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Whether China Should Implement International Tax Arbitration: A Study

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Abstract

In economic globalization, China plays an increasingly important role, and Chinese enterprises are speeding up the pace of going global. In this process, "going out" enterprises face prominent tax risks. Some countries adopt arbitration to settle international tax disputes, but China does not. However, the widely used MAP has many disadvantages, and tax disputes cannot be solved efficiently. To deal with this, the *Pillar 1 Blueprint* calls for mandatory binding arbitration of disputes over Amount A, which can be seen as a future trend. This paper suggests that China should adopt temporary means of tax arbitration and enhance taxpayers' participation in the arbitration procedure. In addition, setting up tax dispute prevention measures to protect the interests of multinational enterprises to a greater extent.

Keywords: international tax arbitration, MAP, pillar one, tax dispute prevention measures

1. Introduction: Debate on the Availability of International Tax Arbitration

During the globalization of the world economy, enterprises are more and more active in carrying out economic activities and expanding their business territory, but they often encounter various disputes in the process. In the field of investment disputes, the International Center for Settlement of Investment Disputes (ICSID) takes advantage of the Investment Dispute Settlement Mechanism (ISDS) for arbitration; disputes in the field of trade can be submitted to the Dispute Settlement Body (DSB) of the WTO by the Understanding on rules and procedures governing the settlement of disputes (DSU). In the field of taxation, the Mutual Agreement Procedure (MAP) is currently the main dispute resolution method. There are professional institutions that adjudicate disputes in the fields of international investment and trade, but there is no specialized international institution or a relatively stable and transparent resolution procedure to adjudicate on similarly high-incidence tax disputes. Therefore, it is necessary to consider the improvement of tax dispute resolution.

Since international taxation is closely related to national sovereignty, the related dispute-resolution methods have always attracted the attention of various countries. Law scholars have conducted extensive discussions on whether

the international arbitration mechanism can be applied to resolve international tax disputes.

From a global perspective, some scholars recognize the use of arbitration for tax disputes considering the BEPS action, anti-malicious tax planning, and the increase in MAP cases. Research shows that an increasing number of countries have decided to withdraw their previous reservations to arbitration and resort to compulsory arbitration. Some scholars suggested establishing a permanent international tax arbitration institution to improve the efficiency and neutrality of dispute resolution.

In China, this is still controversy among domestic law scholars that whether arbitration shall be applied in the resolution of international tax disputes. From the perspective of the public interest of taxation, the legal principle of taxation, and the coordination of taxation systems in various countries, some scholars believe that the international arbitration system is mandatory and confrontational, which is contrary to "the Belt and Road initiative" which aims at mutual benefit and win-win situation. However, other scholars believe that the international arbitration mechanism can help improve the MAP and provide certainty for resolving tax disputes when the MAP procedure cannot resolve tax disputes. Due to the large differences in the tax systems of countries along the "Belt and Road", my country should introduce an arbitration system into its domestic law, the Tax Collection and Administration Law, and lead the construction of a tax arbitration system suitable for the development of the "Belt and Road". Scholars suggest considering the establishment of the "Belt and Road" International Tax Dispute Resolution Center.

However, Chinese scholars still have disputes over the arbitrability of international tax disputes and believe that the fundamental reason why international tax disputes cannot be resolved by arbitration is based on the consideration of national sovereignty. However, Chinese scholars have not given specific measures on how to implement tax arbitration measures, but only put forward principled suggestions such as incorporating tax arbitration into the legal system. Therefore, this essay will first demonstrate the necessity of arbitration of international tax disputes, and then put forward specific suggestions on how to implement tax arbitration in my country.

2. The Necessity of Establishing an International Tax Arbitration System in China

With the increase of global economic activities, although Chinese scholars have disputes over whether to adopt an international tax arbitration system, there are various problems in the current tax dispute resolution mechanism, so it's time to rethink how to solve tax disputes efficiently. The following pages will analyze the necessity of the establishment of a tax arbitration system from four aspects: existing problems in the current international tax dispute resolution mechanism, international trends, tax certainty requirements, and sovereignty considerations.

2.1 Current Problems in Existing Dispute Mechanism

The existing dispute mechanism can be divided into a domestic part and an international part. In addition to the relief methods of administrative reconsideration and litigation in Chinese domestic law, disputes can also be resolved through MAP by the tax authorities of both parties and other methods. The following parts will analyze the problems in the currently widely used MAP program.

2.1.1 MAP Has Political Overtones

In the actual operation of MAP, congenital deficiencies and acquired defects, which are caused by obvious political traces, weak legal color, insufficient protection for taxpayers, opaque procedures, and low efficiency, have become more and more obvious. These congenital deficiencies and acquired defects expose the independence, injustice, inefficiency, and other issues in the traditional tax dispute settlement mechanism.

