

Mrs. Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and Financial Transaction Division
Centre for Tax Policy and Administration
OECD

By email to: taxtreaties@oecd.org

16 January 2015

Dear Mrs. de Ruiter,

Re: BEPS Action 14, Public Discussion Draft

We are writing you as representatives of the TRIBUTE initiative for the establishment of a permanent international body specialising in the resolution of tax disputes. We note that for all of us our participation in this initiative is strictly independent and in our personal capacities.

We are pleased to take the opportunity to respond to the Public Discussion Draft on BEPS Action 14, firstly, to inform you of our initiative. Further, we wish to submit some specific comments on the discussion draft where it relates to features of our initiative. We have listed those comments separately in the annex to this letter.

The objective of TRIBUTE is to contribute to improvement of the effectiveness, fairness, and transparency of the resolution of tax disputes - including, but not exclusively, tax treaty disputes - by offering an independent, neutral, and expert third party facility. The services of TRIBUTE will comprise the full range of options for alternative dispute resolution: from facilitation, and mediation, to arbitration. TRIBUTE will avail its own high-qualified tax experts and dispute resolution experts, both groups being diverse in professional background, area of expertise, nationality, culture, and gender. The TRIBUTE services will have global coverage, being accessible to authorities and taxpayers from any jurisdiction in the world. Herewith attached is a detailed outline of the initiative, for your information.

We note that the OECD places much weight on improvements to MAP and relieving resources of competent authorities. We believe that third party facilitation may fulfil an important role in this respect, specifically by assisting in managing MAP proceedings, establishing and preserving a collaborative working relationship between competent authorities, assessing legal and technical merits of a dispute, making factual determinations, and identifying viable pathways to resolution. The OECD has identified already the potential of mediation (in the 2007 MEMAP Report, at paragraph 3.5.2, and in the Commentary on Article 25 of the Model Tax Convention, at paragraphs 86 and 87). TRIBUTE will offer a host of similar professional techniques - including facilitated structured negotiations involving mediation techniques, facilitative or evaluative mediation, and non-binding expert determination - as are being successfully applied at domestic level in such countries as the UK, United States, the Netherlands, and Australia.

We further note the OECD's observation that at this moment there is no consensus for moving towards universal mandatory and binding arbitration. However, under the vast majority of treaties providing for the standard of Article 25 of the OECD Model Tax Convention competent authorities are free to voluntarily agree arbitration (we refer to the Commentary on Article 25, at paragraph 69). We hope and anticipate that the availability of the TRIBUTE facility will encourage more countries to include explicit arbitration clauses in their treaties, and more competent authorities to turn to arbitration if they find disputes too complicated or too principled to resolve through a compromise in MAP negotiations.

Any arbitrations brought before TRIBUTE will be supported and administered by the Permanent Court of Arbitration of the Peace Palace at The Hague. You find the confirmation letter to this effect from the Secretary-General of the Court as per attached.

TRIBUTE will be prepared to conduct arbitrations on the basis of the rules of the OECD sample mutual agreement on arbitration, as well as the rules of the UN sample mutual agreement, the UNCITRAL rules, or any other procedural rules as disputing parties may mutually agree. Next to the formats of "final offer" or "baseball" arbitration, and "independent opinion" arbitration, as both reflected in the OECD sample, TRIBUTE will offer a variety of other formats balancing time- and cost-efficiency and fair judgement, including expedited proceedings, interim measures, and emergency proceedings, which have proven their effectiveness in the area of commercial arbitration.

Over the next months we will continue working to complete the TRIBUTE lists of experts and settle matters of administrative organisation, governance and funding. We aim to have TRIBUTE formally established and operative before the end of this year.

We will be most happy to elaborate, either in writing or through an oral presentation, on details of the TRIBUTE initiative, or, more particularly, on the various services TRIBUTE will offer to facilitate MAP negotiations and arbitration, should you or the FTA MAP Forum wish so.

