

Mr. Mike Williams
Chair, ad hoc Group for the development of the BEPS Multilateral Instrument

By email to: multilateralinstrument@oecd.org

8 July 2015

Dear Mr. Williams,

Re: TRIBUTE proposals on Supplementary Dispute Resolution

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 refer for details on the initiative to the TRIBUTE submission of 16 January 2015 in response to the OECD Public Discussion Draft on BEPS Action 14. We note that for all of us our participation in the initiative is strictly independent and in our personal capacities.

We are pleased to present you a set of proposals we have drafted on behalf of the TRIBUTE initiative for purposes of assisting the ad hoc Group in its considerations on the provisions of the Multilateral Instrument concerning dispute resolution pursuant to BEPS Action 14. The overall objective of our proposals is to promote the use of supplementary dispute resolution mechanisms (SDR) in mutual agreement procedures. We believe that the use of SDR can play an important role in unlocking stalled MAP discussions. Moreover, we believe that SDR, because of its non-binding nature, can be an acceptable alternative for those countries that for sovereignty or other reasons cannot commit to arbitration.

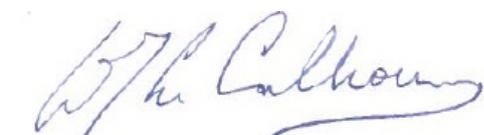
We are available of course to discuss our proposals at any time with you and/or other members of the ad hoc Group, should you wish so.

We will send by separate mail copies of our present proposals to Mrs. Marlies de Ruiters, Head of the OECD Tax Treaties, Transfer Pricing and Financial Transaction Division, to Mr. Michael Lennard, Secretary of the United Nations Committee of Experts on International Cooperation in Tax Matters, and to Mr. Heinz Zourek, European Commission Director-General Taxation and Customs Union, for their information.

Sincerely,



Hans Mooij



Willem J. L. Calkoen



John F. Avery Jones



J. Arnaud Booiij



Peter M. W. Nias



Natalia Quiñones Cruz

Proposals by the TRIBUTE Initiative, at July 8, 2015

For purposes of the Multilateral Instrument implementing the results of the BEPS project

Option A:

Voluntary SDR

“To assist them in the process of reaching an agreement, the competent authorities may agree to the application of a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation.”

Article 25 OECD Model Tax Convention on Income and on Capital:

(...)

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. ***To assist them in the process of reaching an agreement, the competent authorities may agree to the application of a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation.***

Article 25 and Article 25(alternative B) United Nations Model Double Taxation Convention:

(...)

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. ***To assist them in the process of reaching an agreement, the competent authorities may agree to the application of a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation.***

Option B:

Voluntary arbitration

“The competent authorities may also agree to the application of an arbitration procedure administered by an independent arbitrator.”

Article 25 OECD Model Tax Convention on Income and on Capital:

(...)

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. ***To assist them in the process of reaching an agreement, the competent authorities may agree to the application of a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation. The competent authorities may also agree to the application of an arbitration procedure administered by an independent arbitrator.***

Article 25 and Article 25(alternative B) United Nations Model Double Taxation Convention:

(...)

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, may develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. ***To assist them in the process of reaching an agreement, the competent authorities may agree to the application of a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation. The competent authorities may also agree to the application of an arbitration procedure administered by an independent arbitrator.***

Option C:

Mandatory SDR preceding mandatory arbitration

“Before submitting any unresolved issues arising from the case to arbitration in accordance with the preceding paragraph, the competent authorities of the Contracting States shall, unless they otherwise agree, submit these issues first to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting them in reaching an

agreement. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.”

Article 25 OECD Model Tax Convention on Income and on Capital:

(...)

5. Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

6. Before submitting any unresolved issues arising from the case to arbitration in accordance with the preceding paragraph, the competent authorities of the Contracting States shall, unless they otherwise agree, submit these issues first to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting them in reaching an agreement. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Article 25(alternative B) United Nations Model Double Taxation Convention:

(...)

5. Where,

- (a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within three years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if either competent authority so requests. The person who has presented the case shall be notified of request. These unresolved issues

shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. The arbitration decision shall be binding on both States and shall be implemented notwithstanding any time limits in the domestic laws of these States both competent authorities agree on a different solution within six months after the decision has been communicated to them or unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

6. Before submitting any unresolved issues arising from the case to arbitration in accordance with the preceding paragraph, the competent authorities of the Contracting States shall, unless they otherwise agree, submit these issues first to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting them in reaching an agreement. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Option D:

Mandatory SDR at request of either competent authority, as an alternative for mandatory arbitration

“Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within [one year] from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting the competent authorities in reaching an agreement if either competent authority so requests. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.”

