BEPS 2.0 Dispute Resolution - The Need for Effective Dispute Prevention/ Resolution in a Global Taxation Framework

NAKAMURA Mayuko

Attorney-at-Law (Partner), Nishimura & Asahi

Abstract

The OECD/G20 "BEPS Inclusive Framework" discussion on international tax challenges arising from the digitalization of the economy resulted in an agreement on a two-pillar solution: Pillar 1 (allocation of new taxing rights to market countries) and Pillar 2 (global minimum taxation). Pillar 2 has been legislated in many countries, and in Japan, the corporate income tax system for global minimum taxation will be applied to fiscal years beginning on or after April 1, 2024.

However, it appears that the framework for dispute resolution corresponding to the new international taxation has not yet been sufficiently developed. In other words, Pillar 1: Multilateral Convention on Amount A provides an innovative multilateral dispute prevention/ resolution mechanism, but the prospects for its entry into force are uncertain, and no new dispute prevention/resolution measures for Amount B are envisaged, while Pillar 2: Global Minimum Taxation seems to not yet have been sufficiently developed in the event of disagreement on interpretation and application. It is expected that discussion on this point of view will progress before its implementation, considering the current efforts to improve mutual agreement procedure and the ICAP mechanism.

Keywords: international taxation, BEPS inclusive framework, tax challenges arising from the digitization of the economy, tax certainty, dispute resolution, mutual agreement procedure, ICAP

JEL Classification: H25, K34

I. Introduction

In November 2021, BEPS Inclusive Framework, in which approximately 140 countries and regions participated, agreed on a two-pillar solution. With regard to Pillar 2, which aims to realize a global minimum tax, domestic legislation has progressed in many jurisdictions. In Japan, the "corporate income tax system for global minimum taxation" corresponding to the Income Inclusion Rule (IIR) was introduced in the 2023 tax reform, which is applicable from fiscal years beginning on or after April 1, 2024. Undertaxed Profits Rule (UTPR) and Qualified Domestic Minimum Top-up Tax (QDMTT) will be introduced in the 2025 tax reform. On the other hand, Pillar 1, which gives market countries new taxation rights, seems to be stuck. The multilateral convention to implement Amount A of Pillar 1 was scheduled

to be signed by the end of 2023 and to enter into force by 2025.[1] However, though the text of the multilateral convention was released in October 2023, the text has not been finalized yet (the signing ceremony had been postponed to June 2024 but it has not been held yet).

This paper raises the question of whether the framework for dispute resolution in response to such new international taxation is sufficiently developed. Under the framework of the two-pillar solution agreed by Inclusive Framework, each jurisdiction must, in accordance with the international consensus, enact a law or conclude a treaty for implementation of the two-pillar solution, and the legislature of each jurisdiction is not expected to make any amendments to this. Therefore, the views of taxpayers will not be reflected in the legislature through the normal democratic process (they are expected to be directly input to OECD through public consultation). In addition, domestic tax systems based on country-specific policies, such as the Digital Services Tax (DST), special tax measures reducing the effective tax rate, and CFC tax systems,[2] will be eliminated. Once these rules are enacted into domestic law, they will be enforced by the tax administrations of each jurisdiction. In particular, regarding Pillar 2: Global Minimum Taxation, which will be implemented by the domestic laws of each jurisdiction, it seems that there is no sufficient mechanism to correct and unify the differences in interpretation between the tax administration of each jurisdiction.

For the stable enforcement of the tax system, it is necessary to ensure predictability for both the tax administrations and taxpayers, and to ensure the remedy to protect taxpayers' rights in the event of unfair taxation. In the field of international taxation, it is essential to ensure the elimination of double taxation in order to promote investment activities without creating tax evasion or avoidance. However, there are many countries, mainly developing countries and emerging countries, that are reluctant to adopt mandatory and binding dispute resolution mechanisms as well as arbitration clauses in tax treaties. In the area of international taxation, it is not easy to enforce the "rule of law" and to unify the level of enforcement and dispute resolution in each jurisdiction.

