the APA provision under Indian domestic law.<sup>18</sup>

All these domestic options have alleviated, but not resolved the issue. The next section looks at possibilities for dispute resolution under Indian tax treaties

## 2.2 The Mutual Agreement Procedure

### 2.2.1 Framework for the MAP

Indian DTCs contain a dedicated provision dealing with dispute resolution. This is along the lines of Article 25 of the OECD and UN Model Conventions (OECD and UN Models) that provide for the MAP. The purpose of MAP is to provide the taxpayers with a diplomatic remedy when they feel they have not been taxed in accordance with the provisions of a tax treaty.

Article 25, as contained in these Models and in most Indian treaties, requires both states involved to resolve any disputes in relation to the treaty on the basis of 'mutual agreement'. However, the MAP has not been very successful globally. The efficacy of the MAP has been questioned for several reasons, including that the MAP places no obligation on the competent authorities to arrive at an agreement and that it

does not impose a time limit within which an agreement should be concluded.<sup>19</sup> Further issues include possible exertion of influence by the relevant jurisdiction to put pressure on the taxpayer to accept a reduced assessment, possible horse-trading within the process, domestic law conflicts such as no suspension of tax, interest or penalties during a MAP,<sup>20</sup> procedural concerns such as inadequate framework for MAP<sup>21</sup> and the increase in case volumes and considerable delay in the conclusion of MAPs.<sup>22</sup> Taxpayers have also opposed the MAP citing non-transparency and limited access and rights to the taxpayer.<sup>23</sup> Understandably, the effectiveness of the MAP for tax treaty dispute resolution is constantly under question.<sup>24</sup>

These problems are often amplified in developing and emerging economies where tax administrations struggle with resource constraints and significant issues in areas such as transfer pricing.<sup>25</sup> The data regarding MAP trends and performance in developing countries are difficult to ascertain as non-OECD countries did not have an obligation to report the details of MAP proceedings in their countries till 2016, where all members of the inclusive framework reported data per the new reporting framework.<sup>26</sup> The 2016 MAP Statistics show that several developing countries have no or very few MAP cases in their inventory, which may indicate lack of proper implementation of MAP rules or lack of taxpayer faith in the

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<sup>17</sup> Press Information Bureau, Ministry of Finance, Government of India, *CBDT Signs Advance Pricing Agreements (APAs) to Usber in Certainty in Taxation* (6 Aug. 2015), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=124438> (accessed 25 Apr. 2017).

<sup>18</sup> Press Information Bureau, Ministry of Finance, Government of India, *Resolution of More Than 100 Cases of Transfer Pricing Disputes with USA Under MAP* (28 Jan. 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=135867> (accessed 25 Apr. 2017).

<sup>19</sup> J. Kollmann & L. Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in *International Arbitration in Tax Matters* 25 (M. Lang & J. Owens eds, IBFD 2015); K. Vogel, *Klaus Vogel on Double Taxation Conventions*, (3d ed., Kluwer Law International 1997); M. Lang, *Introduction to the Law of Double Taxation Conventions* 148, 149 (2d ed., Linde 2013).

<sup>20</sup> Kollmann & Turcan, *supra* n. 19.

<sup>21</sup> Several countries have also placed no real distinction between their audit and competent authority functions and have created revenue-based performance incentives for competent authority staff in the past, further escalating these issues.

<sup>22</sup> As per the OECD MAP Statistics (2015), there is a steady increase in the number of new MAP cases initiated and in the number of pending cases as reported by OECD member countries. It was 6176, in 2015, a 14% increase from 2014 and a 163% increase from 2006. The average time taken to resolve OECD member disputes increased from 19.1 months to 33 months within a period of one year. The sudden increase in processing time for claims could be indicative of the increase in number and complexity of cases. However, it should be noted that disputes between OECD countries are double counted in these statistics. This was noted in R. Petrucci, L. Turcan & I. Vock, *Annex 7 International Tax Disputes – Current Trends in Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution* 120–137, E/C.18/2016/CRP.4 (7 Oct. 2016). In the cited paper, however, this issue is adjusted for and as per their revised statistics, there is still an increase in the total year-end inventories and newly initiated cases. However, they note that these numbers are larger in cases involving non-OECD countries as well, which might be illuminating for countries such as India. Since the 2016 MAP statistics includes more countries per the new reporting framework, a direct comparison may not be possible to note the increase in cases. However, it may be noted that out of 8002 total cases, almost 25% were closed by the end of the year per these statistics – albeit that developed nations account for most of the closed cases. The average time taken for transfer pricing cases is thirty months and for other cases is seventeen months (although the calculation is different per country for cases started prior to Jan. 2016).

<sup>23</sup> K. Perrou, *Participation of the Taxpayer in MAP and Arbitration: Handicaps and Prospects in International Arbitration in Tax Matters*, in Lang & Owens (eds), *supra* n. 19, at 291; Although the 2007 OECD Manual on Effective Mutual Agreement Procedure (MEMAP) allows for taxpayer participation on invitation, this is rare since there is no enforceable right. The lack of transparency could be a major concern for the taxpayer since information obtained under the MAP may be used for future audits as well.

<sup>24</sup> In this context, several proposals to modify the MAP have been put forward in the BEPS Action Plan 14 Final Report, mostly at the soft-law level. The only important change to the provision itself, which is to be implemented through the MLI as a 'minimum standard' is that MAP requests may be made to 'either' competent authority involved as per the new provision. Other proposals in the report include development of detailed MAP guidelines, maintaining relationship between States through a MAP Forum, and commitment to resolve MAP cases in twenty-four months as 'minimum standards'. Several important provisions such as the publishing of general MAP agreements, dealing with multi-year MAPs, bilateral/multilateral APA guidance etc. ended up being optional 'best practices'. The OECD will be monitoring the implementation of the minimum standards imposed in the BEPS project under its 'inclusive framework' to ensure that they are complied with by all participating States. Overall, it is clear that the changes do not go far enough to resolve all issues that have been pointed out with respect to the MAP.

<sup>25</sup> J. Dalton, *Unlocking MAP Disputes: Is Mediation the Key?*, 24 Int'l Tax Rev. 14 (2013). Further, Petrucci, Turcan & Vock, *supra* n. 22 notes that MAP statistics were few and far between for most developing countries and emerging economies leading to uncertainty in this regard.

<sup>26</sup> The new reporting framework is applicable starting from 1 Jan. 2016 and uses common definitions for computing the number of MAP cases and the time taken to close such cases. This new framework is tailored to avoid 'double counting' of cases as seen in the 2015 MAP Statistics (as noted above). The reporting framework also makes a distinction between attribution or allocation cases (cases involving transfer pricing or attribution of profits to a PE) and other cases. See OECD, *MAP Statistics Reporting Framework*, <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-reporting-framework.pdf> (accessed 10 Dec. 2017).

Table 1

Country	Number of Cases Pending – Start of 2016 (Total Number – Row 1; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		Cases Started in 2016 (Total Number – Row 1; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		Cases Closed in 2016 (Total Number – Row 2; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		Number of Cases Pending – End of 2016 (Total Number – Row 2; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)	
Brazil	11		4		2		13	
	4	7	4	0	1	1	7	6
China	160		32		84		108	
	113	47	21	11	60	24	74	34
Russia	0		2		0		2	
	0	0	2	0	0	0	2	0
South Africa	19		6		1		24	
	10	9	2	4	0	1	12	12

process. The MAP position of the BRICS countries other than India as provided in these statistics is provided below: Although China has seen a large volume of MAP cases, it has also shown great efficiency in the MAP to be able to close a vast majority of pending cases. The reasons for this are unclear but could be attributed to administrative efficiency, more dedicated MAP resources etc. This is also reflected in China's average closure time even for cases prior to January 2016 i.e. twenty-six months for transfer pricing cases and sixteen months for other cases. Although the number of cases is limited in the other three countries, statistics of case closure do not show significant progress.

### 2.2.2 India's Experience with MAP

Echoing the global experience, the Indian experience with the MAP has not been very positive either. In this context, it is important to examine whether the cause is a purely domestic issue unique to India, issues inherent to the MAP which are also faced by other countries (discussed above), or a combination of both.

On the domestic law side, Indian MAP provisions generally replicate Article 25 of the OECD and UN Models. However, the Indian domestic law rules implementing the MAP<sup>27</sup> contain little guidance on the procedure in the manner contained in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) and the UN Guide to MAP. This means that there are few/no principles, best practices or guidance regarding reasonable time limits, implementation practices or information required at the time of application. Further, the prescribed form is generic and does not ask specific information regarding facts, issues, applicable treaty provisions, calculation, supporting data and documentation, if previous complaints were filed, local remedies pursued etc.<sup>28</sup>

There are also unique issues relating to the interaction of the MAP with Indian domestic mechanisms – for example, situations where the Indian tax administration did not allow access to transfer pricing disputes through the MAP unless a tax treaty contained Article 9(2) denying access in case of certain key treaties such as those with prominent European states,<sup>29</sup> did not provide a stay on

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<sup>27</sup> Rules 44G, 44GA and 44H of the Income Tax Rules, 1962.

<sup>28</sup> Form 34F, Income Tax Rules, 1962.

<sup>29</sup> However, this concern has been assuaged now that India has clarified that access to the MAP and bilateral APAs would not be subject to Art. 9(2) in tax treaties. See CBDT, Press Release – Clarification of India's Position on the Acceptance of MAP and Bilateral APA in Cases of Countries Where Article 9(2) of OECD Model Tax Commentaries Is Absent (27 Nov. 2017), <http://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/674/Press-Release-Clarification-India-position-acceptance-MAP-bilateral-APA-countries-27-11-2017.pdf> (accessed 20 Dec. 2017). Further, India has agreed to adopt a similar provision in all its covered tax treaties. See OECD, *India – Status of List of Reservations and Notifications at the Time of Signature*, <http://www.oecd.org/tax/treaties/beps-mli-position-india.pdf> (accessed 31 July 2017).

domestic proceedings in all cases,<sup>30</sup> did not include interest and penalty components within the scope of the MAP etc.<sup>31</sup> It has also been pointed out that the tax administration fails to recognize that the MAP falls *outside* of domestic law, and that competent authorities have sufficient legal capacity to resolve disputes and enter into agreements.

Indian MAPs also suffer from issues inherent to the MAP elsewhere – for example, Indian taxpayers have concerns regarding transparency and predictability. They distrust MAP outcomes as they are susceptible to bureaucratic roadblocks and use this mechanism as a last resort when all other domestic remedies have been exhausted.<sup>32</sup>

Unfortunately, information regarding cases under the MAP were not publicly available till the inclusive framework reporting process starting 2016. The few nuggets of information that were available from different sources, how-

ever, such as the Ministry of Finance Annual Reports,<sup>33</sup> right to information law requests<sup>34</sup> and specialized reports such as the recent APA report<sup>35</sup> suggest that although MAP discussions were held, speedy resolution is uncommon.<sup>36</sup> India's MAP inventory, as provided in the 2016 OECD MAP Statistics, is provided below:

Based on this data, it is clear that India still has a large inventory of MAP cases i.e. 645, with an around 3% increase in case volumes in 2016. Only Belgium, France, Germany and the United States have a larger MAP inventory at the moment and all of these countries have closed cases at a better rate than India in 2016.<sup>37</sup> Further, India has reported an average time of around twenty-seven months for transfer pricing<sup>38</sup> cases and a staggering 108 months for other cases.<sup>39</sup> Based on this, it can be said that there is an urgent need to bring Indian MAP procedure in

Table 2

<i>Number of Cases Pending – Start of 2016</i> (Total Number – Row 1; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		<i>Cases started in 2016</i> (Total Number – Row 1; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		<i>Cases Closed in 2016</i> (Total Number – Row 2; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)		<i>Number of Cases Pending – End of 2016</i> (Total Number – Row 2; Allocation/Attribution Cases – Row 2a; Other Cases – Row 2b)	
622		78		55		645	
550	72	71	7	52	3	569	76

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- <sup>30</sup> India has, however, bilaterally allowed such stay subject to placing of a guarantee through a competent authority agreement under Art. 25(3) in the case of the United States, United Kingdom, South Korea and Sweden.
- <sup>31</sup> Several of these concerns are also addressed in the final report to Action Plan 14 and is addressed in the Commentaries on the OECD Model (2017) and the upcoming update to the UN Model. See UN Committee of Experts on International Cooperation in Tax Matters, *Annex II, Changes to the UN Model deriving from the Report on BEPS Action Plan 14*, E/C.18/2017/CRP.4/Annex.2 (28 Mar. 2017), [http://www.un.org/esa/ffd/wp-content/uploads/2017/04/14STM\\_CRP4-Annex-2-action-14-un-model.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2017/04/14STM_CRP4-Annex-2-action-14-un-model.pdf) (accessed 22 June 2017).
- <sup>32</sup> First Report of the Tax Administration Reform Commission, *supra* n. 8, at 245.
- <sup>33</sup> For instance, See Ministry of Finance, *Annual Report 2015–16*, 213, <http://finmin.nic.in/reports/AnnualReport2015-16.pdf> (accessed 25 Apr. 2017) which discusses the countries with which India had MAP inventories.
- <sup>34</sup> In such an application filed by Advocate Ashish Goel, the Government has clarified that 106 out of 305 transfer pricing related requests in relation to North American States were resolved in an average time-period of two to four years while twenty-five out of ninety-five similar requests in relation to European State were resolved between 2012 and 2015. See Government of India, Ministry of Finance, CBDT, Foreign Tax & Tax Research Division – 1, APA-1, F. No. 500/13/2014- APA- 1, 27 Apr. 2017; Government of India, Ministry of Finance, CBDT, Foreign Tax & Tax Research Division – 1, APA-2, F. No. 500/1/2016- APA- II, 24 Apr. 2017.
- <sup>35</sup> An official release states that in a meeting in Oct. 2016 between Indian and United States competent authorities, the discussion points included sixty-six MAP cases on transfer pricing and forty-two MAP cases on treaty interpretation issues, with nearly 5000 crores being locked up in disputes dating back to 1999. However, as of Apr. 2017, bilateral APAs within the MAP framework have only seen applications involving 12 countries and from the 127 applications filed since 2012–2013, only 11 agreements have been entered into where only 7 have been disposed of. The average pendency period as regards bilateral APAs has been stated to be around 39 months. See Press Information Bureau, Government of India, *India–USA Bilateral Competent Authority MAP/APA Meeting – Resolution of More Than 100 Cases Under MAP and Agreement on Terms and Conditions of First Ever Bilateral APA Involving India and USA* (17 Nov. 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=153710> (accessed 25 Apr. 2017); Ministry of Finance, APA Report, *supra* n. 17.
- <sup>36</sup> These reports state the countries with which India engaged in MAP discussions and that 'a number of cases were resolved' with various countries during the review period, but no information is provided regarding how many cases were resolved by when, with which country, and how many new cases were initiated. However, in respect of transfer pricing cases under the APA framework and under the India-US framework agreement, several cases have been reported to be resolved using the MAP.
- <sup>37</sup> The average time period reported by all of these countries for cases opened prior to 2016 is around twenty to forty months (with Belgium and Germany taking around 40 months for allocation/attribution cases).
- <sup>38</sup> This may be due to the bilateral APA process as noted above. However, a vast majority of transfer pricing MAPs remain pending as well and unless the closure rates increase substantially, it may be difficult to maintain these time periods.
- <sup>39</sup> This time period is much higher than the average time period reported by all countries of around 17 months for other cases. Since India has had a number of high profile international tax issues outside of allocation/attribution such as the existence of permanent establishments, treatment of royalties, indirect transfers etc., this number is of significance as well.

