

SHAPING THE FUTURE OF TRANSNATIONAL TAX DISPUTE SETTLEMENT: THE PATH TO MEDIATION

Julien Chaisse & Xueliang Ji*

Abstract

The underlying objective of the Article is to impart an insightful comprehension of mediation and its efficacy as a viable alternative for resolving transnational tax disputes. The Article posits three main arguments. Firstly, mediation, as a method of conflict resolution, offers an array of benefits, and its utilization has witnessed a surge in popularity, particularly with the recent establishment of the Singapore Mediation Convention. Secondly, in the rapidly evolving global landscape, transnational tax disputes have become increasingly intricate and arduous to adjudicate. The current system of dispute resolution, though possessing certain advantages, ultimately falls short in keeping pace with the evolving demands of the industry. The final contention is that mediation can serve as a potent tool to augment the effectiveness of the Mutually Agreed Procedure (MAP) system. In sum, the Article posits that the use of mediation in the context of tax-related disputes embodies the characteristics of soft law, owing to its imaginative and inventive nature. Additionally, as a non-binding mechanism, mediation confers increased flexibility to contending parties, particularly sovereign entities, to safeguard their respective interests. Consequently, mediation can be a valuable adjunct to the MAP system in facilitating the resolution of tax-related conflicts.

* Mr. Julien Chaisse is a Professor at the School of Law, City University of Hong Kong, and President of the Asia Pacific FDI Network. He can be reached at julien.chaisse@cityu.edu.hk. Mr. Xueliang Ji is a Research Associate at the Asian Academy of International Law (AAIL) and a PhD Candidate at the Faculty of Law, Chinese University of Hong Kong. He can be reached at xueliang.ji@link.cuhk.edu.hk. This work was substantially supported by the Humanities and Social Sciences Prestigious Fellowship Scheme (HSSPFS) from the Research Grants Council of the Hong Kong SAR (Project No. CityU 31000121). The authors would like to express their gratitude to Richard Bolwijn, Jeffrey Owens, David Bradbury, Michael Keen, Zahira Quattrocchi, Ruth Mason, Irma Mosquera, Tove Ryding, Logan Wort, Anita Kapur, and Michael Lennard for their indispensable feedback and comments on this Article. The authors also acknowledge the attendees at the UNCTAD's 7th Edition of the World Investment Forum (WIF2021) session on "The interplay between international taxation and investment – Evaluating the implications of G20's promoted changes" (October 2021) and the comments received from the WU Global Trade and Tax Advisory Group (Wirtschaftsuniversität Wien GTPC), where a previous version of this Article was first presented.

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INTRODUCTION

Ever-increasing global interconnectivity has precipitated a surge in the number and complexity of transnational tax disputes. With all taxation areas, including direct and indirect taxes, falling within the purview of such conflicts, a plethora of multinational entities find themselves embroiled in legal tussles with sovereign states. A prime illustration of such disputes is the ongoing tax inquiry against Kering, a leading luxury conglomerate, by French authorities, who have accused the company of fraud and tax evasion.¹ This is not the first time that Kering has come under the scrutiny of tax having previously faced a similar investigation by Italian authorities, which was ultimately resolved through the payment of substantial fines. Against this backdrop, the viability of traditional methods of dispute resolution, such as litigation and arbitration, has come under increasing scrutiny, paving the way for alternative mechanisms such as mediation to emerge as a potentially effective means of resolving transnational tax disputes.² In fact, many transnational conglomerates, including Apple and Google, have entangled

¹ Coily Lozada, *Kering confirms tax probe by French authorities, denies any wrongdoing*, S&P GLOBAL, Dec. 18, 2020, <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/kering-confirms-tax-probe-by-french-authorities-denies-any-wrongdoing-61804070>, [https://perma.cc/ZW3W-47YS].

² Claudia Cristoferi & Emilio Parodi, *Kering to pay 187 mln euros to settle Bottega Veneta tax dispute*, REUTERS, Apr. 1, 2022, <https://www.reuters.com/business/retail-consumer/kering-agrees-pay-187-mln-euros-bottega-veneta-tax-dispute-sources-2022-04-01/>, [https://perma.cc/JM8X-J5JT].

with authorities and have made payments to regularize their fiscal positions.³ The dilemma in this matter is that the core principle of transnational corporate tax is that companies should be taxed on the territorial base of their activities. But tech companies can skirt ordinary corporate taxes because they have little or no physical presence.

In transnational tax disputes, the state has sovereignty to design its taxation mechanism and decide the nature of its domestic taxation law.⁴ However, as the relationship between countries is growing tight, the effect of the domestic tax system inevitably exceeds a country's borders.⁵ As a logical consequence, tax disputes may arise when "these domestic tax systems are not aligned with each other".⁶ Moreover, the ever-increasing transnational activities of companies show that the risk of double taxation is greater than ever, which is fueling the number of disputes.⁷ The current scenario raises a fundamental challenge for transnational dispute settlement because when a double taxation dispute cannot be adequately resolved, the likely consequence is that the confidence of MNCs and foreign investors decreases, and the free flow of investment may also be affected negatively.⁸

On October 5, 2015, OECD issued Action 14 under Base Erosion and Profit Shifting (BEPS) project to improve the dispute resolution in transnational tax disputes.⁹ Aside from securing revenues by realigning taxation with economic activities and value creation, the OECD/G20 BEPS Project seeks to develop a single set of consensus-based transnational tax rules to address BEPS, and thus to protect tax bases while providing increased certainty and predictability to taxpayers. The OECD and G20 established an Inclusive Framework on BEPS in 2016 to allow interested countries and jurisdictions to collaborate with OECD and G20 members to develop standards on BEPS-related issues as well as review and monitor the implementation of the entire BEPS Package.¹⁰ The Action 14 report,

³ Jiyoung Sohn, *Google, Apple Hit by First Law Threatening Dominance Over App-Store Payments*, WALL ST. J., Aug. 31, 2021, <https://www.wsj.com/articles/google-apple-hit-in-south-korea-by-worlds-first-law-ending-their-dominance-over-app-store-payments-11630403335/>, [https://perma.cc/37EN-KC2C].

⁴ Michelle Markham, *Litigation, Arbitration and Mediation in International Tax Disputes: An Assessment of Whether this Results in Competitive or Collaborative Relations*, 11 CONTEMP. ASIA ARB. J. 278 (2018).

⁵ Vito Tanzi, *Globalization, Tax Competition and the Future of Tax Systems* 4-11 (IMF, Working Paper No. 1996/141, 1996).

⁶ Angel Gurria, OECD, *Remarks on OECD Tax and Competition Policy* (Feb. 11, 2014), <http://www.oecd.org/competition/taxation-and-competition-policy.htm/>, [https://perma.cc/75CF-JSBQ].

⁷ ROY ROHATGI, *BASIC INTERNATIONAL TAXATION*, 2 (2d ed. 2005).

⁸ Michelle Markham, *Recurring Resistance to Tax Treaty Arbitration as a Dispute Resolution Mechanism*, AUSTAXPOLICY: TAX & TRANSFER POL'Y INST., Oct. 23, 2017, <http://www.austaxpolicy.com/recurring-resistance-tax-treaty-arbitration-dispute-resolution-mechanism/>, [https://perma.cc/K59W-3V2J].

⁹ OECD, *Action 14 Mutual Agreement Procedure*, <http://www.oecd.org/tax/beps/beps-actions/action14/>, [https://perma.cc/348W-SDPY] (last visited May 20, 2023).

¹⁰ OECD, *OECD/G20 Base Erosion and Profit Shifting Project*, https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612, [https://perma.cc/5GLU-MCQX] (last visited May 20, 2023).

Making Dispute Resolution Mechanisms More Effective, presents a commitment by countries to implement a so-called “minimum standard” on dispute resolution, according to the OECD.¹¹ Mandatory arbitration is mentioned in the 14th movement of BEPS and OECD model convention (2008 version).¹² The negotiation of the Multilateral Instrument (MLI)¹³ under Action 15 of the BEPS Action Plan¹⁴ has included a mandatory binding MAP arbitration provision to encourage countries to adopt arbitration procedures in their tax treaties. When the states adopt BEPS requirements, they are required to make some changes associated with their domestic taxation system. BEPS aims to decrease disputes; however, disputes may arise in the short term when states are adopting new criteria for dealing with taxation.¹⁵ Thereby, it becomes imperative to consider the tax-related dispute mechanisms on which taxpayers always depend upon.

Pillar One and Pillar Two make up the Two-Pillar Solution. Pillar One aims to ensure an equitable distribution of profits and taxing rights among countries relating to the largest MNEs, which have benefited from globalization. The new rules emphasize tax certainty, which includes a mandatory and binding dispute resolution process for Pillar One. On the other hand, Pillar Two limits tax competition on corporate income tax by instituting a global minimum corporate tax of 15% that countries can use to protect their tax bases (the GloBE rules). Pillar Two does not eliminate tax competition, but rather limits it through multilateral agreements.¹⁶ The Two-Pillar strategy offers to remove tax competition while imposing multilaterally agreed upon limits. These new regulations will apply to multinational firms with worldwide sales of more than €20 billion and profits of more than 10%, which can be called winners of globalization, with 25% of profits over the 10% level to be redistributed to market jurisdictions. Regarding the largest and most successful multinational firms, a fairer division of earnings and taxing rights across nations will be ensured by Pillar One. Some taxation powers over MNEs will be reallocated from MNEs’ home states to the host states, where MNEs are conducting business and making profits. Based on the Multilateral Convention (MLC), the parties will be required to eliminate all Digital Services Taxes and other related equivalent measures affecting all enterprises, as well as to promise not to

¹¹ OECD, *BEPS Actions*, <http://www.oecd.org/tax/beps/beps-actions.htm/>, [https://perma.cc/L7CV-WDNE] (last visited May 20, 2023).

¹² OECD, *Articles of the Model Convention with Respect to Taxes on Income and on Capital*, (July 17, 2008) <http://www.oecd.org/tax/treaties/42219418.pdf>, [https://perma.cc/RCU9-WEKJ].

¹³ The MLI was released in 2016 and serves to amend existing treaties so that they are updated with the OECD BEPS measures agreed by the G20.

¹⁴ OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (2015).

¹⁵ Julien Chaisse & Xueliang Ji, ‘Soft Law’ in *International Law-Making: How Soft International Taxation Law is Reshaping International Economic Governance*, 13 *ASIAN J. OF WTO & INT’L HEALTH L. & POL’Y* 463 (2018).

¹⁶ OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD/G20 Base Erosion and Profit Shifting Project (Oct. 8, 2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm>, [https://perma.cc/4C6B-AKQB].

enact such measures in the future. From October 8, 2021 till the sooner of December 31, 2023, or the effective date of the MLC, no recently legislated Digital Services Taxes or other relevant equivalent requirements are going to be levied on any firm. The method for removing current Digital Services Taxes, as well as other relevant equivalent actions, will be coordinated accordingly.¹⁷ Pillar Two establishes a 15 percent worldwide minimum corporation tax rate. The new minimum tax rate, which is expected to raise an additional US\$150 billion in worldwide tax collections each year, will be applied to companies with revenues over €750 million.¹⁸

In tax treaties, the MAP article permits selected representatives from contracting states' governments to interact with the goal of resolving transnational tax disputes. These examples feature both economic and legal double taxation, as well as contradictions in the interpretation and application of a convention.¹⁹ Through mediation, a neutral third party can help disputing parties resolve disputes in a voluntary and confidential way.²⁰ Some countries, like China, have already utilized mediation in resolving tax-related disputes, including transfer pricing cases.²¹ Furthermore, the United Nations has included mediation as an advance dispute resolution (ADR) method to resolve transnational tax disputes in one chapter of a dispute resolution handbook.²² Mediation is also mentioned in the Commentary on Article 25 of the 2017 UN Model Double Taxation Convention between Developed and Developing Countries.²³ Consequently, mediation can be used more often in the future to complement and facilitate the mutual agreement procedure (MAP) in solving taxation disputes.