MAP is a negotiation procedure between the tax authorities from two countries, however, the tax authorities mainly focus on maintaining their tax interests during the negotiation. The negotiation process is essentially a game of national interests, reflecting a strong political nature. In addition, tax authorities are only required to try their best to resolve tax disputes, according to Article 25 of *The United Nations Model Double Taxation Convention between Developed and Developing Countries* (hereinafter referred to as *UN Model*) and *The*

Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital (hereinafter referred to as *OECD Model*), and do not undertake legal obligations to achieve certain results through MAP, which is a legal deficiency of MAP.

2.1.2 MAP Is of Low Efficiency

According to data published on the OECD website, in 2020, the average resolution time for MAP cases involving transfer pricing worldwide was 35 months, and the average resolution time for other types of disputes was 18.5 months.[1] Taking China as an example, in 2020, 11 cases were closed through the MAP (3 of which were disputes arising from transfer pricing and 8 were disputes of other types), a total of 46 new cases, and 124 cases were still pending at the end of 2020.[2] Not finally resolved in the MAP. It can be seen from the data that the number of cases resolved by the MAP per year is small and we can conclude that it is not that effective. In the context of economic globalization, however, the number of foreign direct investment and overseas direct investment is far more than the number of MAP cases, and this does not mean that there are fewer international tax disputes, but that there are fewer cases which can be settled through the MAP. And taxpayers have not actively considered applying for a MAP as a means of resolving tax disputes.

2.1.3 MAP Does Not Fully Reflect the Interests of Taxpayers

In the MAP, the taxpayer is not a participant in the MAP procedure, and the taxpayer does not actually participate in the formal initiation, negotiation, and final settlement of the procedure. Statistics show that in 2020 alone, a total of 3% of MAP applications were rejected. [3] The taxpayer feeds back the dispute to the tax authority of his home country, and the tax authority is the one who determines whether this dispute is able to be resolved through the MAP procedure. Therefore, whether a dispute can enter the MAP is not under the control of taxpayers, and it is difficult for taxpayers to use the MAP to protect their legal tax rights.

As mentioned earlier, the MAP has a strong political overtone, and the interests of taxpayers may not be the focus of the countries concerned in the MAP negotiations. Taxpayers also can not directly participate in the MAP to express their concerns and protect their interests on their own, but only have the right to choose to accept or reject the final negotiation result of the MAP. Although the taxpayer has the right to refuse the final decision, after a long wait, the taxpayer has spent a lot of time and cost, however, still has not waited for a solution that satisfies his rights and interests. All in all, this MAP is not beneficial to the taxpayer. Its cost-benefit analysis is seriously unbalanced, in which more costs are invested but not necessarily rewarded, this can also explain why most taxpayers do not give priority to the MAP procedure when a tax dispute arises.

2.1.4. MAP Does Not Meet the Current Economic Status of China

Against the backdrop of a sharp decline in the total scale of global foreign direct investment (FDI) in 2020, China has become the world's largest investor. China has now changed from an investee country to a major investor country, this change in status means that my country needs to change the way of safeguarding relevant interests in the dispute settlement mechanism. The use of MAP is to examine the settlement of tax disputes from the standpoint of *treasuryism*.[4] The biggest advantage of MAP lies in the controllability of the results. Through mutual negotiation, the interests of the treasury are maximized. This was commensurate with the fact that my country, as the main investment destination at that time, participated in negotiations on behalf of the country when tax disputes occurred, to keep the country's tax revenue as the goal.

Now, China is gradually changing from a major investment destination country to a capital exporting country, whose foreign direct investment also increases. When an international tax dispute occurs, Chinese tax authorities are representative of the taxpayer, on most occasions, when participating in the MAP negotiation. However, since the tax authorities have not personally experienced the whole process of the dispute, it is difficult for them to fully safeguard the interests of the taxpayer. As mentioned earlier, agreements reached through the MAP may not fully reflect the interests of taxpayers. Therefore, in line with the policy of protecting taxpayers and encouraging enterprises to go global, the current MAP is no longer suitable for the current

economic status of China.