line with international best practices and standards.<sup>40</sup> As India aggressively pursued the BEPS project as a member of the Committee of Fiscal Affairs, a member of the steering group of the Inclusive Framework, and part of the ad hoc group that drafted the Multilateral Instrument<sup>41</sup> (MLI), expectations ran high that India would go beyond the minimum standards and implement best practices as well as regards improvement of the MAP.<sup>42</sup> However, considering India's position to not even substantially modify the MAP under Article 25, refusing direct access to either competent authority in its tax treaties pursuant to the MLI, it seems unlikely that one will see significant steps to improve the functioning of Indian MAPs beyond the minimum standards.<sup>43</sup>

In light of this, it is important to evaluate whether alternative or supplementary dispute resolution mechanisms may be implemented in Indian tax treaties to improve the functioning of the MAP. The next two sections examine the global framework for such dispute resolution mechanisms and Indian concerns relating to the same.

### 3 ALTERNATIVE OR SUPPLEMENTARY DISPUTE RESOLUTION MECHANISMS TO RESOLVE TAX DISPUTES

Alternative or supplementary means of tax treaty dispute resolution can serve as tools to improve the efficacy of the MAP. This idea has been around since the first draft model conventions created by the League of Nations in 1927<sup>44</sup> and 1928 which envisaged an 'advisory opinion procedure' in case the participating states fail to resolve the dispute under Article 14.<sup>45</sup> However, in 1943, the provision was removed from the League of Nations draft

and subsequently replaced by a specific case MAP provision to resolve cases of 'double taxation' in the 1943 League of Nations Mexico Model and the 1946 League of Nations London Model.<sup>46</sup> This format was then used in the draft OECD Model in 1963. It was then followed by the OECD Model until its 2008 update and was part of the UN Model until 2011.<sup>47</sup>

In its 2008 update, the OECD created a 'mandatory dispute resolution' mechanism to supplement the MAP through an 'arbitration' process. This proposal was later adopted in the UN Model and by several developing countries as well. In the following section 3.1, the authors analyse the current landscape in this area.<sup>48</sup> Since non-binding dispute resolution mechanisms may also be used to supplement the MAP and to improve its efficacy, the merits of implementing such mechanisms to improve the MAP will also be discussed in section 3.2. As many developing countries have raised concerns as regards supplementing the MAP with such procedures, these concerns will be discussed in section 3.3.

#### 3.1 Mandatory Dispute Settlement in Tax Treaties

##### 3.1.1 Existing Framework for 'Arbitration' in Tax Treaties

In 1984, the OECD evaluated the possibility of arbitration in tax treaties, through its report on 'Transfer Pricing and Multinational Enterprises: Three Taxation Issues' but did not favour it owing to various legislative and procedural problems, including the impinging of the sovereignty of states.<sup>49</sup> However, in its 1995 Transfer Pricing Guidelines,<sup>50</sup> the OECD noted the need to reconsider this position.

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<sup>40</sup> S. Goel, *A Case for MAP Arbitration in India*, Kluwer International Tax Blog (2 Jan. 2017), <http://kluwertaxblog.com/2017/01/02/a-case-for-map-arbitration-in-india/> (accessed 25 Apr. 2017).

<sup>41</sup> Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, text adopted 24–25 Nov. 2016.

<sup>42</sup> Several recommendations for the improvement of the MAP in India such as improving competent authority staffing, creating precedential value for MAPs, entering into further suspension of tax collection agreements as in the BEPS proposals, imposition of time-limits and increasing awareness among taxpayers have also been made in Butani, *supra* n. 5, at 138–139.

<sup>43</sup> OECD, *supra* n. 29. India is now awaiting its peer review for compliance under BEPS Action Plan 14 and is supposed to put into place the minimum standards by then.

<sup>44</sup> League of Nations, *Report Presented by the Committee of Technical Experts on Double Taxation and Tax Evasion* (Doc. C.216.M.85.1927 II), Geneva (Apr. 1927).

<sup>45</sup> Although this provision did not provide for a detailed MAP provision as we are used to in modern tax treaties, it created a first level of settlement of a dispute as regards the 'interpretation or application' of the provisions of a tax treaty by agreement between the competent authorities. Further, this provision created a flexible framework where States that cannot mutually resolve a dispute may obtain either a mandatory expert determination process or obtain a non-binding expert opinion in order to aid them to resolve the dispute. H. M. Pit, *Arbitration Under the OECD Model Convention: Follow-up Under Double Tax Conventions: An Evaluation*, 42(6 & 7) *Intertax* 445 (2014).

<sup>46</sup> League of Nations Fiscal Committee, *London and Mexico Model Tax Conventions: Commentaries and Text*, Doc C. 88.M, (I.A, Geneva), 1946.

<sup>47</sup> J. S. Wilkie, *Article 25: Mutual Agreement Procedure – Global Tax Treaty Commentaries*, Global Tax Treaty Commentaries IBFD.

<sup>48</sup> Although the 2016 US Model contains a detailed arbitration provision as well, since this may not be a global model for arbitration clauses, the provisions are not analysed in detail here.

<sup>49</sup> The Report acknowledged the shortcomings of the MAP, but reinforced the belief in its efficiency and flexibility. See OECD, *Transfer Pricing and Multinational Enterprises: Three Taxation Issues* (Paris 1984). See also Pit, *supra* n. 45.

<sup>50</sup> OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (Paris 1995).

Thereafter, the OECD commenced work on this issue and the arbitration provision i.e. Article 25(5) was added to the OECD Model in its 2008 update.<sup>51</sup> See Annexure 6 for a brief chronology of the development of arbitration in tax treaties.

Article 25(5), as it stands today, allows the taxpayer to submit unresolved issues for arbitration if an agreement under a MAP has not been arrived at for two years.<sup>52</sup> However, an arbitration request cannot be made if a domestic law court or administrative tribunal has decided on the issue.<sup>53</sup> The arbitration decision is binding on the states and shall be implemented irrespective of domestic law time limits unless a person directly affected by the case objects to it. However, the procedure for such arbitration has to be decided through mutual agreement by the competent authorities.

The Commentaries on Article 25(5) of the OECD Model (2017) emphasizes that the procedure envisaged in the article is supplementary and only enhances the effectiveness of the MAP; it is not an alternative or additional recourse.<sup>54</sup> It also clarifies that this process is different from commercial 'arbitration' since particular unresolved issues may also be referred to arbitration while the remaining issues are agreed under a MAP.<sup>55</sup>

Further, the OECD Commentaries provide details on the relationship between the arbitration process and domestic remedies. In order to pursue arbitration, the taxpayer would have to renounce his right to domestic law remedies on the same issue.<sup>56</sup> In states where an arbitration decision can deviate from a final Court decision, the provision may be modified to exclude such exception. Further, where arbitration is only possible if there are no further domestic remedies, the provision may include such wording.<sup>57</sup>

The competent authorities are also provided the right to agree to a solution different from the arbitration opinion in the OECD Commentaries.<sup>58</sup> Further, although the procedural rules are to be agreed by the competent authorities by mutual agreement, a sample mutual agreement providing rules for the arbitration has been attached as an Annex to the OECD Commentaries on Article 25.<sup>59</sup> The sample mutual agreement, till the 2014 update, prescribed the 'independent opinion' approach as the primary method and provided, inter alia, rules for appointment of arbitrators, their transparency and confidentiality. The 2017 OECD Model moved from suggesting the independent approach to the baseball approach.

It must be noted that a footnote was added to Article 25(5) as well stating objections made by certain countries on the grounds of constitutional law limits or other concerns in which case this provision shall not be binding and this was retained till the 2017 update. This was also clarified in the OECD Commentaries where an option to apply the provision, but to limit its application to cases that mostly involve a factual determination has also been provided.<sup>60</sup>

Accordingly, the 2011 UN Model also updated the MAP provision to include two alternatives. Alternative A included the arbitration provision as in the OECD Model with a few changes. Here, the threshold of two years for arbitration has been extended to three years, the option to request for arbitration has been given only to the competent authorities,<sup>61</sup> and the competent authorities have been given the power to enter into an agreement different from the arbitration opinion within six months. Alternative B retained Article 25 as it was prior to the update. The UN Model Commentaries largely follow the

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<sup>51</sup> Pit, *supra* n. 45. However, starting from the 1989 US–Germany tax treaty, around fifty other treaties contained an arbitration clause till 2008. The development of OECD work on mandatory arbitration, however, is largely attributed to the increase in transfer pricing disputes across the globe, the entry into force of the EU Arbitration Convention and the inclusion of mandatory arbitration provisions by the United States in several of its tax treaties starting from 2006. See H. J. Ault & J. Sasseville, 2008 OECD Model: The New Arbitration Provision, 63 Bull. Int'l Tax'n 5 (2009). The ICC had proposed the use of arbitration in international tax disputes, first in 1984 and then, in 2000. See ICC, *The Resolution of International Tax Conflicts*, Document No. 180/240, 24(10) Eur. Tax'n 337 (1984); ICC, Commission on Taxation, 3 May 2000, Document No. 180/438, as referred to in M. Züger, *ICC Proposes Arbitration in International Tax Matters*, Eur. Tax'n 221 (June 2001).

<sup>52</sup> Till recent, the two year period was calculated from the presentation of the case to the competent authority. However, in the 2017 update, Art. 25(5) of the OECD Model was modified to make this date two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities.

<sup>53</sup> It is important to note that the arbitration process envisaged here is not 'automatic' and the taxpayer may choose to move towards arbitration at any time after the expiry of the two-year period. See Commentaries on Art. 25 of the OECD Model Convention (2017), para. 70. The Commentaries also provide that States are free to extend this time period by agreement. Further, the taxation must have already happened owing to the actions of one of the States and there should be no agreement between the two States as to no unresolved issues for the process to be invoked. See paras 71, 72. The request may be communicated to the other competent authority as well by the taxpayer directly or by the concerned competent authority as well. See para. 75.

<sup>54</sup> Ault & Sasseville, *supra* n. 51 also notes that the intended effect of this provision is prophylactic, preventing the failure of the MAP, as seen in the case of the EU Arbitration Convention under which arbitration is uncommon.

<sup>55</sup> OECD, *supra* n. 53, para. 64.

<sup>56</sup> *Ibid.*, paras 76–79.

<sup>57</sup> *Ibid.*, paras 74, 80.

<sup>58</sup> *Ibid.*, para. 84.

<sup>59</sup> The sample agreement also envisages the possibility for the taxpayer to present its arguments before the arbitrators in writing and even includes the possibility of oral hearings, after permission. See Annex to Commentaries on Art. 25 of the OECD Model Convention (2017), OECD, *supra* n. 53, para. 28.

<sup>60</sup> Commentaries on Art. 25 of the OECD Model Convention (2014), paras 66, 67.

<sup>61</sup> This provision is not ideal since the taxpayer is not provided the opportunity to access arbitration on its own accord where there is a failure on the part of the competent authorities to arrive at an agreement. However, this may help improve MAP in general. See H. Ault, *Dispute Resolution: The Mutual Agreement Procedure*, in Papers on Selected Topics in Administration of Tax Treaties for Developing Countries, No. 8-A (2014), para. 4.3.

OECD Model Commentaries on Article 25, except for, *inter alia*, stating the possibility for 'voluntary' arbitration as an option, where both competent authorities must agree for a case to go to arbitration. There are also some changes in the sample mutual agreement annexed to the UN Model Commentaries on Article 25.<sup>62</sup>

This arbitration framework as it exists today has seen some acceptance. The IBFD database (as of April, 2017) suggests that there are 217 tax treaties in force at the moment in the English language that contain an arbitration clause in the model described above.<sup>63</sup> It is also interesting that an analysis of early adopters reveals that there are an almost equal number of treaties with the OECD wording allowing the taxpayer access to arbitration and the UN wording not allowing the taxpayer access to arbitration (i.e. allowing access only to competent authorities). Further, several developing countries in Asia, Africa and South America have entered into tax treaties that contain the arbitration clause. However, India has publicly expressed its unwillingness to add arbitration in its tax treaties and has not included this provision in any of its tax treaties to date.<sup>64</sup>

The next section deals with efforts to improve the existing arbitration framework, as documented in the BEPS Action Plan 14 (AP14).

### 3.1.2 Changes Proposed in BEPS Action Plan 14

As discussed earlier, in June, 2012, the G20 requested the OECD to prepare reports dealing with base erosion and profit shifting practices. Accordingly, the OECD launched the BEPS project containing several action plans to counter particular types of abuse. However, since the introduction of anti-abuse measures in such a broad manner would lead to an increase in disputes as well, one action plan i.e. AP14 was dedicated to making dispute resolution mechanisms more effective.<sup>65</sup>

Along with reports on the other action plans, the AP14 final report was released on 5 October 2015 and one of its key focus areas was on improving the MAP.<sup>66</sup> This was a departure from the initial work of the OECD which focused on resolving issues faced by countries in implementing the arbitration provision, and arose due to lack of consensus on the arbitration issue.<sup>67</sup> The approach adopted by the AP14 final report is that a few measures have been marked as 'minimum standards', which would be mandatory for the countries who took part in the project while others are 'best practices', which would be optional. Although the G7 meeting in June, 2015<sup>68</sup> supported the OECD work on promoting mandatory arbitration in tax treaties, the AP14 final report only contained a broad commitment to mandatory binding arbitration. These measures would be implemented through a combination of amendment of the OECD Model and Commentaries and the amendment of tax treaties through the MLI.