The aim of this Article is not to illustrate the defects of the current transnational tax dispute resolution mechanism; instead, the Article aims to enhance the understanding of mediation and how to adopt it in resolving taxation disputes. The Article makes three central claims. The first claim is that mediation has merits in resolving disputes, and with the Singapore Mediation Convention, it has gained more attention.

Firstly, the OECD has suggested mediation as a dispute resolution option, but has not provided specific guidance. Thus, mediation is not considered a serious option by the OECD. The OECD has expressed interest in mediation, so this Article focuses on the Singapore Mediation Convention as a potential solution. Instead of

¹⁷ See *id.*

¹⁸ Reuven S. Avi-Yonah, *The International Tax Regime at 100: Reflections on the OECD's BEPS Project* (Law & Economics Working Paper No. 209, 2021).

¹⁹ OECD, Centre for Tax Policy and Administration, *Manual on Effective Mutual Agreement Procedures (MEMAP)*, (Ctr. for Tax Pol'y and Adm' ed. 2007).

²⁰ ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS: ANALYSIS AND CASE STUDIES (Otto J. Hetzel & Steven Gonzales eds., 2015).

²¹ Svitlana Buriak, Alexandra Miladinovic, & Jean-Philippe Van West, *European Union/OECD/International Conference Report: Tax Treaty Arbitration*, 73 BULL. FOR INT'L TAX'N 3 (2019).

²² See *id.*

²³ UNITED NATIONS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES 2017 UPDATE 199 (2018).

creating a new treaty, it would be better to determine whether and how the Singapore Mediation Convention can be applied to tax disputes.

In addition, even though the Singapore Convention is designed for commercial mediation, it can be applied to other disputes as well. The mechanism can be used, for instance, to resolve disputes between investors and states. A definition of “commercial” is not provided in the Convention, but the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) tends to define it broadly, so investor-state disputes are included in the definition.²⁴ Apart from that, ICSID assumes that investment disputes can also benefit from the Singapore Convention, even though it has not provided an explanation.²⁵ In other words, the Singapore Mediation Convention is not purely limited to commercial disputes.

The third factor is that mediation has gained new credibility since 2020 as a method of resolving transnational disputes. As an example, CETA, ECT, and ICSID all support mediation.²⁶ Historically, mediation was underutilized due to ineffective transnational enforcement regimes. However, this gap has been filled by the Singapore Mediation Convention. Mediation was recognized by the participating states in the Singapore Mediation Convention as a means of handling cross-border disputes. Thus, the Convention has become a new benchmark for dispute resolution for the tax community. In addition, since tax law is becoming increasingly multilateral (BEPS, etc.), there is no need to launch a new initiative.

The second claim is that the current transnational tax dispute resolution regime has its own disadvantages and is not enough to deal with growing transnational tax disputes. The final claim is that mediation can be experimented to use as a soft law in resolving taxation disputes, and with mediation, the efficiency of MAP can be improved. Mediation does not aim to replace the current transnational tax dispute resolution regime; it just aims to make some improvements. This Article provides another angle in dealing with transnational tax disputes.

As the world becomes more interconnected, transnational taxation disputes have become increasingly complex and challenging to resolve. The current dispute resolution regime has its limitations and falls short in keeping pace with the evolving demands of the industry. In light of these challenges, this Article proposes mediation as a complementary mechanism to augment the efficiency of the existing

²⁴ Mushegh Manukyan, *Singapore Convention Series: A Call For A Broad Interpretation Of The Singapore Mediation Convention In The Context Of Investor-State Disputes*, KLUWER MEDIATION BLOG (June 10, 2019), http://mediationblog.kluwerarbitration.com/2019/06/10/singapore-convention-series-a-call-for-a-broad-interpretation-of-the-singapore-mediation-convention-in-the-context-of-investor-state-disputes/?_ga=2.155267774.401588551.1665561051-124403074.1605057846, [https://perma.cc/8TFF-BJYC].

²⁵ INT’L CTR. FOR SETTLEMENT OF INV. DISPS., World Bank Grp., *Proposals for Amendment of the ICSID Rules - Consolidated Draft Rules*, 173-183, (World Bank Grp. ed., vol. 2 2018).

²⁶ Wolf von Kumberg, *Investor State Mediation and the Singapore Convention*, ADR PERSPECTIVES (Apr. 4, 2023, 7:48 PM), <https://adric.ca/investor-state-mediation-and-the-singapore-convention/>, [https://perma.cc/MT33-YB4V].

dispute resolution mechanisms, particularly the MAP. By serving as a form of soft law, mediation confers increased flexibility to contending parties, especially sovereign entities, in safeguarding their respective interests. This Article is divided into four parts, beginning with a brief overview of mediation and its merits, followed by an examination of the current tax-related dispute resolution mechanisms, including MAP and other forms of arbitration. Part III discusses the potential for mediation to address the weaknesses of the current system and improve the efficiency of transnational tax dispute resolution. Finally, Part IV concludes by outlining the potential benefits of mediation and offering recommendations for its successful implementation.

I. MEDIATION AS A DISPUTE RESOLUTION MECHANISM

Mediation, an extensively employed mechanism for resolving disputes, has emerged as a potent tool in the armamentarium of contemporary legal practitioners. A quintessential feature of mediation is the involvement of an impartial third-party professional, who facilitates constructive discussions between conflicting parties to arrive at a mutually agreeable resolution. Whether the setting is an informal meeting or a structured settlement conference, mediation has proven to be an effective means of addressing disputes that may either be the subject of ongoing litigation or have the potential to escalate into contentious legal entanglements. A salient characteristic of mediation is that the contending parties retain full autonomy over the decision of whether or not to settle and the terms of such a settlement. This degree of flexibility has made mediation a valuable resource for resolving complex disputes, particularly those with cross-border implications.²⁷ Commercial mediation provides a non-public forum within which the parties will perceive each other's positions and work along to explore choices for resolution. Further, with the initiation of the Singapore Mediation Convention in 2018, it has gained more attention. In the following parts, a brief introduction of the Singapore Mediation Convention is introduced at Part A, Part B is about the introduction of mediation in trade and investment areas, and the merits of mediation in resolving disputes are analyzed in Part C. This section is about general mediation, not mediation in tax matters.

A. Singapore Mediation Convention

The Singapore Convention on Mediation (Singapore Convention) is a multilateral treaty aimed at providing members with an effective framework for resolving transnational economic disputes. This pact bears some resemblance to the New York Convention on Arbitration, which was signed in the same year. Like the New York Convention for transnational arbitral decisions, the Singapore Convention provides a consistent and effective method for parties who have agreed to a negotiated settlement to apply the terms of that agreement in other

²⁷ David Foster, *What is Commercial Mediation?*, MOORE BARLOW RESOURCES (May 15, 2021), <https://www.moorebarlow.com/what-is-commercial-mediation>, [<https://perma.cc/6NGV-CJPB>].

jurisdictions.²⁸ As a result, the Singapore Convention is attempting to accomplish for mediated international settlement agreements what the New York Convention does for foreign arbitral awards (i.e. allow cross-border enforcement on a large scale) in a standardized manner. The New York Convention has had an unparalleled impact on transnational dispute resolution.²⁹

Furthermore, a fundamental similarity between the two conventions is that they both aim to attract commercial parties to arbitration and mediation rather than other forms of dispute resolution. The New York Convention permits the enforcement of arbitral awards, or written results reached after the parties “submit to arbitration all or any differences that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” Similarly, the Singapore Convention “applies to a written agreement reached by parties after mediation to resolve a commercial dispute.”³⁰ The application of the Singapore Convention favors mediated settlements over other business settlements reached through direct party-to-party negotiations, much like the New York Convention that encourages arbitration over litigation or adjudication.³¹

The Singapore Convention follows the success of language and structure of the New York Convention.³² For example, both conventions demand that “each party to the convention” or “each contracting state” enforce settlement agreements or arbitral judgements in accordance with the procedure of the territory where enforcement is sought and within the terms of the conventions respectively.³³ Additionally, Article V and VI of both conventions are similar in nature. These provisions are essential because they strike a compromise between the competing goals of improving the enforceability of foreign arbitral rulings and the requirement for judicial monitoring.³⁴ Finally, the Singapore Convention, like the New York Convention, requires local implementation of the treaty.³⁵

In mediation, parties have a greater degree of control than in litigation or arbitration, since reaching a settlement is entirely up to them. The mediator does not determine the case by himself but aims to facilitate the resolution of disputes.³⁶ It is the parties’ opinions and not those of the mediators that matter. There has been a significant growth in mediation to settle disputes in the past few years, while the

²⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018 [hereinafter Singapore Convention].

²⁹ Suraj Sajnani, *The Singapore Convention: Is This the New York Convention for Mediation?*, 50 H.K. L.J. 863 (2020).

³⁰ Singapore Convention, *supra* note 28, at 3

³¹ *Id.*

³² Robert Butlien, *The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation*, 46 Brook. J. Int’l L. 183 (2020).

³³ *Id.*

³⁴ Emmanuel Gaillard & Benjamin Siino, *Enforcement under the New York Convention*, in THE GUIDE TO CHALLENGING AND ENFORCING ARB. AWARDS 96 (J. William Rowley QC et. al eds., Law Business Research Ltd., 2019).

³⁵ Singapore Convention, *supra* note 28, at 3.

³⁶ Jeffrey Owens, Arno E. Gildemeister, & Laura Turcan, *Proposal for a New Institutional Framework for Mandatory Dispute Resolution*, 82 Tax Notes Int’l 1011 (2016).

number of disputes that are submitted to commercial courts is decreasing.³⁷ Changes within civil and commercial society are leading to this growth. After the COVID-19 pandemic, arbitration and mediation will still be important dispute resolution tools in an altered legal landscape. Such procedures, it is said, aid in the promotion of access to justice, particularly in legal systems that are not open to the public.³⁸ Even if virtual ADR has some drawbacks, it cannot be overlooked or dismissed that COVID-19 has prepared the way for parties to move towards virtual or hybrid ADR for the quick resolution of disputes, with reduced travel costs, documentation, and other time-consuming procedures.³⁹

The United Nations Commission on International Trade Law (UNCITRAL) approved the final draft of the Singapore Convention on June 26, 2018.⁴⁰ With the enforcing framework built by the Singapore Convention, “mediation will undoubtedly become a fierce competitor of arbitration.”⁴¹ According to Article 1(1), the dispute settlement agreement must be “international,” which requires the parties to the dispute or the subject of the dispute to be international.⁴² Further, as per Article 2(3), mediation is a process to resolve disputes between the parties amicably with the help of a mediator.⁴³ In order to get relief from related competent authority, Article 4 prescribes (1) a settlement agreement; (2) evidence that shows “the settlement agreement resulted from mediation,” like the signatures of mediators or a document which illustrates that the mediation is applied; (3) a requirement that a settlement agreement be signed by parties; (4) that a translation may be required when the official language is not applied to conclude a settlement agreement; (5) that a competent authority may require any necessary documents to verify the requirements mentioned in the Convention and (6) that the authority shall act expeditiously when a request of relief is placed before them by the parties.⁴⁴ Mediation is welcome, especially in Asia, for dispute resolution; as per a survey conducted by the International Institute for Conflict Prevention and Resolution in 2011, more than sixty percent of respondents expressed positive attitudes towards mediation. In light of this and lack of a cross-border implementation of mediated

³⁷ See Houzhi Tang, *Worldwide Use of Mediation* (2013), [https://www.cityu.edu.hk/slhw/adr_moot/doc/Worldwide_Use_of_Mediation_\(by_Prof_Tang_Houzhi\).pdf](https://www.cityu.edu.hk/slhw/adr_moot/doc/Worldwide_Use_of_Mediation_(by_Prof_Tang_Houzhi).pdf), [<https://perma.cc/3RV9-7P92>].