Article 25 United Nations Model Double Taxation Convention:

(...)

5. Where,

- (a) *under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and*
- (b) *the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within [one year] from the presentation of the case to the competent authority of the other Contracting State,*

any unresolved issues arising from the case shall be submitted to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting the competent authorities in reaching an agreement if either competent authority so requests. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Option E:

Mandatory SDR at request of a taxpayer, as an alternative for mandatory arbitration

“Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and**
- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within [one year] from the presentation of the case to the competent authority of the other Contracting State,**

any unresolved issues arising from the case shall be submitted to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting the competent authorities in reaching an agreement if the person so requests. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.”

Article 25 United Nations Model Double Taxation Convention:

(...)

5. Where,

- (a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and**
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within [one year] from the presentation of the case to the competent authority of the other Contracting State,**

any unresolved issues arising from the case shall be submitted to a supplementary dispute resolution mechanism administered by an independent facilitator, including a facilitated discussion process, non-binding expert determination, or mediation, for the purpose of assisting the competent authorities in reaching an agreement if the person so requests. Such supplementary dispute resolution process shall in any case be concluded within [60 days] of the date the facilitator was appointed. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

Explanatory Note by the TRIBUTE Initiative

Purposes of our proposals

We note that in the OECD webcasts of 12 February and 8 June 2015 on the progress of the BEPS project OECD officials confirmed that provisions for binding arbitration would be part of the envisaged Multilateral Instrument modifying bilateral tax treaties for purposes of a quick implementation of treaty-related BEPS recommendations. We further note the OECD press communication of 28 May 2015 announcing that the ad hoc Group formed to develop the BEPS Multilateral Instrument has been formally established.

Our present proposals are meant to assist the ad hoc Group in its considerations on the provisions of the Multilateral Instrument concerning arbitration and dispute resolution more generally, pursuant to BEPS Action 14. Next, these proposals may also serve the purposes of the OECD or the United Nations in any future review of the relative provisions of their respective model income tax conventions. We are available to discuss our proposals with members of the ad hoc Group, as well with any interested bodies of the OECD or the United Nations, should they wish so.

We deliberately drafted our proposals as plain texts without any particular structuring, as we anticipate that the draft of the Multilateral Instrument will use a structure or numbering of provisions of its own design. Each of our proposals easily fits in with any treaties that carry provisions on mutual agreement procedure modelled after either Article 25 of the OECD model convention or Articles 25 or 25 (alternative B) of the United Nations model convention. For each proposal we have included samples of how this would work.

Our proposals are designed as alternative options which countries may choose from, or to some extent may combine, for adoption in their treaties. Our ranking of the various proposals from A to E is for sake of convenience only. We intend no order of preference – all proposals are to us of equal value, and are intended to accommodate the

different needs or concerns of the OECD members and developing countries participating in the development of the Multilateral Instrument.

Supplementary dispute resolution (SDR)

The overall objective of our proposals is to promote the use of supplementary dispute resolution mechanisms (SDR) in mutual agreement procedures. SDR is process-related assistance by an independent facilitator, usually in the form of either or both facilitation of discussions, non-binding expert determination, or mediation.

We believe that the use of SDR can play an important role in unlocking stalled mutual agreement discussions, and can help to provide to competent authorities a perspective on the discussions, identify process hindrances, and in appropriate cases bring a more problem-solving focus to the discussions. SDR is typically only facilitative, and non-binding as to any results. It is an informal and flexible process, fit to be tailored to the specific substance matter and circumstances of a dispute, and as such a time and cost efficient means to improve the effectiveness of MAP discussions. Throughout a SDR process it is the disputing parties that remain in full control both of the various steps to be taken in the process and of the outcome, if any, which depends entirely on their voluntary consensus. SDR is designed to preserve mutual relations between parties and can even help to improve their mutual relations on longer term. In this respect our proposals respond to the invitation in the OECD Public Discussion Draft on BEPS Action 14, in paragraph 40, for suggestions for additional measures to facilitate the resolution of a MAP case.

Moreover, SDR because of its non-binding nature can be an acceptable alternative for those countries that for sovereignty or other reasons cannot commit to arbitration, which by contrast is binding. Also, we can imagine other countries wanting to gain practical experience first with less far-reaching non-binding SDR, before eventually deciding if they want to commit to binding arbitration. We express our agreement with both present provisions on mandatory arbitration in Article 25 of the OECD model convention and Article 25 (alternative B) of the United Nations model convention, and we will support any proposals as there may be in the Multilateral Instrument to promulgate their wider adoption by countries in their treaties. Our proposals are not meant to question in any way the legitimacy or scope for mandatory arbitration. At the same time, however, it must be recognised and respected that there are many countries whose interests are targeted at other, non-binding approaches for purposes of improving treaty dispute resolution. It is those countries' interests that we seek to accommodate by our present proposals.