In this paper, I'd like to discuss how dispute prevention and resolution mechanism can be achieved in a global taxation framework despite these constraints.[3]

II. Initiatives for Tax Certainty in the Two-Pillar Solution

The new international tax framework increases the compliance burden on taxpayers, so it is an important concern, particularly from the taxpayer side to ensure predictability and legal certainty and eliminate the risk of double taxation. By implementing the two pillars, the tax administrations of each jurisdiction, especially market countries and emerging countries, may actively conduct tax audits on these points. If they try to deny the tax treatment

[1] OECD (2023a)
[2] Masuda (2023)
[3] This paper is written based on the information available as of end of December 2024. Further development on the two-pillar solution should be discussed at another time.

by taxpayers, tax disputes will involve multinational tax administrations. In both Pillar 1 and Pillar 2, one of the key objectives is to ensure tax certainty in order to implement without excessive burden on taxpayers. In this chapter, I will first outline the dispute prevention and resolution mechanisms that are currently being discussed in the two pillars.

II-1. Dispute prevention/resolution under Pillar 1

II-1-1. Tax certainty framework for Amount A

As for Amount A, since it gives the market country a new taxing right on the excess profit of multilateral enterprise (MNE) and multiple market countries share the same taxable object, it is highly necessary to establish a legally binding dispute settlement mechanism to eliminate double taxation. The tax certainty framework for Amount A is provided in the Multilateral Convention (MLC) and the Understanding on the Application of Certainty for Amount A of Pillar One (UAC), which were published in October 2023. Though the texts have not been finalized due to the dissenting views from a small number of countries on some of the issues, they represent the consensus reached by Inclusive Framework to date, which is described below.

(1) Tax certainty framework for Amount A

With respect to Amount A, there are three mechanisms to provide certainty. In each case, a binding decision panel is available to resolve the disagreements arising in these procedures (Part V, Section 2 of MLC). The results of the review shall be binding on all parties.

(i) Scope Certainty Review: a mechanism for determining whether an MNE is within the scope of Amount A over a particular period.
(ii) Advance Certainty Review: a mechanism to confirm in advance how Amount A will be applied for a particular period, like the APA.
(iii) Comprehensive Certainty Review: a mechanism for review of the overall application of Amount A.

When an MNE files an application with the lead tax administration (LTA: the tax administration of the jurisdiction in which the ultimate parent company is resident), it is reviewed (i) by a review panel established where certain conditions are met, such as in the case of a first-time application, or (ii) by LTA in other cases. If the review panel agrees and the listed parties or the affected parties agree, the review will end, but if no agreement is reached, it will be referred to the determination panel for resolution.

The determination panel will completely resolve disputes regarding Amount A within the panel without tax audit or mutual agreement procedures, and any disagreement arising in the review will be referred to the determination panel. The determination panel consists of seven members: three independent experts, three government officials selected from affected parties or listed parties and one chair selected by agreement of six panelists. The determination panel will endeavor to agree on one alternative outcome presented by the parties partic-

ipating in the review. If no consensus is reached, an alternative outcome that the majority of the members think most appropriate will be chosen. If no alternative outcome is supported by the majority, then each member will rank the alternative outcomes that he or she considers most appropriate, eliminate the alternative outcomes with least support, and the last remaining alternative outcome will be chosen (Article 27, paragraph 6, Annex F Section 2 of MLC).

Since all of these procedures have clear timeframes in the MLC/UAC, the period from the commencement of the review to the decision of a determination panel is estimated to be approximately 18-21 months for the Scope Certainty Review, approximately 21-24 months for the Advance Certainty Review, and approximately 24-27 months for the Comprehensive Certainty Review.[4]

The MNEs are required to pay a fee (tax certainty user fee) to use these procedures (Article 22 para 1, Article 23 paras.1 and 2 of MLC).

(2) Dispute resolution mechanism for issues related to Amount A

Since Amount A will co-exist with the existing international tax rules, a tax certainty framework is prepared for disputes related to transfer pricing and the allocation of profit attributable to PE, which affect the calculation of Amount A. If the dispute falls under the "related issues" and cannot be resolved through mutual agreement procedures (MAP), it can be resolved through mandatory and binding dispute resolution procedures (Part V, Section 3 of MLC).

A "related issue" is a transfer pricing, business profit or withholding tax characterization dispute covered by a tax treaty which: (a) affect the elimination of double taxation arising from Amount A; and (b) materially impacts the calculation of Amount A in the relevant jurisdiction (EUR 3 million for initial three-year period and EUR 1.5 million thereafter) (Article 34 paras 1 through 3 of MLC).

