Harm J. Oortwijn*

Dispute Resolution in Cross-Border Tax Matters

The author, in this note, looks at the history and present trends of cross-border tax dispute resolution as discussed at the 20 November 2015 ICT Leiden Conference. The author provides his personal insights and comments, exploring the current state and future initiatives aimed at making dispute resolution more effective.

1. Introduction

According to Nietzsche, "there are no facts, only interpretations". Using Nietzsche's concept of "perspectivism", it can be asserted that disputes are prone to arise from agreements and are rather challenging to resolve, since all decisions, facts and arguments are subjective, i.e. they represent different interpretations of such facts by individual parties to agreements. This is even more true in respect of cross-border tax matters, where diverging cultural, (geo-) political, legal and religious, etc. systems are involved. The outcome of an effort to resolve such a dispute is, therefore, uncertain and not particularly appealing to undertake. If any resolution is reached, it would be through, to the extent possible, a principle-based negotiation in an atmosphere of mutually gained trust and joint confidence in a reasonable outcome.

At present, there are still many unresolved cross-border tax matters despite the various OECD principle-based dispute resolution mechanisms in European multilateral and bilateral tax conventions. With the implementation of the BEPS Action 14 Report,[1] the number of cross-border tax matters is expected to significantly increase – a common concern to both states and taxpayers.

On 20 November 2015, the International Tax Center of Leiden (ITC) held a conference[2] on how current dispute resolution mechanisms, such as mutual agreement procedures (MAPs) and tax arbitration procedures can be improved to address the increasingly high number of outstanding cross-border tax matters. Leading international opinion makers[3] were present to discuss the current and future state of the OECD's BEPS Action 14 Final Report and comment on how states could overcome the obstacles they envisage arising in order to come to an effective cross-border tax dispute resolution. This note reports on the conference's outcome and, where appropriate, provides additional information and comments.

2. MAP and Arbitration

The dispute resolution provisions of article 25 of the OECD Model (2014)[4] have not changed over the past few decades. The provisions have never included an international institution for the settlement of disputes. Article 25 of the OECD Model (1995)[5] was updated in the OECD Model (2008)[6] to add an arbitration clause in article 25(5). It provides for mandatory (at the request of the taxpayer concerned) and binding arbitration as an extension of the MAP procedure. Further, paragraphs 86 and 87 were added to the Commentary on Article 25 of the OECD Model (2008)[7] to allow for implementation of other supplementary dispute resolution mechanisms as part of the MAP.

Hans Mooij explained that, to date, on the one hand, authorities have only had negative incentives to invoke arbitration procedures. Binding arbitration was introduced as a means to incentivize a MAP resolution. In addition, no detailed guidance and procedures were implemented, leaving taxpayers and accountants with a less than effective procedure.

On the other hand, states have been unwilling to accept binding arbitration because they fear they might lose tax sovereignty and control over the outcome of a MAP. Such an argument may be considered less relevant, as arbitration is only a means of interpreting treaty rules already agreed to; ad hoc arbitration leaves parties with full control over their disputes since they are the ones to decide such essentials as the appointment of the arbitrators, the format and timelines of the arbitration, whether in conventional or short form. Further, there is the alternative of non-binding mediation or expert determination under paragraphs 86 and 87 of the Commentary on Article 25 of the OECD Model (2014).[8]

* **Director of international tax at Paramount Pictures, owner/director of EA Tax Services BV. The author can be contacted at harm.oortwijn@ea-tax.com.** **The author would like to thank, in particular, the TRIBUTE initiators Hans Mooij and Peter Nias for their input.** **The views expressed in this note are those of the author and do not necessarily represent the views of his employer.**

1. OECD, *Making Dispute Resolution Mechanisms More Effective – Action 14: 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (5 Oct. 2015), International Organizations' Documentation IBFD.
2. Conference on International Tax Dispute Resolution, 20 Nov. 2015, ITC Leiden, initiated by Prof. Dr Sjoerd Douma and Dr Arnaud Booij.
3. The presenters included Hans Mooij, Peter Nias, Prof. Dr Kees van Raad, Dr John Avery Jones, Dr Willem Calkoen, Dr J. Arnaud Booij and Hugo Siblesz.
4. *OECD Model Tax Convention on Income and on Capital* (15 July 2014), Models IBFD.
5. *OECD Model Tax Convention on Income and on Capital* (1995).
6. *OECD Model Tax Convention on Income and on Capital* (17 July 2008), Models IBFD.
7. *OECD Model Tax Convention on Income and on Capital: Commentary* (17 July 2008), Models IBFD.
8. *OECD Model Tax Convention on Income and on Capital: Commentary* (15 July 2014), Models IBFD.