As regards arbitration, the 'minimum standard' under AP14 requires transparency from countries as regards their position on mandatory arbitration in tax treaties. Owing to the footnote contained in Article 25(5) of the OECD Model (2014) and observations made in the Commentaries,<sup>69</sup> states could choose to not implement arbitration without recording 'reservations' to the OECD Model, leading to no transparency as regards their positions. The AP14 final report provides that in the next update of the OECD Model, the footnote attached to Article 25(5) would be deleted and the paragraph in the Commentaries would be appropriately amended. Consequential changes would also be made to the Commentaries by which the possibility of restricting arbitration to a particular variety of cases would also be provided.<sup>70</sup> These changes can be seen in the 2017 OECD Model and Commentaries.

In addition, in the AP14 Final Report, twenty states committed to introduce mandatory binding arbitration in

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<sup>62</sup> The UN Sample Mutual Agreement on arbitration prescribes baseball arbitration as the procedure which is a deviation from the erstwhile OECD approach (the 2017 OECD Model Commentaries have resulted in the OECD also adopting 'baseball' arbitration). Further, as expected, the Agreement allows default appointment powers to a UN official as opposed to an OECD official in the OECD Model Commentaries.

<sup>63</sup> A few of these treaties may not yet be active since some procedural, diplomatic or formal requirements have not been complied with.

<sup>64</sup> Out of the BRICS countries, only Russia has signed a tax treaty containing an arbitration clause to date.

<sup>65</sup> P. Saint-Amans & R. (Raffaele) Russo, *The BEPS Package: Promise Kept*, 70 Bull. Int'l Tax'n 4 (2016), Journals IBFD.

<sup>66</sup> OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* (OECD 2015).

<sup>67</sup> The mandate on AP14 read as follows: 'Develop solutions to address obstacles that prevent countries from [re]solving treaty-related disputes under the MAP, including the absence of arbitration provisions in most treaties and the fact that access to the MAP and arbitration may be denied in certain cases.' However, little was achieved in the area of arbitration.

<sup>68</sup> The G7 leaders observed as follows in their official communique: 'Moreover, we will strive to improve existing international information networks and cross-border cooperation on tax matters, including through a commitment to establish binding mandatory arbitration in order to ensure that the risk of double taxation does not act as a barrier to cross-border trade and investment. We support work done on binding arbitration as part of the BEPS project and we encourage others to join us in this important endeavour.' See *G7, G7 Leaders' Declaration – Schloss Elmau, Germany* (8 June 2015), <https://ng.usembassy.gov/g-7-leaders-declaration-schloss-elmau-germany-june-8-2015/> (accessed 25 Apr. 2017).

<sup>69</sup> *Supra* n. 60, para. 65.

<sup>70</sup> OECD, *supra* n. 66, at 17, Minimum Standard 1.7, paras 22, 23. The OECD Model and Commentaries have been modified to this extent in 2017 with the addition of para. 65.1. However, after the 14th Session of the Committee of Experts on International Cooperation in Tax Matters of the United Nations in Apr. 2017, no changes are expected in the UN Model as regards arbitration since it already provides for two alternatives.

their tax treaties to improve the functioning of the MAP.<sup>71</sup> The AP14 Final Report also provided that the OECD would be developing a new provision for mandatory binding arbitration under the MLI.

It may be noted that although several measures to improve dispute resolution have come out of the BEPS project, lack of consensus has led to political compromises resulting in the measures losing the necessary teeth.<sup>72</sup> However, even if consensus seemed far off, the international tax community waited for a year with bated breath to see the proposals contained in the MLI to see how dispute resolution and specifically, the tax treaty arbitration procedure have been improved in terms of legal framework.

### 3.1.3 The Arbitration Option in the Multilateral Instrument

The MLI was adopted on 24–25 November 2016 and was first made available for signature to states during the signing ceremony on 7 June 2017. The MLI is a multilateral treaty that acts only so far as to modify the application of bilateral tax treaties between two signatories.<sup>73</sup> The MLI also allows for flexibility in terms of options and reservations, subject to limitations in case of minimum standard provisions,<sup>74</sup> but unrestricted in other cases. The arbitration provision is contained in Part VI of the MLI and is applicable only if both states involved notify Part VI to apply in relation to their tax treaty.<sup>75</sup> As of December, 2017, only twenty-seven jurisdictions have chosen to implement Part VI in their tax treaties.<sup>76</sup>

Part VI of the MLI, in strictly legal terms, provides for a significant improvement from the existing Article 25(5)

in the OECD Model (2017) in terms of clarity since procedural rules contained in the Commentaries (including the sample agreement) to date have been introduced in the provision. Detailed rules have been created as regards access to arbitration, time thresholds involved, the type of arbitration involved, appointment of arbitrators, transparency, and confidentiality and fees.

#### 3.1.3.1 Access to Arbitration

The means of access to arbitration under the MLI is similar to the existing provision, but some flexibility has been added. If a MAP leads to no resolution within a period of two years, the unresolved issues can be submitted to arbitration by the taxpayer with a request made in writing.<sup>77</sup> However, the time period of two years may be extended, prior to expiry, by the competent authorities by agreement, subject to them notifying the taxpayer.<sup>78</sup> States may also reserve to generally extend this time period from two years to three years.<sup>79</sup>

#### 3.1.3.2 Information Requests and Timelines

Specific details have also been added by the MLI in respect of notice and information requests prior to arbitration that are beyond what is in the Commentaries on date.<sup>80</sup> If both competent authorities agree that the information requested was not provided in a timely manner, the two year timeframe for arbitration is extended by the time from which information was requested to the time at which it was provided.

If no information request has been made, the start date of a MAP from which the two-year period for arbitration must be calculated is the earlier of the date notifying the

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<sup>71</sup> 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. Although the OECD believes that these countries account for more than 90% of MAP cases, since most of those cases involve other States as well and since the OECD statistics did not accurately depict the MAP status of most non-OECD States, this may not be reflective of the general participation in this initiative.

<sup>72</sup> 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 (2016).

<sup>73</sup> The MLI would only have effect in respect of a tax treaty if the tax treaty and in most cases, the concerned provision in such treaty, are notified to the official depository under the MLI i.e. the OECD by each concerned State.

<sup>74</sup> The preamble modification, the principal purpose test (with or without the simplified limitation on benefits clause), the changes to the MAP and to an extent, the corresponding adjustment provisions.

<sup>75</sup> Art. 18 of the MLI reads as follows: 'A Party may choose to apply this Part with respect to its Covered Tax Agreements and shall notify the Depository accordingly. This Part shall apply in relation to two Contracting Jurisdictions with respect to a Covered Tax Agreement only where both Contracting Jurisdictions have made such a notification.'

<sup>76</sup> Apart from the jurisdictions that already agreed to arbitration under AP14, Andorra, Curaçao, Fiji, Finland, Greece, Liechtenstein, Malta, Mauritius, New Zealand and Singapore have provisionally chosen to apply Part VI to date. However, Poland and Norway have moved away from their commitment in AP14 and the United States has not signed the MLI. See H. M. Pit, *Arbitration Under the OECD Multilateral Instrument: Reservations, Options and Choices*, 71(10) Bull. Int'l Tax'n (2017).

<sup>77</sup> If the MAP is suspended till there is a decision by a Court or administrative tribunal on the same issue or by agreement between the competent authority and the taxpayer, this two year timeframe is also extended by such period.

<sup>78</sup> Although the Explanatory Statement to the MLI, para. 216 explains that this could be a longer or a shorter period and it is clear that this should not be considered a way to opt out from the arbitration procedure, but only a way to set a practical time-period for an individual case, this provision has the scope to be misused.

<sup>79</sup> The three year time period is in line with the UN Model provision as discussed above.

<sup>80</sup> Some requirements have been introduced in the MAP stage also to facilitate the arbitration provision. Within two months of the MAP request, the competent authority must confirm receipt to the taxpayer and also inform the other competent authority. Further, within three months of the request, the competent authority must notify the taxpayer and the other competent authority if it already has sufficient information or if it requires more information. Within three months from receiving the original information, the competent authority should notify the taxpayer and the other competent authority whether it is satisfied or if it requires more information.

taxpayer that information is sufficient and three months from the date when notification is provided to the other competent authority of the MAP. If there was an information request, the start date of MAP referred relevant for arbitration is the earlier of the latest date when a competent authority notifies the other that it has received all the information it requested and three months of receipt of information by both competent authorities.

### 3.1.3.3 Appointment of Arbitrators and Costs

Rules regarding appointment of arbitrators are laid down in the MLI and are applicable except where the competent authorities agree otherwise. The panel shall comprise three members with experience and expertise in international taxation. Each competent authority would appoint one member within sixty days of the arbitration request. The appointed members would appoint the third member, who would be the 'Chair' within sixty days of the later appointment.

Each Member should be 'impartial' and 'independent' of the tax authorities, the competent authorities and the ministry of finance of each state and of all persons affected by the issue at the time of appointment. They should maintain this throughout the process and for a reasonable time after so as to not damage their independence. If no appointment is made in any of the cases above, the arbitrator would be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the OECD, who is not a national of either concerned states.

Confidentiality obligations have been placed on the arbitrators and rules are included in Part VI in this respect as well. Confidentiality rules applicable to taxpayers have also been added, which may be chosen as an option by states. Further, fees and expenses of the members would be agreed by mutual agreement and where there is no agreement, each party would bear the expenses for the member appointed by it. Other costs shall be shared by both states.

### 3.1.3.4 The Arbitration Process

The arbitration process under the MLI may be either 'baseball' arbitration or 'independent opinion' arbitration. The default option would be 'baseball' or 'last final offer' arbitration where each competent authority submits a proposed resolution that provides only the specific tax amount that may be paid or the tax rate that would be

applicable for each issue by an agreed date. In case of a substantive issue involving a question as to the application of the tax treaty, alternate proposed resolutions may be proposed by each competent authority contingent on this question. The competent authorities may also submit a supporting position paper (along with a copy to the other authority), with the other competent authority also given the right to give a reply to the proposed resolution and position paper (along with a copy to the counterpart). The Panel would decide the issue based on either proposed resolution by simple majority and without providing a reasoned opinion. The decision would not have any precedential value.

States would also have the option to reserve to apply detailed or 'independent opinion' arbitration. In this case, all information previously available should be provided to the Panel without undue delay.<sup>81</sup> The Panel would decide the case based on the tax treaty, domestic law and other sources identified by the competent authorities by agreement. The decision is to be supported by references, is to be made by simple majority, and would not have any precedential value. If one state wishes to apply baseball arbitration and the other state wishes to apply detailed arbitration, the arbitration provisions would not apply as yet and the states shall endeavour to agree on one of the modes as regards their tax treaty. In either type of arbitration, the opinions would not be published.

As of October, 2017, Canada, Finland, Italy and Singapore have provisionally opted for baseball arbitration and have also indicated, through a reservation, that they would apply Part VI only as regards treaty partners who have chosen identically. Andorra, Greece, Japan, Malta, Portugal, Slovenia and Sweden have provisionally opted for independent opinion arbitration. Therefore, Part VI would not be applicable to the treaties between the former group of countries and the latter group of countries until they arrive at an agreement as regards procedure. The remaining states have not indicated a preference and the procedure applicable to their treaties would either be baseball arbitration, by default, or independent opinion arbitration, by choice of their treaty partner.<sup>82</sup>

Significantly, states are also given the option to make an open-ended reservation as regards arbitration procedure under the MLI allowing them to make Part VI applicable only to a certain variety of cases. Since this was seen as a practice in bilaterally accepted arbitration clauses in the past, it is expected that arbitration would be applicable in a wider variety of cases owing to this provision.<sup>83</sup>

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<sup>81</sup> New information is not allowed unless expressly agreed to by both competent authorities.

<sup>82</sup> Pit, *supra* n. 76.

<sup>83</sup> Most of the countries that have provisionally opted for arbitration under Part VI have chosen to restrict its applicability to certain cases such as cases of fraud, application of domestic anti-abuse rules etc. However, some of the open-ended reservations are broad restrictions, such as limiting access to only cases that involved double taxation and not beyond. See Pit, *supra* n. 76 for a list of such provisional open-ended reservations.

### 3.1.3.5 Other Significant Provisions

The arbitration decision is implemented by a MAP and is binding except where the taxpayer does not accept the agreement,<sup>84</sup> a Court of one of the states declares the decision as invalid<sup>85</sup> or the taxpayer pursues litigation in a Court or tribunal on these issues. The arbitration process is terminated if a mutual agreement is arrived at during the arbitration process or if the taxpayer withdraws its request. The mode of application of the provisions, including minimum information required for a MAP, is to be decided by the competent authorities by mutual agreement.

Further, under the MLI, states may reserve to not allow arbitration if there is a decision by a Court or tribunal on the issue or for termination of arbitration before a panel decision if a Court or tribunal delivers a decision on the issue. States may also choose to allow the competent authorities to arrive at a different resolution from the arbitration even after the panel decision within three months.<sup>86</sup>

It is also important to note that the MLI allows states to agree to 'wider' obligations with regard to arbitration through other instruments without conflict.