Sincerely,



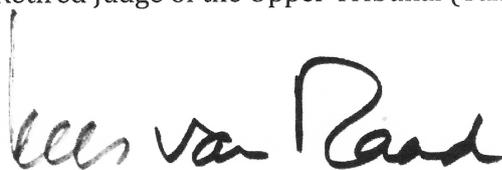
Hans Mooij (Netherlands)
Independent international tax counsel; former Competent Authority for the Netherlands Government



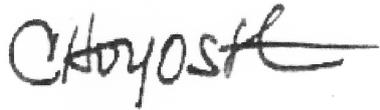
Willem J. L. Calkoen (Netherlands)
Retired Partner, NautaDutilh; member of the Executive Committee of P.R.I.M.E. Finance



John F. Avery Jones (United Kingdom)
Retired Judge of the Upper Tribunal (Tax and Chancery Chamber)



Kees van Raad (Netherlands)
Professor of International Tax Law at the University of Leiden (Netherlands); Chairman of the International Tax Center Leiden



Catalina Hoyos Jiménez (Colombia)
Partner, Godoy&Hoyos; Professor of Tax Law, Rosario University (Bogota); President and member of the Board of Directors of the Colombian Institute of Tax Law (ICDT)



Manuel E. Tron (Mexico)
Partner, Manuel Tron SC; Honorary President of the International Fiscal Association (IFA)

Annex: Specific comments on the Public Discussion Draft

1. With regard to paragraphs 3 and 6 of the Public Discussion Draft, we note the absence of any recommendation for promulgation of mandatory and binding arbitration through a multilateral instrument. At the same time, we welcome the suggestion made, in paragraph 46, for the inclusion in treaties of MFN provisions as an elective mechanism for the quick implementation of treaty arbitration clauses.

2. We further note in respect of the former that taxpayers may themselves initiate arbitrations in tax disputes under investment or trade treaties, where such treaties allow for arbitration on tax matters and within their usual limitations of expropriation and unfair treatment. TRIBUTE will be available to deal with such investor-state disputes.

3. We note the expectation, expressed in paragraph 8, of a process for monitoring the overall functioning of MAP provisions. and that it is envisaged that an appropriate forum of competent authorities could be responsible for such monitoring. We propose that it contributes to enhancing transparency and accountability of MAP if the monitoring forum would involve an independent third party such as TRIBUTE.

4. In response to paragraph 21, we propose the availability of TRIBUTE to assist, through its facilitative services, in the concluding of unilateral, bilateral, or multilateral APAs, or any other international compliance arrangements between authorities and taxpayers outside the area of transfer pricing.

5. In respect of paragraphs 30 and 34, we submit that TRIBUTE will consider itself competent to arbitrate on any disputes whether access to MAP and subsequently arbitration is correctly denied having regard of the relevant treaty and domestic law provisions - including disputes on the issues mentioned, of whether a taxpayer's objection against a particular treaty application or implementation is justified, or whether access to MAP is barred by any applicable time limits.

6. We note that more principled approaches to disputed matters, as is being advocated in paragraph 38, may make it harder for competent authorities to compromise on their initial positions in MAP negotiations. This may lead to a further increase of the scope for third party facilitation of MAP negotiations.

7. We acknowledge the concerns expressed in paragraph 48 over the proper qualifications and the independence and impartiality of arbitrators to be appointed, and we agree that concerns as these may make countries hesitant to adopt arbitration. At the same time, we observe that countries, for various reasons, experience difficulties to find themselves qualified arbitrators who willing to serve in their disputes. It is for this reason that TRIBUTE will offer its own list of tax experts from which parties may choose to appoint arbitrators. All experts of the TRIBUTE list will avail of the highest qualifications, and their impartiality and independence, both generally and more particularly in respect of a dispute at hand, can be taken for granted, and will be confirmed to disputing parties in writing. Disputing parties remain free, of course, to mutually agree other arbitrators than experts from the TRIBUTE list.

