

The Future of International Tax Dispute Resolution post BEPS and MLI

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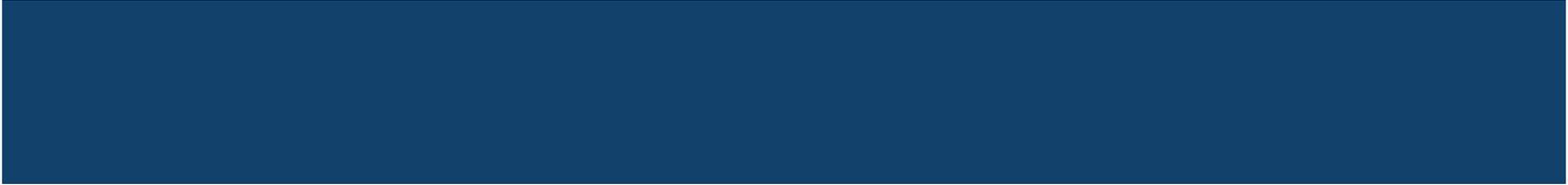
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Looking into the crystal ball

- **From 2018 ...**
 - J. Owens (on arbitration) : „I suspect that when we look back on this debate in ten years' time, we will ask ourselves why did it take so long to get to the point where arbitration becomes the norm not the exception” (Intertax 2018)
- **... to now** : what about international tax dispute resolution if Pillars 1 & 2 are implemented?
- **Will tax international tax dispute be :**
 - More efficiently prevented ?
 - Settled through new procedures?

Key issues

- Bilateral tax treaties will continue to exist
 - → « classical » questions about dispute resolution will continue to arise
- A multilateral tax treaty may be signed on the basis of Pillar 1
 - → to what extent does this change the way dispute resolution is handled?
- Bilateral treaties will coexist with multilateral treaties
 - → how will both worlds coexist for the purpose of dispute resolution?



THE WORLD OF BILATERALISM

Dispute resolution under a traditional model

- **MAP left at the discretion of competent authorities**
- **Arbitration** : extension of MAP / preferably to be avoided
- **Other non-binding dispute resolution mechanisms as a way to solve the traditional model?**
 - Tools
 - Mediation : facilitation of discussions between the competent authorities by a neutral third person
 - Conciliation : the conciliator can provide a non-binding settlement proposal to the competent authorities
 - Use of tools : in the course of a MAP/between MAP and arbitration
 - Expectations :
 - Enhance the effectiveness of MAP
 - Respond to developing country concerns

The traditional model after the MLI

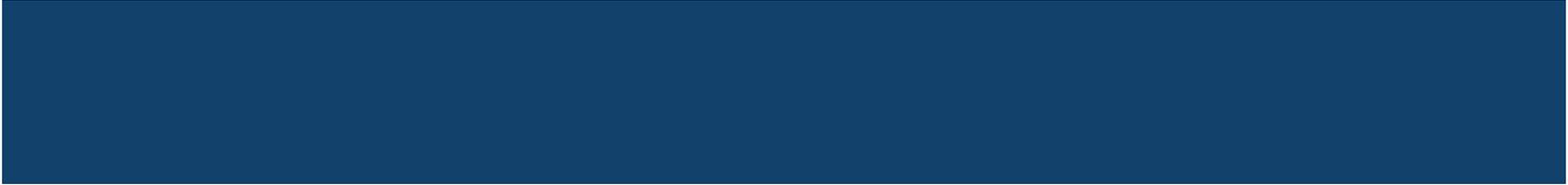
- **The MLI does not threaten bilateralism**
 - Tax treaties remain bilateral
 - Dispute resolution therefore remains bilateral
 - Question whether some kind of arbitration institution should express opinions on the interpretation of the MLI and/or the added content to bilateral treaties
- **The MLI has not fundamentally changed the tools of dispute resolution**
 - Improvement of MAP
 - Enhancement of arbitration
 - See also Directive 2017/1852 of 10 October 2017

The traditional model after the MLI

- **To think about the future of the traditional model, one has to ask the following questions :**
 - Are tax treaties increasingly complex or difficult to interpret because of the MLI ?
 - Have the traditional tools of dispute resolution proved to be inefficient?
 - As a result, is it necessary to change the pattern of tax treaty dispute resolution?

