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# Scrutiny by Tax authorities across the globe - when to use ADR

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# Case 1 - Background of mandate of the expert group

- **Background**

The issues is relating to the taxable profits derived in countries A and B which were subject to litigation as follows:

- a. An action brought by a Multinational Enterprise (“MNE”) against the Ministry of Taxation in country A for refusal to admit a MAP procedure being started (ultimately providing access to the EU Arbitration Convention).
- b. Challenges to the transfer pricing adjustments for the income year 2012 and subsequent years.

- **Role of the expert group**

The role of the expert group is not in any way to prejudge or offer conclusions on any of the matters subject to current dispute. The group is not, therefore, reaching any conclusions on whether adequate information has been supplied by the MNE or whether the post 2012 transfer pricing between A and B is correct.

The role of the expert group is purely to review the background facts and suggest possible bases for a resolution of the dispute between the competent authorities with a view to resolving these matters without further litigation.

The outcome of this process simulates a formal MAP process, reporting and outcome.

# Scope and purpose of mandate of the expert group

- **Scope**

Consideration of the profit derived in countries A and B for MNE's income years 2012 – 2014 and subsequent years.

- **Purpose**

The MNE has requested the international group of tax experts to provide suggestions on how the double tax dispute between countries A and B could be resolved. The ambition is that these suggestions could be used as a starting point for resuming negotiations between the 2 countries' Tax Authorities.

Discussions have taken place between the 2 countries' competent authorities but those discussions have reached an impasse. The MNE has requested the group of experts to consider the factual background and propose possible lines of discussion that might lead to a resolution of this dispute.

# Information and facts reviewed by the expert group

- The expert group reviewed the business model, interviewed the global head of tax of the MNE, performed a FAR analysis, a marketing intangibles analysis, choice of method and performed a benchmarking study.
- 3 suggestions/scenarios were given to both tax authorities to resolve the double taxation dispute;
- All 3 scenarios comprised clearly defined process steps to be discussed with both tax authorities and an impact analysis has been conducted for the 3 scenarios.

**Question:** Under what other circumstances could the use of such an expert group be seen as the best ADR tool available?

## Case 2

- In 2010, a ruling (and the renewal) was agreed on a principal structure ran through the Netherlands based upon which 4% operating margin was to be reported. The other group companies in Europe were sales entities.
- After 10 years, the principal functionality turned out to be more a cost centre rather than a profit centre.
- The management was centralized in the US parent (previously family-owned business), whereas the management team of about 40 employees and only 2 statutory directors could only decide on OPEX related activities.

**Question:** How do you resolve the past 10 years of mismatch in functionality and what is the appropriate toolbox?

# Evidence – F/R/A profile

Functions assumed in APA presumption of 2010	Descriptions	Yes/No/Partially	Estimated number of employees in APA 2010	Number of employees on the payroll in FY 2020
Procurement and logistics	Product planning to determine the number of types of units that are expected to be sold during the coming six months		30	40
	Directs e-commerce warehousing, inventory management and fulfillment			
	Collects sales data at MNE's stores, reports expectations and actual differences to MNE US, makes recommendations and participates in product planning.			
	Importing VAT and import duties			
Marketing	Support with the management of the branding and marketing activities directed by MNE US		5	0
	Directly involved in the planning and organization of every new store opening			
	Assists in monitoring the success of the marketing strategies and the result of the various product styles and brands			
Retail sales	Renting the shop premises, maintaining the store fronts, serving customers within the store		100	20
Administration	Understanding, communicating and implementing MNE US guidelines in the European region		3 managers	1 managers
General management/human resources/IT/Accounting	Ensuring that all MNE stores operate with the market and in accordance with the MNE US standard		15	10
	Human resources management			
	IT technical support			
	financing			

- Function currently not performed in line with APA
- Function currently performed in line with APA
- Function currently partially performed in line with APA

# Negotiation with Tax Authorities

Formal arguments:

- Existing APA?
- Statute of limitations?
- No CIT returns filed?
- Is this a new style ruling to be reported?

Compromise reached?