2.2 International Trends

In 2008, in the modification of the *OECD Model*, paragraph 5 was added to article 25, which added the means of arbitration. In other words, if the dispute has not been resolved two years after the initiation of the MAP, the taxpayer who submitted the MAP can apply for arbitration.[5] When the *UN Model* was revised in 2011, an arbitration solution was added, that is, the competent tax authorities of either Contracting State may apply for arbitration for matters that cannot be resolved after three years of the MAP procedure.[6]

Since 2013, the OECD has cooperated with the G20 to carry out the *Base Erosion and Profit Shifting Action Plan* (hereinafter referred to as *BEPS Action Plan*), of which *BEPS Action Plan 14* aims to promote more efficient dispute resolution mechanisms between countries. While the OECD and G20 member countries have not agreed on whether to resolve tax disputes by arbitration, the business community and several countries[7] believe that a binding arbitration mechanism is the best way to ensure that treaty-related disputes can be effectively resolved through the MAP mechanism. In order to implement the results of Action 14 of BEPS, the *Multilateral Convention on the Implementation of Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting* (hereinafter referred to as the *Multilateral Convention*) came into being. Chapter VI of the *Multilateral Convention* clarifies that arbitration is a dispute resolution method available to contracting parties.

In recent years, arbitration has been incorporated into the tax dispute resolution method available to the disputing parties in international documents. In addition, many tax treaties between countries have included tax arbitration as a method of dispute resolution. For example, Article 13 of the Protocol to the *U.S.-German Tax Treaty* (2006), "If the MAP procedure does not reach an agreement within two years, the tax dispute may be brought to arbitration with the consent of the taxpayer and a signed consent form."[8] Since there are already tax treaties between countries that have adopted arbitration as a supplementary means of MAP. In the process of the Chinese opening to the outside world, when concluding tax treaties with other countries, it is bound to face the question of whether to use arbitration as a means of dispute resolution. Therefore, China needs to address this issue as soon as possible. A detailed study and judgment on one issue in order to reduce the damage to Chinese economic sovereignty should also be conducted quickly and comprehensively.

2.3 The Requirement from Tax Certainty

Tax certainty includes not only the clarity of tax laws and regulations, the legitimacy and consistency of tax collection and administration but also the effectiveness of dispute prevention and resolution methods. Therefore, building a complete and efficient tax dispute prevention and resolution system is essential for improving tax revenue, which is of vital importance to improving certainty.

In December 2020, the OECD released the *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* (hereinafter referred to as the "*Pillar 1 Blueprint*"), in which tax certainty is occupied with a whole chapter, emphasizing that "securing tax certainty is an essential element of Pillar One. Providing and enhancing tax certainty across all possible areas of dispute brings benefits for taxpayers and tax administrations alike and is key in promoting investment, jobs, and growth, and G20 Finance Ministers have recognised the importance of international cooperation to ensure tax certainty as an integral part of arriving at a consensus-based solution to the tax challenges of the digitalisation of the economy."[9] The Pillar One Blueprint guarantees this through two aspects: Tax certainty: Dispute prevention and resolution related to Amount A, and dispute prevention and resolution other than Amount A.

On October 8, 2021, OECD released the *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (hereinafter referred to as the "*Statement"*), it was clarified that the tax disputes of multinational enterprises within the range of Amount A will be passed through mandatory and binding dispute prevention and resolution mechanism for dispute settlement, all matters related to Amount A are subject to this mandatory and binding dispute prevention and resolution mechanism, and there are applicable exceptions: for a small number of developing countries, when disputes related to Amount A is involved, they have the autonomy to

choose whether to apply a binding dispute resolution mechanism or not. However, the *Statement* does not detail mandatory and binding dispute prevention and resolution measures. Therefore, the following analysis of the dispute resolution procedures in Pillar 1 is still based on the relevant provisions in the *Pillar 1 Blueprint.*

Dispute prevention and resolution for Amount A is to provide early tax certainty to multinational enterprises in a multilateral manner. The coordinating entity within a multinational enterprise is responsible for the provision of relevant information, and an external review team and decision-making team composed of tax authorities.

The *Pillar 1 Blueprint* proposes a standardized self-assessment of Amount A and a centralized process for filing, validating, and exchanging that information, as shown in Figure 1 below. First, the multinational enterprise ((hereinafter referred to as "MNE") conducts a self-assessment and submits the assessment report to the lead tax authority for preliminary review. At this time, it only checks whether there are obvious errors, and does not conduct a substantive review of the multinational enterprise's self-assessment. The lead tax authority would then exchange the MNE's self-assessment with the affected tax authority. This exchange is not initiated by the MNE applying for tax certainty but is only to ensure that all MNE groups plan to rely on domestic remedies to resolve disputes. Affected tax authorities have access to consistent information. This approach can reduce part of the burden on multinational companies, which do not have to submit documents to all tax jurisdictions; for tax authorities, it can exchange work experience promptly and facilitate the formulation of work guidelines.