It is, therefore, questionable whether arbitration has ever been a serious option, in particular given the fact there have been only a few actual arbitrations in the past 20 years – mainly between the United States and Canada under the Canada-United States Income and Capital Tax Treaty (1980).[9]

Under the EU Arbitration Convention (90/436),[10] submission of an arbitration procedure is mandatory. The arbitral decision is not binding, in the sense that the competent authorities still have some time to agree on a different solution before the arbitral decision takes binding effect. The backlog of around 200 cases results from the lack of capacity and experience of the competent authorities that are tasked with organizing and administering the arbitration. At the current speed of only a handful of cases being arbitrated per year, it may take decades for the backlog to be resolved.

The average MAP takes about two years to complete and the number of pending and new MAPs continues to grow each year[11] and is expected to significantly increase as a result of implementation of the BEPS project. Unresolved disputes cause revenue losses for residence states (through foreign tax relief), as well as for source states (as a disincentive for foreign direct investment).

3. BEPS Action 14: Making Dispute Resolution Mechanisms More Effective

On 5 October 2015, the final report on improving the effectiveness of dispute resolution mechanisms under BEPS Action 14 was released. It presents a commitment by G20 and OECD countries to implement a "Minimum Standard" on dispute resolution. It further comprises 11 "Best Practices" that complement the respective Minimum Standard principles.

Arbitration was not fully embraced in BEPS Action 14 as the preferred solution because of the sovereignty argument, i.e. other states and/or foreign tax administrations controlling the MAP process and its outcome. States typically only accept the legislative impact of decisions of domestic legislative bodies and courts. A group of 20 countries[12] have declared their commitment to providing for mandatory binding MAP arbitration. For this purpose, there is an intention to develop a mandatory binding arbitration provision as part of the negotiation of the multilateral instrument under Action 15 of the BEPS Action Plan.

The initially requested supplemental means of dispute resolution, i.e. mediation and outsourcing of some competent authority functions to another international body as per the December 2014 discussion draft, were dropped from the October 2015 Final Report. The OECD's view is that the Forum on Tax Administration's (FTA) MAP Forum or the FTA's "Global Awareness Training Module" is more appropriate to address these proposals.

The Minimum Standard requires that article 25 of the OECD Model be implemented in "good faith", i.e. in a manner that would allow for competent authorities to resolve differences or difficulties concerning the interpretation or application of the OECD Model. "Good faith" implementation encompasses, inter alia, a commitment to resolving a MAP case within a 24-month timeframe, timely reporting of a state's MAP statistics, membership in the FTA MAP Forum and explicitly stating whether or not the state allows for MAP arbitration. Furthermore, taxpayers are allowed to access the MAP process when the requirements have been met and states should assure that domestic administrative procedures do not block access to the MAP process.

The OECD has further introduced 11 "Best Practices" complementing the Minimum Standard. These "Best Practices" that need to be applied to ensure a more effective MAP process are of a more subjective and qualitative nature. These Best Practices have not been accepted by all G20 and OECD member countries, whereas there is consensus in respect of the Minimum Standard as a means to improve the MAP process.

Those countries that have accepted the Minimum Standard have also recognized that the Minimum Standard will be evaluated via a peer review monitoring mechanism. All of the G20 and OECD member countries will be subject to this review, which will then be summarized in a report monitoring progress, which will subsequently be used as a means to make recommendations.

BEPS Action 14 will impact a state's MAP infrastructure significantly and consequently require governments to invest more capacity and financial resources into their competent authority function. The reality, however, is that governments are shrinking spending due to budget restraints. Budget constraints, therefore, impose a threat to successful implementation of BEPS Action 14.

The International Tribunal of Independent Tax Experts (TRIBUTE) might be an appropriate means for states to address their dispute resolution needs in a more cost-effective manner. *See* section 8. for more on this.

4. OECD Dispute Resolution Mechanisms and the Multilateral Tax Convention

Action 15 of the BEPS Action Plan is aimed at providing a multilateral instrument that would allow jurisdictions wishing to do so to implement all BEPS measures and thus amend their tax treaties.