³⁸ See generally Jacqueline Nolan-Haley, *International Dispute Resolution and Access to Justice: Comparative Law Perspectives*, 2020 J. DISP. RESOL. 391 (2020).

³⁹ See generally Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims*, 15 NY DISP. RESOL. LAW. 42 (2022); Amy J Pierce, *Mediation in the Time of a Pandemic: Preparing for the ‘New Normal’ of Online Mediations*, OKLA. BAR J., Nov. 2020, at 24.

⁴⁰ Int’l Trade Law Comm’n, Rep. on Its Fifty-First Session, U.N. Doc. A/73/17 (2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/052/21/PDF/V1805221.pdf?OpenElement/>, [<https://perma.cc/9HR9-2W9E>].

⁴¹ Elisabetta Silvestri, *The Singapore Convention on Mediated Settlement Agreements: New String to the Bow of International Mediation*, ACCESS TO JUSTICE IN EASTERN EUROPE Sep. 2019, at 5, 11.

⁴² Singapore Convention, *supra* note 28, art. 1.

⁴³ *Id.* at art. 2(3).

⁴⁴ *Id.* at art. 1.

resolution agreements, the Singapore Mediation Convention, which provides an effective mechanism to recognize and enforce mediated resolution agreements, is required.⁴⁵ Moreover, with the Singapore Mediation Convention, transnational mediation will have a great future.⁴⁶

When comparing mediation with arbitration, mediation is possibly a successor to arbitration with the establishment of the Singapore Convention.⁴⁷ Due to transnational arbitration's increasing cost and procedural complexity, a more collaborative approach, like mediation, can be utilized to deal with cross-border disputes.⁴⁸ Mediation may be deployed simultaneously with the arbitration in solving cross-border commercial disputes, considering that the majority of countries in East Asia allow mediation to be used with arbitration.⁴⁹ The Singapore Mediation Convention will promote the understanding and development of contractual interpretation.⁵⁰

B. Mediation Clauses in Trade and Investment Treaties

Mediation is accepted and incorporated in some treaties, including Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs), and multilateral treaties. According to the database of Investment Policy Hub, 624 out of 2,572 BITs have incorporated mediation or conciliation for ISDS.⁵¹ For example, in the Norway draft Model BIT 2015, mediation is stipulated as a non-binding procedure to settle disputes amicably.⁵² Moreover, in the China Model BIT 2010, mediation is presented as one form of negotiation, which can be utilized to resolve investment disputes between disputing parties amicably.⁵³ Compared with the examples above, the Thailand Model BIT provides more specific requirements for mediation

⁴⁵ See generally Timothy Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPPERDINE DISP. RESOL. L. J. 1, 3 (2019).

⁴⁶ See generally Lucy Reed, *Ultima Thule: Prospects for International Commercial Mediation*, (NUS Centre for International Law Working Paper No. 19/03, 2019).

⁴⁷ See generally Veronika Vanisova, *Current Issues in International Commercial Mediation: Short Note on the Nature of Agreement Resulting from Mediation in the light of the Singapore Convention* 8, (Prague Law Working Paper No. 2019/II/5, 2019).

⁴⁸ See generally Kim M Rooney, *Turning the Rivalrous Relations between Arbitration and Mediation into Cooperative or Convergent Modes of a Dispute Settlement Mechanism for Commercial Disputes in East Asia*, 12(1) CONTEMP. ASIA ARB. J. 109 (2019).

⁴⁹ See generally *id.*

⁵⁰ Christina G Hioureas, *The Singapore convention on International Settlement Agreements Resulting from Mediation: New Way Forward*, 46(1) ECOLOGY L. Q. 61 (2019).

⁵¹ *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iialnnerMenu/>, [https://perma.cc/7YHA-TNCM].

⁵² Norway Draft Model Bilateral Investment Treaty 2015, Art. 14.2, <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf>, [https://perma.cc/5KEW-ZUVL].

⁵³ Kun Fan, *Mediation of Investor-State Disputes: A Treaty Survey*, 2020 J. OF DISP. RESOL. 332.

procedures, like the timing of initiation and termination.⁵⁴ According to Article 10.4, as long as the disputing parties agree, the mediation can be started or be closed at any time.⁵⁵

Additionally, the 2017 Investment Agreement between Mainland China and Hong Kong SAR provided a mediation mechanism with detailed guidance.⁵⁶ Further, Hong Kong has also proposed to use mediation in ISDS during UNCITRAL Working Group III.⁵⁷

In addition to BITs, FTAs have also provided mediation in the dispute resolution mechanism. For example, mediation has been included in a FTA between the Republic of Korea and the Republics of Central America.⁵⁸ The Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada has incorporated mediation in Article 14.5.⁵⁹ In this treaty, the timing of a mediation's initiation is not particularly regulated, and disputing parties are provided with the flexibility to resolve their disputes among different alternatives.⁶⁰ Under Annex III, the mediation procedure is more strictly regulated.⁶¹ The mediators enjoy procedural freedom, like holding individual meetings whenever they think is appropriate, in order to reach a flexible resolution.⁶²

The Energy Charter Treaty (ECT) also contains provisions for mediation, which allow disputing parties to resort to mediation for help during the cooling-off period.⁶³ Moreover, mediation provisions are also provided in the Trans-Pacific Partnership (TPP).⁶⁴ Even in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), mediation is mentioned, and it states that when disputes appear, the disputing parties may initially utilize mediation to resolve the

⁵⁴ Thailand Model BIT May 2012, Art. 10.4, <https://www.itd.or.th/wp-content/uploads/2019/09/Annex-08-2012-Thailand-Model-BIT.pdf> [<https://perma.cc/6SUC-4Z79>].

⁵⁵ *See Id.* at art. 10.4.

⁵⁶ Mainland & Hong Kong Closer Economic Partnership Arrangement Investment Agreement 2018, art. 20(iv), Dec. 14, 2018, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2657/download>, [<https://perma.cc/DNX3-8CD5>].

⁵⁷ Teresa Cheng, Secretary for Justice of Hong Kong, Closing Remarks at UNCITRAL Working Group III Virtual Pre-Intersession Meeting (Nov. 9, 2020), https://www.doj.gov.hk/en/community_engagement/speeches/20201109_sj1.html/, [<https://perma.cc/LY5C-ABYB>].

⁵⁸ Free Trade Agreement Between the Republic of Korea and the Republics of Central America 2018, art. 9.16, Feb. 21, 2018, http://www.sice.oas.org/Trade/CACM_KOR/English/CACM_KOR_Preamble_e.pdf, [<https://perma.cc/B72Z-JSMT>].

⁵⁹ Comprehensive Economic and Trade Agreement (CETA) Between Canada, of The One Part and The European Union 2014, art. 14.5, Aug. 5, 2014.

⁶⁰ *Id.* at art. 14.5

⁶¹ *Id.*

⁶² *Id.*

⁶³ Energy Charter Treaty 1994, art. 26.2, Dec. 17, 1991, https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_ECT.pdf [<https://perma.cc/Z92Y-3MAF>].

⁶⁴ Trans-Pacific Partnership Agreement 2014, art. 28.6, Feb. 4, 2016, http://www.sice.oas.org/Trade/TPP_Final_Texts/English/Chapter28.pdf, [<https://perma.cc/PH8T-Q62C>].

related disputes.⁶⁵ Specific provisions about the usage of mediation are also contained in the International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development 2006.⁶⁶

C. Advantages of Mediation in Resolving Disputes

Mediation is voluntary in nature, and parties are not bound by it. Due to its voluntary nature, mediators are significant to facilitate the negotiation process. A fundamental feature of mediation is the impartiality of mediators.⁶⁷ ICC Mediation Rules regulate that before appointing a mediator, a declaration of acceptance, availability, fairness, and independence must be signed. If there are facts questioning the mediator's independence or impartiality, these facts should be disclosed to the Centre, and the Centre shall write to the disputing parties and allow them to submit comments in a time limit set by the Centre.⁶⁸ Mediators are not decision-makers; instead, they facilitate voluntary dispute settlement processes and aim to reach agreements that satisfy all parties.

Additionally, mediation stipulates confidentiality obligations.⁶⁹ The meetings used in mediation are private and *ex parte*.⁷⁰ Hearings and communications are conducted privately between the mediator and each disputing party separately, and different opinions can be heard during the process.⁷¹ Private communications between the mediator and parties are standard in the mediation process. Without permission of the party, the information exchanged is confidential and is not disclosed to other parties.⁷² For example, according to SCC Mediation Rules, unless disclosure is authorized by the related disputing party, the information cannot be disclosed to other parties by the mediator.⁷³

With the information obtained from these discussions, the mediator can identify the main disputes.⁷⁴ The information is confidential because the information may have a negative effect on a possible lawsuit in the future.⁷⁵

⁶⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, art. 9.18, Dec. 30, 2018, <https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf>, [https://perma.cc/8FN4-UB4S].

⁶⁶ HOWARD MANN ET AL., IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT (Negotiator's Handbook 2d ed. 2005).

⁶⁷ Carol A. Ludington, *Med-Arb: If the Parties Agree*, 5 Y.B. ON INT'L ARB. 317 (2017).

⁶⁸ Mediation Rules of the International Chamber of Commerce 2014, art. 5 (3), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/mediation-rules/>, [https://perma.cc/WUF5-UH2U].

⁶⁹ See Ludington, *supra* note 67, at 318.

⁷⁰ Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 334 (2011).

⁷¹ *Id.*

⁷² Johnathan Rickman, *ABA Tax Section Meeting: Confidentiality Preserved in the Dispute Resolution Process*, 103 TAX NOTES FED. 822 (2004).

⁷³ Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2014, art. 3(2).

⁷⁴ Hyung Kyun Kwon, *Med-Arb Adoption in Securities Law Disputes: Advantages and Costs*, 2 CONCORDIA LAW REV. 53 (2017).

⁷⁵ *Id.*

Compared with the trial process, mediation provides (1) a cheaper alternative,⁷⁶ (2) more flexible remedies, (3) a speedier procedure,⁷⁷ (4) an informal platform for participants to describe their concerns freely,⁷⁸ and (5) an agreed dispute resolution mechanism by all participants.⁷⁹

Parties can control both the mediation procedure and the agreement.⁸⁰ During the mediation procedure, besides the dispute itself, communications and relationships may also be discussed.⁸¹ A more creative, durable solution can be reached after the mediation procedure.⁸² Mediation has a principle of self-determination, which includes procedural self-determination and substantive self-determination. Procedural self-determination includes the selection of mediators and conditions incorporated in the mediation agreement.⁸³ Substantive self-determination indicates that the disputing parties control the dispute resolution process, and with some guidance from the mediators they can find the best solution.⁸⁴

Considering cost,⁸⁵ speed,⁸⁶ confidentiality, and satisfaction, mediation is more favorable to disputing parties. For example, mediation is attracting more businesses as an alternative to arbitration.⁸⁷ Although arbitration has a dominating position, mediation is gaining attention from businesspeople, lawyers, judges, and governments⁸⁸ because parties seek an effective, inexpensive, and friendly dispute resolution mechanism to maintain their business relationships.⁸⁹ The International Chamber of Commerce (ICC), which is a significant arbitration supplier, prefers

⁷⁶ Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 16 (1990).

⁷⁷ Stephen B. Goldberg, *The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U.L. REV. 270, 290 (1982).

⁷⁸ See Gerber, *supra* note 76.