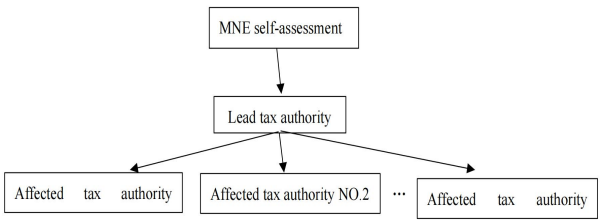

Figure 1.

If an MNE makes an early application for certainty about whether it falls within the scope of Amount A and the allocation of Amount A, the lead tax authority will first review it. The preliminary review is only to screen out MNEs in low-risk, and the affected tax authorities can also submit a review within 3 months after the lead tax authority decides if they think it needs to be reviewed. If the lead tax authority deems the matter to be material, it is necessary to submit a review panel composed of the affected tax authorities to seek consensus and reach an amicable solution by way of group consultations, which will be beneficial to the various subsidiaries of the multinational enterprise, members of the Inclusive Framework are valid. If the review panel cannot reach a solution, a decision panel composed of individual panel members is required to make a final decision by way of final quotation arbitration. If the multinational enterprise rejects the final arbitration result, the multinational enterprise can withdraw the arbitration application, thereby initiating domestic relief procedures. [10]

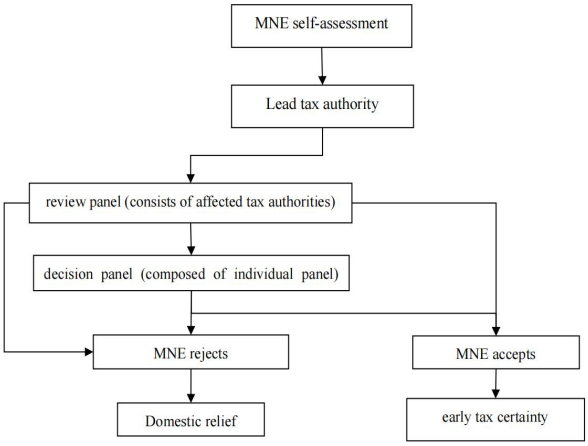

Figure 2.

Different countries have different opinions on how to handle disputes other than Amount A. The *Pillar 1 Blueprint* adopts dispute prevention procedure and MAP, supplemented by an innovative mandatory and binding dispute resolution mechanism, [11] which is to ensure the certainty of matters other than Amount A.

Dispute prevention and resolution measures proposed in Pillar 1 can improve the efficiency of the resolution, especially when MNEs apply for early certainty in the second year and later years,

which is mainly based on the review time will be shorter thereafter due to the careful review of MNEs in the first year, the review efficiency is higher. In addition, this scheme conducts a lot of reviews before the dispute occurs, which will improve the compliance of multinational enterprises. This scheme integrates the traditional tax dispute resolution mechanism and applies it before the dispute occurs, in order to solve the dispute over Amount A. Effective prevention and disposal can be done before the emergence of disputes, so as to reduce the complexity of the settlement procedures after disputes occur, and even avoid the occurrence of tax disputes to a certain extent, reducing the tax burden of MNEs.

There are still some shortcomings, although these tax prevention and resolution measures can improve the efficiency of case resolution. First, the *Pillar 1 Blueprint* increases tax compliance costs for MNEs, which require detailed self-assessment documents to be submitted to the lead tax authority. Not only that, a special coordinating unit needs to be established within the MNE to complete the self-assessment document and timely complete the amendments proposed by the leading tax authority. In addition, the administrative burden may increase. The lead tax authority plays an important role in this mechanism. It not only needs to maintain good communication with multinational enterprises but also needs to coordinate and communicate with other affected tax authorities.

Among the dispute prevention and resolution measures in *Pillar 1 Blueprint*, the decision panel adopts baseball arbitration to make the final decision. In essence, the dispute prevention and resolution measures of *Pillar 1 Blueprint* improve the efficiency of tax dispute resolution, and the core is still to resolve disputes by arbitration and improve the efficiency of dispute resolution. At the same time, the composition of the decision panel is similar to that of the arbitral tribunal, but the decision panel is not required to be a professional arbitrator, but its role function is to make a staged final decision in order to resolve the dispute. These measures are all the use of arbitration in Pillar 1. It can be seen that the OECD tends to resolve international tax disputes by arbitration.

Furthermore, since the taxpayer is not a participating party to the arbitration proceeding, the dispute prevention, and resolution measure gives the taxpayer the option to accept the arbitration award or not. Although the arbitration ruling is non-final and cannot completely resolve the dispute, it is also a little efficiency sacrifice made to better protect the legal rights of taxpayers, and it is more inclined to ensure fairness between efficiency and fairness.