Where it is applicable, the mandatory and binding dispute resolution process under the MLC is available if the dispute settlement cannot be agreed upon by MAP within two years (unless mandatory and binding dispute settlement is otherwise available under an existing tax treaty or EU system).

The dispute resolution panel, consisting of nine members ((i) four members, one of its own official and one independent expert, appointed by each tax authority, and (ii) five independent experts), will adopt one of the proposed resolutions submitted by each tax authority by majority vote according to a clear timeline (Annex G of MLC).

For certain developing countries in which there is no or low level MAP dispute, an elective binding dispute resolution process is available, and referrals to the dispute resolution panel are permitted only if the competent authorities mutually agree (Article 36 of MLC).

[4] OECD "The Multilateral Convention to Implement Amount A of Pillar One– Factsheets, October 2023" p. 15.

(3) Summary

The tax certainty framework for Amount A is innovative as it provides binding dispute prevention and dispute resolution mechanisms with the participation of multilateral jurisdictions, and appreciable as it enables prompt and efficient dispute prevention and resolution mechanisms with a clear timeline, gives taxpayers predictability, and ensures the reliable elimination of double taxation.

However, the text of MLC released in October 2023 still contains several footnotes with dissenting views, mainly from Brazil, Colombia, and India. The text has not yet been opened for signature, which was scheduled to take place during 2023 (the signing ceremony had been postponed to the end of June 2024, but not been held yet[5]). In addition, MLC must be ratified by at least 30 countries with a total of at least 600 points. Of the total 999 points, 486 points are allocated to the United States and 513 points to the remaining countries and regions (47 points for Japan). Therefore, it is assumed that the treaty will not enter into force unless the United States ratifies the treaty (Article 48, Annex I of MLC). The U.S. Treasury Department solicited public comments on the text of the multilateral convention by December 11, 2023, but the current status of the U.S. Congress makes it unlikely that the U.S. will approve the conclusion of MLC (at least two-thirds of the Senate will approve it), and furthermore, due to the change of administration to President Trump, the prospective for the entry into force of MLC is considered unlikely.

In addition, the African countries represented by Nigeria proposed a resolution on the promotion of comprehensive and effective international tax cooperation at the United Nations, which was passed by a majority vote of 125 countries, mainly developing countries, at the UN General Assembly in November 2023 (48 countries, including Japan, opposed the resolution). These developments indicate that Pillar 1 is not a satisfactory solution for developing countries.

From this perspective, there is no hope of the signing and entry into force of MLC.

II-1-2. Tax-certainty framework for Amount B

As for Amount B, unlike Amount A, the tax certainty is expected to be secured by simplifying the transfer pricing framework.[6] The Amount B itself is considered to contribute to tax certainty, and dispute prevention and resolution will be addressed with the existing dispute mechanism including APA, MAP, or arbitration (if introduced in an existing tax treaty).

However, an additional certainty mechanism for Amount B such as a dispute resolution panel in Amount A, has been requested from the taxpayer side,[7] because the existing APA and MAP alone may not be effective in resolving disputes that are available to taxpayers (there is no remedy when Amount B is applied in a jurisdiction without a tax treaty).

In a report on Amount B issued by Inclusive Framework on February 19, 2024,[8] the sim-

[5] OECD (2023c)
[6] OECD (2022b)
[7] Keidanren (2023a, 2023c)
[8] OECD (2024)

plified and streamlined approach to Amount B will be selected by each jurisdiction, and each jurisdiction may (i) choose not to apply or choose to apply a simplified and streamlined approach, (ii) allow taxpayers to apply a simplified and streamlined approach they choose to, or (iii) require taxpayers to apply a simplified and streamlined approach. The simplified and streamlined approach is not binding on other jurisdictions that do not choose to do so, and is not supposed to be used for the elimination of double taxation. In other words, in MAP or arbitration proceedings for the elimination of double taxation with jurisdictions that have not chosen a simplified and streamlined approach, its position needs to be justified by other means provided for in OECD Transfer Pricing Guidelines.