The plan is to issue the final multilateral instrument for endorsement by all G20 and OECD member countries by 31 December 2016. An ad hoc non-permanent Group dedicated to Action 15 was formed in August 2015 and had its first actual meeting in early November 2015. The

9. *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (26 Sept. 1980) (as amended through 2007), Treaties IBFD.
10. Arbitration Convention (1990): Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, OJ L 225 (1990), EU Law IBFD.
11. The statistics on MAP cases for 2014, as published on 23 November 2015, reveal an increase in the number of MAPs and the time for completing MAP cases.
12. The 20 countries that have declared their commitment are: 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.

funding for this Action would need to come from the voluntary contributions of its members.

Given the large number of existing tax treaties, the approach of agreeing on a single multilateral tax convention seems to be the only way to swiftly modify existing tax treaties in line with BEPS measures.

There is currently consensus amongst the majority of the G20 and OECD countries regarding implementation of a multilateral tax convention. The adoption of the final agreement by all members will be a balancing act, as there may be one or more BEPS measures that certain members will not agree to – MAPS, arbitration and other dispute resolution mechanisms have shown to be problematic in the past.

5. Supplementary Dispute Resolution (SDR)

Cross-border dispute resolution mechanisms have been discussed for decades without resulting in effective solutions to date. In addition to MAP and arbitration, there are "supplementary"[13] dispute resolution mechanisms, inter alia, issued in the 2004 OECD Report "Improving the Process for Resolving International Tax Disputes" and its Annex 1 "The JWG Proposals".[14] The 31 proposals are aimed at improving the way that tax treaty disputes are resolved through the mutual agreement procedure.

Some of these 2004 proposals did require additional work. This work is reflected in the February 2006 Public Discussion Draft Report "Proposals for Improving Mechanisms for the Resolution of Tax Treaty Disputes".[15] This Draft Report included draft changes to the OECD Model, mainly seeking to add an arbitration process for resolving disagreements arising in the course of a MAP. In addition, the development of an online Manual on Effective Mutual Agreement Procedures (MEMAP) has been proposed.

The Draft Report resulted in the issuance of the 2007 Final Report, "Improving the Resolution of Tax Treaty Disputes" and the release of the MEMAP.[16] Paragraphs 86 and 87 of the Commentary cover the SDR mechanisms of mediation and expert reasoned opinions. TRIBUTE would be an appropriate forum to handle such mediation and expert involvement.

6. The FTA's Map Forum

The FTA recognizes that:[17]

> MAP programs maintained by competent authorities to conduct the mutual agreement established by tax conventions, are at the very heart of the global tax environment. The degree to which each competent authority is able to realize success, however, is closely dependent on the efforts of competent authority colleagues in all other jurisdictions.

The FTA member countries formed a forum (the FTA MAP Forum) to discuss their participants' programmes for conducting MAPs. The November 2014 paper "Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement"[18] is the forum's strategic plan. The strategic plan provides that the competent authorities from FTA member countries (1) meet to discuss MAP issues; (2) collectively improve mutual agreement procedures; and (3) collaborate with multilateral bodies, for example the OECD's Working Parties 1 and 6.

The areas of strategic focus of the Forum are:

- resources – competent authorities must have sufficient qualified staff available;
- empowerment – the competent authority must not be unduly influenced or constrained by competing considerations derived from matters concerning tax administration;
- the relationships among competent authorities in different countries, based on mutual trust, should encourage competent authorities to adopt the appropriate posture at the MAP table;
- process improvements; and
- relationships with audit functions – competent authority managed MAPs should not be burdened by wayward audit practices.

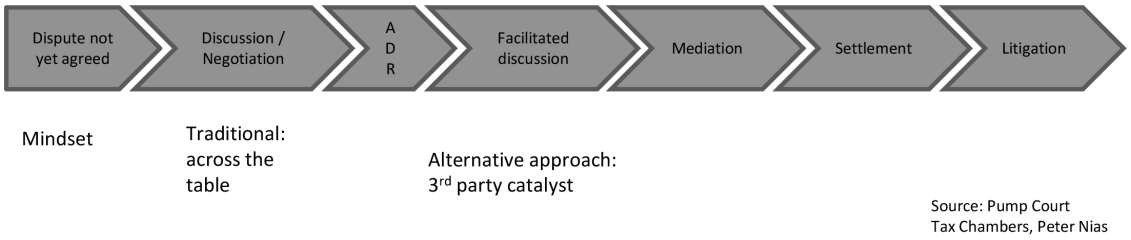
The degree of success of the FTA MAP Forum will be important to the success of BEPS implementation and the effectiveness of MAP procedures. Given the large number of unresolved MAPs and the fact that the FTA MAP Forum has only existed since late 2014, the Forum will need to prove that it is able to meet these goals.