We note that a number of major countries, e.g. the United Kingdom, the United States, Australia and the Netherlands, regularly apply facilitation or mediation by independent professionals at domestic taxation level. The OECD Manual on Effective Mutual Agreement Procedures (MEMAP) 2007, in paragraph 3.5.2., and the Commentary on Article 25 of the OECD model convention, in paragraphs 86 and 87, explicitly recognise the use of SDR mechanisms, in particular mediation and non-binding expert determination, as part of the regular mutual agreement procedure under Article 25(4) of the OECD model convention. The United Nations 2012 Guide to the Mutual Agreement Procedure under Tax Treaties, in paragraph 66, suggests more specifically the hiring in of services of external experts, e.g. economists or industry specialists, in complex transfer pricing cases.

Notwithstanding, SDR is as far as we are aware still hardly practised at tax treaty level. We believe this is mainly due to competent authorities being unfamiliar with SDR: how it functions, which value added it may have for mutual agreement procedures, or which responsibilities the independent facilitator has. Also, and likely as result of this low demand, there is still only scarce availability of facilitators with specialisation in international tax matters.

We anticipate that explicit treaty language addressing the availability of SDR such as we now propose through various options will help to promote a wider and more frequent use. In addition, TRIBUTE will offer a list of qualified facilitators available for

competent authorities to choose from, as well as a draft SDR Process Agreement for competent authorities wishing to appoint a TRIBUTE facilitator, which describes in detail the various SDR techniques available, the course of the process, and the roles in the process of both the facilitator and the competent authorities themselves.

Position of taxpayers

Generally, we do not envisage that taxpayers should have a right to request that competent authorities use SDR, since a SDR process is part of the discussions between competent authorities within the framework of a mutual agreement procedure and taxpayers, besides being allowed to give presentations, do ordinarily not interact in these discussions. The sole exception is our proposal under option E that provides for mandatory SDR at request of a taxpayer.

We note, however, the suggestion made in the OECD Public Discussion Draft on BEPS Action 14, in paragraph 8, for the appointment of an appropriate forum of competent authorities that should monitor the overall functioning of the mutual agreement procedure. We can imagine that taxpayers in individual cases might inform such monitoring forum if MAP discussions appear to be locked and ask the forum to invite the competent authorities to consider applying SDR. Alternatively, we can imagine TRIBUTE undertaking this action viz. the competent authorities on behalf of taxpayers. Taxpayers should be allowed to make such requests at any time during MAP discussions, and irrespective if competent authorities might be committed to apply SDR at a later stage as we propose under options C, D and E.

It is a different matter if competent authorities would themselves invite taxpayers to join them as party in a SDR process. This might be of interest e.g. to countries that allow taxpayers to directly participate in discussions between competent authorities on a bilateral or multilateral Advanced Pricing Agreement. Taxpayer participation in a SDR process would need to be decided for each case individually, and would rest solely on the initiative of either of the competent authorities and be subject to their mutual agreement.

Option A: Voluntary SDR

Option A provides for voluntary SDR by way of a mutual agreement between competent authorities. Competent authorities may agree to proceed to SDR at any time during MAP discussions, whenever it appears to them the use of SDR might pay a substantial or even indispensable contribution to enhancing an amicable resolution for their dispute. We envisage that competent authorities when agreeing to apply SDR at the same time also agree a mode of application, including the appointment of a facilitator, the issues for the facilitator to address in the SDR process, and the SDR mechanisms the facilitator may use.

As said, the reason why we propose this option is primarily to explain and promote the use of SDR as part of the regular set of MAP instruments competent authorities have at their disposal. This proposal may therefore not be read as to preclude or limit in any way the use of SDR under the vast body of treaties that contain just the present wording of either Article 25(4) of the OECD or United Nations model conventions.

We are aware that in some countries competent authorities need explicit treaty language as authorisation to be able to agree the use of SDR. This option is meant also to provide such authorisation where needed.

Option B: Voluntary arbitration

Option B provides for voluntary arbitration purely by mutual agreement between competent authorities, as opposed to mandatory arbitration at request of either a taxpayer under Article 25(5) of the OECD model convention, or of either of the competent authorities under Article 25 (alternative B) of the United Nations model convention. Countries having chosen to adopt in their treaties option A on voluntary SDR may also choose to adopt this option B.