The traditional model after the MLI

- **MLI, complexity and tax treaty interpretation**
 - The technical changes introduced by the MLI in tax treaties are unevenly complex
 - The MLI mechanism is very complex
 - Some rules are very complex (e.g. rules on hybrids)
 - Other rules (thresholds, etc.) are not
 - Interpretation issues more important
 - Vague concepts (extension of PE concept ; PPT) → more leeway left to tax authorities in tax treaty interpretation
 - Traditional tools have not proved to be inefficient but may be supplemented by other tools
- **Conclusion on the MLI**
 - The MLI does not call for a fundamental change in the tools of dispute resolution
 - However, increased tax certainty for taxpayers is the compensation for increased interpretative authority for competent tax authorities



THE WORLD OF MULTILATERALISM

Multilateralism is not entirely new

- **Today**

- APA are sometimes multilateral
- Triangular situations may arise where a company is resident in country A and has a PE in country B that receives income from country C...
- However, these cases remain rather exceptional

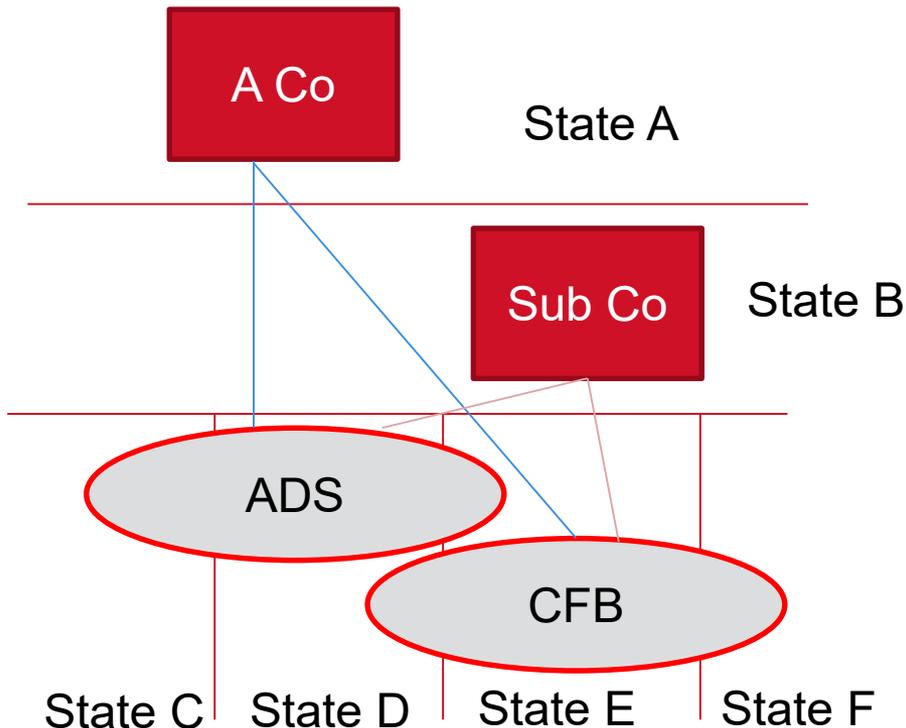
- **Tomorrow**

- If Pillars 1 and 2 are implemented, multiple taxation may become commonplace
- Tomorrow's multilateralism is not about triangles ; it is about squares, pentagons, hexagons, heptagons, etc.

- **The question is therefore whether these n-sided tax polygons call for a change in dispute resolution**

Multilateral disputes as a result of Pillar 1

> Situation (amount A)