7. HMRC's Approach to Dispute Resolution Mechanisms

Peter Nias[19] made a plea for a more holistic approach to cross-border dispute resolution. A complete dispute resolution process should be available that uses a mix of dispute resolution mechanisms – making reference to HMRC's 2007 Litigation and Settlement Strategy (LSS)[20] underpinned by Collaborative Dispute Resolution (CDR).[21] HMRC supplemented the LSS with Alternative Dispute Resolution (ADR). As suggested by Peter Nias, the acronym ADR should better stand for "Appropriate Dispute Resolution" to remove any suspicion or stigma that might attach to the word "Alternative" in the context of settling a tax dispute through negotiation.

13. "Supplementary" means supplementary to those in the *OECD Model: Commentary on Article 25* (2014).
14. OECD, *Improving the Process for Resolving International Tax Disputes* (27 July 2004), available at http://www.oecd.org/tax/treaties/33629447.pdf.
15. OECD, *Proposals for Improving Mechanisms for the Resolution of Tax Treaty Disputes* (February 2006), available at http://www.oecd.org/ctp/dispute/oecdaimstoimproveinternationaltaxdisputesmechanisms.htm.
16. OECD, *Improving the Resolution of Tax Treaty Disputes* (February 2007), available at http://www.oecd.org/ctp/dispute/38055311.pdf.
17. Forum on Tax Administration, *Multilateral Strategic Plan on Mutual Agreement Procedures*, Preamble Item 4, November 2014, available at http://www.oecd.org/site/ctpfta/map-strategic-plan.pdf.
18. Id.
19. Tax Specialist Barrister at Pump Court Tax Chambers. Peter is a CEDR accredited mediator. Peter advises clients on mediation and pre-mediation strategies for resolving tax disputes and has acted as both a mediator and facilitator in the United Kingdom. Peter is also one of the TRIBUTE initiators.
20. HMRC, *Litigation and Settlement Strategy*, June 2007, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387743/Litigation_and_settlement_strategy.pdf.
21. HMRC's Litigation and Settlement Strategy (LSS) was first published in 2007 and refreshed in 2011 and 2013 (available at https://www.gov.uk/government/publications/resolving-tax-disputes).

Diagram 1: LSS – Collaborative approach



HMRC states in the LSS Guidance that:[22]

> Most disputes can be resolved collaboratively and by agreement once the facts have been established and the points at issue discussed, including cases where there is a formal appeal against the view we have taken. Only a very small minority of disputes need to be resolved by legal action, either in a tribunal or a higher court.

HMRC is using the CDR process in disputes with taxpayers across all taxes and duties. The LSS guidance comprehensively prescribes best practices for successfully resolving a dispute and reaching a settlement. The CDR approach is where all parties involved recognize a mutual interest in resolving the dispute cost effectively and bring a shared mindset focused on resolving the dispute on satisfactory terms. ADR is a subset of LSS; it is a consensual mediation process involving a trained neutral who only facilitates the negotiation.

In 2010, HMRC launched a pilot project for SMEs and large taxpayers (with complex tax affairs), not involving fraud or technical cases, where ADR would facilitate resolving tax disputes that were heading towards litigation. This ADR pilot has been considered successful by HMRC and taxpayers alike. Consequently, ADR is being used more widely.

In the July 2015 report "The Tax Assurance Commissioner's Annual Report 2014-15",[23] HMRC reveals that in 2015 they had 82% and 74% success rates concerning 61 large complex ADR cases and 455 SME and individual ADR cases, respectively. These rates represent (fully or partially) closed ADR cases in a single year, expressed as a percentage of the number of cases accepted for ADR that were closed during the year.

Despite this success, however, HMRC will require any settlement arriving from ADR to be compliant with principles that would be accepted in a court decision. In this context, there may be cases where litigation offers the most effective and efficient means of resolving a dispute, whereas in other cases ADR may be more effective.