⁷⁹ Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. ON DISP. RESOL. 385 (1988).

⁸⁰ Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation & Arbitration*, 65 J. OF PERSONALITY AND SOC. PSYCH. 1167, 1170 (1993).

⁸¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 23-24 (John Wiley & Sons eds., 2004).

⁸² Howard J. Aibel, *Mediation Works: Opting for Interest-Based Solutions to a Range of Business Needs*, 51 DISP. RESOL. J. 24, 26 (1996).

⁸³ Diana van Hout, *Is Mediation the Panacea to the Profusion of Tax Disputes?*, 10 WORLD TAX J. 59 (2018).

⁸⁴ *Id.* at 60.

⁸⁵ *U.S. Corporate Counsel Litigation Trends Survey Findings*, FULBRIGHT & JAWROSKI LLP (2004), <http://www.fulbright.com/mediaroom/files/fj0536-uk-v13.pdf>, [https://perma.cc/RF4L-A7QW].

⁸⁶ Noel Rhys Clift, *Introduction to Alternative Dispute Resolution: A Comparison Between Arbitration and Mediation*, PENNINGTON MANCHES COOPER LLP, at 7-9 (Feb. 1, 2006).

⁸⁷ Thomas J. Stipanowich, *Contract and Conflict Management*, WIS. L. REV. 831, 849-51 (2001).

⁸⁸ Carlos de Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 150, 154 (2004).

⁸⁹ ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 41 (Sweet & Maxwell eds., 3rd ed. 1999).

mediation.⁹⁰ This is a deviation from dispute resolution requirements in contracts, in which mediation is most preferred, followed by arbitration, and litigation as a last resort.⁹¹ In 2007, the American Institute of Architects (AIA) maintained mediation as a precondition to litigation, and the arbitration clause was deleted from the AIA contract.⁹² Mediation has become a choice of ADR for both dispute and pre-dispute contracts.⁹³ There is a trend that lawyers have combined litigation skills with mediation.⁹⁴ Mediation has become a kind of "New Arbitration" as it has gained some characteristics of arbitration, like the third party adjudicating and evaluating the disputes.⁹⁵ Consequently, mediation can be a substitute for arbitration.⁹⁶

Mediation's confidentiality level is higher than that in arbitration.⁹⁷ If the information gained during the mediation process is used to reach arbitration or litigation awards, the related awards may be repealed. Compared with arbitration, mediation is more straightforward and cheaper.⁹⁸ For example, in mediation, there are fewer procedural rules that parties are likely to encounter. Mediation is a settlement assistance procedure in nature.⁹⁹ Mediation can be a catalyst for parties to reach a settlement and save more money. As the parties establish the terms of the agreement, the parties' needs will be more efficiently satisfied by the settlements reached through mediation.¹⁰⁰

D. Mediation Clause in Tax Treaties

It is important to first ask whether mediation can be adopted to settle taxation disputes before applying it to tax-related investment disputes. The OECD has already discussed the possibility of utilizing mediation to enhance the MAP. As an additional dispute resolution procedure to MAP, mediation has been used in the Model Tax Convention Commentary on Article 25.¹⁰¹ OECD Manual on Effective

⁹⁰ Int'l Chamber of Commerce, Arbitration and ADR Rules, art. 5.2 (2011).

⁹¹ Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 159, 162-77 (2005).

⁹² Am. Inst. of Architects, General Conditions of the Contract for Construction, art. 15.3.1 (2007).

⁹³ Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 163 (2015).

⁹⁴ See Am. Inst. of Architects, *supra* note 92, at art. 15.3.1.

⁹⁵ Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 HARV. NEGOT. L. REV. 61 (2012).

⁹⁶ Robert Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RES. L.J. 125 (2002).

⁹⁷ See Blankley, *supra* note 70.

⁹⁸ *Comparison Between Arbitration & Mediation*, FIN. INDUS. REGUL. AUTH., <https://www.finra.org/arbitration-and-mediation/comparison-between-arbitration-mediation>, [<https://perma.cc/Z479-R4SJ>].

⁹⁹ See Kwon, *supra* note 74.

¹⁰⁰ See Henry, *supra* note 79.

¹⁰¹ The potential use of other supplementary dispute resolution mechanisms is discussed in *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* paras. 86-87 (2017). No similar discussion is to be found in the 2017 Update of the UN Model Tax Convention

Mutual Agreement Procedures (MEMAP) 2007 describes how mediators can provide assistance during negotiations.¹⁰² As part of this assistance, process hindrances can be identified, an aspect of the discussion can be provided, and a main focus can be placed on the problem-solving process.¹⁰³

The European Commission published the Directive on Tax Dispute Resolution Mechanisms in October 2017.¹⁰⁴ Dispute resolution techniques include mediation and alternative dispute resolution (ADR) commissions that are permitted by Article 10 of the Directive. As a dispute resolution mechanism for cross-border tax disputes within the EU, mediation can be included as a means of resolving disputes.

Chapter 3 of the United Nations Handbook on Dispute Avoidance and Resolution, published in October 2019, discusses the application of mediation through country examples.¹⁰⁵ The Subcommittee on Dispute Avoidance and Resolution of the UN was responsible for drafting this chapter, which was approved by the UN Committee of Experts on International Cooperation in Tax Matters.¹⁰⁶ Chapter 6 of this Handbook has provided mediation to improve MAPs in specific conditions.¹⁰⁷ The purpose of this chapter is to analyze several aspects of mediation and present mediation as an alternative dispute resolution regime that can enhance the effectiveness of MAP.¹⁰⁸

II. CURRENT TRANSNATIONAL TAX DISPUTE RESOLUTION MECHANISM

Unresolved transnational tax disputes may impede global development because they can undermine cooperation and discourage investment.¹⁰⁹ On a practical level, dispute resolution is an effective mechanism that ensures justice to

Commentary, United Nations 2017, https://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf, [https://perma.cc/H9X6-ARXX].

¹⁰² On the use of mediation in the context of the communication between competent authorities, *see* the MEMAP, at § 3.5.2. <http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm>; *see also* <http://www.oecd.org/ctp/transferpricing/3howmap-35interactionbetweentaxpayersandcompetentauthorities-352.htm>.

¹⁰³ *Id.*

¹⁰⁴ EU, Council Directive 2017/1852, Oct. 10, 2017 on tax dispute resolution mechanisms in the European Union.

¹⁰⁵ UN, Document E/C.18/2019/CRP 17, Sept. 23, 2019, https://www.un.org/esa/ffd/wp-content/uploads/2019/09/19STM_CRP17_domestic-dispute-resolution-mechanisms.pdf, [https://perma.cc/4Q32-TSC7].

¹⁰⁶ *Id.*

¹⁰⁷ UN, Document E/C.18/2019/CRP 18, Sept. 23, 2019, https://www.un.org/esa/ffd/wp-content/uploads/2019/09/19STM_CRP18_new-chapters-5-and-6.pdf, [https://perma.cc/V2VB-M86K].

¹⁰⁸ *Id.* at § 6.6.4.

¹⁰⁹ Jeffery Owens, *Resolving international tax disputes: The Role of the OECD*, Gale Academic Onefile (OECD Publications and Information Centre, 2004), <https://go.gale.com/ps/i.do?id=GALE%7CA132120958&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=00297054&p=AONE&sw=w&userGroupName=anon%7Ecc17f21>, [https://perma.cc/4G8R-N33Q].

the tax authorities who, because of limited resources, find it difficult to stand up to multinational conglomerates and foreign authorities.

Fair and effective dispute resolution mechanisms serve as a significant influence on the compliance attitudes of taxpayers. By the equivalent token, the OECD and IMF focus on tax-related mandatory binding arbitration to improve taxpayer certainty.¹¹⁰ International double taxation has been a significant issue in which two jurisdictions seek to tax the same set of transactions or activities.¹¹¹ Such disputes are usually resolved by tax treaties. When adopting the treaty provision, if there is a disagreement, the MAP can be used to resolve the related disagreement. An efficient way to resolve tax disputes can be arbitration or mediation, as its costs are significantly less than the costs incurred in litigation.¹¹²

A. By Design: MAP in Double Tax Treaties

Taxpayers can escape the possibly unfair hearings by utilizing the MAP process. With MAP, taxpayers do not have to expose themselves to host states' regulations.¹¹³ The MAP process provides taxpayers with an alternative dispute resolution regime to the host state's judicial system. Moreover, under double tax treaties, MAP is a prepositive stage before taxpayers reach mandatory arbitration.

There has been a significant increase in the use of investor-state dispute settlement (ISDS) mechanisms for the settlement of tax disputes.¹¹⁴ Further, investment arbitral awards are easier to enforce as they will be enforced in accordance with the related arbitral institution's corresponding regulations.¹¹⁵ For example, when enforcing ICSID arbitration awards¹¹⁶, the corresponding BITs and International Convention on the Settlement of Investment Disputes between States and Nationals of the Other States¹¹⁷ will be applied. When enforcing the UNCITRAL arbitration awards, arbitration rules and the corresponding BITs should be applied.¹¹⁸ According to Article 54 of the ICSID Convention, arbitration awards have binding effect on the contracting parties, and they have to enforce them

¹¹⁰ Hans Mooij, *International Tax Disputes and Developing Countries*, CIAT (July 1, 2020), <https://www.ciat.org/international-tax-disputes-and-developing-countries/?lang=en/>, [https://perma.cc/8ZT3-8WUR].

¹¹¹ Michael Lang, INTRODUCTION TO THE LAW OF DOUBLE TAXATION CONVENTIONS 2 (IBFD 2021).

¹¹² See generally Michelle Markham, *Litigation, Arbitration and Mediation in International Tax Disputes: An Assessment of whether this results in Competitive or Collaborative Relations*, 11 *Contemp. Asia Arb. J.* 277 (2018).

¹¹³ Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28 *ICSID REV.* 88, 88–122 (2013).

¹¹⁴ August Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, 21(1) *ASIA PAC. L. REV.* 3, 3-26 (2013).

¹¹⁵ Vincent O. Nmeielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 *ANN. SURV. INT'L & COMPAR. L.* 21, at 30, 36 (2001).

¹¹⁶ Julien Chaisse, *International Investment Law and Taxation: From Coexistence to Cooperation*, E15 INITIATIVE, at 11 (2016).

¹¹⁷ ICSID Convention, Regulations and Rules 2006, at 27-28.

¹¹⁸ Julien Chaisse, *Making Tax Dispute Resolution Mechanisms More Effective—The Base Erosion and Profit Shifting Project and Beyond*, 10 *CONTEMP. ASIA ARBIT. J.* 1, 27 (2017).

within their territories.¹¹⁹ Additionally, only the parties to the dispute are bound by the awards.¹²⁰ When an arbitral tribunal in BITs reaches an award, the contracting parties and participating members of ICSID's Convention are bound by the related awards.¹²¹ Furthermore, as the ICSID has a close relationship with the World Bank, ICSID awards are enforced by the World Bank's member states voluntarily.¹²² Therefore, the losing parties will follow the ICSID awards to avoid negative consequences, such as sanctions.¹²³ In this respect, the arbitration clause under BITs is chosen by foreign investors to deal with their transnational taxation disputes.