2.4 Sovereignty Do Not Constitute a Sufficient Condition Against Tax Arbitration

Taxation is regarded as an important means for a country to exercise its sovereignty. Therefore, countries have adopted a more cautious attitude toward whether international tax disputes can be arbitrated. Therefore, it is necessary to consider whether international tax arbitration will erode national sovereignty in order to fully demonstrate the necessity of international tax arbitration.

2.4.1 The International Tax Arbitration Is a Supplementary Measure to the MAP

First of all, international tax arbitration is a supplementary mechanism to MAP, in other words, the mechanism does not directly file tax dispute cases into arbitration. The arbitration will only be initiated if the dispute cannot be resolved in time through the MAP procedure, so not all cases need to be resolved by arbitration. Secondly, the existence of the international tax arbitration system is for efficiency reasons, that is, arbitration, as a backup method, in turn, forces the tax authorities to resolve disputes through negotiation and accelerates the MAP negotiation process. In addition, during the implementation of the arbitration, the MAP was not terminated, and the arbitration method did not deprive the tax authorities of both parties of their right to negotiate independently, and the tax authorities could continue to resolve tax disputes through MAP negotiations. In essence, MAP is still the main solution, and the introduction of the arbitration procedure is to improve the efficiency of the resolution.

2.4.2 Sovereignty Can Be Partially Transferred

In this era of deepening interdependence, national sovereignty is unlikely to remain absolute, and the relativity of sovereignty is increasingly reflected. Although national sovereignty is inviolable, it can be partially transferred in certain matters. For

example, when countries cooperate in tax collection and administration, the automatic exchange mechanism of tax-related information in financial accounts indicates that the state has transferred some economic sovereignty so that tax-related information can be obtained. The automatic exchange between countries provides a powerful tool for combating international tax evasion. ICSID involves dispute resolution between sovereign states and investors, and the WTO dispute resolution mechanism also involves dispute resolution between sovereign states and international traders. The above two systems are implemented because sovereign states voluntarily transfer the economic sovereignty of some countries, in order to safeguard the long-term interests of the prosperity and development of the international economy. So, in tax disputes, sovereign countries can also give up part of their national sovereignty for long-term interests, which is also justified.

2.4.3 International Investment Arbitration May Be Transplanted into International Tax Area

The arbitration mechanism has been widely used in the field of international investment, so it is worth considering whether international investment arbitration may be transplanted or adapted to the field of international taxation. At the beginning of the establishment of the investment arbitration system, some objections pointed out that the investment field is very different from general commercial arbitration because it involves national policies, etc., so the system of commercial arbitration cannot be directly applied. The introduction of investment arbitration would violate national sovereignty, but ISDS still works well in general, and ICSID also handles a large number of investment arbitration cases every year. Although there is also a view that ICSID will violate national sovereignty, it is mainly aimed at the violation of national sovereignty caused by ICSID expanding its jurisdiction. It does not fundamentally question the impact of the international investment arbitration system on national sovereignty. The arbitral tribunal's extended interpretation of bilateral investment treaties is a violation of national sovereignty. Therefore, the issue of sovereignty is not in dispute with regard to the arbitrability of investment disputes.

Compared with investment arbitration, the parties to tax arbitration are arbitration between two sovereign states, while investment arbitration is an arbitration between investors and sovereign states. Tax arbitration has greater interference with the sovereign, so a cautious approach shall be taken. However, tax disputes and investment disputes have some similarities, which is also the reason for transplanting investment arbitration when considering tax dispute resolution methods. Investment arbitration will also involve the treatment of enterprises by the host country. These measures are also a manifestation of national sovereignty. From this perspective, the sovereignty issues involved in tax disputes are very similar to investment disputes. Therefore, just as investment arbitration can be accepted by most countries, then tax disputes can also be resolved by arbitration.