### 3.1.3.6 Analysis

Although as noted above, the arbitration option in the MLI provides for more legal basis to the procedural aspects of arbitration, several shortcomings may be identified. First, the access to arbitration may be extended indefinitely with only an obligation to notify the taxpayer. Second, the nature of information that may be requested in a MAP and thereby extending the arbitration period is not provided for and has to be agreed by mutual agreement, allowing possible fishing expeditions. Third, the appointment rules that are virtually reproduced from the sample mutual agreement, coupled with the transparency rules, do not guarantee even-handedness

in the appointment of the arbitrator. Fourth, baseball arbitration, coupled with unpublished opinions, may conflict with constitutional guarantees against discrimination and the principle of certainty in some states.<sup>87</sup> Fifth, the taxpayer has not been granted any right to participate in the process either at the MAP or the arbitration stages.<sup>88</sup> Finally, there is also the concern that the complexity of the way in which Part VI is structured has led to reduced support, creating a sub-optimal solution.<sup>89</sup>

## 3.2 Non-Binding Dispute Resolution Mechanisms in Tax Treaties

Very little has been written on the possibility of applying non-binding dispute resolution mechanisms in tax treaty disputes. Non-binding dispute resolution techniques may vary ranging from mediation, where a neutral person facilitates the discussion between the competent authorities in a MAP,<sup>90</sup> to conciliation, where the conciliator acts as a facilitator as well, but can provide a non-binding settlement proposal for the competent authorities, to expert evaluation, where an expert may be called upon to give a non-binding opinion on the dispute.<sup>91</sup>

As discussed earlier, the MAP has several shortcomings including and especially the fact that the competent authorities are not obliged to arrive at an agreement. Flexible non-binding processes such as mediation would help facilitate such an agreement and thus, improve the functioning of the MAP, assist in developing experience and confidence in the competent authority process by levelling the playing field between the concerned competent authorities, as well as potentially avoid the issues that are often perceived as arising with respect to binding dispute resolution mechanisms such as arbitration.<sup>92</sup> This is evidenced by the experience of several countries with such procedures for resolution of domestic tax

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<sup>84</sup> The taxpayer is deemed to not accept the agreement where an action before a Court or a Tribunal has not been withdrawn.

<sup>85</sup> In this case, an arbitration request is deemed to have not been made except as regards confidentiality and costs. A new request may be made thereafter, unless the competent authorities do not permit this.

<sup>86</sup> This is similar to the option provided in the UN Model (2011) and the OECD Model Commentaries on Art. 25(5) (2017). Interestingly, most States have chosen to apply this option, reducing the 'binding' nature of the arbitration in Part VI in practice. See Pit, *supra* n. 76.

<sup>87</sup> The Sample Mutual Agreement in the OECD Model Commentaries allows redacted publication and this provision is a departure from this position. See Annex. To the Commentaries on Art. 25 of the OECD Model Convention (2017), *supra* n. 54, para. 32; See also J. F. Avery Jones, *Arbitration and Publication of Decisions in International Arbitration in Tax Matters*, in Lang & Owens (eds), *supra* n. 19 for a detailed analysis of this issue.

<sup>88</sup> For a detailed discussion of these substantive and procedural issues, See S. P. Govind & L. Turcan, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, 71(3/4) Bull. Int'l Tax'n (2017), Journals IBFD. See also P. Baker & P. Pistone, *General Report: Practical Protection of Taxpayers' Fundamental Rights* 65 (IFA Cahiers 2016); P. Baker & P. Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, (5/6) EC Tax Rev. 341 (2016).

<sup>89</sup> It is interesting to note that several OECD and European Union Member States that have accepted arbitration provisions previously in international tax law, either under their treaties or under the European Union Arbitration Convention have not signed up for the provision contained in the MLI as yet.

<sup>90</sup> Mediation where an international organization or institution acts as mediator is referred to as 'good office' in international diplomacy.

<sup>91</sup> UN Committee of Experts on International Cooperation in Tax Matters, *Annex 3: Working Group Note on Mediation and Other Forms of Non-Binding Dispute Resolution in Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution* 31–35, E/C.18/2016/CRP.4 (7 Oct. 2016), [http://www.un.org/esa/ffd/wp-content/uploads/2016/10/12STM\\_CRP4\\_Disputes.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2016/10/12STM_CRP4_Disputes.pdf) (accessed 25 Apr. 2017).

<sup>92</sup> UN Committee of Experts on International Cooperation in Tax Matters, *Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution* 11, E/C.18/2017/CRP.4 (28 Mar. 2017), [http://www.un.org/esa/ffd/wp-content/uploads/2017/03/14STM\\_CRP4\\_map-dar.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2017/03/14STM_CRP4_map-dar.pdf) (accessed 17 June 2017).

disputes.<sup>93</sup> Non-binding dispute resolution mechanisms may also act as a precursor to arbitration, till developing countries develop experience and confidence in such binding mechanisms. However, the question to be considered is whether these methods may be used within the auspices of the MAP already or whether a change would be required in a tax treaty modelled on the OECD Model or the UN Model.

Paragraph 4 of Article 25 of the OECD Model (2017), dealing with the scope of the MAP allowing for communication directly or through a joint commission is broad enough to be considered to include such facilitation within its ambit. This position is further substantiated by paragraphs 86 and 87 in the Commentaries on Article 25 that specifically allow supplementary dispute resolution mechanisms other than arbitration with a special reference to the merits of mediation in case of disagreement on merits and expert opinion in case of disagreement on facts. Therefore, it is clear that the OECD Model (2017) broadly allows for the use of non-binding dispute resolution mechanisms to supplement the MAP.

Further, Article 25(4) of the UN Model (2011) (in both Alternatives A and B) provides even more flexibility for such use within the wording by stating that ‘The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the MAP provided for in this article.’ Paragraph 41 of the UN Model Commentaries on Article 25 also provides a clarification on this possibility of use of non-binding methods, applicable to both Alternatives A and B. Nevertheless, the UN Committee of Experts, in its most recent reports, have been emphasizing on the use of such non-binding methods. This is especially mooted for developing countries that are not able to include arbitration to improve the MAP in their tax treaties.<sup>94</sup>

In the most recent and final meeting of this membership of the Committee of Experts in April, 2017, the Committee discussed the inclusion of language in the Model and the Commentaries overtly allowing the use of non-binding dispute resolution methods such as

mediation.<sup>95</sup> However, the Committee decided to not make any changes to the Model in the next update, but to only include an addition paragraph 41.1 in the Commentaries which states as follows:

41.1 The possibility for such assistance may include the utilization of non-binding methods of dispute resolution, such as mediation. For countries that wish to use such procedures, there are several non-binding methods that can be used to resolve disputes between parties at an early or later stage of the competent authority process. Such non-binding means of dispute resolution could range from facilitating the relational aspects of the competent authority process to providing insights or views on the substantive tax matters at hand in the dispute. Such methods are presently used for the resolution of tax disputes under the domestic laws of a number of countries. These procedures should, however, be utilized with due regard to issues such as the timing and duration of the procedures, the mechanism and criteria for selection of the mediator or other such appointed person and, the treatment of confidential information.

Although the addition of this paragraph does not add to the substantive vires of the MAP provision, the signalling effect of the language used may lead to more developing countries employing such techniques to improve the MAP in the future. As suggested in the UN reports as well, these methods may even act as a precursor to arbitration for some countries that are working towards resolving their existing concerns as regards arbitration.<sup>96</sup> However, as in the case of arbitration, for efficient functioning in a developing country situation, procedural rules should be laid down as regards the timing and duration of the procedures, the mechanism and criteria for selection of the mediator or other such appointed person and, the treatment of confidential information which are missing from the Commentaries on the OECD/UN Models.<sup>97</sup>

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<sup>93</sup> E.g. See the analysis of the United Kingdom’s approach in S. Govind & S. Varanasi, *Dispute Resolution in Tax Matters: An India-UK Comparative Perspective*, 9 *Taxmann Int’l Tax’n* (1 Sept. 2013).

<sup>94</sup> One of the reports note that non-binding dispute resolution to supplement the MAP would be useful since the presence of a neutral third party would make the process more efficient, lead to more principled decisions and to more predictability, and allow competent authorities to justify the concessions that are made in a MAP. See UN Committee of Experts on International Cooperation in Tax Matters, *supra* n. 91, at 36, 37.

<sup>95</sup> Detailed additions were proposed, as can be seen in the report of the coordinator of the sub-committee on dispute resolution and avoidance, UN Committee of Experts on International Cooperation in Tax Matters, *Annex 1: Non-Binding Dispute Resolution Potential Changes to Article 25 of the UN Model in Coordinator’s Report on Work of the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution*, *supra* n. 93, at 10, 11.

<sup>96</sup> Kollmann & Turcan, *supra* n. 19. It is interesting to note that recourse to non-binding dispute resolution mechanisms in place of arbitration is allowed under the new European Union Dispute Resolution Directive. See Council Directive (EU) 2017/1852 of 10 Oct. 2017 on tax dispute resolution mechanisms in the European Union [Dispute Resolution Directive], Official Journal of the European Union L 265/1.

<sup>97</sup> A reference to these issues was included in the originally proposed Commentaries placed before the UN Committee of Experts, where it was suggested that they be dealt with in the proposed UN Handbook on Dispute Resolution or the UN Guide to the Mutual Agreement Procedure. See UN Committee of Experts on International Cooperation in Tax Matters, *supra* n. 92.

### 3.3 Developing Country Concerns as Regards Supplementary Methods

As discussed above, several countries (including India) have expressed concerns as regards including mandatory arbitration to supplement the MAP in their tax treaties. The legal, constitutional, and administrative concerns were reflected in the footnote that was contained in Article 25(5) of the OECD Model (2014).<sup>98</sup> The Commentaries on Article 25 of the OECD Model (2014) further recognized such concerns, including specifically, constitutional barriers in some states that prevent arbitrators from deciding tax disputes.<sup>99</sup>

Several additional concerns were discussed from the perspective of developing countries by the UN Committee of Experts in 2011 while considering the update to Article 25 of the UN Model. These concerns included the limited number of cases submitted to MAP and even fewer that remain unresolved, how domestic law remedies are geared to resolve unresolved disputes, how lack of expertise in developing countries would result in an unfair advantage to countries having more experience, how private arbitrators are ill-equipped to deal with such matters of public policy, particularly in case of developing countries, how the neutrality and independence of arbitrators would be difficult to guarantee, how mandatory arbitration would be expensive from the perspective of developing countries, and how it is not in the interest of a state to limit its tax sovereignty through arbitration.<sup>100</sup> However, since enough merits were also seen in the arbitration option by the Committee,<sup>101</sup> two alternatives were included in the UN Model in its 2011 update, as discussed above.

In light of the discussions on arbitration in the context of BEPS AP14, the UN Committee of Experts revisited

this issue focusing on dispute resolution and avoidance in its agenda, inter alia, to look at improving or modifying arbitration in the UN Model. In relation to this mandate, the UN Secretariat produced an article on this issue detailing the various issues involved in arbitration including concerns raised by developing countries against the inclusion of arbitration in their tax treaties.<sup>102</sup> These issues include sovereignty and constitutionality concerns,<sup>103</sup> costs and lack of resources,<sup>104</sup> lack of experience and familiarity,<sup>105</sup> even-handedness,<sup>106</sup> transparency in arbitration, and reviewability and enforceability.<sup>107</sup>

Although a large number of these concerns such as sovereignty relate to the binding nature of arbitration, several other concerns such as costs and even-handedness would extend to non-binding dispute resolution mechanisms as well. Therefore, these concerns would need to be taken into account while implementing such mechanisms as well.

In sum, although the implementation of such supplementary dispute resolution mechanisms would certainly be an improvement over the MAP, several concerns would need to be addressed if they are to be implemented in the context of a developing country or even an emerging economy such as India. In the following § 4, the authors analyse India's specific concerns as regards supplementary dispute resolution and in particular, arbitration.

## 4 THE INDIAN PERSPECTIVE: ANALYSIS

As per the IBFD database (as of April, 2017), India has ninety-eight tax treaties currently in force. Although all of these treaties provide for the MAP as in the OECD or the UN Models, not even one Indian tax treaty

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<sup>98</sup> The footnote read as follows: 'In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in para. 65 of the Commentaries on the paragraph. As mentioned in para. 74 of that Commentaries, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals.'

<sup>99</sup> Commentaries on Art. 25 of the OECD Model Convention (2014), *supra* n. 60, para. 65.

<sup>100</sup> Commentaries on Art. 25 of the UN Model Double Taxation Convention, paras 4 and 5; M. Lennard, *Update of the United Nations Model Tax Convention*, 18(2) Asia-Pac. Tax Bull. (2012), Journals IBFD. Ault & Sasseville, *supra* n. 51, also discusses the argument that developing countries may be sceptical that their use of the treaty would be more than that of a treaty partner owing to a one-way flow of investment in certain cases, but firmly rejects this argument.

<sup>101</sup> Prevention of double taxation, increase in certainty to taxpayers, solving inefficacy of domestic remedies, the preventive effect of arbitration on the MAP etc. were pointed out as merits whereas arguments on even-handedness and sovereignty were countered on the basis that the arbitration process would be neutral and impartial since arbitrators would come from various backgrounds, including from developing countries, and the ceding of tax sovereignty would be in the interest of the States. See M. Lennard, *supra* n. 100.

<sup>102</sup> UN Committee of Experts on International Cooperation in Tax Matters, *Secretariat Paper on Alternative Dispute Resolution in Taxation*, E/C.18/2015/CRP.8 (8 Oct. 2015), [http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM\\_CRP8\\_DisputeResolution.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf) (accessed 25 Apr. 2017).

<sup>103</sup> Three situations are possible: (1) Inclusion of arbitration may be unconstitutional, (2) Inclusion of arbitration may constitutionally require extension of such remedy to domestic cases as well, (3) Even though there are no legal concerns, there could be policy concerns as regards shifting decision making power from the State to a third party.

<sup>104</sup> These include arbitrator fees and facilities, additional fees for counsel or representation, possibility of paying in foreign currency, requirement of outside experts for familiarization etc.

<sup>105</sup> This raises the suspicion that such countries would incur excessive costs and still, lose out in disputes leading to leakage of tax revenues.

<sup>106</sup> As of today, there are only a few possible arbitrators around the world who can deal with complex international tax and transfer pricing issues and most of them come from the developed world. Although this group may include academics and people having no affiliation with Governments or business, their thought process and understanding of international taxation may be tuned to the developed world, and might not consider concerns of developing countries. The issue here is that there is a lack of arbitrators in the developing world at the moment.