The parties can agree to three different ADR mediation approaches: (1) facilitative mediation, (2) evaluative mediation and (3) non-binding expert determination in increasing order of direction of the mediator towards the outcome (from passive coordination to active proposal). Facilitated discussion is also part of ADR and usually involves appointing two third-party facilitators/mediators, one by each side, who work together as mediators. This usually precedes (and is in place of) a formal mediation involving a single mediator.

Peter Nias recently suggested to HMRC representatives at a regular ADR Focus Group meeting that they consider resolving some of the open MAP cases using HMRC's collaborative approach, where an SDR process might be appropriate. It will take some time before a programme of SDR intervention on the part of HMRC will sort out the delayed MAP cases, given the bilateral nature of MAP cases and the requirement for other competent authorities to buy into the idea of the use of SDR.

8. Tax Disputes – Role of Mediator and Facilitator

Mediation is, "[a] flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated settlement of a dispute […] with the parties in ultimate control of the decision to settle and the terms of resolution".[24]

The mediator or facilitator can help unlock the deadlock that parties may have reached due to entrenched positions or irreconcilable interests. He will challenge the assumptions of both parties and evaluate these in terms of their strengths and weaknesses. The mediation process encourages parties to look forward rather than backwards. The mediation process is typically short-term. Based on John Avery Jones' experience, one week is a rather realistic timeframe for a mediator completing an average mediation process.

Peter Nias concludes that mediation may act as a catalyst for re-engaging the discussion between parties and getting to the heart of the real issues in dispute. Further, the fact that a trained neutral is involved and the environment is confidential may change the dynamic, creating a safe negotiating environment, thus paving the way for the parties' mutual consent.

9. TRIBUTE and Permanent Court of Arbitration (PCA)

TRIBUTE aims to offer an independent, unbiased, transparent, modern and specialized facility for all types of third-party assistance in tax dispute resolution through

22. HMRC, *supra* n. 20, at bullet point 17.
23. HMRC, How we resolve Tax Disputes: The Tax Assurance Commissioner's Annual Report 2014-15, July 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444911/How_we_resolve_tax_disputes.pdf.
24. Centre for Effective Dispute Resolution (CEDR).

arbitration, mediation and any other form of alternative dispute resolution.[25] They want to achieve a situation in which no state or party will have an excuse for not considering arbitration, for example, the absence of a facility or resources that satisfy their demands for neutrality and a confidential dispute resolution environment. TRIBUTE is an initiative of highly recognized international tax experts themselves, fully respecting European, OECD or UN style arbitration and without any commercial objective.

TRIBUTE tentatively offers a reasoned opinion from a recognized top expert, within one week, at an all-inclusive fee of only a fraction of the current cost of a MAP process. With regard to transparency, the long list of recognized top experts is increasing and is publicly available on the Internet.

TRIBUTE is supported by the PCA, which has been located in the Peace Palace, in The Hague, since 1913. Hugo Siblesz stated at the conference that assuming that a case before the TRIBUTE Tribunal involves at least one state as a party, the PCA is available, in principle, to:

- provide registry support to the TRIBUTE Tribunal through the PCA International Bureau; and
- provide appointing authority services through the PCA Secretary-General.

The PCA will provide free use of hearing rooms in the Peace Palace, offer privileges and immunities under the Headquarters Agreement with the Netherlands, other Host Country Agreements and Cooperation agreements. The Peace Palace's facilities are, in principle, available to TRIBUTE for holding arbitration sessions. The PCA appointing authority would appoint arbitrators where parties themselves cannot agree and decide on challenges to arbitrator independence and impartiality.

In summary, TRIBUTE is able to offer the appropriate amenities, facilities and resources in a neutral and confidential environment on an entirely voluntary basis – states would have no excuse not to use TRIBUTE. In order to convince states and parties to use TRIBUTE, TRIBUTE's members and contributors will need to actively promote its services and to make efforts towards gaining trust, such that states and parties eventually become comfortable using the Tribunal.

10. A Business Perspective

The tax policy group BUSINESSEUROPE[26] issued its report "Double Taxation Cases outside the Transfer Pricing Area" in December 2013 (the Report).[27] The Report reveals the findings of a survey concerning double taxation issues of ten large multinationals.[28] The study confirmed that double taxation remains an obstacle to cross-border trade and investment, as well as the absence of well-functioning dispute resolution mechanisms, i.e. MAPs and arbitration to address such double taxation.

