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Global Tax Policy and Post-BEPS Dispute Resolution

Hans Mooij (TRIBUTE Foundation for improvement of international tax dispute resolution) · Monday, June 19th, 2017

A world of tax without disputes is an illusion. It is just as much an illusion as a world without tax. Tax and disputes come together inseparably. Disputes is not something to be ashamed of – I say this in particular to authorities. Nor – and it this meant more for taxpayers – to be afraid of. As long as numbers of disputes remain within reasonable, decent limits. Between *tax war* and *tax peace* there remains a vast area to cover.

The global trend for international tax disputes is up, and continuously so, for many years in a row already. BEPS will only further accelerate this trend. After all, this is what BEPS was designed for: to alert authorities for possible international tax avoidance schemes, and provide tools to challenge them. At the same time, BEPS and increased transparency demands make any settlements less viable, at either pre or post dispute stages. I am afraid this effect of BEPS will not be merely temporary, until the new rules have settled in in practice. Over the years, the OECD has constantly been revising the international rules on transfer pricing and profits allocation, in an attempt to create more clarity and unity. But in the process these rules also became more and more complex – too complex. With as result that many authorities now have become less inclined to adhere to them. Instead, their preference is for standards of their own invention – allowing for more tax, and satisfying political and public pressures at their domestic front. This is the case in OECD member countries no different than in non-member countries. I call this the paradox of transfer pricing: while the rules were meant to reconcile domestic practices, what they achieved in fact was only raise more controversies. More rules is not the right answer when it comes to preventing disputes.

Disputes are not by all means bad, however. There may actually be something useful in having disputes. They can produce more clarity as to the proper interpretation or application of rules. And they can level inequalities in capacity or economic or political power between disputing parties.

In this regard, developing countries generally can be said to have too little disputes. Capacity issues make their tax authorities reluctant to engage in disputes. They would be much helped if they could avail of independent external technical expertise. This explains why the interest among the developing world concerns predominantly the use of non-binding instruments: technical assistance, facilitation of discussions, mediation, or conciliation. But this raises another serious issue: that of funding.

India, by contrast, has far too many tax disputes. They clog the country's domestic court system. And, by the same token, its MAP function. Creating official programmes at domestic level for mediation, or even binding arbitration, might offer relief. But to do that, authorities and taxpayers

should first gain the necessary trust in such instruments, and, more importantly still, in each other.

In China, disputing with the government is not common practice. The Chinese authorities' focus is on preventing international tax disputes. They host an elaborate APA programme for the purpose. Internationally, China is a front-runner in concluding bilateral APAs. There apply stiff information requirements for taxpayers requesting an APA, often coupled with intense auditing. The central authority employs over 200 high-skilled staff to work on APAs alone. It is difficult to imagine this possible in any other countries but China. But even for Chinese standards, this is a huge administrative burden. Preventing disputes comes at a price, and a high one, too.

Europe is faced with a large backlog of by now about 900 overdue MAP cases. There is an increase each year by some 10 per cent. These cases should go to arbitration, but so far hardly any of them have, due to shortcomings in the EU Arbitration Convention. The recently agreed EU Directive on double tax disputes will repair this. Processing such large quantities of cases inevitably calls for fast-track arbitration. As well as some forms of institutionalisation, including external case administration, listing of available arbitrators, and maybe, in time, permanent in stead of *ad hoc* arbitral panels. The new Directive acknowledges this, too, and recommends it for further consideration by the EU countries.

Is there any more work the international organizations might do on dispute resolution, after the MLI? Yes, most certainly there is. I see the MLI merely as a beginning.

I sincerely hope the OECD, through its BEPS Inclusive Network, will seek to promote and commit countries to both anti-tax avoidance *and* effective dispute resolution as a single coherent package. Because it is the combination of the two that preserves the integrity of tax treaties and the balance of interests. I also hope the OECD MAP Forum will want to make more work of options for mediation and voluntary arbitration in MAP negotiations. Political commitment to mandatory binding arbitration does not have to preclude support for these alternative instruments. A further useful role for the OECD, so I believe, might be encourage and facilitate countries in sharing their practical experiences in arbitration cases. By sharing experiences of others, countries can gain the trust they may need before committing to arbitration. But even those countries that are committed to arbitration still show hesitance to go to arbitration in practice. Lack of knowledge how to set up a proper arbitration process, and of the necessary capacity, seem to be the main explanation for this.

The U.N. Tax Committee is investing in creating awareness, by providing in-depth analysis and guidance on the usefulness for developing countries of the full range of instruments for dispute resolution and prevention. This work is essential to get developing countries aboard, sooner or later. It is work that deserves more attention and support than it currently receives.

The U.N., Worldbank Group, IMF and OECD recently created a joint platform for collaboration on tax. Building capacity on dispute resolution for developing countries and funding external expertise might be a good project for this new platform to take the lead on. Any such efforts are destined to bear little fruit, however, if pursued without engaging regional or local organizations of developing countries themselves.

In the area of dispute resolution there is clearly no size that fits all. I refuse to speak in terms of countries being unwilling, or lacking good faith. The issue, rather, is one of different needs, and different speeds, that each need to be catered. The traditional international organizations may not

be the best fora for doing this anymore. I note, for instance, that the OECD countries are strongly divided about mandatory binding arbitration – even they. Perhaps the time is for new, specialized platforms, that bring together parties with more homogeneous interests, and thereby can produce results more effectively and faster. The MLI *ad hoc* Group, and more particularly its Sub-Group on Arbitration, might set the first examples for such new platforms. And maybe, if authorities are ready for that, such new platforms can offer a place as well for other stakeholders. After all, international tax is a latecomer in dispute resolution, compared to other areas of law. There is a lot of expertise available elsewhere from investment or commercial arbitration and mediation, with arbitration institutions, academics, business and advisory communities, that tax authorities can benefit from.

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