At the same time, since international investment and tax issues are closely intertwined, [12] taxing foreign investment is an important regulatory task for sovereign countries. Investment tribunals usually review the tax measures of host countries in accordance with relevant standards in international investment agreements. Whether it is discriminatory or expropriating. [13] However, because taxation involves national fiscal sovereignty, some countries introduce tax exclusion clauses in investment treaties or rely on tax treaties to resolve tax disputes. [14] For example, the United States and Germany, Belgium, Canada, France, Japan, Spain, and Switzerland have concluded mandatory tax arbitration clauses in tax treaties. [15]

In the practice of investment arbitration, tax disputes between investors and host countries have been resolved through arbitration, mainly involving tax measures related to indirect expropriation, national treatment, fair and equitable treatment, etc. According to *the Restatement (Third) of the Foreign Relations Law of the United States)*, the tax is of a levy nature only if it is discriminatory and designed to cause a foreigner to relinquish ownership of property or sell it to the state at a low price. In *Emanuel Too v. Greater Modesto*, the arbitral tribunal explicitly invoked this principle, holding that the forfeiture of a claimant's liquor license, housing and bank account for non-payment of taxes was not an

expropriation. [16] In *ADM v. Mexico*, the arbitral tribunal held that although the Mexican tax law exempts products that use only sucrose, the purpose is to protect the cane sugar industry in Mexico, and the tax is discriminatory. Specifically, the sweeteners of soft drinks and syrups produced in Mexico are mainly Sucrose does not need to be taxed; while the fructose syrup industry in Mexico is controlled by American companies, and the production and sale of high-fructose syrup are subject to a 20% tax. [17] It can be seen that the tax is set up against American companies and is discriminatory. The arbitral tribunal in the above-mentioned case arbitrated the disputes arising from tax measures, that is, it was clarified that the arbitral tribunal had jurisdiction over tax disputes and affirmed the arbitrability of tax disputes.

3. Suggestions on China's Implementation of International Tax Arbitration

Since the MAP procedure is time-consuming and sometimes ineffective in resolving disputes, the international community is increasingly calling for arbitration to resolve international tax disputes. In the process of internationalization, China needs to change its thinking promptly and consider incorporating it into international tax arbitration. The following will provide suggestions for my country's implementation of international tax arbitration from the aspects of the dispute resolution system and the dispute prevention mechanism.

3.1 Dispute Resolution System

3.1.1 Arbitration Measures as a Supplement to MAP

Although the current MAP approach to resolving tax disputes is flawed, the reform of the system should not only focus on dispute resolution but also respect the sovereignty of countries. Although submitting tax disputes to a third party for arbitration will weaken the state's control over dispute resolution to a certain extent, if the tax authority enjoys sufficient control in the arbitration process, then the state's tax sovereignty will not be lost. Therefore, it is possible to consider the use of arbitration measures as a supplement to the MAP mechanism to resolve tax disputes on the premise of safeguarding the sovereignty of participating countries.

Article 25 of the *OECD Model* and the *UN Model*, and the *Multilateral Convention* stipulate that if the tax authorities of both parties cannot resolve the tax dispute through mutual negotiation within two or three years, they may apply for the initiation of arbitration proceedings. This paper proposes to give taxpayers and the parties the right to apply for arbitration, that is, after the expiration of the two years, the taxpayer shall apply to the tax authority of its own country or the tax authority itself shall submit an arbitration application to the arbitration organization, so as to ensure the efficient resolution of tax disputes. Here, two years are chosen as the time limit because of these two reasons: First, it is based on the average length of time to resolve disputes in the MAP procedure published on the official website of the OECD. Second, it is considered that the *BEPS Action Plan 14* sets the goal of closing the case in 24 months. The average resolution time of the MAP that China has participated in is 24.33 months, [18] so in most cases, tax disputes can be resolved through MAP within 2 years. In order to avoid delay, disputes over 2 years can be resolved by other means, so it is reasonable to limit the time limit for allowing the application for arbitration to be 2 years after the start of the MAP procedure.

3.1.2 International Tax Arbitration Takes the Form of *Ad Hoc* Arbitration

Ad hoc arbitration and institutional arbitration are two forms of arbitration, each with its own advantages and disadvantages. At this stage, this paper recommends ad hoc arbitration to resolve tax disputes for the following reasons.

First, *ad hoc* arbitration has higher flexibility, and the formation of its arbitral tribunal is also more optional. Establish an international arbitrator pool, including arbitrators not only from developed countries but also from developing and less developed countries, in the career field, fully including experienced arbitrators, jurists, and lawyers. Secondly, *ad hoc* arbitration does not have a fixed institutional venue and does not require administrative employees, etc. *Ad hoc* arbitration does not have to pay arbitration fees to the arbitration institution, and it can also save some financial expenses for the state. Therefore, *ad hoc* arbitration has more advantages in terms of implementation costs. In addition, although institutional arbitration is more neutral, it is not

necessary to establish a permanent international tax arbitration institution because the arbitration settlement of tax disputes has not reached a consensus worldwide.

3.1.3 Arbitration Based on Independent Opinion

This paper recommends using independent opinion arbitration as the principle, with the exception of baseball arbitration. When dealing with disputes related to transfer pricing, baseball arbitration can be conducted with the agreement of both parties.