On MAPs the respondents stated:

> Generally, we consider that double taxation is usually only suffered where different Member States have unilateral and opposing interpretations of double taxation agreements. The sensitive areas may include HQ charges, permanent establishments […]. In such cases, Mutual Arbitration Procedures should subsequently eliminate the double taxation, but the process is a lengthy one, and there is an opportunity for them to seek settlements which result in the acceptance of double taxation by the taxpayer rather than having to go through arbitration. Improvements to the MAP process would help eliminate the risk of this.

Respondents commented as follows on the Arbitration Convention (90/436):

> Access to the Arbitration Convention is another key issue going forward. Our experience is that countries are very reluctant to allow this and try to find "loopholes" to avoid access (e.g. serious penalties in "normal" cases, do not adhere to time limits stipulated in the AC etc.). We interpret this as a general unwillingness to resolve double taxation within the EU.

This Report remains a well-reasoned reflection of the perspective of business regarding the current state of MAPs and arbitration procedures.

The author wonders if the issue underlying this problem could simply be a lack of willingness to resolve disputes on the part of the competent authority, or whether other issues might be at play, for example a lack of capacity or the fact that disputes are too principled or involve too large of a financial interest to be resolved through a compromise.

The business community should welcome TRIBUTE, as it will help improve dispute resolution mechanisms and thereby increase the percentage of successfully resolved disputes.

11. Conclusion

Discussions concerning cross-border dispute resolution mechanisms have been around for a number of decades. To date, such discussions have not resulted in effective measures – mostly because of the perception of states (and taxpayers) that they have no control over the outcome of the dispute resolution process and, therefore, it will impact their sovereignty. The fear of a lack of control is the result of the absence of mutual trust and confidence with regard to resolving the dispute. In addition, SDR mechanisms are generally not well understood amongst competent authorities, taxpayers and advisors.

25. J. Stanley Smith, *TRIBUTE – The Permanent Tax Treaty Arbitration Tribunal*, Intl. Tax Rev. (20 Feb. 2015).
26. "BUSINESSEUROPE is the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent and campaigning on the issues that most influence their performance. A recognized social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members". Available at www.businesseurope.eu.
27. Available at https://www.businesseurope.eu/sites/buseur/files/media/imported/2013-01353-E.pdf.
28. Ten out of the following 13 multinational companies that were asked to cooperate, responded: Siemens, GE, Unilever, Shell, AB Volvo, Yves Rocher, Volkswagen, Microsoft, ABB, Novartis, Caterpillar, AstraZenica, BP and one other large multinational.

The OECD's BEPS and FTA initiatives, i.e. minimum standards and best practices to resolve cross-border disputes in a principle-based manner, are all consensus based. In the EU Arbitration Convention (90/436), arbitration procedures are mandatory, but a resolution is not. The opinions amongst tax experts concerning whether procedures should be mandatory or voluntary are mixed. If there were sufficient mutual trust and confidence between the parties to resolve a dispute, it should not make much difference. States are willing to enter into multilateral binding agreements to exchange information when there is mutual interest.[29]

The successful results of the collaborative approach to domestic dispute resolution of HMRC over the past decade argue in favour of states being realistic and opting for a plain vanilla implementation of the OECD and FTA initiatives. The reality is that differences in interpretation or semantics between states, in respect of the same term, may exist; awareness of each other's jurisdictions should overcome this. It is also realistic to assume that some disputes between states simply cannot be resolved due to irreconcilable arguments or the large financial interests at stake. Further, double taxation may not be fully eliminated after a case is successfully closed under a MAP procedure. Taxpayers that disagree with the outcome may or may not, depending on the state(s) and situation, appeal against the decision or start another domestic or international procedure.

On balance, TRIBUTE, supported by the PCA, may make arbitration an alternative seriously worth considering. Because of the expected increase in budgetary constraints and the increasing number of cross-border disputes as a result of implementation of the BEPS initiative (unilaterally and bilaterally), states will be forced to reconsider more cost-effective options for arbitration, mediation and other types of dispute resolution.

29. Kenya, in February 2016, became the 94th jurisdiction to sign the *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (as amended through 2010), Treaties IBFD.