However, during the MAP process, taxpayers enjoy little legal standing and can only provide some written materials of evidence.¹²⁴ According to the 2017 OECD Model Convention, before the MAP process, disputes should be submitted by taxpayers to the corresponding competent authority.¹²⁵ If the dispute can be resolved by the competent authority unilaterally, the other methods, like MAP procedure, will not be needed. Consequently, access to the MAP procedure can be decided by the competent authority.¹²⁶ A lack of transparency in the competent authority's decision-making process is a main shortcoming.¹²⁷

Over 100 jurisdictions signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("Multilateral Instrument" or "MLI") in November 2016, which will quickly implement a series of tax treaty measures to update transnational tax rules and reduce the opportunity for multinational enterprises to avoid paying taxes. During the MAP procedure, the national interests of disputing parties can be vital, as MAP works as a diplomatic dispute resolution mechanism.¹²⁸ MAP includes some issues such as lack of finality, double taxation, binding nature, issue of impartiality, etc.¹²⁹ MAP, despite its flaws, is capable of serving the vital interests of the opposing parties. For taxpayers, MAP is an alternative to tax litigation and will be less cumbersome for them.¹³⁰ With tax litigation, taxpayers have to wait until the

¹¹⁹ Dany Khayat, *Enforcement of Awards in ICSID Arbitration*, MAYER BROWN (Dec. 19, 2011), <https://www.mayerbrown.com/en/perspectives-events/publications/2011/12/enforcement-of-awards-in-icsid-arbitration>, [https://perma.cc/7N2S-L92V].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD publishing, 2017), https://doi.org/10.1787/mtc_cond-2017-en, [https://perma.cc/Y6R9-PA2T].

¹²⁵ *Id.*

¹²⁶ Jasmin Kollmann & Laura Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in *INTERNATIONAL ARBITRATION IN TAX MATTERS* at 155 (Michael Lang & Jeffrey Owens eds., IBFD, 2016).

¹²⁷ Jean-Pierre Lieb, *Introduction: Taking the Debate Forward*, in *INTERNATIONAL ARBITRATION IN TAX MATTERS* at 61 (Michael Lang & Jeffrey Owens eds., IBFD, 2016).

¹²⁸ See Kollmann & Turcan, *supra* note 126.

¹²⁹ Konstantinos Taramountas, *The Mutual Agreement Procedure: Coordinating the Global Tax Orchestra*, *LSE L. REV.* 39, at 41-50 (2019).

¹³⁰ OECD Model Commentary on Article 25, para.7.

taxation is actually charged. However, MAP can be accessed as long as the disputing tax measures may result in taxation that violates the tax convention.¹³¹ For competent authorities, as MAP is a kind of diplomatic dispute resolution mechanism and taxpayers have little participation during the process, the national interest can be better protected.

B. By Design: Baseball Arbitration

Final Offer Arbitration (FOA), also referred to as baseball arbitration, represents a potent mechanism for dispute resolution in which an arbitrator considers all the outstanding issues as a collective package and elects one party's package over the other. This arbitration format necessitates that both sides submit a proposed remedy, following which the arbitrator selects one offer, rendering it as the ultimate resolution. FOA has garnered a reputation for its expeditiousness and effectiveness in arriving at a resolution, as it incentivizes both parties to provide their best offer upfront, promoting transparency and ensuring that both parties make an earnest effort to find a middle ground. The FOA approach has found extensive application in diverse industries, including but not limited to, sports, healthcare, and labor disputes, owing to its pragmatic and streamlined approach to resolving complex disputes. Therefore, FOA serves as an excellent option for parties seeking a cost-effective and efficient mechanism for resolving disputes in a timely and impartial manner.¹³² No midpoint or compromise can be formulated in such a process. This is ideal for parties who are wary of the “split the difference” kind of arbitral awards.

The United States spearheaded the adoption of baseball arbitration in resolving tax disputes.¹³³ The double tax treaty between the United States and Canada firstly included FOA at the transnational level, and the United States also incorporated this clause in some other tax treaties, for instance, with Germany, Belgium, France, and Switzerland.¹³⁴ It is also stipulated in a UN Model Convention.¹³⁵ In order to protect their tax sovereignty, the developed economies tend to incorporate FOA in resolving tax-related disputes.¹³⁶ FOA is also beneficial for companies as they can enjoy quicker tax bill certainty.

The idea behind this form of arbitration is that each party, conscious of the risk of rejection of an outrageous proposal, makes concessions in order to submit the most reasonable offer, thus incentivizing the parties to move towards a compromise, speeding up the resolution of disputes, and lowering costs. In order to improve efficiency, some guidance can be given on implementation of the

¹³¹ *Id.* at para.14.

¹³² See Lieb, *supra* note 127.

¹³³ Raffaele Petruzzi, Petra Koch, & Laura Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration*, in INTERNATIONAL ARBITRATION IN TAX MATTERS (Michael Lang & Jeffrey Owens eds., IBFD 2016).

¹³⁴ Joost Pauwelyn, *Baseball Arbitration to Resolve International Law Disputes: Hit Or Miss*, 22 FLA. TAX REV. 51 (2018).

¹³⁵ United Nations Model Double Taxation between Developed and Developing Countries, art. 25, p.5, (Alternative B) (2017).

¹³⁶ William W. Park, *Tax and Arbitration*, 36 ARBIT. INT'L. 200 (2020).

arbitration clause.¹³⁷ For example, although taxpayer participation is not provided in FOA¹³⁸, many detailed regulations are provided in the United States-Canada double tax treaty.¹³⁹ In the treaty, submission deadlines and maximum page numbers of the individual submissions are stipulated clearly. Furthermore, a baseball arbitral award is cheaper to obtain¹⁴⁰, and since no reasoning is required, the whole procedure is speedier.¹⁴¹ Earnings are also limited.¹⁴² Instead, technological submissions including emails are preferred.¹⁴³ According to the 2016 OECD model convention, if a tax dispute cannot be solved within two years, FOA would be triggered when both disputing parties opt for it.¹⁴⁴

According to Article 23(1) of MLI, FOA is the default approach in resolving disputes.¹⁴⁵ One explicit merit of FOA is that it limits and avoids certain sovereignty costs, as the arbitral tribunals have to pick one of the proposals provided by the disputing parties instead of developing their own proposals.¹⁴⁶ With FOA, the arbitrator's discretion is limited, and tax sovereignty is protected.¹⁴⁷ Another advantage of FOA is that it can keep and preserve the disputing parties' relationship.¹⁴⁸

One of the disadvantages of this process is that this model limits the arbitrator's role. If both parties submit unreasonable proposals, the arbitrator is forced to choose one, resulting in a probably vital and unjustified loss in one of the disputing parties' tax revenue. The limited authority has another consequence, which is that the decision has no additional information or comment from the arbitrator. Another weakness is that only a limited range of cases can be resolved better by FOA. If the dispute is a principled threshold question rather than a numerical one, FOA cannot reach a satisfying result.¹⁴⁹

¹³⁷ Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital (1980).

¹³⁸ Hans Mooij, *Tax treaty arbitration*, 35 ARBIT. INT'L. 215 (2019).

¹³⁹ *Id.*

¹⁴⁰ Memorandum of Understanding Between the Competent Authorities of Canada and the United States of America (2008), art. 13 [hereinafter Canada-US memorandum].

¹⁴¹ Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 128 (2009).

¹⁴² See Kollmann and Turcan, *supra* note 126, at 130.

¹⁴³ See Canada-US memorandum, *supra* note 140, at art. 14.

¹⁴⁴ Multilateral Tax Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing art. 19 (2016).

¹⁴⁵ Michelle Andrea Markham, *Arbitration and tax treaty disputes*, 35 Arbitration Int'l 496 (2019).

¹⁴⁶ See Pauwelyn, *supra* note 134, at 56.

¹⁴⁷ Ehab Farah, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, 9 FLA. TAX REV. 703, 15–17 (2009).

¹⁴⁸ See Pauwelyn, *supra* note 134, at 56.

¹⁴⁹ See Petruzzi et al., *supra* note 133.

C. Independent Arbitration and Tax Matters

In the past, the only option for resolving tax disputes was independent arbitration, which is a more traditional and widely used method.¹⁵⁰ In contrast to independent arbitration, baseball arbitration represents a compelling alternative for resolving disputes, particularly in the context of the EU Directive on Dispute Resolution.¹⁵¹ It is noteworthy that baseball arbitration has been included in the ambit of the European Arbitration Convention, further underscoring its significance as a dispute resolution mechanism.¹⁵² With its unique features, such as the finality of awards and a simplified procedure, baseball arbitration has gained popularity as a method for settling disputes. The inclusion of baseball arbitration in the European Arbitration Convention highlights the recognition of its value and underscores the growing significance of alternative dispute resolution methods in the contemporary legal landscape. There is no interference from competent authorities in the final award of the arbitration tribunal.¹⁵³ Professional and less biased arbitrators can produce a more reliable final award.¹⁵⁴ In independent arbitration, a written opinion is required, which makes it differ from baseball arbitration.¹⁵⁵ An independent arbitration decision is reached “. . . based on a written, reasoned analysis of the facts involved and applicable legal sources.”¹⁵⁶ It is even highlighted in the OECD commentary, arguing that when taxpayers know how arbitrators arrived at an opinion, they will be more likely to accept it.¹⁵⁷ An arbitrator will deal with the disputing parties’ facts and arguments during the arbitration process. Supporting independent arbitration also requires consideration of due process.¹⁵⁸ Even though a written opinion has no precedential value, subsequent arbitrators can use it as a reference point.¹⁵⁹

The “independent opinion” approach in arbitration has garnered significant criticism, with one of the main contentions being its proclivity towards a “splitting the baby” mindset. Essentially, this approach often compels arbitrators to seek a

¹⁵⁰ See OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION 2017, 387 (2017).

¹⁵¹ Luís Flávio Neto, *Baseball Arbitration: The Trendiest Alternative Dispute Resolution Mechanism in International Taxation*, in FLEXIBLE MULTI-TIER DISPUTE RESOLUTION IN INTERNATIONAL TAX DISPUTES 279 (Pasquale Pistone & Jan J.P. de Goede eds. 2020).

¹⁵² Hans Mooij, *MAP Arbitration in Tax Treaty Disputes*, in FLEXIBLE MULTI-TIER DISPUTE RESOLUTION IN INTERNATIONAL TAX DISPUTES 278 (Pasquale Pistone & Jan J.P. de Goede eds., 2020).

¹⁵³ See OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION 2017 387 (OECD Publishing, 2017).

¹⁵⁴ See generally Michael Lang & Jeffrey Owens, INTERNATIONAL ARBITRATION IN TAX MATTERS (Michael Lang & Jeffrey Owens eds., 2016).

¹⁵⁵ Petruzzi et al., *supra* note 133.

¹⁵⁶ OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (OECD Publishing, 2017); *Commentary on Article 25*, Sample Mutual Agreement on Arbitration, Clause 2, in MODEL TAX CONVENTION ON INCOME AND ON CAPITAL (OECD Publishing, 2017).

¹⁵⁷ See OECD, COMMENTARIES ON THE ARTICLES OF THE MODEL TAX CONVENTION 387 (OECD Publishing, 2017).

¹⁵⁸ See Mooij, *supra* note 152, at 279.

¹⁵⁹ See OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 2017 472 (OECD Publishing, 2017).

middle ground between the contending parties in order to reach a resolution, which can have detrimental consequences. By seeking compromise, parties may be incentivized to take extreme positions during negotiations in an attempt to shift the final outcome in their favor, thereby having a “chilling effect” on the proceedings. Consequently, this aspect of independent arbitration has been a subject of considerable debate and calls for more effective approaches to address the nuances of dispute resolution.¹⁶⁰

D. By Default: Mandatory Arbitration Under BITs

Taxation disputes can also be resolved by arbitration under BITs. Furthermore, taxpayers tend to submit claims based on investment law treaties.¹⁶¹ Mandatory arbitration within the BITs has its own advantages, compared with the MAP usually utilized in double tax treaties.¹⁶² While competent authorities are sometimes not independent, arbitration can provide a fair hearing and award to taxpayers.¹⁶³ Accordingly, taxpayers enjoy a substantial advantage under arbitration within BITs.¹⁶⁴ Foreign investors can decide to pursue a claim when a breach of a treaty obligation appears.¹⁶⁵

However, under double tax treaties, the determining power is controlled by the related competent authorities.¹⁶⁶ The MAP cannot be launched without the related competent authorities’ permission.¹⁶⁷ According to Article 25(5) of the OECD Model Convention, arbitration can only be initiated when unresolved disputes are available after the MAP process. In international investment law, the entire dispute can be submitted by foreign investors directly to the arbitral tribunal.¹⁶⁸ For instance, a foreign investor can submit a claim based on an issue that has already been considered by a national court. *Deutsche Bank v. Sri Lanka* serves as a poignant illustration of the complex dynamics of transnational dispute resolution.¹⁶⁹ The claimant, in this instance, was compelled to take recourse to an

¹⁶⁰ See Petruzzi et al., *supra* note 133; I. Grlica, *Baseball arbitration: Comparison of the Rules under the US-Canada Tax Treaty with the Rules under the Multilateral Instrument*, in OECD, ARBITRATION IN TAX TREATY LAW (M. Lang ed., Linde 2018).