Although the arbitral tribunal in baseball arbitration only needs to choose from the plans provided by the tax authorities of both parties, which seems to be more respectful of national sovereignty, however, behind the plans that are not selected are countries that will suffer actual losses. In addition, because the arbitral tribunal does not need to give reasons in the baseball arbitration model for their choice, it is disadvantageous for the party that does not receive support from the arbitral tribunal. The baseball arbitration model is only suitable for solving quantitative problems of the amount of property, such as the amount of income and expenses for transfer pricing, the tax rate of adjusted income, and other quantitative problems. For non-amount disputes, will cause an either-or result and is not suitable for disputes, when the strength of the two sides is too disparate.

Although the United States, the European Union, and other countries advocate baseball arbitration, China as a developing country, may not have the same grasp of international tax policies as developed countries. If a zero-sum game like baseball arbitration is adopted, it will often be detrimental to Chinese tax authorities and multinational corporations. The independent opinion arbitration method can hand over the right of the award to a neutral third party, and the arbitral tribunal can come to the final conclusion after fully considering the situation of the case, and can better protect the interests of Chinese tax authorities and MNEs.

3.1.4 Increase Taxpayer Engagement

The *COUNCIL DIRECTIVE (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union* stipulates that companies have certain rights to participate in arbitration, such as initiating proceedings (Article 3.1), the right to appeal against arbitrary dismissal cases (Article 5.3), requesting the Advisory Committee's Right (Article 6.1), Right to appear or be represented on an Advisory Committee or Alternative Dispute Resolution Committee (Article 13.2), Right to Appeal for Final Judgment (Article 15.1.3), Application for Enforcement of Final Decision rights (Article 15.2). It can be seen that the EU emphasizes the participation of enterprises in tax arbitration. Therefore, when my country is building a tax arbitration system, it can also learn from its experience and increase the participation of taxpayers.

It is recommended that the taxpayer be involved in the arbitration process as an *amicus curiae*. According to ICSID, NAFTA, and some cases, the criteria that can be established in judging whether it can be used as a court include but are not limited to: the applicant has a significant interest in the case, the dispute raised by the applicant is within the scope of the dispute under arbitration, the applicant is independent, and can assist the arbitration hearing. [19] Given the uniqueness of international tax arbitration, the claimant and the respondent are two countries, and the application of the taxpayer to become an *amicus curiae* is in line with the standard.

Although taxpayers cannot directly participate in the arbitration as an arbitration party, they can submit written materials to the arbitral tribunal as an *amicus curiae* to express their interests and concerns to the tribunal. Although the length and other forms of the written materials will be limited, it is still an opportunity for the taxpayer to communicate with the arbitral tribunal directly, which is more conducive to the taxpayer safeguarding their legitimate rights and interests, and also increases the acceptability of the arbitration result to a certain extent.

3.1.5 Binding Force of Arbitral Awards

The arbitration award is binding on both parties, but at the same time it should give the taxpayer the right to deny, that is, the taxpayer has the right to choose to accept or not to accept the arbitration result. Because the taxpayer has not participated in the arbitration procedure as the claimant or the respondent and is not a participant in the international tax arbitration, the arbitration

procedure may not fully consider the interests of the taxpayer, so in order to better protect the legality of the taxpayer rights, the taxpayer should be allowed to refuse to accept the arbitral award.

In addition, arbitral awards are not legally binding on similar cases. As the disputes in each case are different and occur between different countries, it is suggested that the arbitral award only has a certain binding force on the parties to the dispute and MNEs. When dealing with similar cases, the arbitral tribunal may take precedent into consideration, but not as a basis for judgment nor refer to it. In addition, in order to enhance the predictability and transparency of the arbitration result and the stability of the arbitration, the arbitration award may be published on the premise of protecting trade secrets and national interests.

3.2 Dispute Prevention Mechanism

Some improvement suggestions for dispute resolution measures have been put forward above. However, if the process of dispute resolution can be taken in advance, the risks and losses that MNEs bear will also be reduced accordingly. *Pillar 1 Blueprint* proposes a relatively complete set of procedures for tax dispute prevention but only applies to Amount A. If there is a sound dispute prevention mechanism applicable to all tax disputes, it will be able to prevent minor problems, reduce the occurrence of tax disputes, and truly allow multinational enterprises to enjoy the convenience brought by tax certainty.