8. In respect of paragraph 49, we confirm that the Code of Practice of TRIBUTE will explicitly recognise that the confidentiality of all information disclosed to it be strictly preserved except where, and to the extent in which, all parties in the dispute have agreed to its publication. However, within the privacy of its own organisation, TRIBUTE will reserve the right to share with its arbitrators and other experts, all being contractually subject to similar confidentiality and non-disclosure rules, such information from cases in which it is involved, in order to better secure consistency of approach and decision making in future cases.

9. While we acknowledge that in some cases taxpayer involvement in arbitrations may result in a lengthier, more complicated, and more expensive process, as is suggested in paragraph 52, it should also be noted that arbitrators may need a taxpayer's witness testimony in order to obtain objective and reliable information, especially where factual determinations make an important part of a dispute.

10. With regard to paragraph 55, we note that in practice it is only exceptionally that arbitrator fees are the most significant cost of arbitration. As a rule, preparation of parties' position papers, other submissions, and presentations before the arbitrators constitute the bulk of cost. TRIBUTE will have its arbitrator fees determined in a most objective and acceptable manner by the Secretary-General of the Permanent Court of Arbitration, based on what he in his vast experience considers appropriate in view of the degree of complexity of a dispute and by comparison to prior arbitrations in comparable cases.

11. With regard to the same paragraph 55, we further submit that any excessive streamlining of procedures, in particular by further reducing or omitting evidentiary production, would likely jeopardise the possibility of a balanced arbitral decision, and prevent arbitrators from accepting to deal with a case.

A permanent international tribunal for the resolution of tax disputes

Outline by the TRIBUTE initiative, at 16 January 2015

A permanent international tribunal for the resolution of tax disputes is expected to be established by the end of 2015. It is provisionally named: 'TRIBUTE' - short for 'International Tribunal of Independent Tax Experts'.

TRIBUTE will be supported by the Permanent Court of Arbitration of the Peace Palace at The Hague¹. The Permanent Court of Arbitration is a full organ of the United Nations organisation, and specialises in facilitating the resolution of disputes between states, at which it is unique, as well as disputes between state entities and private parties, notably in the area of bilateral investment treaties.

Like other tribunals supported by the Permanent Court of Arbitration, TRIBUTE will not be an integral part of the Court but will be governed by a separate legal body, with a board envisaged to consist of representatives of the international tax community at large. The board members are as yet still to be appointed.

TRIBUTE will be available to arbitrate on tax disputes arising under bilateral and multilateral tax treaties, investment or trade treaties, the European Arbitration Convention, domestic laws, or contractual arrangements, wherever there is a provision – mandatory or voluntary - for arbitration. TRIBUTE will also offer facilities for collaborative dispute resolution, such as facilitated structured negotiations, facilitative or evaluative mediation, and non-binding expert determination.

The services of TRIBUTE will be available to all States, whether member of the Permanent Court of Arbitration organisation or not, and to all of their nationals or residents.

The Permanent Court of Arbitration will provide the administration of the TRIBUTE arbitrations.

Arbitral sessions may be conducted at any location in the world as parties may agree, or even through video or telephone conferencing.

TRIBUTE will avail of its own list of internationally recognised and impartial tax experts, diverse in professional background, area of expertise, nationality, culture, and gender, from which disputing parties may agree to select arbitrators. Where parties fail to agree among themselves, it is up to the Secretary General of the Permanent Court of Arbitration as the TRIBUTE appointing authority to decide on the appointment of arbitrators. Parties will remain free to agree arbitrators who are not on the TRIBUTE list, or to agree an appointing authority other than the Secretary General of the Permanent Court of Arbitration.

There will be a separate list of TRIBUTE mediation experts available to provide services for collaborative dispute resolution or assist in arbitrations.

Disputing parties have a choice of five alternative sets of arbitration rules to cover TRIBUTE arbitration proceedings:

- the rules of the OECD sample mutual agreement on arbitration in the Annex to the Commentary on Article 25 of the OECD model income and capital tax convention;
- the rules of United Nations sample mutual agreement on arbitration in the Annex to the Commentary on Article 25 (Alternative B) of the United Nations model double taxation convention;
- the procedural rules of the European Arbitration Convention;
- procedural rules for "baseball arbitration" as provided in the Memorandum of Understanding agreed under Article XXVI of the income and capital tax treaty between the United States of America and Canada; or
- TRIBUTE's own procedural rules, based on the widely accepted UNCITRAL rules for arbitrations under investment or trade treaties.