<sup>107</sup> In mandatory binding arbitration in tax treaties, opinions are considered binding on the competent authorities creating issues as regards enforcement of these opinions if the competent authorities do not act in accordance, and possibility of judicial review.

contains an arbitration provision to supplement the MAP. This is owing to the fact that India believes that introducing arbitration to resolve tax treaty disputes would be an impingement of its sovereign right to taxation.<sup>108</sup>

Although little has been released in the public domain by the Government, the understanding of the authors is that this argument is based on two basic contentions. First, the Government believes that tax is a sovereign power<sup>109</sup> that is extended to the competent authority of the state for the purposes of the MAP, and that this cannot extend to a third party under arbitration as per the Constitution of India, 1950 (**the Constitution**). The authors have examined this question in two parts. Section 4.1 will deal with whether the extension of arbitration to tax treaty disputes would be an unconstitutional extension of sovereign powers, as argued by the Government. Section 4.2 will deal with whether the extension of arbitration as a remedy in case of tax treaties would be a violation of the right of equality guaranteed under Article 14 of the Constitution by discriminating against domestic taxpayers.

Second, tax disputes involve various elements such as determination of facts, appreciation of evidence, interpretation of domestic laws and interpretation of tax treaties and the Government believes that the MAP is the only mechanism that can adequately examine all relevant elements (even though it is typically applied only in the last category of tax treaty disputes). This position is due to Indian concerns with a lack of even-handedness and a poor experience with arbitration in other areas such as bilateral investment treaties (**BITs**). These issues will be dealt with in section 4.3.

#### 4.1 Constitutionality of Tax Treaty Arbitration Under Indian Law

To set some context, Article 245 of the Constitution provides the Parliament of India (**the Parliament**) the power to make laws for the territory of India, subject to

the other provisions contained in the Constitution. With regard to treaties, India is a dualist country and requires that treaties are to be incorporated into Indian law through specific legislation.<sup>110</sup> If an international treaty operates in such a way as to modify the law of the land or to affect the rights granted under the law, a treaty may only be enforced in India after enactment of an incorporation law by the Parliament.<sup>111</sup> Accordingly, Article 253 of the Constitution provides that, apart from the general law-making power under Article 245, the Parliament has exclusive specific law-making powers as regards the incorporation of a treaty into Indian law.<sup>112</sup>

Interestingly, in case of tax treaties, the legislature has chosen an unconventional path for exercise of this law-making power. Section 90(1) of the Indian Income Tax Act, 1961 gives automatic force to tax treaties<sup>113</sup> provided that they are entered into in the context of at least one of four situations – first, for the granting of relief in respect of tax chargeable or paid under the Act or the partner state's corresponding legislation; second, for the avoidance of double taxation of income under the Act and the partner state's corresponding legislation; third, for exchange of information purposes; or fourth, for recovery of income tax under the Act and partner state's corresponding legislation.

Clearly, section 90(1) is broad in its purview.<sup>114</sup> It is capable of providing to the Central Government, the power to negotiate the substantive provisions of each treaty per its discretion, whether this leads to an increase or decrease of the Indian tax base. Such a power would be meaningless unless it includes the power to interpret or apply the treaty and to create a dispute resolution mechanism to resolve disputes arising from different application or interpretation of the treaty by both states.

This framework compels us to ask two questions from an Indian constitutional standpoint: the first, is whether section 90(1) itself is constitutional in its automatic conferral of legitimacy to tax treaties; the second, whether the Central Government acts constitutionally when it enters

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<sup>108</sup> Since the UN Model contains an alternative provision, no official position had been recorded on this provision. However, India has recorded a non-member position on Art. 25 of the OECD Model (2017) not to adopt Art. 25(5). Further, India was one of the States to raise a concern against this provision at the UN Committee of Experts discussion on the update of the UN Model. This concern was also raised by India at the G20 meeting in Sept. 2014 as well while discussing the merits of the BEPS proposals. See *Text of Speech of Smt. Nirmala Sitharaman, Minister of State for Finance at the G20 Finance Ministers' Meeting on International Tax*, Cairns, Australia (21 Sept. 2014), [http://finmin.nic.in/press\\_room/2014/MOSFinance\\_speechG20\\_Cairns\\_Australia.pdf](http://finmin.nic.in/press_room/2014/MOSFinance_speechG20_Cairns_Australia.pdf) (accessed 25 Apr. 2017).

<sup>109</sup> This is evidenced by the recent decision to exclude taxation from the Indian Model BIT. See *Indian Express, Bilateral Investment Treaty Model to Minimise Cairn Energy Type dispute: Nirmala Sitharaman* (8 Aug. 2016), <http://indianexpress.com/article/business/economy/nirmala-seetharaman-cairn-energy-dispute-economy-2961422/> (accessed 14 Apr. 2017).

<sup>110</sup> This was upheld by the Supreme Court of India in its landmark decision in *Jolly George Vergese and Anr. v. State Bank of Cochín*, 1980 SCR (2) 913.

<sup>111</sup> *Maganbbai Iswarbbai Patel v. Union of India*, (1970) 3 SCC 400.

<sup>112</sup> This power of the Parliament is also reiterated in Entry 14 of the Union List contained in Schedule VII of the Constitution, providing for items that are under the exclusive jurisdiction of the Parliament.

<sup>113</sup> The notification must be in the Official Gazette, which is a public journal of the Government of India where official notifications are to be made.

<sup>114</sup> This was also upheld by the Supreme Court of India in its landmark decision in *Union of India v. Azadi Bachao Andolan*, (2003) 263 ITR 706 (SC), where the Court stated that: 'A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that s. 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income-tax Act.'

into a tax treaty allowing for a third-party dispute resolution mechanism such as arbitration.

The constitutional validity of section 90 can be examined in light of several principles, the most relevant of which is the principle of excessive delegation. The view of the authors is that section 90 should not be considered unconstitutional on this ground as it provides sufficient policy guidance to the Central Government in its specifications of which treaties will be given automatic effect. The Supreme Court of India, in *Raj Narain v. Chairman, Patna Administration*<sup>115</sup> held that excessive delegation by the Parliament would only occur where the Parliament destroys its legislative power, where it abandons its control over the delegate, and it creates a new legislative power not contemplated under the Constitution. None of these conditions are satisfied by section 90(1) and no other constitutional challenge should prove fatal to the validity of the provision.

Once this is the case, the more critical question is whether the exercise of power by the delegate i.e. the Central Government is constitutionally valid. This question was examined by the Supreme Court of India in *Azadi Bachao Andolan*<sup>116</sup> which held in the affirmative and stated that section 90 enables the Central Government to enter into double tax treaties with foreign Governments, and give such treaties domestic effect provided that the objectives of such treaties are in accordance with the policy guidelines contained in section 90. In other words, if the policy guidelines contained in section 90 are met with, the Central Government's actions would be constitutional even if they conflict with domestic law enacted by the Parliament.

To phrase this differently, the most significant question relating to the constitutionality of introducing third party dispute resolution mechanisms into tax treaties is as follows: if the entering into of a tax treaty i.e. a bilaterally agreed restriction of the sovereign right to impose tax at will, does not result in an unconstitutional ceding of sovereignty, can the enforcement of the terms of the treaty through a dispute resolution mechanism be considered unconstitutional? If yes, it would imply that the state never had the intention to enforce, which would then directly conflict with the duty imposed upon the state by Article 51 of the Constitution, which requires the state to respect international law and treaty obligations.

Prof. Schoueri evaluates this argument, in his analysis of whether tax treaties are affected by the principle of legality that requires sovereign law to dictate a claim of tax in all aspects. He states that the limits to a state's sovereignty to impose taxes under their domestic laws are dictated by the tax treaty, which constitutes a ceding of the sovereign right to tax to the extent of the provisions contained in the treaty. The MAP, whether supplemented by arbitration or not, is merely a dispute resolution procedure under the tax treaty that ensures that both states impose taxes according to the spirit of the tax treaty in case of different interpretations. On this basis, he argues that these procedures should not constitute an unconstitutional waiver of tax revenue or delegation of power since they merely assure effective functioning of the process dictated by the tax treaty, within the limits of sovereignty that are already created by the tax treaty.<sup>117</sup>

The authors find merit in this view in the Indian context, from a constitutional standpoint. This is particularly so due to the broad ambit of section 90(1) of the Indian Income Tax Act, 1961 and the policy guidelines it contains for the Central Government in relation to treaty making power. After all, most Indian treaties today contain a form of MAP which is not considered to be constitutionally problematic. Irrespective of which model one goes with, tax treaty arbitration, under the OECD and UN Models as well as the MLI, envisages mandatory arbitration to supplement the MAP and not to replace the MAP with a third-party decision making process.<sup>118</sup> Just as in the MAP, the function of the arbitral panel would be limited i.e. to make a decision based strictly upon the accepted meaning of the provisions of the tax treaty and relying upon international law principles. Any decision arising from arbitration would still be implemented through a MAP agreement by the competent authorities, within the *vires* of the wording of the tax treaty. Therefore, in the authors' view, from a legal standpoint, a MAP arrived at on the basis of such an arbitration opinion should not be considered an unconstitutional ceding of sovereignty. Further, just as in the MAP, an arbitration decision implemented through a MAP, but which is based on an incorrect understanding of tax treaty provisions, could be subject to judicial review as any administrative or quasi-judicial remedy is in India. The mere inclusion of the supplementary arbitration mechanism in Indian tax

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<sup>115</sup> *Raj Narain v. Chairman, Patna Administration*, AIR 1954 SC 569.

<sup>116</sup> *Union of India v. Azadi Bachao Andolan*, *supra* n. 114.

<sup>117</sup> L.E. Schoueri, *Arbitration and Constitutional Issues' in International Arbitration in Tax Matters* in Lang & Owens (eds), *supra* n. 19. This argument has also been put forward by Prof. Patricia Brown in P.A. Brown, *Enhancing the Mutual Agreement Procedure by Adopting Appropriate Arbitration Provisions in International Arbitration in Tax Matters*, in Lang & Owens (eds), *supra* n. 19. However, there are a few countries where their domestic law may expressly bar such provisions such as some Latin American countries as noted in N. Quiñones Cruz, *International Tax Arbitration and the Sovereignty Objection: The South American Perspective*, 51 *Tax Notes Int'l* 533, 533–542 (11 Aug. 2008). It is interesting to note that similar concerns were raised in the United States as well before arbitration was implemented in tax treaties. However, these concerns were later proven to be unfounded on grounds similar to what the authors have discussed above. See H. David Rosenbloom, *Mandatory Arbitration of Disputes Pursuant to Tax Treaties: The Experience of the United States in International Arbitration in Tax Matters*, in Lang & Owens (eds), *supra* n. 19.

<sup>118</sup> It may be noted that some tax treaties contain a directly binding arbitration provision, as noted in Pit, *supra* n. 45. Such clauses are not the subject of this article.

treaties should not convert the constitutionally valid MAP into an unconstitutional delegation of sovereign power.<sup>119</sup>

Here, it is worthwhile to re-examine constitutionality in the context of excessive delegation. The authors discussed above that when the Parliament confers discretion and authority upon the Central Government to enter into tax treaties, it should not amount to section 90 being considered unconstitutional, on the basis of the tests specified in *Raj Narain v. Chairman, Patna Administration*.<sup>120</sup> This is because the legislative provision specifies policy guidelines within which the Central Government must operate when it enters into treaties. It was also discussed that the government would have discretion regarding the content of treaties under Article 253, subject to compliance with the objectives in section 90. However, would this discretion continue to be constitutionally valid in situations where the government gives away the decision-making power under a tax treaty to the third party arbitral tribunal?

Constitutional law commentary in India states that a delegate cannot delegate his authority (*delegatus non potest delegare*), unless the power to sub-delegate is expressly or by necessary implication conferred by law. This means that judicial power cannot ordinarily be sub-delegated unless the law expressly or by clear implication permits it. The government's ability to enter into MAPs should be covered by section 90 of the Indian Income Tax Act, 1961 read with Article 253 of the Constitution relating to treaty making power. Any sub-delegation of such power by the Government to a third-party such as an arbitral tribunal should be allowed only by express or necessary implication. However, the question is whether a dispute resolution authority created under the tax treaty would be subject to such a standard.

It is arguable that section 90(1) of the Indian Income Tax Act, 1961 is broad enough to allow the Government absolute discretion as to the provisions of a tax treaty, including the dispute resolution mechanism intended solely to implement and protect such provisions. As discussed above, the Supreme Court of India, in *Raj Narain v. Chairman, Patna Administration*<sup>121</sup> held that excessive delegation by the Parliament would only occur where the Parliament destroys its legislative power, where it abandons its control over the delegate and it creates a new legislative

power not contemplated under the Constitution. Even if the MAP in a tax treaty is supplemented with mandatory, binding arbitration by a third party, the decision making power is restricted to implementing the provisions of the tax treaty.<sup>122</sup> Further, since section 90(1) is a general incorporation, it may even be argued that any dispute resolution mechanism created under the tax treaty stands incorporated by the Parliament. Therefore, it is possible to take a view that there is no destruction or abandonment of legislative power or the creation of new legislative power in the creation of a different dispute resolution mechanism, even if it involves a third party.

However, section 90 is unique in terms of its breadth as compared to other treaties that India is a party to since in other areas, each treaty is specifically ratified by the Parliament. Further, this particular issue as such has never been considered by the Supreme Court of India or any High Court. Therefore, in order to ensure that mandatory, binding arbitration is not subject to constitutional scrutiny, if India intends to implement mandatory, binding arbitration without granting discretion to the competent authorities, the legislature could amend section 90 of the Indian Income Tax Act, 1961 to include an express provision allowing the Government to authorize third party arbitration for disputes in a tax treaty. The authors' proposal in § 5 takes this concern into account as well.

To summarize, the authors do not believe that the existing constitutional framework should be fatal to India's ability to introduce a supplementary arbitration mechanism in tax treaties. Having said this, decisions cannot be based solely upon the letter of the law. India is an emerging economy which has suffered on account of distributive inequities in treaty allocations, which has as a consequence developed unique policy views on interpretation of tax treaties. One cannot ignore that it is strongly concerned with relinquishing control over treaty interpretation to third parties who may have be influenced by their developed country perspectives. This is the third aspect of sovereignty as discussed in the UN secretariat paper<sup>123</sup> This issue will be dealt with in more detail in section 4.3 of § 4 and has been taken into consideration for the authors' proposal in § 5.

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<sup>119</sup> This is further evidenced by the fact that India has entered into several bilateral investment treaties that contain arbitration provisions in case of a dispute between the investor and State or between two States and such provisions have been enforced by investors on several occasions. The constitutional *vires* of such clauses has not been called into question in India as yet. See B. Yimer, N. Cisneros, L. Bisiani & R. Donde, *Application of International Investment Agreements by Domestic Courts*, UNCTAD Memorandum, Trade Law Clinic, Geneva (10 June 2011).