We propose this option since in practice a SDR process may lead competent authorities in an individual case to wish to complete the resolution of the dispute by submitting any remaining issues to arbitration. Voluntary arbitration is recognised as part of the regular mutual agreement process by the Commentary on Article 25 of the OECD model convention, in paragraph 69, without any explicit treaty provision to its effect being required. The Commentary on Article 25 of the United Nations model convention, in paragraph 14, suggests to include an additional paragraph expressly providing for voluntary arbitration. Our proposal is meant to create better awareness of the possibility of voluntary arbitration and where necessary provide authorisation to competent authorities for agreeing voluntary arbitration.

We emphasize that countries by adopting this proposed reference only acknowledge the possibility of voluntary arbitration, but an actual commitment would remain subject to a mutual agreement between competent authorities for each case individually. Countries unable to commit to any type of arbitration, voluntary as well as mandatory, should obviously not adopt this option.

Option C: Mandatory SDR preceding mandatory arbitration

While option A concerns the use of SDR on a wholly voluntary basis, this option C by contrast provides for mandatory SDR. This option is intended as one package together with the existing provisions on mandatory arbitration of either Article 25(5) of the OECD model convention or Article 25(5) (alternative B) of the United Nations model convention. We propose to allow competent authorities, after two years or three years, respectively, of unsuccessful MAP discussions and before having to deliver themselves to mandatory arbitration, a limited 60 days period of extra time to continue exploring possibilities for an amicable solution with the assistance of an independent facilitator.

This proposed option draws from experiences under the EU Arbitration Convention as recorded by statistics of the EU Joint Transfer Pricing Forum⁷, where competent authorities with the taxpayer's consent frequently prolong MAP discussions beyond the two years time limit period provided under the Convention, in order to make an ultimate attempt for an amicable settlement and thus avoid having to go to arbitration. Our proposal is different, however, in that it obligates competent authorities to seek for the time of the prolongation of their discussions the assistance of a facilitator.

We believe the assistance of a facilitator will give competent authorities a much better chance of achieving a resolution by their own strength at this very last stage, and thus will better justify the delay of the arbitration – that is, to the extent the SDR process would remain fruitless and arbitration would still be necessary. Even where a SDR process would fail, it would in any case help competent authorities in preparing well for the arbitration and thereby contribute to a time and cost effective arbitration process.

This option works to limit the need for mandatory arbitration in favour of a resolution through the use of SDR. Such limitations may help in encouraging more countries to embrace the rule of mandatory arbitration; we refer in this respect to Option 23 in the OECD Public Discussion Draft on BEPS Action 14. But we emphasize

⁷ Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the of 2013, October 2014, DOC:JTPF/008/2014/EN

that this option does not in any way affect the principle or scope of mandatory arbitration itself.

Based on practical experiences with SDR in domestic tax cases, we believe that a period of 60 days should be sufficient to complete a SDR process even in complex cases of international taxation. These 60 days would normally be successive, but some short intervals could be permitted, e.g. for mediators to propose interim conclusions or recommendations, and for competent authorities to have internal discussions. The 60 days period commences from the date the facilitator is appointed, rather than the earlier date of the expiration of the period of two years of prior MAP discussions under Article 25(5) of the OECD model convention or three years under Article 25(5) (alternative B) of the United Nation model convention. It is reckoned that the competent authorities need some extra time to agree the proper arrangements for the SDR process. Countries would be free to agree a somewhat longer period than the 60 days mentioned if they prefer.

Under this option the competent authorities are expressly charged with mutually agreeing the mode of application for the SDR process. This is different from option A, where the decision to use SDR is based on a mutual agreement between the competent authorities and a mode of application makes part of that agreement.

It is ordinarily the competent authorities which by their mutual agreement on the mode of application appoint the facilitator. Where competent authorities fail to reach agreement and have not agreed an appointing authority either which can decide on the facilitator for them, we can imagine that the monitoring forum as envisaged in the OECD Public Discussion Draft on BEPS Action 14 might act as such appointing authority. In cases where competent authorities bring their dispute for SDR to TRIBUTE, the matter will be referred for a final recommendation to the Secretary General of the Permanent Court of Arbitration.

Competent authorities are left free to decide, on a case by case basis, not to submit a dispute to SDR and proceed immediately to mandatory arbitration, e.g. because they have unsuccessfully attempted a SDR process before in the case, or because they consider their dispute as such principled that it is beyond any compromise solution.

We envisage that disputes brought to TRIBUTE for arbitration will as a standard routine be examined first, in consultation with the competent authorities, whether an amicable solution through SDR might still be worthwhile trying. This option allows for this. Otherwise competent authorities would be bound to immediately proceed to arbitration even if SDR would appear the better approach.