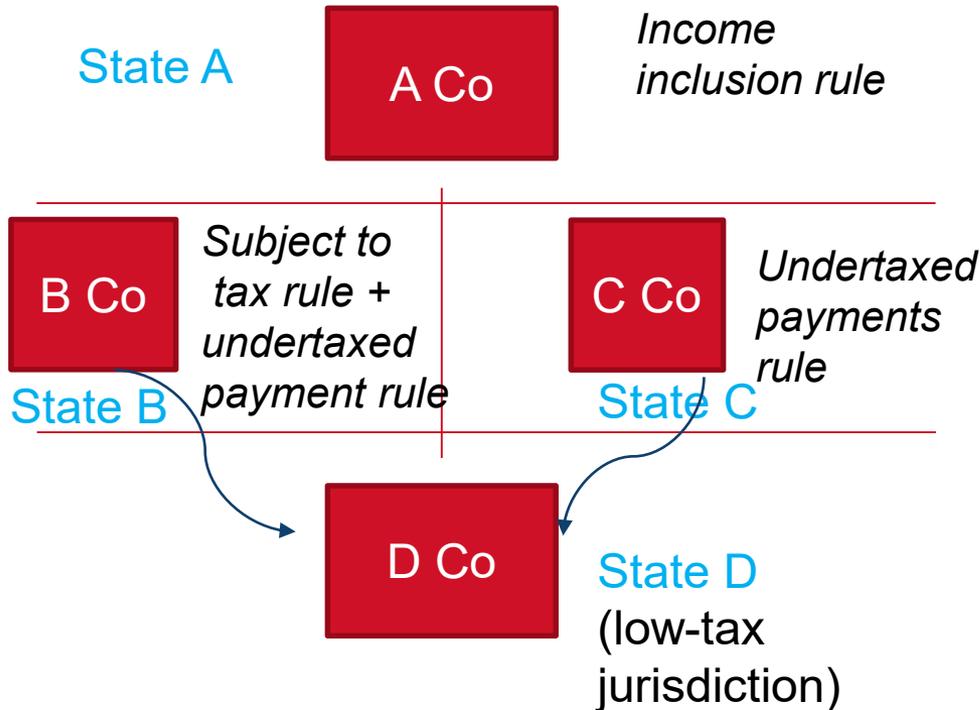


> Disputes (examples)

Problem	Dispute
Revenue threshold of Parent Co	All States should agree... but A
Whether A Co performs ADS	C, D and E say yes A says no
Whether Sub Co performs CFB	D, E and F say yes B says no
Whether there is an ADS nexus in State C	C says yes D, E and A say no
Whether there is a CFB nexus in F	F says yes D, E and B say no
To what extent A and B should grant exemption	A and B may not agree

Multilateral disputes as a result of Pillar 2

> Situation



> Dispute (ex.)

- Ex. 1 :
 - State B does not apply STTR but applies UTPR
 - State A does not apply IIR
 - C Co takes the view that :
 - B should have applied STTR
 - A should have applied IIR
 - → C Co should not be subject to UTPR
 - Question arises whether A, B and C have implemented Pillar 2 correctly
- Ex. 2 :
 - State B applies STTR
 - State A applies IIR but does not take into account the fact that State B applied STTR
 - State C considers that A & B have failed to implement STTR & IIR correctly → applies UTPR

Which lessons do we draw from these examples?

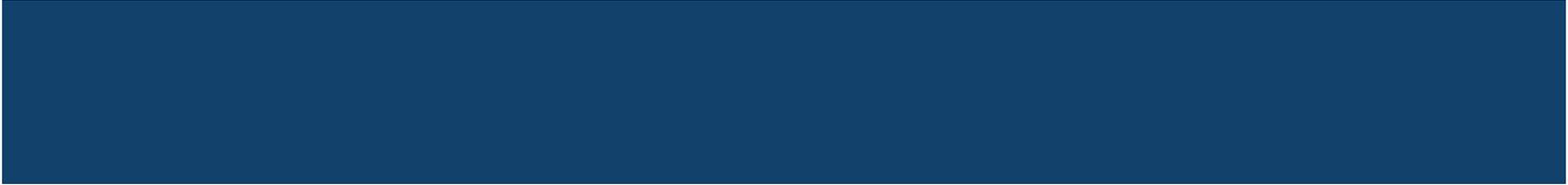
- **Both pillars establish a system whereby the taxing right of one state depends on the taxing rights of several other states**
 - Situations of multiple taxation may arise
 - Situations where several states wrongly disapply Pillar 2 rules, with the effect that the burden of reaching minimal taxation is incorrectly transferred to a single State
- **Both pillars, not only Pillar 1, may raise multilateral disagreements**
 - It is irrelevant in this respect that some rules of Pillar 2 may be implemented through domestic legislation rather than bilateral or multilateral agreements
 - Pillar 2 rules build on Pillar 1 rules (esp. to determine the effective tax rate) → it is to a certain extent artificial to disconnect the two pillars for the purpose of dispute resolution
 - Blueprint on Pillar 2 does not devote much substance to dispute resolution
 - See 10.6 and hesitations displayed in § 713 to 715
- **Technical complexity** of Pillars 1 and 2 is extremely high

Multilateralism calls for more prevention of disputes

- **The Inclusive Framework is aware of this** (See *Blueprint on Pillar 1, chap. 9 on Tax Certainty*)
- **New framework** based on
 - Self-assessment return or request for tax certainty
 - Optional initial review by the lead tax administration and determination if a panel review is needed
 - Review panel
 - Determination panel
- **Other improvements to dispute prevention process**
 - ICAP / transfer pricing and PE risk
 - Joint audits
 - Improved processes for bilateral and multilateral APAs