<sup>120</sup> *Raj Narain v. Chairman, Patna Administration*, *supra* n. 115.

<sup>121</sup> *Ibid.*

<sup>122</sup> An interesting question that may arise at this juncture is whether the MAP on issues outside the framework of the tax treaty as under Art. 25(3) of the OECD Model (2017) could also be included within this rationale. The authors believe that s. 90 of the Indian Income Tax Act, 1961 incorporates all provisions of a tax treaty into domestic law, including Art. 25(3), if contained in a tax treaty. If the MAP is extended to cases involving Art. 25(3) owing to the treaty provision, it is arguable that such a MAP may also be supplemented by arbitration without constitutional infirmities.

<sup>123</sup> UN, *supra* n. 108.

## 4.2 Analysis with Respect to Right to Equality Under the Constitution

The second issue that merits consideration from the viewpoint of constitutionality is whether the inclusion of arbitration to supplement the MAP in a tax treaty would be violative of the right to equality guaranteed under the Constitution.

Article 14 of the Constitution guarantees equal treatment under the law for every person. However, Article 14 does not forbid reasonable classification of persons by the legislature for specific grounds as long as it is not arbitrary, artificial or evasive, and is based on 'intelligible differentia', a substantial distinction that can justify leaving one group of persons out of the class of people covered, and this differentia must have a rational relation with the object sought to be achieved by the legislation.<sup>124</sup>

The Supreme Court of India, in *State of Kerala v. Haji K. Haji Kutty Naba*,<sup>125</sup> in the context of taxation, held that imposition of uniform taxing norms on dissimilar transactions may in turn, create discrimination and thus, a reasonable classification may be required. Further, in *Amalgamated Tea Estates Co. Ltd. v. State of Kerala*,<sup>126</sup> in the context of different rates prescribed under the Indian Income Tax Act, 1961 for domestic and foreign companies, upheld the constitutionality of such classification since it was reasonable on the basis of need for revenue. Moreover, in *Murthy Match Works v. CCE*,<sup>127</sup> the Supreme Court of India upheld that a state, while exercising its sovereign power of taxation, has to deal with several complex issues such as 'the objects to be taxed, the quantum to be levied, the conditions subject to which the levy has to be made, the social and economic policies which the tax is designed to subserve' Finally, the Supreme Court of India, in a plethora of decisions,<sup>128</sup> has upheld that the legislature enjoys the widest latitude possible for the classification of persons in taxation matters since taxation also entails fiscal and social objectives apart from revenue raising.<sup>129</sup>

Benefits and reductions in source taxation resulting from a tax treaty may only be made available to a person who is non-resident in the source state, resident in the treaty partner state and fulfils requirements

under the treaty. This scheme of limited taxation of non-residents is contained in India's domestic tax law<sup>130</sup> and derives legitimacy from the relevant DTC, based on principles of avoidance of double taxation. It is clear that this amounts to a reasonable classification based on 'intelligible differentia' as laid down by the Supreme Court of India, especially considering the wide scope available to the legislature in taxation matters. A dispute resolution mechanism flowing from a DTC can only be considered ancillary to this broader purpose – therefore, whether the relevant dispute resolution process is a plain vanilla MAP or a MAP strengthened by arbitration, should not create a difference here since it would only qualify as a dispute resolution mechanism to protect advantages that are granted under a tax treaty based on 'intelligible differentia'. Further, it is clear here that residents and non-residents are not in comparable positions for the purpose of this analysis, making it impossible to extend benefits under a tax treaty to residents as well. Even if arbitration is considered an 'advantage', as the tax treaty grants other advantages as well, this would not lead to an arbitrary or artificial classification as laid down by the Court and would be well-justified by fiscal, social or trade/investment related objectives.

Therefore, there is little support in Indian constitutional law for the position that a MAP supplemented by arbitration should be unconstitutional and against the scheme of Article 14 of the Constitution. If this position was true, it would expose all Indian tax treaties and even the existing MAP provisions to an Article 14 challenge, on the grounds that they confer an 'undue advantage', which is not defensible under the current law.

## 4.3 Relevant Concerns from an Indian Perspective

From the above analysis, the authors' view is that legal and constitutional claims made by India against tax treaty arbitration on the grounds of 'sovereignty' are not tenable under the law. Similarly, concerns as regards enforceability of arbitral awards without a specific mechanism for the same

### Notes

<sup>124</sup> This is as per law of the land laid down by the Supreme Court of India over the years. See *In re the Special Courts Bill, 1978*, (1979) 1 SCC 380; See also *Chiranjit Lal Chowdhuri v. Union of India & Ors.*, (1950) SCR 869; *State of Bombay & Anr. v. F. N. Balsara*, (1951) SCR 682; *State of West Bengal v. Anwar Ali Sarkar*, (1952) SCR 284; *Kathi Raining Rawat v. State of Saurashtra*, 1952 SCR 435; *Lachmandas Kewalram Abujia v. State of Bombay*, 1952 SCR 710; *Syed Qasim Razvi v. State of Hyderabad & Ors.*, (1953) 4 SCR 589; *Habeeb Mohamed v. State of Hyderabad*, 1953 SCR 661; *Kedar Nath Bajoria v. State of West Bengal*, (1954) SCR 30; *V.M. Syed Mohammad & Company v. State of Andhra Pradesh*, (1954) SCR 1117; *Budhan Choudhry & Ors. v. State of Bihar*, (1955) 1 SCR 1045; *Center for Public Interest Litigation v. Union of India*, (2012) 3 SCC 1.

<sup>125</sup> *State of Kerala v. Haji K. Haji Kutty Naba*, AIR 1969 SC 378.

<sup>126</sup> *Amalgamated Tea Estates Co. Ltd. v. State of Kerala*, (1974) 4 SCC 415.

<sup>127</sup> *Murthy Match Works v. CCE*, (1974) 4 SCC 428.

<sup>128</sup> *R.K. Garg v. Union of India*, (1981) 4 SCC 675; *Elel Hotels and Investments Ltd. v. Union of India*, (1989) 3 SCC 698; *P.M. Ashwathbanarayana Setty v. State of Karnataka*, (1989) Supp. (1) SCC 696; *Kerala Hotel and Restaurant Assn. v. State of Kerala*, (1990) 2 SCC 502; *Spences Hotel (P) Ltd. v. State of W.B.*, (1991) 2 SCC 154.

<sup>129</sup> A detailed analysis of tax discrimination in light of these decisions is provided in AM Legals, *Supreme Court on Article 14 & Tax Discrimination –II* (29 Apr. 2016), <http://amlegals.com/supreme-court-article-14-tax-discrimination-ii/> (accessed 25 Apr. 2017).

<sup>130</sup> S. 5 of the Indian Income Tax Act, 1961.

as in the case of commercial disputes<sup>131</sup> or investment treaty disputes<sup>132</sup> should not be of major concern to India since the authors believe that since opinions in tax arbitration are generally implemented through a mutual agreement as in the case of a MAP, domestic rules relating to implementation of the MAP may be sufficient to enforce an arbitration opinion.<sup>133</sup> Further, since any MAP agreement entered into after arbitration should still be subject to judicial review in India,<sup>134</sup> the concerns around ceding complete sovereignty over interpretation may not be defensible.<sup>135</sup>

However, the other practical issues raised by developing countries and referred to in section 3.3 of § 3 of this article continue to be relevant. Some of these issues are discussed below with regard to their applicability to India.

**Costs and lack of resources:** The relatively large number of pending MAP cases in India is likely to create a drain on Government resources, if there is a shift to arbitration. Further, the Government of India has already borne substantial costs in defending arbitration claims under bilateral investment disputes. It is likely to be concerned about undergoing a similar experience with tax treaties, unless procedural or institutional guidance is laid down that ensures that costs are minimized.<sup>136</sup>

**Transparency:** Transparency in determinations will be important for India since Indian Courts have held that a judicial or quasi-judicial body should follow the reasoning in previous decisions in identical factual and legal circumstances.<sup>137</sup> If arbitration proceedings follow the baseball approach and/or remain unpublished, a MAP based on an arbitration opinion may result in

constitutional scrutiny in India,<sup>138</sup> particularly in situations where it squarely opposes a previous identical decision.

**Even-handedness:** The biggest concern that India is likely to have is with respect to even-handedness of the arbitral process. Although international tax rules are largely moulded along similar lines, it is clear that there is a gap between the views adopted by developed countries, emerging economies and developing countries in several critical areas. While developed countries look to reinforce residence based taxation norms that suit capital exporting countries, the latter groups of countries try and expand the source country's right to tax. This struggle is clear even in respect of tax treaties since the OECD and UN Models differ in some very crucial aspects and it is clear from the discussions in the UN Committee of Experts that the tax policy concerns of developing countries are almost entirely different from those of developed countries.<sup>139</sup>

One way to resolve this impasse would have been to lay down guidelines regarding the composition of the arbitral tribunal. However, developing and emerging countries (including India) are likely to find a shortage of disinterested parties having expertise in international taxation. In light of the above-mentioned divide in terms of tax treaty policy, even if unbiased parties from developed countries act as arbitrators, India's concerns as regards possible inherent bias may well be valid. This is also based on India's experience from arbitrations in BITs where several claims have been filed against India by investors with one prominent award going against it.<sup>140</sup>

## Notes

<sup>131</sup> Convention on the Recognition and Enforcement of Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>132</sup> UN Committee of Experts on International Cooperation in Tax Matters, *supra* n. 102.

<sup>133</sup> This correlation should apply also to appeals and review; J. S. Wilkie, *Implementation of Arbitration Decisions in Domestic Law in International Arbitration in Tax Matters*, Lang & Owens (eds), *supra* n. 19. However, there may still be practical concerns as regards failure of the competent authority to implement an arbitration opinion which may not have further remedies on a bilateral basis except before Indian Courts.

<sup>134</sup> Arts 32 and 226 of the Constitution provide powers to the Supreme Court of India and various High Courts to decide on the constitutional *vires* of any judicial, quasi-judicial or administrative decision. Arts 226 and 227 of the Constitution gives wide powers to the Government to challenge the *vires* of an arbitral opinion.

<sup>135</sup> MAPs are not subject to an official appellate process in India. Further, Indian arbitration law i.e. the Arbitration and Conciliation Act, 1996 does not allow domestic appeal to an award granted in an international commercial arbitration even on grounds of 'public policy'. See *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552. This, coupled with access to judicial review, may serve as grounds to not specifically allow appeal in MAPs supplemented by tax treaty arbitration as well.

<sup>136</sup> See UNCTAD, *World Investment Report*, 2015.

<sup>137</sup> *Linde AG Linde Engineering Division v. Dy. DIT*, (2014) 365 ITR 1.

<sup>138</sup> On this basis, the positives of baseball arbitration in terms of speediness and low costs may not be feasible from India's perspective either. See Govind & Turcan, *supra* n. 88.

<sup>139</sup> Brooks, *supra* n. 1; See also S. Rao, *The Indian Equalization Levy: Inelegant but not Unexpected*, 2 NLS Bus. L. Rev. 25 (2016).

<sup>140</sup> Similar issues have also been raised with respect to arbitration under a BIT, especially under International Convention for Settlement of Investment Disputes (ICSID), where there have been discussions of a possible pro-investor bias or the possibility of arbitrators bearing conflicts of interest owing to them seeking re-appointment in future matters by investors. See L. E. Trakman, *The ICSID Under Siege*, 45 Cornell Int'l LJ 603 (2013), p. 603, as cited in A. Strezhnev, *Detecting Bias in International Investment Arbitration*, Draft paper presented at the 57th Annual Convention of the International Studies Association – Atlanta, Georgia (16–19 Mar. 2016). Although some studies, and most prominently, S. Franck, *The ICSID Effect? Considering Potential Variations in Awards*, 51(4) Va. J. Int'l L. 825 (2011) have found that there is no system bias in investment arbitration based on ICSID and UNCTAD statistics, these results are not found to be conclusive by other authors. See K. P. Gallagher & E. Shreshtha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, Global Development and Environment Institute Working Paper No. 11-01; U. Kollamparambil, *Bilateral Investment Treaties and Investor State Disputes*, ERSA working paper 589. UNCTAD, *World Investment Report*, 2013 reflects these concerns and India's new model BIT has reformed the arbitration process by requiring exhaustion of local remedies and introducing stricter timelines. See UNCTAD, *World Investment Report* (2016); Since 2011, India has seen a large number of claims being raised against it by investors under BITs leading to an adverse award in the White Industries case, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 Nov. 2011) and pending disputes with large stakes such as *Vodafone v. India*, UNCITRAL, 17 Apr. 2014; *Deutsche Telekom v. India*, ICSID Additional Facility, 2 Sept. 2013, *Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India*; *CCI/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, UNCITRAL; *Cairn Energy and Cairn UK Holdings Limited (CUHL) v. Government of India*, 27 Mar. 2015, UNCITRAL. A critical analysis of India's BIT policy can be found in P. Ranjan, *India and Bilateral Investment Treaties: From Rejection to Embrace to Hesitance?* in R. Babu & S. Burra (eds), *Locating India in the Contemporary International Legal Order* (Springer: 2018) (Forthcoming). See also M. Lennard, *International Tax Arbitration and Developing Countries in International Arbitration in Tax Matters*, in Lang & Owens (eds), *supra* n. 19.

If tax treaty arbitration is to be implemented in India, these proposals would need to be taken into account and a reasonable solution should be devised. As this is likely to be an issue across most emerging economies, the success of an international tax arbitration framework will most likely depend on its ability to assuage these concerns.

## 5 PROPOSALS FOR INDIA: AN INSTITUTIONAL FRAMEWORK SOLUTION

It is clear from the analysis in § 2 of this article that the effectiveness of cross-border dispute resolution mechanisms in India is reducing at a steady pace. With 77,400 direct tax cases pending at the Tribunal level and above amounting to a value of USD 29 billion reported till 2015<sup>141</sup> and an almost three year backlog of cases even in alternative dispute forums in India such as the AAR, disputes are set to increase with the implementation of the Indian GAAR and other domestic BEPS measures<sup>142</sup> along with tax treaty level BEPS measures under the MLI. Further, as noted above, a large number of MAP cases remain pending in India as per the 2016 OECD MAP Statistics, with the closure rate in India not keeping up with other countries having similar MAP volumes. Therefore, it is imperative that the effectiveness of the MAP under tax treaties is improved.