This paper proposes to create a dispute prevention mechanism, that is, an MNE first applies to its resident country, and the resident country submits the relevant materials submitted by the multinational enterprise to the tax authorities of the country and region where the multinational enterprise conducts business (that is, the tax jurisdiction that may be affected), the above-mentioned tax authorities will review the relevant information of the multinational enterprise, point out the possible tax problems, and hand it over to the tax authority of the resident country and return it to the multinational enterprise for rectification. After the final rectification is qualified, the multinational enterprise obtains the tax certainty qualification. After this process, when multinational enterprises actually carry out relevant activities, their business activities and taxation behaviors meet the requirements of the tax authorities, and thus will not lead to tax arbitration.

Of course, the above suggestions are more principled, and there are still many issues to be resolved, such as how to determine the standards for application materials submitted by multinational enterprises, whether to reach an international consensus, and other issues that need to be further demonstrated.

4. Conclusion

As the world's largest capital-importing country and the second-largest capital-exporting country, China occupies an increasingly important position in the global economy. In the process of "going global", tax disputes have become a major stumbling block. Therefore, efficient and reasonable resolution of tax disputes can not only better safeguard the country's tax sovereignty, but also protect the legitimate interests of multinational enterprises to a greater extent.

The world is marked by changes unseen in a century, and China should firmly grasp this period of change and improve its status in the world economy. At present, it is possible to consider building an *ad hoc* arbitration mechanism that supplements the MAP mechanism. Multinational enterprises can apply to become *amicus curiae* to increase their participation in arbitration and make the final decision based on the principle of independent opinion arbitration. Also, the arbitral award does not take a precedent role, but it can guide subsequent arbitrations, and be made public under the premise of protecting trade secrets and national public interests to improve transparency and predictability of the outcome of the arbitration. In addition, it is also possible to consider setting up dispute prevention measures to improve tax certainty, reduce tax risks and economic losses of multinational enterprises, and thus improve the international competitiveness of multinational enterprises.

[1] See 2020 Mutual Agreement Procedure Statistics, https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm, accessed on Dec. 6, 2021.

[2] See 2020 MAP caseload per jurisdiction-China (People's Republic of), https://www.oecd.org/tax/dispute/2020-map-statistics-china.pdf, accessed on Dec.7, 2021.

[3] See 2020 Mutual Agreement Procedure Statistics, https://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm, accessed on Dec. 6, 2021.

[4] Treasuryism means that everything is for the treasury revenue, everything is beneficial to the treasury revenue, and the treasury revenue is regarded as the overriding priority of the tax authorities.

[5] Article 25(5) of *The Organization for Economic Co-operation and Development Model Tax Convention on Income and on Capital*.

[6] Article 25B (5) of the *United Nations Model Double Taxation Convention between Developed and Developing Countries*.

[7] Countries that have expressly stated that cases that cannot be resolved by MAP are resolved by arbitration: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the UK, the USA.

[8] Protocol Amending the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Pervention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Article 13.

[9] See OECD. (2020). Tax Certainty, in Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/59b9c504-en., para. 703, pp. 168.

[10] See OECD. (2020). Tax Certainty, in Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/59b9c504-en., para. 734–780, p.175–185.

[11] See OECD. (2020). Tax Certainty, in Tax Challenges Arising from Digitalisation—Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD Publishing, Paris, https://doi.org/10.1787/59b9c504-en., para. 710, pp. 190.

[12] See J. Chaisse, Chapter 17: Arbitration in Tax Treaty Law and Arbitration under Bilateral Investment Treaties in International Arbitration in Tax Matters (M. Lang et al. eds., IBFD 2016), Books IBFD (accessed 12 Sep. 2021).

[13] See Uğur Erman Özgür. Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty, https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Taxation_of_Foreign_Investments_2015_en.pdf, p.12. Taxation of foreign investments is a key regulatory exercise in every sovereign State.

[14] See Ara Cho, Daae Kim. Taxes, para. 3, https://jusmundi.com/en/document/wiki/en-taxes, accessed on 10 Oct. 2021.

[15] See Mandatory Tax Treaty Arbitration, https://www.irs.gov/businesses/international-businesses/mandatory-tax-treaty-arbitration, accessed on 20 Dec. 2021.

[16] See Emanuel Too v. Greater Modesto Insurance Associates and the United States of America, Iran—United States Claims Tribunal, Award of 29 December 1989, para.24–27.

[17] See Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, 21 Oct 2021, para. 209–211.

[18] See 2020 MAP caseload per jurisdiction-China (People's Republic of), https://www.oecd.org/tax/dispute/2020-map-statistics-china.pdf, accessed on Jan.10, 2022.

[19] See Gary Born. (2019). Stephanie Forrest, Amicus Curiae Participation in Investment Arbitration, *ICSID Review - Foreign Investment Law Journal*, *34*(3), pp. 643–656.