Option D: Mandatory SDR at request of either competent authority, as an alternative for mandatory arbitration

Option D provides for mandatory SDR as an alternative for mandatory arbitration. With this option we mean to serve in particular those countries that are unable to commit to mandatory arbitration and therefore at present adhere to the provisions of the ordinary Article 25 of the United Nations model convention or Article 25 of the OECD model convention as it stood before Article 25(5) became included, but nevertheless want to express in their treaties their readiness to invest in improving the effectiveness of the MAP resolution process. Mandatory SDR as an alternative for mandatory arbitration was suggested already as early as in the OECD report of 27 July 2004: "Improving the Process for Resolving International Tax Disputes", in paragraph 133, as an issue for further review but was never actually pursued since. Under this option SDR is at request of either competent authority, different therefore from the proposed option A where SDR requires a mutual agreement between the competent authorities.

We note that the mandatory element in this option only concerns the submission of the dispute to a SDR process, and that there is no requirement for any of the parties involved in the process to necessarily agree a resolution. Such is the non-binding nature of SDR. However, we trust that competent authorities will act in good faith and live up to

the commitment made by their countries in adopting mandatory SDR by using their best endeavours to reach agreement.

We believe that the proposed period of one year of MAP discussions before a request for mandatory SDR can be made should be sufficient to reasonably determine if the use of SDR would better enable the competent authorities to agree a MAP resolution. Countries are free to decide on a somewhat longer period of time, e.g. where for lack of resources their competent authorities need more time to properly organise and conduct MAP discussions. However, to wait for any longer period than that might work counter-productive, as it might result in competent authorities to harden in their positions, thus making a successful SDR process more difficult.

Option E: Mandatory SDR at request of a taxpayer, as an alternative for mandatory arbitration

Option E differs from the previous option D only, in that it provides for mandatory SDR at request of a taxpayer instead of at request of either competent authority. The reason we include this option is that we anticipate there are countries that, while unable to commit to arbitration, are not opposed against allowing taxpayers a right to request for SDR. Moreover, we anticipate that a competent authority having initiated MAP discussions on behalf of a taxpayer will generally be supportive as well to a request for SDR from that taxpayer.

The TRIBUTE SDR Programme

TRIBUTE will offer competent authorities a comprehensive SDR Programme, providing for the full range of mechanisms of facilitated discussions, non-binding expert determinations, mediation, or voluntary arbitration, whichever the competent authorities with advice from the facilitator in each individual case agree would fit the substance matter and circumstances of the dispute best.

Competent authorities can join this Programme by entering into a SDR Process Agreement with TRIBUTE. We attach a draft form of the SDR Process Agreement. The draft sets out in more detail how TRIBUTE could assist the parties to the dispute. The draft is intended to be a preliminary discussion document, and for that reason it is widely drawn to provide a range of opportunities not all of which might be relevant to any particular case. The scope of a SDR Process Agreement and its specific terms will be negotiated between the parties with the assistance of TRIBUTE. The draft provides for participation by taxpayers in the SDR process, but this is of course relevant only to cases where the competent authorities and the taxpayer have mutually agreed so. Where a SDR Process leads the parties to settle all or some of the issues under dispute, the terms of the settlement will be laid down in a settlement agreement for the parties to sign and that agreement will constitute a binding and enforceable MAP outcome document.

As the draft evidences, SDR is an informal process by its nature, covered only by a limited set of standard rules. The main requirement imposed on the parties is a cooperative, good faith attitude towards the facilitator and each other. Next to a SDR Process Agreement there will be TRIBUTE Mediation Rules constituting a code of conduct for the TRIBUTE facilitators.

TRIBUTE will host a list of available qualified facilitators – international tax experts or dispute resolution experts. These facilitators will be either accredited as SDR specialist under any applicable domestic laws, or have significant practical experience in administering SDR processes. Parties are free to choose a facilitator from other accredited organisations (e.g. the Centre for Effective Dispute Resolution), should they prefer so.

A unique facility for arbitration and SDR

We recognise that at present both the OECD and the United Nations model conventions leave it to the competent authorities to settle which organisation or persons should administer their arbitrations. It is only the EU Arbitration Convention that provides for a list of experts for appointment as chair of an advisory committee, but that list is composed by the European member states themselves and from European nationals alone. We will respect it if it were decided to leave this discretion of the competent authorities unchanged under the Multilateral Instrument. In our present proposals we anticipated that this will be the case.