Even though it may be desirable for India to improve its MAP processes as provided in AP14 and detailed in section 2.2 of § 2, keeping the sheer volume of disputes in mind, the structural concern with the MAP that there is no obligation on the competent authorities to arrive at an agreement may still prevent it from being an effective legal remedy. It is clear that supplementing the MAP with arbitration is bound to have a prophylactic effect as described by the OECD and might ensure that competent authorities arrive at an agreement within the period before arbitration commences. This may be evidenced by the 2016 MAP Statistics where the closure of MAP cases is at a higher percentage in most OECD countries that have included arbitration in their tax treaties.<sup>143</sup> Although several developing countries opposed to arbitration argue that their focus should first be

to make the MAP more efficient, without a concrete obligation to engage in a MAP, cases would remain pending and such countries would continue to have very little experience in the MAP. Hence, it is definitely a valid proposition to argue that arbitration would force competent authorities to create capacity to engage in the MAP and to make the MAP better so as to not trigger arbitration, hence, improving their experience in the MAP. Therefore, supplementing the MAP with arbitration may be a solution, providing a definitive increase in the effectiveness of the MAP, making it a more efficient dispute resolution mechanism that is more attractive to taxpayers than domestic remedies. However, as noted above, it is equally important that the concerns referred to in section 4.3 of § 4 of this article are addressed as well.

The authors believe that the most effective way for India to implement tax treaty arbitration in such a way that the concerns discussed above are addressed would be to implement arbitration as part of an institutional framework. Various proposals have been put forward for the creation of an institutional framework for tax treaty arbitration.<sup>144</sup> The authors' proposal has been described below with suggested modifications to the proposed arbitration provision in the MLI.<sup>145</sup>

### 5.1 The Dispute Resolution Clause

The authors' proposal is to revise the existing arbitration clause in the MLI to include both non-binding facilitation methods and binding dispute resolution on a mandatory basis, but in two stages.<sup>146</sup> As noted above, the aim of including such a clause is to improve the effectiveness of the MAP as a remedy.

Under this clause, if no agreement is arrived at by the competent authorities in two years from the start of the MAP, the competent authorities would have to mandatorily use facilitative mediation to aid them in reaching an agreement. The proposed mediator along with proposed replacements would have to be selected by the competent authorities, from a panel of experts maintained within an Institutional Framework,<sup>147</sup> by agreement, prior to the commencement of the MAP. A minimum of five meetings are to be held by the competent authorities in the presence of the mediator to discuss this case within one year

## Notes

<sup>141</sup> *Supra*, para 2.1 of § 2 of this paper.

<sup>142</sup> India has recently moved towards a 'place of effective management' test for corporate residency. See s. 6(3) of the Indian Income Tax Act, 1961. Further, through the Finance Act, 2017 several new anti-abuse or similar measures such as an interest limitation rule and secondary adjustments in transfer pricing have been introduced by India.

<sup>143</sup> E.g. Germany has closed around 22%, the United States has closed around 14% and France has closed around 26% of pending MAP cases (including new cases) in 2016 whereas India has closed only around 8% of its cases (including new cases) in 2016 in spite of the great momentum given to closing transfer pricing cases under the APA program.

<sup>144</sup> UN Committee of Experts on International Cooperation in Tax Matters, *supra* n. 102 had some discussions on creating an institutional framework under the auspices of the UN. However, the most exhaustive proposal may be found in J. Owens, A. E. Gildemeister & L. Turcan, *Proposal for New Institutional Framework for Mandatory Dispute Resolution*, 82(10) Tax Notes Int'l 1001 (2016) where detailed rules for selection of arbitrators, independence, transparency, costs and the procedure have been discussed.

<sup>145</sup> Analysed in detail in para. 3 of s. 3.1 of § 3 of this article.

<sup>146</sup> Such a streamlined process is also used in the proposal made in Owens, Gildemeister & Turcan, *supra* n. 144. This also draws inspiration from mandatory conciliation processes under ICSID, the benefits of which were stated by Lord Wilberforce, the conciliator in *Tesoro Petroleum v. Trinidad & Tobago*, ICSID Case No. (CONC 83(1)), as referred to by Arno Gildemeister in his presentation at the 4th meeting of Vienna Multi-Stakeholder Group on Improving Cross-border Dispute Resolution on 8–9 May 2017. Although arbitration and conciliation are alternative remedies, ICSID also allows such two-step dispute resolution clauses and several BITs (such as the India-Netherlands BIT) have incorporated the same.

<sup>147</sup> This panel of experts would be used for the arbitration process as well, described in s. 5.3, § 5, *Infra*.

from the start of the mediation process. This mediation process could be done either physically through scheduled meetings if possible or using the help of technology.<sup>148</sup>

In the event that no agreement is arrived at by the competent authorities in one year from the start of the mediation (or three years from the start of the MAP<sup>149</sup>), the dispute would be referred to a mandatory dispute settlement or arbitration process. For the purpose of determination of timelines (i.e. start of MAP and possible extensions to these periods), the rules under the MLI would be imported except that a relevancy requirement would be specifically inserted in respect of information requests that may extend these timelines. The competent authorities would, however, not be allowed to extend the timeline for arbitration by notifying the taxpayer as in the MLI.

## 5.2 Selection of Arbitrators

The authors' proposal for the selection of arbitrators is the maintenance of an institutional framework for arbitration under the auspices of the United Nations.<sup>150</sup> This would be ideal since the UN is a body that is representative of all nations, developing or developed and since the UN has well represented the interests of all developing countries historically. Such an institution could be funded by all UN Member States based on a formula that takes into account both the Gross Domestic Product (GDP) of the state and the number of cross-border tax disputes that arise on account of the actions of that state. Separately, existing UN funding could also be used to fund this institution.<sup>151</sup>

This institution could maintain a panel of experts in the area of international tax law, with particular experience in international tax adjudication.<sup>152</sup> This panel could be divided into two pools – one pool comprising net capital exporting country representatives and one pool comprising net capital

importing country representatives.<sup>153</sup> Each state may nominate ten experts to be part of the Panel and all states may decide by vote on the constitution of the two mutually exclusive pools, with the restriction that at least one expert be selected from each nominating state. The membership of the Institution could be reconsidered every five years by the states involved using the same process.<sup>154</sup>

For selection of arbitrators, the MLI selection provision may be modified to state that each state could nominate one arbitrator from the pool to which they belong in this Institution. The pool from which each state selects could also be based on the bilateral relationship between the two states i.e. if state A is a capital exporter relative to state B, then state A could choose an arbitrator from the capital export pool while state B could choose from the capital import pool. These two arbitrators could nominate the third arbitrator and chair by agreement. In case of failure to make such nominations within six months from the start of the arbitration process or in case of the chair, after the selection of the second arbitrator, the panel could be decided by vote within the Institution.<sup>155</sup>

## 5.3 The Arbitration Process and Decision

The authors' proposal for the arbitration process is independent opinion arbitration since reasoned decisions are possible and this would be in line with the common law obligation of natural justice towards taxpayers.<sup>156</sup> The process in independent opinion arbitration contained in the MLI may be retained, but it must be added that the decision of the arbitration panel on interpretation of the tax treaty should be based on Article 31 of the Vienna Convention on Law of Treaties<sup>157</sup> after considering all relevant materials.

Further, in a deviation from the MLI, the authors propose that the decisions may also be published in redacted form as provisionally allowed in the OECD sample mutual

### Notes

<sup>148</sup> The procedure for mediation could be laid down in detailed procedural rules, as in the case of ICSID. See ICSID, Rules of Procedure for Conciliation Proceedings.

<sup>149</sup> This would be in line with the UN Model (2011) and the option provided under the MLI.

<sup>150</sup> A similar proposal is also included in Owens, Gildemeister & Turcan, *supra* n. 144 and their detailed presentations based on this proposal serves as an inspiration for the authors' proposal. Alternatively, institutions such as the World Trade Organization (WTO) or the World Bank or the International Monetary Fund (IMF) may be involved. The recently formed Platform for Collaboration on Tax by the OECD, UN, World Bank and IMF could be in charge of this process as well for increased transparency. Since viability and funding are the biggest practical concerns involved, a study of how the WTO dispute settlement mechanism is funded for and organized may assist the implementation of this proposal.

<sup>151</sup> However, the institution need not necessarily be a public funded venture. Existing arbitral institutions such as ICC, SIAC, LCIA etc. may even be expanded to include a tax arbitration wing. This is particularly relevant in India since the Mumbai Centre for International Arbitration has recently been launched with support from the Government.

<sup>152</sup> The proposal of maintaining a panel of arbitrators is inspired from ICSID that contains separate lists for arbitrators and conciliators and the EU Arbitration Convention which provides for a similar mechanism within the European Union for transfer pricing disputes. See Arbitration Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises EU Law. The recently passed dispute resolution directive in the European Union suggests a similar solution as well. *Supra* n. 96.

<sup>153</sup> This suggestion was briefly discussed in Govind & Turcan, *supra* n. 88. Although BRICS countries are generally considered representative of 'capital importing' States, States may shift their roles in the near future (e.g. China has become a net capital exporter recently). In light of this, separate treatment has not been granted for BRICS countries in the authors' proposal.

<sup>154</sup> This is similar to the ICSID panels. However, no powers of appointment are granted to the Chairman of an administrative body as in ICSID here.

<sup>155</sup> In case of selection of the State nominated arbitrators, voting would be within the pools first and then, there would be selection of a third arbitrator by those arbitrators. In case of the chair, the voting would be across the whole Institution.

<sup>156</sup> The Supreme Court of India has held that even quasi-judicial authorities are required to give reasons for their orders as per the principles of natural justice, especially since Indian law provides for judicial review of any such decision. See *Siemens Engineering v. Union of India*, AIR 1976 SC 1875.

<sup>157</sup> United Nations Convention on the Law of Treaties Signed at Vienna (23 May 1969), Entry into Force: 27 Jan. 1980.

agreement<sup>158</sup> and mandated in the recently passed European Union dispute resolution directive.<sup>159</sup> Although decisions may not be given precedential value, general principles of law used in multiple previous decisions should be followed. This would avoid concerns under Article 14 of the Constitution in India based on accepted case law discussed earlier in section 4.3 of § 4.<sup>160</sup>

#### 5.4 Independence Conditions

The rules regarding independence in the MLI may be retained in the dispute resolution provision in the authors' proposal. However, an additional requirement could be added for arbitrators to provide affidavits or similar written declarations stating their impartiality.<sup>161</sup> Separately, rules regarding independence could be maintained by the Institution as requirements for nomination.<sup>162</sup> These conditions, along with confidentiality norms prescribed for arbitrators in the MLI, would also be extended to mediators discussed in section 5.1 above.<sup>163</sup>

#### 5.5 Implementation of the Decision

The authors propose that the arbitral decision should be implemented through the MAP as in the OECD and UN Model provisions and the MLI. However, as in the UN Model and in the options provided under the OECD Model Commentaries and the MLI, the authors propose that the competent authorities should be given the option to enter into a different agreement under a MAP within six months from the arbitral decision after stating reasons for departure from the decision as well. Further, the taxpayer should be given the right to reject the arbitral decision within six months from the decision. However, on expiry of this six month period, the arbitral decision should be binding on both the taxpayer and competent authorities, subject to possible judicial review.<sup>164</sup>

This ensures three distinct results. First, the MAP essentially stays in the hands of the competent authorities and would alleviate concerns of binding decisions being taken by third parties. Second, any constitutional concerns in India as to delegation of dispute resolution powers under the tax treaty are resolved here since the power is

retained by the competent authorities. Third, the taxpayer is brought to a situation of parity with the competent authorities in respect of a binding decision after the six month window to ensure that resources are not wasted on the arbitration process.

#### 5.6 Taxpayer Rights

As highlighted above, present dispute resolution options in tax treaties are considered ineffective by taxpayers because they do not have access to such proceedings and do not have the rights to make oral or written submissions. The authors' proposal is based on the suggestion in the OECD sample mutual agreement and what is allowed under the recently issued EU dispute resolution directive<sup>165</sup> to allow written submissions to be submitted to the arbitral panel by the taxpayer. Further, if the Panel accepts such a request, oral hearings of the taxpayer position may also be allowed. This would also be in line with accepted principles of natural justice as upheld by the Supreme Court of India in the context of domestic administrative, judicial or quasi-judicial proceedings.<sup>166</sup> This would also go a long way in improving taxpayer confidence in the tax treaty dispute resolution process as well.

#### 5.7 Tax Authority Support

Even in a situation where a balanced arbitral panel is created, it is important that tax authorities from developing and least developed countries are able to make nuanced and legally sound arguments. This may be a concern for a state that has capacity constraints. In such a situation, the institutional framework described above could maintain a network of experts in the field from practitioners and academia, who could provide *pro bono* advice and/or representation.<sup>167</sup> An advisory mechanism could also be created so that members of the 'capital importing country' pool who are not part of the dispute may provide advisory opinions to such countries to help them prepare their arguments.

#### 5.8 Costs

In terms of costs for the arbitration process, a possible option is for the taxpayer to pay costs and for the money to be kept

#### Notes

<sup>158</sup> Annex to Commentaries on Art. 25 of the OECD Model (2017), *supra* n. 53, para. 32.

<sup>159</sup> *Supra* n. 96.

<sup>160</sup> The Delhi High Court decision in *Linde AG*, *supra* n. 137.

<sup>161</sup> This requirement is borrowed from the 'confidentiality' provision in the MLI. See Govind & Turcan, *supra* n. 88. A similar requirement is also contained in the ICSID Arbitration Rules. See ICSID, Rules of Procedure for Arbitration Proceedings.

<sup>162</sup> Once again, ICSID may be referred to for inspiration as regards such rules.

<sup>163</sup> This would address the concerns raised in Kollmann and Turcan, *supra* n. 19 as regards such procedures.

<sup>164</sup> As in ICSID, further procedures may be added for revision, rectification or review of opinions by other, independent panels as well to ensure that opinions are not biased.

<sup>165</sup> Govind & Turcan, *supra* n. 88.