# Contact



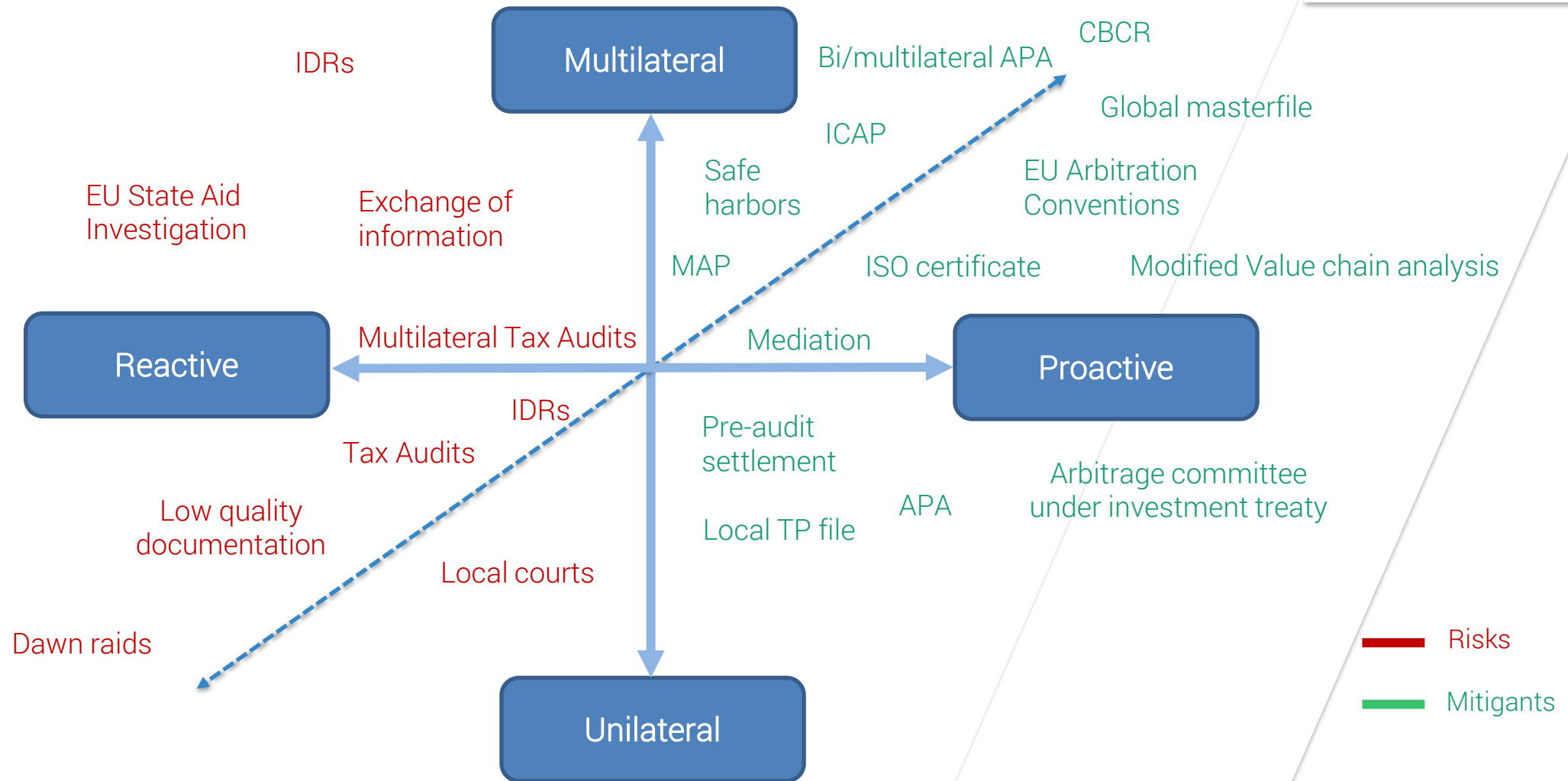
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# Appendices

# Controversy management instruments – how does ADR fit in?



# Linking tax controversy management instruments with value chain analysis

## A. A value chain analysis after BEPS



## C. Main questions:

- which disputes to handle?
- which toolbox to use?
- what timing of risk management?
- what professional process to use?

## B. Dispute avoidance / resolution toolbox