Nevertheless, we want to point out, as we did before in our submission of 16 January 2015 to the OECD in response to the Public Discussion Draft on BEPS Action 14, that the level of professionalism, quality of judgment, transparency, consistency of considerations and decisions, time and cost efficiency would all substantially benefit if the ad hoc arbitration currently practised would be replaced by arbitration by a permanent, specialised body availing of its own internationally recognised experts. Moreover, we believe that these advantages of permanent arbitration could only be fully realised if arbitrations would be administered by one unique facility. We believe that TRIBUTE would be perfectly suited as such unique facility, with its envisaged global scope of operation and being supported by the Permanent of Court of Arbitration which is uniquely created to facilitate the resolution of disputes between states. Similar considerations apply for the administering of SDR.

Countries that wish SDR processes or arbitrations to be administered exclusively by TRIBUTE can delete in their treaties the sentence: "The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph." as is included in Article 25(5) of the OECD model convention, Article 25(5) (alternative B) of the United Nations model convention, and either of our proposed options C, D and E. Instead, they can include the following provision if the treaty provides for both SDR and arbitration, whether voluntary or mandatory:

"Any supplementary dispute resolution mechanisms and any arbitrations under the provisions of this Article shall be administered by the TRIBUTE organisation in accordance with such rules as the competent authorities of the Contracting States agree for these purposes with the TRIBUTE organisation."

Alternatively, if the treaty does not provide for arbitration, neither mandatory nor voluntary, but only for SDR, they can include the following provision:

"Any supplementary dispute resolution mechanisms under the provisions of this Article shall be administered by the TRIBUTE organisation in accordance with such rules as the competent authorities of the Contracting States agree for these purposes with the TRIBUTE organisation."

Countries can include the draft TRIBUTE SDR Process Agreement in a protocol or exchange of notes along with their treaties if they want to provide explicit authorisation for the competent authorities to negotiate and agree the terms for a SDR Process Agreement on the basis of the draft.

SDR Process Agreement
between the countries [X, Y and Z] [together with [taxpayer]] for resolving [describe dispute]
in respect of the applications of the provisions of [describe relevant Double Tax Treaties]

1. Introduction

On [date] [name of Competent Authorities] being the Competent Authorities of [countries X, Y, Z] assembled [at a meeting in [state country]] [by video conference link] [with / at the request of [name of taxpayer¹]] pursuant to and in accordance with the provisions of Article 25(4) [Model Treaty] applying the best practice guidelines set out in the 2007 Manual on Effective Mutual Agreement Procedures (MEMAP) authorising the Competent Authorities to communicate directly to discuss the possibility of resolving their current dispute through the use of Supplemental Dispute Resolution (“SDR”) processes and procedures.

The dispute concerns [insert brief summary, including overview of issue(s) / fact, law or both and relevant accounting periods and/or tax years impacted].

[Both / All] parties are keen to resolve the dispute without recourse, if possible, to arbitration or any other form of litigation and have agreed to enter into this process in good faith and use their best endeavours to resolve in a timely way the dispute through SDR, including facilitated discussions between the parties non-binding expert determination and, if necessary, mediation.

The parties also agree they may decide as a result of progress made in the resolution of the dispute using SDR techniques to submit the issues that remain unresolved to arbitration using the TRIBUTE arbitration rules for that purpose.

This Agreement has been drafted on behalf of [all / both] parties by TRIBUTE, an independent organisation based in the Hague, Netherlands, appointed by them jointly for this purpose to facilitate, administer and manage the SDR process.

This Agreement sets out a framework and timetable for agreeing a proposal for how the process might work, together with an indicative timetable and dates which the parties will endeavour to meet.

It is agreed between the parties that the whole of the SDR process is on a without prejudice and confidential basis in which TRIBUTE will assist them in working towards a negotiated settlement of the dispute but with the parties in ultimate control of the decision to settle and the terms of resolution.

2. Administrative Process

2.1. The following administrative points need to be worked through:

- (1) Facilitated Discussion Process. Do the parties want to engage in such a process? This process can be useful where the dispute is still in the “fact-finding” and/or “fact understanding” stage. In the circumstances the parties need to decide which of the following three principal methods (or any other suggested format) is preferable from their point of view:

¹ Note: the SDR Process Agreement anticipates the taxpayer being invited to have some participation in the process.

- joint facilitation: where a facilitator is appointed by each party and they act together whether meeting all sides at the same time or meeting each side separately. In this situation anything said to the facilitators during the process in a separate private meeting by any one party would be treated as confidential and not be disclosed to any other party without express consent;
- separate facilitation: each facilitator would act separately, each with their own appointed party but meeting and exchanging views and positions to be communicated. Whilst this process reduces any perceived risk of discussing sensitive issues, it will increase the time engaged in the process;
- sole facilitation: this is where all the parties agree to the appointment of a single independent facilitator to manage and conduct the facilitated structured discussions.

(2) Appointment of Facilitator(s).