<sup>166</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>167</sup> This proposal is adopted from broad suggestions proposed in Owens, Gildemeister & Turcan, *supra* n. 144 as well.

in escrow until resolution of the dispute, where the arbitrator will decide apportionment of costs.<sup>168</sup> However, the states participating in the Institution may also start a fund within this authority to pool money on the basis described above that could be used to fund arbitration procedures that arise.<sup>169</sup> Another option is to have a minimum fee to be paid by the taxpayer to initiate an arbitration proceeding similar to a 'Court fee', which could generally contribute towards funding the process and also serve the purpose of dissuading taxpayer from moving to arbitration for infructuous cases.

## 5.9 Implementation

Since the MLI is all set to create a precedent for multilateral revision of tax treaties, the authors' proposal is for this mechanism to be implemented within the MLI in the future as an amendment or through a new, similar multilateral convention for this purpose. In case countries would like to create bilateral adjustments, a multilateral framework agreement could also be created, based on which arbitration provisions could bilaterally be negotiated, based on such framework.<sup>170</sup>

In sum, the authors believe that this proposal would put into place a dispute resolution process that would increase the effectiveness of the MAP and make the remedy attractive to taxpayers earning income from India in precedence over domestic remedies in India, while taking into account and alleviating some key and valid concerns raised by India.

## 6 CONCLUSION

The sustenance of India's economic development is dependent on a growth-friendly economy, which in turn is dependent on tax certainty and an effective tax dispute resolution mechanism.

However, as the economy grows, there has also been an unprecedented increase in the number of disputes, including some internationally publicized disputes such as those in the cases of Vodafone, Cairn and Nokia. The backlog of pending cases is constantly increasing and, as detailed in this article, the domestic Indian adjudicatory system is heaving under the weight of pending appeals at each level of the appellate chain. The government has experimented with several alternatives to formal adjudicatory processes, be it in the form of the AAR, APAs or the India-US Framework Agreement.

Some of these processes were successful but limited in scope (as in the case of the framework agreement) or successful in the short term (as in the case of the AAR). However, none managed to bring about a large scale, enduring improvement to the problems of case pendency and backlog.

Internationally as well, there is consensus that the existing system is fraught with deficiencies. India involved itself actively in the G20 initiated BEPS project and one of the primary concerns arising out of the project was that it would create an environment of uncertainty for taxpayers. Taking cognizance of this concern, the G20 leaders requested the OECD and IMF to prepare an analysis and report back to them on progress in this area at the Hangzhou Summit in September, 2016.<sup>171</sup> This report was released by the OECD and IMF in and presented before the G20 finance ministers at the recently concluded meeting in March 2017 in Baden.<sup>172</sup> The Report emphasizes that the lack of definitive dispute resolution is a significant concern as regards tax certainty<sup>173</sup> and states that an effective MAP supported by mandatory, binding arbitration could be an effective solution.<sup>174</sup>

There is therefore, some amount of consensus (internationally) that the existing system is wanting, and that an effective MAP process supported by mandatory arbitration could be an effective solution. While the shape and form of such solutions may continue to be debated, India can take a lead in influencing conversations as a leading member of the G20 process. Accordingly, this article has focused on the core idea being posited internationally (i.e. the MAP backed by arbitration) and endeavoured to examine its appropriateness for countries like India.

The authors believe that it is vital to acknowledge the sensitivities surrounding mandatory arbitration. Therefore, the framework discussed here proposes a MAP supplemented by mandatory, yet flexible and facilitative binding and non-binding procedures that the authors believe should achieve a balance between the concerns of various stakeholders. The two-step dispute settlement mechanism would firstly ensure that two sovereign nations speak to resolve issues through a MAP. If this process fails, they may resort to other non-binding means to facilitate an agreement. If this process also fails, the available recourse would be to opt for an institutional arbitration conducted under the auspices of a neutral

### Notes

<sup>168</sup> Also part of the proposals considered in the UN Secretariat Paper, *supra* n. 102.

<sup>169</sup> This would be similar to the formal dispute resolution authority run under bodies such as the WTO.

<sup>170</sup> A similar suggestion for modifying tax treaties can be seen in J. F. Avery Jones & P. Baker, *The Multiple Amendment of Bilateral Double Taxation Conventions*, 60(1) Bull. Int'l Tax'n 19 (2006).

<sup>171</sup> G20 Leaders' Hangzhou Summit, *Communique*, Hangzhou (5 Sept. 2016), [http://europa.eu/rapid/press-release\\_STATEMENT-16-2967\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-16-2967_en.htm) (accessed 14 Apr. 2017).

<sup>172</sup> OECD/IMF, *IMF/OECD Report for the G20 Finance Ministers: Tax Certainty* (18 Mar. 2017), <http://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf> (accessed 25 Apr. 2017).

<sup>173</sup> *Ibid.*, at 22, 31 and 32.

<sup>174</sup> *Ibid.*, at 37, 48, 49, 50 and 52. In light of this report, the G20 ministers also emphasized on the need for more effective dispute resolution mechanisms in their official Communique following the meeting. G20 Finance Ministers and Central Bank Governors Meeting Baden-Baden, Germany, *Communique* (17-18 Mar. 2017), [http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/G20-2016/g20-communique.pdf;jsessionid=CD0835A0FE8CCCEC7B78C5632504C2AA?\\_\\_blob=publicationFile&v=7](http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/G20-2016/g20-communique.pdf;jsessionid=CD0835A0FE8CCCEC7B78C5632504C2AA?__blob=publicationFile&v=7) (accessed 25 Apr. 2017).

party such as the UN, with the panel containing adequate representation from pools of developed and developing countries as the parties may choose. With a view to preserving taxpayers' rights and for meting out natural justice, the authors have suggested that taxpayers must be allowed to submit written submissions to the arbitral panel. Finally, the authors have recommended that costs should be borne by the tax payer which may be deposited in escrow account until dispute resolution or that states participating in the institution may start a fund to pool money for bearing costs.

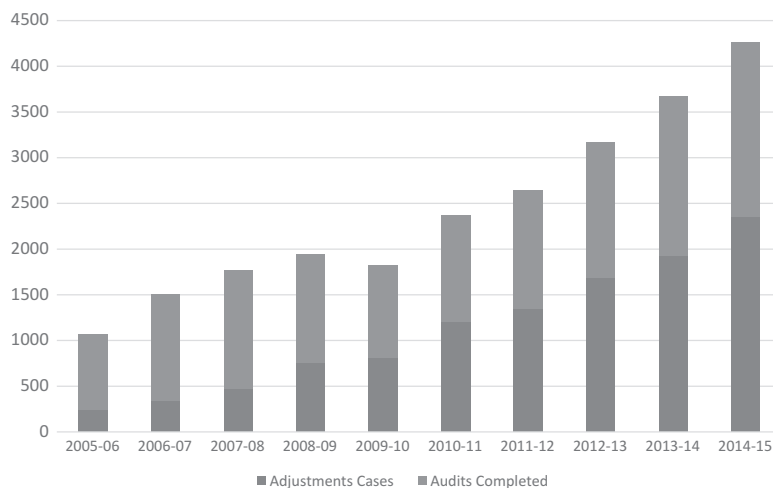
This framework should provide teeth to the MAP and enable the MAP to become a reliable option that provides more visibility to taxpayers, while still allowing states the freedom that they wish for in retaining control over their sovereignty. In light of this balance that the authors have

sought to achieve, they hope that India (and other countries which share Indian concerns) will find this proposal more palatable.

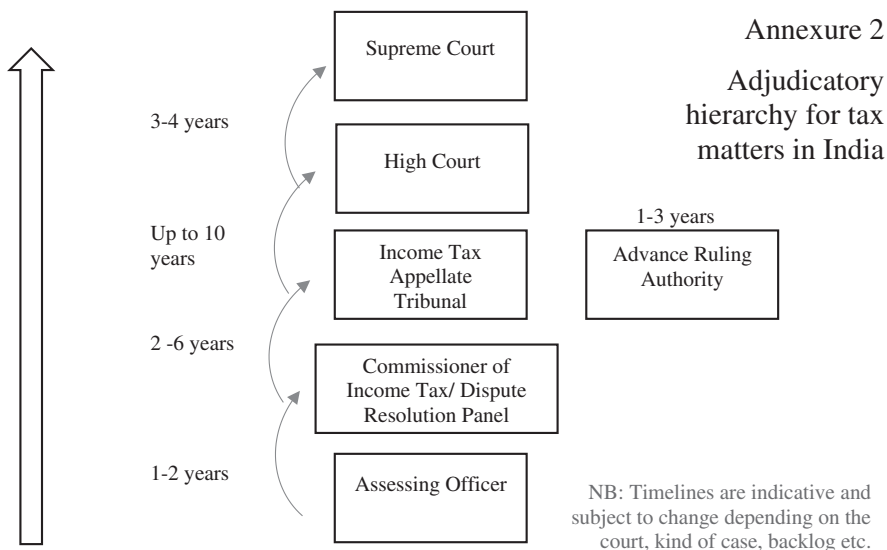
Irrespective of the policy choices that India may eventually make, it is imperative that we continue to engage and have an imagination in relation to alternative options in dispute resolution, while also demanding checks and balances that ensure equitable, fair treatment of all parties. It would be unfortunate if the debates around this important issue were reduced to binaries that are incapable of resolution. That would in fact be the ultimate irony – if there are continuing struggles in the resolution of cross-border tax disputes, because parties are unable to resolve this dispute over a mechanism to resolve disputes.

**ANNEXURES**

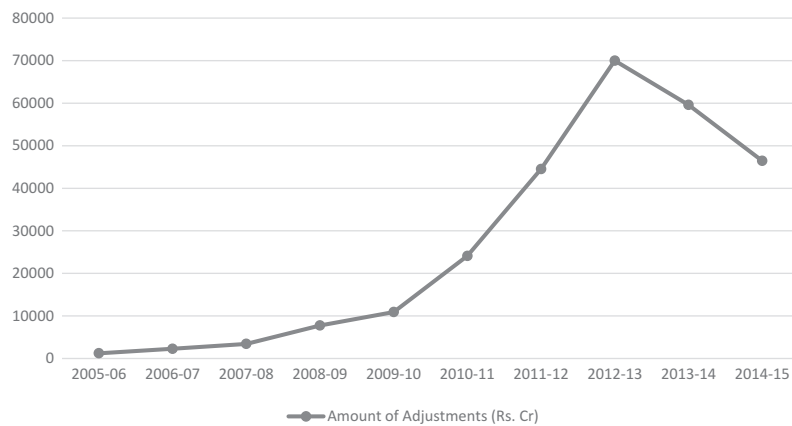
*Annexure 1: Transfer Pricing Litigation in India.*



*Annexure 2: Adjudicatory Hierarchy for Tax Matters in India.*



Annexure 3: Amount of Adjustment (Rs. Cr).



Annexure 4: Disposal of Appeals Cases by the Commissioner of Income Tax (Appeals)

Financial Year	Appeals Due for Disposal	Appeals Disposed of	Appeals Pending	Pendency (%)	Amount Locked up in Appeals (Rs. Millions)
2010–2011	2,58,000	70,000	1,88,000	72.6	1,980,880 (around USD 30 billion)
2011–2012	3,06,000	76,000	2,30,000	75.3	2,421,820 (around USD 37 billion)
2012–2013	2,84,000	85,000	1,99,000	70.1	2,595,560 (around USD 40 billion)
2013–2014	3,03,000	88,000	2,15,000	71.0	2,874,440 (around USD 44 billion)
2014–2015	3,06,000	74,000	2,32,000	75.8	3,837,970 (around USD 59 billion)

 Annexure 5: Appeals/Writs and Other Pending Matters<sup>175</sup>

Authority Before Whom Pending	Cases Pending (in Numbers)	Amount Locked up (Rs. Millions)
ITAT	37,506	1,455,347 (around USD 22.5 billion)
High Court	34,281	376,840 (around USD 5.82 billion)
Supreme Court	5,661	46,545 (around USD 720 million)
<b>Total</b>	<b>77,448</b>	<b>1,878,732 (around USD 29 billion)</b>

## Notes

<sup>175</sup> While this article was in the final round of editing, the 2018 Economic Survey released some updated statistics as well. Per the survey results on direct tax cases, as of 31 Mar. 2017, 6357 cases involving around INR 80,000 million were pending at the Supreme Court, 38,481 cases involving around INR 2,870,000 million were pending at the High Court and 92,338 cases involving around INR 2,010,000 million were pending at the ITAT level. This signifies a sharp increase in the pendency level as compared to the statistics compiled for 2015 provided above. See Ministry of Finance, Government of India, Economic survey 2017-18, Ch. 9 at 138. available at: [http://mofapp.nic.in:8080/economicsurvey/pdf/131-144\\_Chapter\\_09\\_ENGLISH\\_Vol%2001\\_2017-18.pdf](http://mofapp.nic.in:8080/economicsurvey/pdf/131-144_Chapter_09_ENGLISH_Vol%2001_2017-18.pdf) (accessed 21 Feb. 2018).

*Annexure 6: Chronology of the Development of Tax Treaty Arbitration*

<i>Year</i>	<i>Update</i>
1927, 1928	Draft League of Nations Models contained 'advisory opinion' procedure which could be binding/non-binding to supplement a general mutual agreement
1943, 1946	League of Nations Mexico and London Models had only a specific MAP provision with no supplementary mechanism
1963	Draft OECD Model contained specific MAP provision with no supplementary mechanism as above, continued this format in later updates till 2008
1980	UN Model contained a provision identical to the OECD Model provision
1984	OECD considered and rejected the need to add an arbitration provision in the OECD Model
1995	OECD noted the benefits of adding an arbitration provision in the OECD Model
2003–2006	A joint working group was created for this issue, final report recommending arbitration was published in 2006
2008	OECD Model was updated to include a mandatory arbitration provision to supplement the MAP in Article 25(5)
2011	UN Model was updated to include an alternative where the MAP is supplemented by mandatory arbitration
2015	BEPS AP14 Final Report recommends use of mandatory arbitration
2016	Adopted text of MLI contains a more detailed mandatory arbitration provision, which is optional for countries to adopt
2017	Text of Article 25(5) and Commentaries thereto revised to reflect the recommendations in AP14 with the procedural rules in the MLI being introduced in the Commentaries