However, even if the simplified and streamlined approach is not selected, corresponding adjustments may be made to reflect the simplified and streamlined approach on a case-by-case basis if it produces an acceptable outcome in a specific case. Also, Inclusive Framework commits to respecting the outcome determined under the simplified and streamlined approaches by low-capacity jurisdictions (published on OECD website) and to taking reasonable steps to relieve potential double taxation where there is a bilateral tax treaty in effect.

The simplified and streamlined approach in Amount B is incorporated into the Annex to OECD Transfer Pricing Guidance, which allows jurisdictions to choose to apply it from fiscal years beginning on or after January 1, 2025, and is expected to amend Article 25 of the OECD Model Tax Convention and its commentary accordingly. The Inclusive Framework is working on an additional optional qualitative scoping criterion that jurisdictions may choose to apply, which should have been completed by March 31, 2024.[9]

As described above, the simplified and streamlined approach in Amount B was made optional for each jurisdiction and not binding on the other jurisdiction. Therefore, it became clear that Amount B itself does not necessarily result in enhanced tax certainty unless a sufficient number of jurisdictions choose the simplified and streamlined approach (and even if they do choose, if the criteria for qualifying transactions is not the same), as long as the number of jurisdictions choosing the simplified and streamlined approach does not increase sufficiently. Although the policy of each jurisdiction is not clear at this time, India has many reservations in the report of Amount B, and New Zealand has also announced that it will not adopt Amount B. Japan's ruling coalition announced in its 2025 tax reform package outline that Japan will refrain from introducing the Amount B rule into its domestic law for the time being, to see how other jurisdictions respond to the proposal and monitor developments of the international discussion.

In any case, no new tax certainty framework is introduced in Amount B, and there is currently no guidance that will contribute to the elimination of effective double taxation. Therefore, it is questionable whether the existing framework alone is sufficient as an effective dispute settlement framework. This point should be evaluated in light of the improvement of MAP based on BEPS Action 14.

[9] Additional guidance on this point has not been published yet as of the end of December 2024.

II-2. Dispute prevention/resolution under Pillar 2

Unlike Pillar 1, the Pillar 2 GloBE rule will be implemented by each jurisdiction's domestic legislation rather than by multilateral conventions, and new dispute settlement framework is not prepared for Pillar 2. Consistent implementation will be made through the order of application of the rules and the allocation of top-up tax according to the model rules agreed in Inclusive Framework.

However, there is a possibility of double taxation due to differences in interpretation and application of the rules, and disputes may arise regarding, for example, the following matters.[10]

- There may be a risk of double taxation if a jurisdiction applies UTPR due to a disagreement over whether other jurisdiction's legislation for the IIR is qualified.
- Also, risk of double taxation arises when a jurisdiction applies top-up tax under the IIR due to a disagreement over whether other jurisdiction's legislation for the Domestic Minimum Top-up Tax is qualified.
- Double taxation may arise in cases where tax administrations have different views on calculating the effective tax rate (ETR).
- In cases where top-up taxes are allocated to multiple jurisdictions based on the UTPR, tax administrations may have different views on calculating the allocated amount under the UTPR.
- In cases where top-up taxes are allocated to the Ultimate Parent Entity (UPE) jurisdiction and the Partially Owned Parent Entity (POPE) jurisdiction, tax administrations may not agree over the top-up taxes to be allocated.

The draft of the tax certainty framework for GloBE rule, which was incorporated in the Public Consultation Document, is as follows.[11]

(1) Dispute prevention mechanisms

First, it is intended to ensure a common interpretation and application of domestic legislation in each jurisdiction by the following methods.

(i) Reliance on the Model Rules, Commentary and Administrative guidance agreed at Inclusive Framework
(ii) Multilateral review process on qualified rule status of IIR, UTPR, DMTT
(iii) Referral to Inclusive Framework

However, these methods do not guarantee the resolution of individual cases. Therefore, with regard to the certainty of individual cases, (iv) common risk assessment and coordinat-

[10] Keidanren (2023b) and Japan Foreign Trade Council (2023)
[11] OECD (2022a)

ed compliance programme, similar to OECD International Compliance Assurance Programme (ICAP), and (v) binding certainty mechanism similar to APA are being considered.