(3) Non-binding expert determination. The parties should consider whether the process could be assisted by appointing an expert to consider and give a non-binding determination on any one or more of the issues the subject of the dispute.

(4) Appointment of expert and agreeing issues to be determined.

(5) Mediation. In the event the dispute cannot be resolved at the pre-mediation facilitated structured discussion stage, the parties need to consider whether at that point to refer the dispute to a mediator.

(6) Appointment of Mediator.

(7) Process, Procedure, Costs and Timetable. The parties need to agree the process, how it shall proceed, the location and form for meetings or video / telephone conference seminars and the timeframe for it.

2.2. The parties acknowledge that the participation by the taxpayer in the process would be beneficial for the purposes of clarifying the factual background in respect of the arrangements the subject of the dispute as well as offering its view on the technical issues and potential outcome.

However, the parties also agree that there will be a need for the Competent Authorities to engage in confidential discussions and communications between themselves in respect of which the taxpayer would not be invited to participate.

The parties will work together to agree in good faith and in accordance with the best practice guidelines in MEMAP, a protocol for taxpayer participation in the process.

2.3. TRIBUTE will liaise with all parties to work with them individually and jointly to agree a consensus for a way forward in respect of the matters referred to in paragraphs 2.1 and 2.2 above with a view to reaching an agreement within 30 days of the date of this Agreement.

2.4. An outline suggested process is set out in the Appendix to this Agreement for illustration purposes only and covers the facilitated pre-mediation structured discussion, expert determination and mediation elements of the SDR Process.

APPENDIX

1. Suggested process for a facilitated discussion process, non-binding expert determination and mediation

The following details the steps the parties have agreed to follow. If at any stage either party decides that the dispute can only be resolved by arbitration (or other means), they can notify this to the other party and the SDR process will be discontinued.

Preliminary step: *[Insert details of any preliminary steps required prior to commencing the SDR process.]*

[Insert detail of how preliminary step is to be carried out, including timescales and dates.]

Step 1: Parties to identify which facts and issues are in dispute and which are not

[Insert detail of how this is to be carried out, including timescales and dates. This could entail a series of structured discussions around all potential outcomes of the mediation.]

Step 2: If there was no resolution after Step 1, the parties to prepare position papers based on the key facts and issues identified still to be in dispute.

[Insert description of papers to be provided and dates for exchange, along with method of exchange, i.e. electronically or by same day courier.]

Step 3: Presentation of parties' positions (and possibly expert determination process)

[Insert agreed timescale]

[Optional: The meeting will take place on DDMMYY. The parties will take turns, with [] going first to present their viewpoint. The presentations can take any format and involve any media, but each party may only present for a maximum period of [] minutes. Following both presentations, the parties will go to separate rooms and take a break of one hour to reflect and to identify an outcome which is agreeable to them and possibly, agreeable to the other party 'offer'. After the break, the parties will meet and discuss their respective offers. It is hoped that the parties will agree to a mutually acceptable offer and, by doing so, will have resolved the dispute.]

- If the parties are unable to reach agreement then the need for a non-binding expert determination and/or mediation will be considered. The intention is that a mediator will be appointed to assist in the negotiation of an agreement.
- If the parties agree that the appointment of an expert to give a non-binding determination would assist the process, each party will submit to TRIBUTE the name of one but no more than three experts that they would be willing to appoint for that purpose. TRIBUTE will then work with the parties to agree the appointment of an expert from that combined shortlist of candidates, taking into account their experience and competence in the matter(s) in dispute. *[Note: draft a default position, i.e. if neither party volunteers an expert for the shortlist or after consultation with them TRIBUTE cannot get the parties to agree.]*
- If the parties are still not able to resolve this dispute, the parties are to agree to appoint a mediator.

- If it is agreed that a mediator should be appointed then that should happen by [*insert time and date*].
- The dates and detailed timetable in relation to Steps 4 to 6 will (if needed) be discussed and agreed by the parties in due course. In particular, it is likely that any timetable will be subject to the availability of the particular mediator which the parties agree to appoint. However, the parties will be mindful of the desire to maintain momentum with the process and will endeavour to ensure that Steps 4 to 6 are completed as quickly as possible.

Step 4: Appointment of a mediator

- The parties will each submit to TRIBUTE the name of one but no more than three mediators either identified from the TRIBUTE list or from other accredited organisations (e.g. Centre for Effective Dispute Resolution) or request TRIBUTE to propose a selection of up to three candidates for consideration. TRIBUTE will then work with the parties to agree the appointment of a mediator from that combined shortlist of candidates taking into account their experience and competence in the matter(s) in dispute. In the event agreement cannot be reached by the parties in this way on the appointment of a mediator, TRIBUTE will refer the matter to the Secretary General of the Permanent Court of Arbitration for a final recommendation to the parties which they will consider in good faith with a view to that person's appointment as mediator.