¹⁶¹ *Duke Energy Electroquil Partners v Republic of Ecuador*, ICSID Case No. ARB/04/19, (Aug. 18, 2008) (gives one example where the claim was made through the United States-Ecuador Bilateral Investment Treaty regarding import tax and custom duties).

¹⁶² Julien Chaisse, *Making Tax Dispute Resolution Mechanisms More Effective—The Base Erosion and Profit Shifting Project and Beyond*, 10 CONTEMP. ASIA ARB. J. 25 (2017).

¹⁶³ Carlos Protto, *Mutual Agreement Procedures in Tax Treaties: Problems and Needs in Developing Countries and Countries in Transition*, 42 INTERTAX 176 (2014).

¹⁶⁴ UN Conference on Trade and Development, World Investment Report (2014), https://unctad.org/system/files/official-document/wir2014_en.pdf, [https://perma.cc/C7U6-8EAV].

¹⁶⁵ Maira de Melo Vieira, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective*, 8 DISP. RESOL. INT’L. 63 (2014).

¹⁶⁶ Michael J. McIntyre, *Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes*, 7 FLA. TAX REV. 622, 623–24 (2006).

¹⁶⁷ OECD, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 25 (OECD Publishing, 2014).

¹⁶⁸ See Chaisse, *supra* note 162.

¹⁶⁹ *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, (Oct. 31, 2012).

international tribunal due to the apparent inability of the Supreme Court of Sri Lanka to administer a just hearing. The claimant's submission centered around the violation of the Fair and Equitable Treatment (FET) principle by the Sri Lankan authorities. This case highlights the challenges that litigants often face in cross-border disputes, particularly when navigating the nuances of legal systems that may differ vastly from their own. Moreover, it underscores the critical role played by international tribunals in addressing the limitations of domestic courts and facilitating the resolution of conflicts between sovereign entities and private parties.¹⁷⁰

Because of the substantive clauses provided under BITs, foreign investors prefer submitting their claims based on the BITs.¹⁷¹ The substantive principles include National Treatment (NT), Most Favored Nations (MFN), FET, Full Protection and Security (FPS), and Umbrella Clauses.¹⁷² Taxpayers often use FET standards to protect their interests under BITs, because the FET standard's scope has been expanded by arbitral tribunals.¹⁷³ For instance, in *Roussalis v. Romania*, the arbitral tribunal has expanded the scope of the FET standard.¹⁷⁴ In the *Occidental Exploration v. Ecuador* award, the tribunal stated that based on the FET standard, foreign investors should be provided with a stable and predictable environment.¹⁷⁵ Investment plans are made based on investors' expectations.¹⁷⁶ If the host state destroyed this predictability by utilizing the tax regulations, the FET standard would be breached.¹⁷⁷ Based on the OECD Model Convention, the initiation of mandatory arbitration must wait for final taxation to be imposed.¹⁷⁸ In contrast, as long as the taxation has breached foreign investors' rights under BITs, foreign investors can approach arbitration no matter whether the tax is imposed or not.¹⁷⁹

However, only a limited number of claims related to taxation can be claimed under BITs. For example, according to Article 21 of the ECT and Article 13 of

¹⁷⁰ *Id.* at para. 108.

¹⁷¹ See generally Katia Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, in INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, 101 (OECD 2008) (describing the additional protections umbrella clauses provide to investors in BITs); See also Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225, 226 (2015) (describing the impact of BIT coverage on a foreign investor).

¹⁷² See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 161 (Oxford University Press, 2012).

¹⁷³ *Id.* at 11.

¹⁷⁴ See *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 318 (Dec. 7, 2011) ("Beyond these general principles, the scope of the standard is not precisely defined.").

¹⁷⁵ See *Occidental Exploration and Production Co. v. The Republic of Ecuador*, Case No. UN3467, Final Award, 62-63 (London Centre of International Arbitration 2004).

¹⁷⁶ *Id.* at 62.

¹⁷⁷ *Id.* at 64.

¹⁷⁸ See OECD, Model Tax Convention on Income and on Capital 2014 art. 25(3) (OECD Publishing, 2014), https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en, [<https://perma.cc/3C62-WAU4>].

¹⁷⁹ See Julien Chaisse, *International Investment Law and Taxation: from Coexistence to Cooperation*, THE E15 INITIATIVE 11 (2016) (comparing the OECD Model Tax Convention with arbitration within the international investment law regime).

United Kingdom-Colombia, the treaty can only be applied when tax measures amount to expropriation.¹⁸⁰ The expropriation provision under BITs is often used to resolve tax-related disputes.¹⁸¹ The definition of expropriation is seizing private profits for a public goal.¹⁸² Furthermore, according to Article 13(1) of the ECT, expropriation is legal if it is (a) for a public purpose; (b) non-discriminatory; (c) conducted under due procedure; and (d) with quick and sufficient compensation.¹⁸³ The actual effect is the key to tell the difference between direct and indirect expropriation.¹⁸⁴ Based on the *Burlington Resources v. Ecuador*, a disputing act can amount to indirect expropriation when (i) the value of investment has been deprived substantially; (ii) the related measure is permanent; and (iii) the related measure is not justified.¹⁸⁵

The arbitration clause under BITs can be used to deal with disputes where taxation measures amount to indirect expropriation.¹⁸⁶ In *Link-Trading v. Moldova*, the claimant claimed that tax changes issued by the defendant constituted expropriation measures.¹⁸⁷ The claimant used the mandatory arbitration under the United States-Moldova BIT.¹⁸⁸ Referring to *Tza Yap Shum v. Peru*, the aggressive tax changes also deprived the taxpayer's business.¹⁸⁹ Tax measures can be expropriatory when the related measures are arbitrary or abusive.¹⁹⁰ However, the expropriation clause may not be violated just because of the mere changes in tax regulations.¹⁹¹ If taxpayers still hold possession of the real property, sudden taxation changes cannot be treated as expropriation.¹⁹²

However, in order to protect their own national sovereignty, countries prefer restricting arbitration under BITs in resolving tax related disputes.¹⁹³ Many states have limited the utilization of the FET standard.¹⁹⁴ For example, in *Nations Energy Corp. v Republic of Panama*, the arbitral tribunal excluded taxation claims based on FET standards.¹⁹⁵ Additionally, tax measures are excluded if no explicit words

¹⁸⁰ Elizabeth Snodgrass, *Tax Controversies and Dispute Resolution under Tax Treaties: Insights from the Arbitration Sphere*, 19 DERIVATIVES & FIN. INSTRUMENTS 4 (2017).

¹⁸¹ See Kollmann & Turcan, *supra* note 126, at 166–67.

¹⁸² See William H. Reeves “Expropriation,” “Confiscation,” “Nationalization”: What One Can Do About Them, 24 THE BUS. LAW. 867, 867 (1969).

¹⁸³ The Energy Charter Treaty (Annex 1 to the Final Act of the European Energy Charter Conference), art. 13(1), Energy Charter Treaty and Related Documents 2014.

¹⁸⁴ See Dolzer & Schreuer, *supra* note 172, at 11.

¹⁸⁵ See Julien Chaisse, *Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?*, 35 VA. TAX REV. 149, 187 (2016).

¹⁸⁶ See *Link-Trading Stock Co. v. Dep't for Customs Control of the Republic of Moldova*, Final Award, 1.4 (ITA Inv. Treaty Cases 2002).

¹⁸⁷ *Id.* at 10.

¹⁸⁸ *Id.* at 4.

¹⁸⁹ See *Tza Yap Shum v. Republic of Peru* ICSID Case No. ARB/07/6, Award, (July 7, 2011).

¹⁹⁰ *Id.* at 181.

¹⁹¹ *Id.*

¹⁹² See Chaisse, *supra* note 185.

¹⁹³ See Chaisse, *supra* note 179, at 9, 11.

¹⁹⁴ *Nations Energy Corp. v Republic of Panama* ICSID Case No. ARB/06/19, Award, 39, (Nov. 24, 2010).

¹⁹⁵ *Id.*

have interpreted the FET standard in a BIT.¹⁹⁶ Moreover, tax matters tend to be limited or excluded by states when signing BITs.¹⁹⁷ For instance, taxation was excluded from the scope of the 2015 Indian-European Union Model BIT.¹⁹⁸ Hong Kong -New Zealand BIT.¹⁹⁹ This agreement cannot be applied to tax matters.²⁰⁰ Instead, tax matters should be considered based on both parties' domestic laws and taxation agreements between them.

Due to the limitations mentioned above, the dispute resolution regimes under double tax treaties may be more suitable in resolving tax-related disputes. When using the double tax treaties to deal with disputes, the first step is to submit the dispute to the related competent authority. The related competent authority will try to resolve it unilaterally.²⁰¹ If the competent authority fails to resolve the dispute unilaterally, then the MAP will proceed.

III. MEDIATION FOR TRANSNATIONAL TAX DISPUTES

The resolution of transnational tax disputes is an intricate and formidable task, necessitating sophisticated mechanisms that can adeptly navigate the complex web of domestic and international legal regimes. The MAP is a widely utilized approach to resolving tax-related conflicts, yet it has been subjected to substantial criticism due to its perceived inefficiency. To enhance the efficacy of the MAP system, mediation can be employed in conjunction with it, taking into account the myriad benefits of the mediation process. Mediation is not intended to supplant the MAP mechanism, but rather to augment it, presenting an innovative and complementary approach to resolving complex tax disputes in a mutually agreeable manner.

A. Shortcomings of MAP

Although MAP is popular, it is an inefficient tax-related dispute resolution regime. According to some experts, MAP is not an effective dispute resolution regime because it can be blocked by either disputing party unilaterally.²⁰² As per the OECD Committee on Fiscal Affairs (CFA), states regard MAP as the last choice.²⁰³ Based on the 2001 Global Transfer Pricing Survey, multinational

¹⁹⁶ See Chaisse, *supra* note 185.

¹⁹⁷ Model Text for the Indian Bilateral Investment Treaty 2015, art. 2.6 (iv).

¹⁹⁸ *Id.*

¹⁹⁹ Agreement for the Promotion and Protection of Investments Hong Kong-N.Z., art. 8(2) (1995).

²⁰⁰ *Id.*

²⁰¹ See OECD, Model Tax Convention on Income and On Capital: Condensed Version 2017 (OECD publishing, 2017), https://doi.org/10.1787/mtc_cond-2017-en, [<https://perma.cc/L73S-ZLS3>].

²⁰² Reuven S. Avi-Yonah & Haiyan Xu, *Evaluating BEPS: A Reconsideration of the Benefits Principle and Proposal for UN Oversight*, 6 HARV. BUS. L. REV. 185, 233 (2016).