In response to these proposals, businesses have submitted their comments.[12] Comments call for consistent and coordinated application of the rules by, among others, further updated and improved administrative guidance, a strong peer review process, and publication of a list of qualified rules and covered taxes. In addition, there is strong support for ICAP-like dispute prevention mechanisms where binding and timely certainty is provided.

(2) Dispute resolution mechanisms

The dispute resolution mechanism for the GloBE rules relies on the existing framework of MAP based on tax treaties. The basic elements of the dispute settlement mechanism include:

(i) The MNE should be allowed to submit a request to a competent authority in a jurisdiction where an action taken by such jurisdiction could result in taxation not intended under the GloBE rules
(ii) The competent authority should, where justified, be allowed to resolve the case with competent authorities of the other jurisdictions concerned that are similarly empowered, in line with a common standard; and
(iii) The jurisdictions should implement any agreement between the competent authorities notwithstanding domestic time limits.

Although it is desirable to create a new multilateral convention for dispute resolution mechanisms on GloBE rules, it is not a realistic approach as it takes time for each jurisdiction to conclude a multilateral convention.

It should be noted, however, that disputes on GloBE rules are not necessarily subject to MAP under tax treaties. Although there is a view[13] relying on the second sentence of Article 25(3) of OECD Model Tax Convention: "The competent authorities of the Contracting States…may also consult together for the elimination of double taxation in cases not provided for in the Convention," in cases where there is no bilateral tax treaty, the competent authority agreement under the Convention on Mutual Administrative Assistance in Tax Matters is also being considered. However, it would not provide rights for the taxpayers to request a competent authority procedure and would not provide substantive legal basis for competent authorities to reach agreements or implement them, which may be covered by domestic legislation.

However, if a multilateral convention is not established, it is not guaranteed whether or not each jurisdiction will enact such domestic law or accept MAP request, and furthermore, even if MAP request is accepted, it is not always possible to reach an agreement. As a result, risk of double taxation cannot be excluded.

[12] OECD (2023b)
[13] Danon, Robert, Gutmann, Daniel, Maisto, Guglielmo and Martin Jimenez, Adolfo (2022a)

Taxpayers are strongly concerned about this point, and there have been calls for the securing of taxpayers' right to request MAP, the necessity of mandatory and binding dispute resolution mechanisms, and the creation of a multilateral convention to stipulate these measures. There have also been comments calling for suspending penalties and delinquent charges during the transition period until such measures are in place.[14]

(3) Binding interpretation of OECD/G20 Inclusive Framework

In order to secure consistent interpretation and application of GloBE rules in each jurisdiction, Article 8.3.1 of the Model Rules stipulates that "The tax administration… shall, subject to any requirements of domestic law, apply the GloBE Rules in accordance with any Agreed Administrative Guidance." Each jurisdiction's tax administration shall apply GloBE rules in accordance with the agreed administrative guidance, subject to the requirements of domestic law. If domestic law does not permit such interpretation and application, it may adopt that agreed administrative guidance by incorporating it verbatim or in substance into its own administrative guidance.[15]

If determinations by one tax administration are likely to have corresponding consequences for the application of the GloBE rules in other jurisdictions, tax administrations can collaborate with each other through Inclusive Framework to determine whether a coordinated solution to these questions can be agreed, and the discussions at the level of Inclusive Framework may result in the development of agreed administrative guidance. However, there seems to be no requirement to hold prior discussion or agree on a coordinated solution. As a result, each tax administration may not reach a consensus on the interpretation and application of the GloBE rules in individual cases, and taxpayers seeking effective remedies have to rely on the domestic judicial system.

The GloBE rules are implemented under the domestic law, not multilateral convention, and commentary and administrative guidance provided by OECD/G20 Inclusive Framework are not given formal legal effect under domestic law. Therefore, we cannot expect the consistent judgment of the domestic courts in each jurisdiction. This is because, even if the legislative intention is apparently to follow the agreed administrative guidance, there may be restrictions due to the wording of the domestic legislation and the principle of interpretation inherent in each jurisdiction.