[*Anticipated date*]

- On [*date TBC*], the parties will:
 - formally appoint the mediator agreed by the parties; and
 - send copies of all documents prepared by the parties for Steps 1 to 3, and any further submissions the parties wish to make, to the mediator, and copy these documents to the other party.
- Unless expressly agreed with the other party, neither party will seek to contact or discuss any aspect of the case or point(s) in dispute with the appointed mediator prior to the mediation, outside of any pre-agreed meetings / conference calls with the mediator (as set out in this document).
- Between [*dates TBC*], the mediator is expected to review the documents sent by [].
- On [*date TBC*], the parties (including the taxpayer) and the mediator will talk via a conference call. The purpose of this call is to give the mediator an opportunity to seek clarifications and clarification of any issues (if required) and to ask questions in order to gain a better understanding of this dispute. During the call, the parties and the mediator will agree on mutually convenient day(s) to meet for the formal mediation process. [*Alternatively, this could take place at a face to face meeting.*]
- By 5pm of [*date TBC*], the mediator must have familiarised himself / herself with the facts and the issues in dispute. By 5pm on the same day, the parties and the mediator must have also agreed the amount of time required to complete the mediation process.

Step 5: Mediation Process

Week commencing []

- On the agreed day(s), the parties and the mediator will meet at the chosen venue.
- The process will begin with a short plenary session in which each party (including, where agreed, the taxpayer) will make a brief presentation in relation to what they would like to achieve in the mediation and provide a brief summary of their position following the facilitated discussions.
- The parties and the mediator will be allocated their own separate rooms. During the course of the day(s), the mediator will move between the rooms to hear and discuss the views of the parties.
- The object of these discussions is for the mediator to assist the parties reach agreement on a solution to their dispute, which could include one of the range of outcomes identified in Step 1.

Timings

- *[Optional: The parties are to meet, at least once, between [dates TBC].]*
- The mediation process to commence at 9am on the chosen day(s) and to conclude by 5pm, unless both parties agree that they wish to continue for a longer time.

Step 6: Settlement Agreement or document summarising key points of agreement / difference

Week commencing []

- Following the mediation process:
 - If a basis for settlement has been agreed between the parties, [Party A] to draft a written settlement agreement formalising the outcome agreed upon. [Party A] to send [Party B] the draft agreement electronically by 9am on [date TBC]. [Party B] to review and the parties to sign the same on [date TBC].
 - If a basis for settlement has not been agreed between the parties, [Party A] will draft a document which summarises the key points which have been agreed as well as the principal points of difference (either factual or technical) between the parties.
- In either case, [Party A] will send [Party B] the draft settlement agreement or draft summary of key points of agreement / difference (“the Initial Draft”) electronically by 9am on [date TBC]. [Party B] will review and provide any comments / suggested amendments to [Party A] on or before [time] on [date TBC].
- [Party A] will then send a copy of the Initial Draft together with any comments / suggested amendments received from [Party B] to the taxpayer on or before [time] on [date TBC] to give the taxpayer the opportunity to review and provide any comments / suggested amendments to the parties on or before [date to be agreed].

Timings:

- [Party A and Party B] will draft, review and amend with a view to signing the settlement agreement over the course of [date TBC] and no later than 5pm on that day or agree the summary of key points of agreement / difference by [time on date TBC] in either case, having first taken into account the comments / suggested amendments (if any) received from the taxpayer.

2. Ultimate Outcome

The parties will have resolved the scope of their dispute. In the alternative, they have narrowed the scope of the dispute and, through review and discussion of the facts and arguments, advanced the preparations for arbitration, if agreed or mandated by the [name the Treaty]. The parties will have reached an understanding of each party's arbitration aspirations.

3. Rules of conduct

Confidentiality

The SDR process proceeds entirely on a 'without prejudice basis'. Anything said and all documents produced during the SDR process are confidential and without prejudice to the parties and shall not be disclosed to any third party, other than the parties' professional advisors (including statutory auditors), unless the express consent of each of the parties is obtained and subject to the obligations placed on the parties by the operation of [] law.

Record of action points

At the beginning of any meeting (either via telephone conference call, video conference call or face-to-face), the parties will agree a note taker in order to record the action points emerging from the discussions. The notes taken will not be formally settled by the parties but may assist in the event of any misunderstandings that may have occurred during the course of these discussions.

Compliance with SDR best practice

By entering into this process, the parties have demonstrated a reasonable attempt to resolve the dispute by SDR, as encouraged under the MEMAP 2007 guidance.