Multilateralism calls for an institutional framework of dispute resolution

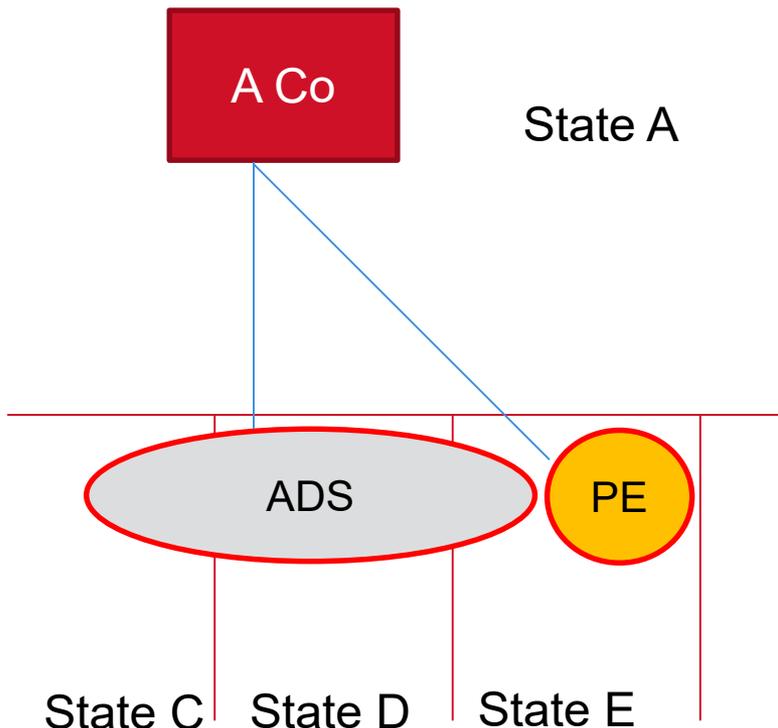
- More people around the table means a **smaller probability to reach an agreement through multilateral APAs (or equivalent) and MAPs**
- Mediation may gain importance in the future
- **Lead tax administration may be granted too much importance in the current form of the blueprint on Pillar 1**
- **An institutional form of binding dispute resolution therefore seems inevitable**
- MNEs falling within the scope of both pillars should have **access to this form of dispute resolution for both of them**
- **A last best offer arbitration process seems difficult to implement in a multilateral setting**



COMBINING BILATERALISM AND MULTILATERALISM

Multilateral dispute in a Pillar 1 + DTC scenario

> Situation



> Dispute (example)

- State E's tax authorities take the view that :
 - A Co is liable to tax in State E on by virtue of Pillar 1 Rule (multilateral treaty)
 - A Co is also liable to tax in State E because it has a PE in that State (bilateral tax treaty)
- State A's tax authorities take the view that :
 - A Co does not meet the nexus requirement in State E
 - A Co does not have a PE in State E
- Should the dispute concerning the tax status of A Co be prevented and settled through different procedures?

› Available options

- Work with two parallel frameworks
- Extend the Pillar 1 dispute resolution framework to mixed situations

› Blueprint on Pillar 1

- « There remain differences in the views of Inclusive Framework members as to the extent to which Pillar One should incorporate new tax certainty approaches beyond Amount A. Some strongly support a mandatory binding dispute resolution mechanism with broad application, while others consider that disputes unrelated to Amount A should be resolved through the existing MAP framework and non-binding administrative tools” (§ 801)

› Arguments in favor a single framework

- CIT liability is indivisible
 - This is true although part of the CIT amount is due to the implementation of Pillar 1 and another part stems bilateral tax treaty → a segmentation of CIT liability for the purpose of resolving a dispute between State A and State E seems to be inappropriate
- Problems are to a certain extent indivisible
 - Existence of a PE under bilateral tax treaty may have a connection with the existence of a nexus under Pillar 1 rule

- › Structural innovation in the field of dispute resolution is needed in a multilateral tax world
- › Once it is acknowledged that multilateral disputes must be settled in a multilateral way, it remains to be seen how this may be combined with bilateral tax treaties
- › Fortunately, this Conference will solve all the problems

So it is time for me to thank you for your kind attention