²⁰³ OECD, TRANSFER PRICING AND MULTINATIONAL ENTERPRISES: THREE TAXATION ISSUES 18 (1984).

corporations do not have trust in MAP.²⁰⁴ Some reasons include that the MAP process is too expensive and time-consuming.²⁰⁵ MAP cases may not be resolved even after more than ten years.²⁰⁶ Moreover, Article 25(2) of the Model Tax Convention only requires the competent authorities to try to resolve the related disputes during MAP process.²⁰⁷ Further, taxpayers criticize the MAP because there is little space for them to participate.²⁰⁸ In other words, the competent authorities control the whole process, and there is a lack of transparency.

B. Mediation Can Make Up for It

Mediation is a consensual and collaborative process in the transnational dispute resolution area. Based on the definition provided by the United Nations, in mediation, a third party is needed to reconcile the claims proposed by both disputing parties and its role is to help both disputing parties reach a compromise agreement in the end.²⁰⁹ Mediation has the potential to resolve cross-border tax disputes. According to the OECD Manual on Effective MAP (the “MEMAP Manual”)²¹⁰, mediation provides competent authorities a chance to view a case from a different angle.²¹¹ In the 2008 update to OECD Model Tax Convention, mediation was referenced as a possibility.²¹²

Mediation can be used to resolve domestic tax disputes, and based on OECD, the application of mediation may be extended to the MAP cases.²¹³ When faced with unforeseen issues that complicate the MAP case, a mediator can clarify key controversies and identify a middle ground between disputing parties.²¹⁴ In dealing with domestic disputes, some countries have already used mediation. Countries including United Kingdom, United States, the Netherlands, and Australia

²⁰⁴ Michelle Markham, *Mandatory Binding Arbitration - Is This a Pathway to a More Efficient Map?*, 32 ARBIT. INT’L 152 (2019).

²⁰⁵ *Id.*

²⁰⁶ Michelle Markham, *Seeking New Directions in Dispute Resolution Mechanisms: Do We Need a Revised Mutual Agreement Procedure?*, 70 BULL. FOR INT’L TAX’N 82 (2016).

²⁰⁷ Marcus Desax & Marc Veit, *Arbitration of Tax Treaty Disputes: The OECD Proposal?*, 23 ARBIT. INT’L 405, 409 (2007).

²⁰⁸ Hugh J Ault, *Improving the Resolution of International Tax Disputes*, 7 FLA. TAX REV. 137, 139 (2005).

²⁰⁹ UN Office of Legal Affairs Codification Division, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES 123 (1992).

²¹⁰ OECD, Manual on Effective Mutual Agreement Procedures (Feb. 2007), www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm, [https://perma.cc/Q7ND-LY95]

²¹¹ Joe Dalton, *Unlocking MAP Disputes; Is Mediation the Key*, 24 INT’L TAX REV. 14 (2013).

²¹² OECD, Model Tax Convention on Income and on Capital: Commentary on Article 25 paras. 86, 87 (2008).

²¹³ Michelle Markham, *Litigation, Arbitration and Mediation in International Tax Disputes: An Assessment of Whether this Results in Competitive or Collaborative Relations*, 11 CONTEMP. ASIA ARB. J. 277 (2018).

²¹⁴ Committee of Experts on International Cooperation in Tax Matters Nineteenth session, *possible improvements to MAP*, in Preliminary Draft of the Chapters on MAP Arbitration and on Possible Improvements to MAP of the Handbook on Dispute Avoidance and Resolution 14 (Geneva, Oct. 15-18, 2019).

have already successfully utilized mediation at the internal level.²¹⁵ For instance, in the United Kingdom, ADR is brought to facilitate negotiation processes. During a negotiation process, competent authorities maintain their sovereignty.²¹⁶ The benefits of such ADR include confidentiality and the respective positions of disputing parties can be sharpened.²¹⁷ In comparison to the traditional multi-day hearings, ADR is more efficient.²¹⁸

Mediation may be helpful in resolving some critical issues in the MAP process, as the mediators can illuminate the case elements from a different view.²¹⁹ When there is a disagreement between disputing parties in a MAP case, mediation is recommended, and the mediators can clarify the disputes.²²⁰ During the MAP process, mediators can communicate with the disputing parties and assist them in getting a better understanding of their viewpoints.²²¹

The United Nations Subcommittee on the MAP - Dispute Avoidance and Resolution is considering including mediation as a non-binding dispute resolution form to improve the efficiency of the MAP procedure.²²² By using mediation, the issues of disputes can be clarified, and misunderstandings can be resolved.²²³ Although mediation is non-binding, the mediator can bring the conflicts back to the discussions.²²⁴

Mediation is advisory in nature. A mediator needs to find a solution to the dispute and reach a balance between the disputing parties (a win-win scenario). Mediation can be active or passive depending on the dispute, and involves guiding discussions, exchanging information, making suggestions, and offering solutions.²²⁵ During the mediation process, “all the relevant facts can be sorted out and agreed until there is no unnecessary dispute left on those anymore and it can be examined and agreed what essentially is the scope of the dispute and where and

²¹⁵ OECD, Comments Received on Public Discussion Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective (2015), <http://www.oecd.org/tax/dispute/public-comments-action-14-make-dispute-resolution-mechanisms-more-effective.pdf>, [https://perma.cc/873K-YCD7]

²¹⁶ Committee of Experts on International Cooperation in Tax Matters Nineteenth session, *supra* note 211.

²¹⁷ *Id.*

²¹⁸ Geoff Lloyd & Paul Dennis, *Q&A: How Is ADR Working for Large Businesses?*, TAX J. (2015).

²¹⁹ Joe Dalton, *supra* note 211.

²²⁰ See OECD, Model Tax Convention on Income and On Capital: Condensed Version 2017 (OECD Publishing, 2017), https://doi.org/10.1787/mtc_cond-2017-en, [https://perma.cc/K3GR-V9BQ]

²²¹ *Id.*; Katerina Perrou, *The Ombudsman and the Process of Resolution of International Tax Disputes – Protecting the ‘Invisible Party’ to the MAP*, WORLD TAX J. (IBFD) 108 (2018).

²²² Comm. of Experts on Int’l Coop. in Tax Matters, Rep. on Its Fourteenth Session, *Coordinator’s Report on Work of the Subcommittee on the Mutual Agreement Procedure - Dispute Avoidance and Resolution*, at 2, U.N. Doc. E/C.18/2017/CRP.4 (2017)

²²³ *Id.*

²²⁴ “Mediation” includes all elements of such procedures as are appropriate in the MAP process.

²²⁵ Committee of Experts on International Cooperation in Tax Matters Nineteenth session, *supra* note 211, at 10.

why the disputing parties' positions differ."²²⁶ During the process, parties retain full control of the decision.²²⁷ Because of its flexibility and confidentiality, mediation is frequently used to solve different kinds of disputes.

Mediation's effectiveness is determined by the mediator, and the fundamental role of a mediator is to create awareness between the disputing parties about what mediation is. When there is a dispute between states with various levels of MAP experience, mediation can be helpful, especially for less developed countries with little experience in MAP processes. Mediation is beneficial to protect the respective countries' tax bases by building experience in resolving such disputes. The ordinary focus of a mediation is not to let the mediator point out the dispute. Instead, the working relations between the disputing parties should be focused more on the mediation process, which is whether or not they are willing to communicate with each other and achieve mutual understanding.

As mediation has already been allowed in Article 25 of the OECD Model and its respective Commentary,²²⁸ countries can choose to adopt mediation either as a default or supplementary option.²²⁹ Rather than depending on the MAP, tax related disputes can also be resolved with the help from a mediator. As it is normal for countries to have various interpretations on the same treaty provision, the dispute may be caused by this plurality of perspectives. The involvement of a mediator can improve the understanding of each party's position and an agreement may be more likely to be reached.

By incorporating mediation to the MAP, the whole procedure can be more efficient and less burdensome. Taxpayers may be more likely to initiate proceedings if they have confidence that their disputes can be resolved efficiently.²³⁰ If countries decide to incorporate mediation into MAP, the proceedings may be conducted without the involvement of taxpayers in line with the requirements of MAP. Mediation can be a good method to resolve disputes at the very beginning.

During the MAP process, the taxpayer is not a party to the process.²³¹ MAP, as a government-to-government process, is conducted between competent authorities. The role of taxpayers is limited in the fact-finding procedure.²³² The inclusion of taxpayers in the dispute resolution process is valuable. They not only provide basic documents and information related to the disputes, but also provide

²²⁶ Hans Mooij, *supra* note 152, at 254-55.

²²⁷ Committee of Experts on International Cooperation in Tax Matters Nineteenth session, *supra* note 211.

²²⁸ See OECD, Model Tax Convention on Income and on Capital, *supra* note 212.

²²⁹ United Nations, ECOSOC Committee of Experts on International Cooperation in Tax Matters, *Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution 3* (2016), E/C.18/2016/CRP.4, Annex 3 on Mediation and other forms of NBDR.

²³⁰ Joe Dalton, *Unlocking MAP Disputes; Is Mediation the Key*, 24 INT'L TAX REV. 15 (2013).

²³¹ For a more detailed analysis on the role of the taxpayer in international tax dispute resolution, see Limor Riza, *Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on the Hybrid Norms of International Taxation*, 34 PACE L. REV. 1064 (2014).

²³² See, OECD, Manual on Effective Mutual Agreement Procedures (MEMAP) (Feb. 2007), <https://www.oecd.org/ctp/38061910.pdf>, [<https://perma.cc/A6JB-TUUT>].

their own proposal to resolve the disputes. In this way, the speed of the dispute resolution process can be improved. If mediation is a part of MAP, the mediator can grant the rights of taxpayers.

C. What Types of Disputes Can Mediation Resolve?

Some double tax treaties allow the application of the MAP.²³³ Mediation is especially useful as a means of building confidence in resolving the related dispute when the disputing countries have different levels of experience in MAP.²³⁴ Third parties serve as mediators during the mediation process to help disputing parties resolve certain issues.²³⁵ It is important to differentiate between fact-related and law-related disputes when analyzing why transnational tax disputes arise.²³⁶ Disputes over taxation may arise when disputing parties lack the same information. When disputing parties cannot reach an agreement on some vital facts, mediation can be useful in resolving these disputes. Mediation is effective in eliminating differences and helping disputing parties reach an agreement on some crucial facts. As a result, mediation may be especially helpful in dealing with some types of tax disputes. Unlike legal disputes, which may be associated with the interpretation of some legal terms, mediation is more appropriate when resolving factual disputes. Cooperation and discussion cannot be of any value in resolving legal disputes unless one disputing party has outright misinterpreted some legal concepts. It is impossible to resolve these legal disputes simply by giving up one's own arguments and accepting the other's.²³⁷

The use of mediation can, therefore, be used to resolve tax-related investment disputes over factual issues. Mediation can facilitate understanding between disputing parties when one party is having difficulties understanding the other party's positions. It is possible for them to make some compromises during mediation even if they cannot reach an agreement on some factual issue. However, mediation does not suffice in some cases, especially those involving complex legal issues.

²³³ See the commentary on the MAP in the Dutch agreements to avoid double taxation with Spain, Australia and Tunisia (available via: Kluwer Navigator, *Vakstudie International Belastingrecht*).

²³⁴ Document E/C.18/2019/CRP .18 of Sept. 23, 2019, at para. 52, https://www.un.org/esa/ffd/wp-content/uploads/2019/09/19STM_CRP18_new-chapters-5-and-6.pdf, [].

²³⁵ For an analysis of the nature of tax disputes and what is different about them that affects the possible use of mediation for the resolution of tax disputes, see M.B.A. van Hout, *Is Mediation the Panacea to the Profusion of Tax Disputes?*, WORLD TAX J. § 4., 10 (2018).