In this regard, it is noteworthy that Prof. Robert J. Danon, Prof. Dr. Daniel Gutmann, Prof. Guglielmo Maisto, and Prof. Dr. Adolfo Martín Jiménez have proposed interpretive principles to resolve the differences in interpretation and legislation caused by the domestic legislation of the GloBE rules: (i) the domestic legislation should be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, not in principle of interpretation of domestic law (sui generis interpretative rule); (ii) differences in legislation can be resolved by stipulating in the model rules that when there is a difference

[14] OECD (2023b)
[15] OECD (2022c), Article 8.3, para. 41

between the language of domestic law and GloBE model rules, GloBE model rules should prevail to the extent necessary to prevent or eliminate double taxation (Lex Specialis).[16]

However, while legislations of EU Member States are harmonized by requiring the Member States to enact domestic laws in accordance with EU directives and EU regulation is naturally considered to be superior to domestic laws, for other jurisdictions it is unfamiliar to introduce such principles of interpretation into domestic laws in the absence of international conventions. Even in Japan, it is difficult to interpret domestic law on the basis of the Vienna Convention and general international law, even though judges may consider it as the intention of the Diet.

The peer review process for qualified rule status, which is essential for consistent interpretation and application, may also be problematic. In particular, in jurisdictions where the language system is different from that of Western countries, it is necessary to make adjustments through translation, and it is inevitable that certain adjustments will be made to suit the unique legal systems of each jurisdiction. It is desirable that examinations be conducted not by such formal differences, but by actual tax administrations, including interpretation and application, based on taxpayers' input. In addition, unlike the peer review of information exchanges and MAP that has been carried out to date, the process and legitimacy will be important in determining "disqualification" because it is necessary to review domestic laws that have been approved by the legislature of each jurisdiction.

In any case, it will take a considerable amount of time for the results of such peer reviews to be available, and it is possible that disputes on these points during the transition period may arise.

(4) Summary

As mentioned above, regarding Pillar 2: Global Minimum Taxation, although consistent and interdependent application and implementation is expected in each jurisdiction, there is no sufficient solution to the disagreement in application and implementation in each jurisdiction since it is introduced by the domestic laws of each jurisdiction.

Although the necessity of multilateral convention for dispute resolution mechanism under Pillar 2 may be discussed in the future, as for GloBE rules, quick introduction and implementation of the rules under the domestic laws of each jurisdiction may be much more important. In addition, since the rules are based on top-up tax in the UPE jurisdiction (or it is assumed that taxation will be completed in the Constituent Entity jurisdiction with the introduction of QDMTT), disputes due to differences in interpretation and application are unlikely to arise, and there may have been little need to develop multilateral convention or introduce mandatory and binding dispute resolution at the expense of the speed with which the rules can be implemented under the domestic laws of each jurisdiction.

In this regard, it is desirable, at least from the viewpoint of taxpayers who demand the elimination of double taxation, the prevention of disputes, and the early resolution of dis-

[16] Danon, Robert, Gutmann, Daniel, Maisto, Guglielmo and Martin Jimenez, Adolfo (2022b)

putes, to develop mandatory and binding dispute resolution measures as prepared in Pillar 1. Although many taxpayers have expressed similar comments, it is not easy in reality. For the time being, there is no choice but to use the existing framework of MAP, but there is a need to take some effective mechanism to resolve disputes related to the GloBE rules. With regard to disputes on the GloBE rules, once a dispute arises, it is expected to become a dispute that involves multilateral tax administrations and bring a heavy burden on taxpayers. Therefore, it is desirable to strengthen the dispute prevention mechanism even more than before.

Furthermore, it is desirable that active guidance be provided in a cooperative framework, particularly until the GloBE rules are stably implemented, through such means as coordination by Inclusive Framework and peer review to ensure consistency in interpretation and application, the establishment of a multilateral dispute prevention mechanism as planned under Pillar 1, the establishment of a taxpayer consultation and inquiry desk, which allow taxpayers to refer to Inclusive Framework.

III. Existing international framework for dispute prevention and resolution

The framework for dispute prevention and dispute resolution under the two pillars envisages the use of existing frameworks. This section will review the current situation of mutual agreement procedures (MAP) based on BEPS Action Plan 14 and examine the current situation of ICAP expected as a multilateral framework for tax certainty.