¹ At: <http://www.pca-cpa.org>

Next to the rules of these standard alternatives, parties may mutually agree to apply any modifications of these rules or rules of the parties' own design.

TRIBUTE's own arbitration rules are especially designed to ensure a fair and efficient resolution process, avoiding unnecessary delay and expense. E.g. while the applicable standard time lines of 45 days for the various communications between the disputing parties and the arbitrators are by all means short, the rules provide for optional expedited proceedings, interim measures, and even emergency proceedings resulting in the delivery of an arbitration award within 15 days. The TRIBUTE rules shall apply in any case by default, either in whole or in part, where parties have failed to agree rules among themselves.

The administrative fees and costs for TRIBUTE arbitrations are expected to range from €12,000 up to some €60,000, depending on the amount of financial interest in dispute. The fees of arbitrators are determined for each case separately following advice from the Secretary General of the Permanent Court of Arbitration on what is to be considered appropriate in the circumstances of the case.

Under the TRIBUTE arbitration rules, as a principle the losing party bears all fees and costs, but the arbitrators may determine a different allocation, for example in consideration of a party's financial ability or in case of a divided responsibility.

TRIBUTE experts are available to advise parties which the format of collaborative dispute resolution or arbitration might best suit the scope, level of complexity, financial interest, and urgency of their specific dispute.

Other highlights of TRIBUTE arbitration:

- Reliance on the TRIBUTE own procedural rules saves parties the time and effort of having to agree such rules among themselves, as well as the likely risk that the agreement of such rules or their application becomes an additional subject of dispute.
- The TRIBUTE rules do not require parties to agree any terms of reference for the arbitrators to observe, for the similar reason of preventing that such terms become themselves subject of dispute.
- Being able to select arbitrators from the TRIBUTE list of tax experts is especially advantageous to those parties which themselves lack contacts with the scarce experts available to deal with their specific dispute, as is often the case for developing countries.
- No party can stall or frustrate the arbitration by not cooperating in the appointment of arbitrators, since in case of disagreement it is eventually the Secretary General of the Permanent Court of Arbitration who decides on that appointment in his capacity of appointing authority under the tribunal's own rules.
- The various time lines applicable under the TRIBUTE rules can be such short since the support of the experienced administrative staff of the Permanent Court of Arbitration allows arbitrators to work more efficiently.
- Absent any specific terms of reference as may be agreed between disputing parties, the TRIBUTE arbitrators in making their determination will apply their judgment of what they believe fair in the specific circumstances of a case, next to such common authorities as the provisions of relevant treaties, explanations thereto as agreed by states, domestic laws, and OECD or UN Commentaries, Guidelines and reports.
- Availing of its own experts and administrative support allows TRIBUTE to establish time and cost-efficient working routines. Being able to share case specific information within the privacy of its own organisation allows TRIBUTE to achieve consistency in approaches to cases and their determinations.
- TRIBUTE arbitral decisions and their considerations will as a rule be published, but only with the agreement from all parties in the dispute concerned and in anonymous form.

COUR PERMANENTE D'ARBITRAGE



PERMANENT COURT OF ARBITRATION

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December 12, 2014

RE: TRIBUTE TRIBUNAL

Dear Mr. Calkoen,

Dear Willem,

I write further regarding our discussions on the establishment of a dispute resolution mechanism designed to handle tax disputes (the TRIBUTE Tribunal).

I understand that cases before the tribunal will involve at least one State as a party. On this basis, I can confirm that the Permanent Court of Arbitration (PCA) is available, in principle, to support such a tribunal, with the PCA Secretary-General as the appointing authority and the PCA as the administering institution for any arbitrations.

Yours sincerely,

Hugo H. Siblesz
Secretary-General

A handwritten signature in black ink, appearing to read 'H. Siblesz', is written over a horizontal line.

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