²³⁶ See the definition of “dispute” as proposed by F D Berman, as “a disagreement on a defined issue of law or fact, or law and fact combined, which has brought the interests of two or more States into conflict and which they (or at least one amongst them) require to have solved.”; see F.D. Berman, *Legal theories on international dispute prevention and dispute settlement: Lessons for the transatlantic partnership*, in TRANSATLANTIC ECONOMIC DISPUTES 455 (E.-U. Petersmann & M.A. Pollack eds., OUP 2003).

²³⁷ Katerina Perrou, *Using Mediation for the Resolution of Cross-Border Tax Disputes*, in FLEXIBLE MULTI-TIER DISPUTE RESOLUTION IN INTERNATIONAL TAX DISPUTES 204 (Pasquale Pistone & Jan J.P. de Goede eds., IBFD 2020).

D. Mediation and Soft Law

Although soft law has no binding power, it still has its own practical effects.²³⁸ Soft law is suitable for the states that prefer the final award without many commitments.²³⁹ There are six main merits of soft law as stated below:

1) Because of the non-binding characteristic of soft law, the contracting costs can be decreased.²⁴⁰

2) With soft law, cooperation can be promoted, and sovereignty costs can be lowered.²⁴¹

3) Soft law can deal with diversity and meet different and unique conditions.²⁴²

4) Greater flexibility can be provided by soft law during negotiations.²⁴³

5) Soft law can speed up the process of reaching agreements, especially when something unforeseen occurs.²⁴⁴

6) More participants can join the process.²⁴⁵

Soft law is important, and when experimentation is needed, it can be functional.²⁴⁶ If an agreement is not binding, it can be seen as soft to some extent.²⁴⁷ With soft law, the disputing parties can decide the implementation totally.²⁴⁸ Complex law cannot cope with the diversity and uncertainties of the changing world.²⁴⁹ Under soft law, there will be more choices.²⁵⁰ States can avoid making hard-law commitments and maintain flexibility with soft law instead when their interests are uncertain.²⁵¹

²³⁸ Francis Snyder, *The Effectiveness of EC Law: Institutions, Processes, Tools and Techniques*, 56(1) MODERN L. REV. (1993); Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOEL 197, 198 (Stephen Martin ed., Kluwer Academic Publishers, 1994).

²³⁹ C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38(4) INT'L AND COMPAR. L.Q. 850, 861 (1989).

²⁴⁰ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 434 (2000).

²⁴¹ Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 94-95 (Dinah Shelton ed., Oxford University Press, 2003).

²⁴² Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 26-29 (Dinah Shelton ed., Oxford University Press, 2003).

²⁴³ See Abbott & Snidal, *supra* note 240.

²⁴⁴ Charles Lipson, *Why Are Some International Agreements Informal?*, 45 Int'l Org. 495, 501 (1991).

²⁴⁵ See Chinkin, *supra* note 242.

²⁴⁶ See Abbott & Snidal, *supra* note 240; David M Trubek et al. 'Soft Law', 'Hard Law' and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 67 (Gráinne de Búrca & Joanne Scott eds., Bloomsbury Publishing, 2006).

²⁴⁷ See Trubek et al., *supra* note 246.

²⁴⁸ Gregory C Shaffer & Mark A Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94(3) MINN. L. REV. 715 (2010).

²⁴⁹ Trubek et al., *supra* note 246, at 3.

²⁵⁰ James D Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48(3) INT'L ORG. 387, 395 (1994).

²⁵¹ See Reinicke & Witte, *supra* note 241, at 94-95.

Mediation can be treated as a kind of soft law when it is adopted to resolve tax-related disputes. Mediation, as soft law, can be adopted in improving the efficiency of MAP.²⁵² Mediation can be utilized to resolve some issues during MAP as the disputes can be clarified and illuminated by mediators from a different angle.²⁵³ During the whole process, the disputing parties maintain full control of the decision.²⁵⁴ The flexibility and confidentiality of mediation are also helpful in dealing with various disputes.²⁵⁵

Although mediation has its own advantages, due to its disadvantages, it cannot be adopted as a kind of hard law. Instead, countries can choose to adopt it as a kind of soft law after considering its merits and drawbacks. For example, it is not compulsory. A result is not guaranteed in mediation. Even if a mediation agreement is reached, the enforcement of the agreement is still a concern. Cooperation is required during the process: if one or both disputing parties are unwilling to cooperate with each other, mediation cannot be a success.

In order to illustrate the disadvantages of mediation in detail, the practice of China can be an example. Firstly, consider disputing parties that are worried about the disclosure of some important information exchanged during a mediation process. If the dispute is not resolved with mediation and the case is submitted to the trial, there is a concern that the arguments of one party may be revealed to the other party.²⁵⁶ Some opponents to mediation hold the view that the impartiality of a mediator is hard to be ensured, so the risk of disclosing secrets during the mediation exists. Although Article 7 of the People's Mediation Law Chinese mediators from disclosing information gained during the mediation process,²⁵⁷ disputing parties may still feel insecure. Secondly, the mediation process may be time and money consuming. In some cases, time may be expanded and cost may be increased. For instance, an additional burden may be levied on the disputants if mediation fails, because the disputing parties may initiate another proposal to mediate the failing case. Collecting evidence and hearing witnesses again will be time and money consuming.²⁵⁸ Thirdly, the satisfaction of a mediation resolution may be diminished.²⁵⁹ Mediators enjoy no rights to impose a duty on the disputing parties because mediation is non-binding. Only when both disputing parties fully

²⁵² Comm. of Experts on Int'l Coop. in Tax Matters, Rep. on Its Fourteenth Session at 2, U.N. Doc E/2017/45 (2017).

²⁵³ See Dalton, *supra* note 211 at 14; also see OECD, Model Tax Convention on Income and on Capital, *supra* note 124.

²⁵⁴ Pasquale Pistone & Jan J P de Goede, *The Flexible Multi-Tier Dispute Resolution Framework and Our Final Conclusions and Recommendations*, in FLEXIBLE MULTI-TIER DISPUTE RESOLUTION IN INTERNATIONAL TAX DISPUTES 492 (Pasquale Pistone & Jan J.P. de Goede eds., 2020).

²⁵⁵ See *Id.*

²⁵⁶ Nicholas Gould, *Recent Trends in Dispute Resolution*, Fenwick Elliot (Nov. 2011), <https://www.fenwickelliott.com/research-insight/articles-papers/recent-trends-dispute-resolution-0>, [<https://perma.cc/TFY3-CKEP>].

²⁵⁷ Karwan A. Perot, *The Advantages and Disadvantages of Mediation in the Chinese Commercial Arbitration Process*, 1 CHINA & WTO REV. 125 (2018).

²⁵⁸ Gabrielle Kaufmann-Kohler & Kun Fan, *Integrating mediation into arbitration: Why it works in China*, 25 J. OF INT'L ARBIT. 479 (2008).

²⁵⁹ See Perot, *supra* note 257 at 125.

accept the resolution can a satisfactory resolution be achieved through mediation. If the disputants are coerced to reach or accept a resolution by the mediator, the value of mediation is diminished. So, in this condition, the satisfaction of the mediation is diminished because of this compromised resolution, as from the disputants' perspective it appears that the decision is imposed by the mediator.²⁶⁰

Furthermore, parties cannot appeal a mediation decision.²⁶¹ If there was a mistake in fact or law during the mediation process, the disputing parties could reject the decision. Based on Article 31 of the Chinese Mediation Rules, even though if a mediation is unsuccessful, no appeal is available.²⁶² Another problematic feature of mediation is that it may be used as a delaying tactic. For example, mediation can be used to delay the payment of debt. If disputing parties have no intention to resolve the disputes in the mediation process, mediation can take a long time and become useless. Lastly, in China, mediators have minimal incentives to perform well.²⁶³ This is because most mediators in China are retired and employed on a part-time basis with small allowances.

IV. CONCLUSION

The contemporary global landscape has undergone substantial metamorphosis, characterized by significant geopolitical realignments, technological advancements, pervasive globalization, emergent business and consumer requirements, and novel lifestyle paradigms, as well as the inception of unprecedented entrepreneurial entities. Historically, sovereign states engaged in persistent rivalry to proffer advantageous arrangements to corporations. This approach was rational when said entities could establish a manufacturing facility and engender gainful employment opportunities. However, the advent of the digital epoch has considerably facilitated cross-border commerce and investment for organizations. Concomitantly, market actors have refined their dexterity in translocating profits from their operational jurisdictions to those with more favorable tax regimes, consequently propelling the phenomenon of Base Erosion and Profit Shifting to unparalleled heights. Thus, imposing taxation within the multinational framework has become a progressively formidable task. Concerted efforts are underway, exemplified by the OECD's ambitious endeavor to establish a bifurcated architecture encompassing enhanced tax mechanisms. Nevertheless, upon implementation, additional lacunae may surface, necessitating vigilant identification and rectification. For instance, it may be difficult to determine which nations will get reallocated revenue proposed in Pillar One of the plan or how double taxation of reallocated income will be avoided. Developing a compelling

²⁶⁰ See de Vera, *supra* note 88, at 159-60.

²⁶¹ See Perot, *supra* note 257, at 126.

²⁶² He Wei & Zeng Ying King, *Extra-judicial Mediation System and Practice*, CHINA LAW INSIGHTS: DISPUTE RESOLUTION (Oct. 31, 2011), <https://www.chinalawinsight.com/2011/10/articles/dispute-resolution/extrajudicial-mediation-system-and-practice-ipart-i-of-iii/>, [https://perma.cc/B82X-ZHFA].

²⁶³ Vai Lo Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 134 (2000).

dispute resolution process to promote tax, especially in light of developing countries' objections, may be a challenge.

The current transnational tax dispute resolution mechanism is not sufficient and cannot meet the increasing trend of transnational tax disputes. As a result, mediation can be put to the test. As there is a converging trend among trade, investment and taxation, a unified mediation regime is plausible and desirable.²⁶⁴ However, mediation does not make amendments to existing tax treaties. As taxpayers seek an effective, efficient, and transparent dispute resolution mechanism, MAP is not suitable, and mediation can be a choice. Because the revenue at stake is large and the issues related to treaty interpretation and transfer pricing are complex, the average duration of MAP is around two and a half years.²⁶⁵ With the help of a mediator, competent authorities can consider the MAP process from a different view. Furthermore, some systemic issues of the MAP process may also be solved by mediation. ADR is attracting many tax authorities' attention, and they want to utilize ADR to reduce the number of cases and compliance costs. Mediation, as a flexible dispute resolution mechanism, is less burdensome for both disputing parties. With ADR, taxpayers have changed their views on the competent authorities. Moreover, they have a better understanding of tax administration. Thereby, mediation can be put to the test to facilitate the effectiveness of tax-related dispute resolution mechanisms.

In the realm of addressing tax-associated conflicts, the utilization of mediation may be regarded as an embodiment of soft law, characterized by its inventive and exploratory nature. Owing to its non-binding essence, contending parties, particularly sovereign entities, are afforded enhanced latitude in safeguarding their vested interests. As a manifestation of soft law, the efficacy of the MAP may be augmented through the integration of mediation. The incorporation of an "opt-in" stipulation within the dispute resolution accord enables parties to elect mediation as their preferred modality. Consequently, mediation may serve as a valuable adjunct to MAP in the resolution of tax-related disputes.

²⁶⁴ Comm. of Experts on Int'l Coop. in Tax Matters Twenty-fifth session, Item 3(p) of the provisional agenda, Relationship of tax, trade and investment agreements, U.N. Doc. E/C.18/2022/CRP.18 (Oct. 18-21, 2022).

²⁶⁵ Poonam Khaira Sidhu, *Is the Mutual Agreement Procedure Past Its 'Best-Before Date' and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?*, BULL. FOR INT'L TAX'N 605 (2014).