III-1. Mutual agreement procedures

(1) Situation of MAP

The National Tax Agency (NTA) publishes the statistics of MAP every year.[17] The number of MAP cases that occurred in the 2022 operation year (July 1, 2022 to June 30, 2023) was 301 (243 cases for APA and 58 cases for transfer pricing taxation and other matters), an increase from 246 in the 2021 operation year to a record high. On the other hand, the number of cases closed in the 2022 operation year was 191 (146 for APA and 45 for transfer pricing and others), and since the number of new cases exceeds the number of the closed cases, the number of MAP inventory has increased to 742, and the number of MAP inventory had been increasing (572 in the 2020 business year and 632 in the 2021 operation year).

However, the recent statistics showed that the number of new MAP cases in the 2023 operation year was 212 (167 for APA and 45 for transfer pricing and others) and the number of cases closed in the 2023 operation year was 219 (158 for APA and 61 for transfer pricing and others), which meant the number of MAP inventory slightly decreased from the 2022 operation year.

The average time for resolving MAP cases was 31.8 months (35.8 months for APA cases and 21.5 months for transfer pricing and others), slightly longer than the average time of

[17] National Tax Agency (2024)

30.2 months for the 2021 operation year.

However, the average time for resolving MAP cases with non-OECD member countries was 42.4 months (63.6 months for APA and 20.8 months for transfer pricing and others). In addition, the number of MAP inventory with non-OECD member countries in the 2023 operation year was 326 (44% of the total inventory). These figures suggest that the length of average MAP resolving time is influenced by the number of MAP cases with non-OECD member countries.

The percentage of MAP inventory by country is: the United States (24%), India (14%), China (14%), Korea (8%), and Germany (5%). Among the non-OECD member countries, there are many cases with Asian countries, mainly China and India.

The minimum standard of BEPS Action 14 requires that jurisdictions should seek to resolve MAP cases within an average time frame of 24 months, which is shorter than the Japan average time stated above. However, the average time for resolving MAP cases published by NTA differs from the statistics published by OECD, and the statistics of OECD are on a calendar year basis and do not include APA. APA accounts for a large percentage of MAP cases in Japan, and Japan was awarded the first APA award for its efforts to prioritize APAs over transfer pricing MAP cases, with 84.7% of its transfer pricing disputes caseload being APAs.[18] Regarding the number of new MAP cases (excluding APA) filed in 2022 announced by OECD, Japan ranks 23rd, which is lower than other developed countries.[19]

According to the data for 2023 released by OECD,[20] Japan's average time for resolving cases started after 2016, when Japan committed to BEPS Action 14, was 19.03 months (19.25 months for transfer pricing cases and 17.94 months for other cases).

In the 2022 MAP statistics, the average time for resolving transfer pricing cases that started in 2016 or later and ended in 2022 is 34.82 months for China (agreed on the partial elimination of double taxation, etc.: 1 case), 45.13 months for India (agreed on the complete elimination of double taxation, etc.: 6 cases, disagreement: 5 cases), 34.22 months for Germany (agreed on the complete elimination of double taxation, etc.: 4 cases), 19.64 months for Italy (agreed on the complete elimination of double taxation, etc.: 5 cases, disagreement: 1 case), 17.37 months for Belgium (agreed on the complete elimination of double taxation, etc.: 3 cases), and 12.22 months for Korea (agreed on the complete elimination of double taxation, etc.: 6 cases). The resolving time and outcome differ from country to country, and in particular, the resolving time for China and India seems to be longer and it is difficult to reach agreements.

The individual situation of MAP with the tax authorities of each country can be seen from the annual speeches given by the head of the MAP Office of NTA. For example, it was stated that while MAP cases with OECD member countries, including Europe and the Unit-

[18] "OECD releases information and statistics on Mutual Agreement Procedures and Advance Pricing Arrangements" <https://www.oecd.org/en/about/news/announcements/2024/11/oecd-releases-information-and-statistics-on-mutual-agreement-procedures-and-advance-pricing-arrangements.html>

[19] Presentation at OECD Tax Certainty Day 2023

[20] "Mutual Agreement Procedure Statistics per jurisdiction Japan," https://www.oecd.org/content/dam/oecd/en/topics/policy-issue-focus/map-statistics/map-statistics-japan.pdf

ed States, have been smoothly resolved, the number of MAP cases with Asian non-OECD member countries has been increasing, and the number of inventory cases has been increasing, making it difficult to resolve them.[21] This is because of the lack of human resources and experience of the counterparties, and the implementation practices unique to each country have made it difficult to resolve cases quickly and reach an agreement.

The NTA's efforts to promote the resolution of MAP cases include: enhancing the structure of the MAP Office by increasing the number of staff; holding flexible and smooth consultations with the tax authorities of each country; and encouraging the NTA to implement MAP effectively and efficiently by actively participating in the peer review on the implementation of minimum standards in the final report of BEPS Action 14. In such efforts, the implementation of peer reviews based on OECD's BEPS Action 14 has made countries aware of the observance of minimum standards, and some improvements have been seen in the response to MAP. Japan has expressed its intention to encourage countries to improve their MAP practices through the new peer review framework of OECD.[22]

(2) OECD initiatives

The final report of BEPS Action 14 identified minimum standards and best practices in order to make MAP for resolving tax treaty disputes more effective. One of the minimum standards is "countries commit to seek to resolve MAP cases within an average timeframe of 24 months," and this timeframe seems to have put pressure on tax authorities to resolve cases more quickly than ever before.

As mentioned above, OECD publishes statistics on MAP cases every year. Although the number of MAP cases carried over has been increasing year by year, the average time to resolve MAP cases completed in 2023 was 27.3 months (25.3 months in 2022) and for transfer pricing cases was 32 months (28.9 months in 2022) and for other cases was 23.4 months (22.2 months in 2022), which is a slight increase from 2022. However, for the first time, MAP inventories have decreased, with a 3.8% reduction in end-of-year cases.[23]

The implementation status of these minimum standards is to be monitored by participating jurisdictions through the MAP Forum established by the OECD Forum on Tax Administration. Peer reviews have been conducted in 82 countries and regions since the end of 2016. In the first phase, whether the minimum standards have been implemented was evaluated, and in the second stage, recommendations were followed up. Among 1,750 recommendations made in the peer reviews, 66% were related to deficiencies in the MAP provisions of the tax treaty, and 34% were related to MAP practices and policies that did not conform to minimum standards. Furthermore, in January 2023, Inclusive Framework announced that it will begin a continuous monitoring process. In the new peer review, (i) a simplified peer review will be conducted for jurisdictions with little experience in MAP, and (ii) a full review

[21] Tabata and Nakayama (2022), p. 123.
[22] Isomi (2023), p. 222.
[23] "2023 Mutual Agreement Procedure Statistics" https://www.oecd.org/en/data/datasets/mutual-agreement-procedure-statistics.html

will be conducted once every four year's from 2024 for other jurisdictions to assess whether they meet the minimum standard.[24]

What recommendations were actually made in the peer review? As for Japan, although it has been recommended that an older tax treaty that does not reflect the provisions of Article 25 of the OECD Model Tax Convention should be revised, the practice of MAP was evaluated as meeting the minimum standard.[25]

Specifically, the average time for resolving MAP cases during the period 2016-2018 was 27.02 months (27.95 months for cases related to transfer pricing/profit attributable to PE / and 17.27 months for other cases), and the cases were not closed within the target of 24 months. However, it has also been pointed out that the number of MAP inventories at the end of December 2018 has decreased by 14% from the number of inventories as of January 1, 2016.

With regard to the item "Jurisdictions should ensure that adequate resources are provided to the MAP function," it is evaluated that as additional personnel has been assigned to Japan's competent authority function in recent years and successful organisational steps have been taken to be able to increase the number of cases closed and reduce the average completion time and as Japan has provided comprehensive clarifications explaining the additional time taken to resolve some cases, "Japan should continue to closely monitor whether the addition of new staff and the organisational steps taken will further contribute to the resolution of MAP cases in a timely, efficient and effective manner."[26]

As for the individual inputs of the peers, one of the peers pointed out that the rotation of personnel is a factor that may impact the timely resolution of MAP cases. In response to this, Japan mentioned that, in order to ensure the timely resolution of MAP cases, it is making its best endeavors to seamlessly hand over the cases to new officials. Some peers also noted that the limitations in Japan to correspond and exchange positions via e-mail or during conferences impacts the timely resolution of cases, as such resolution is only possible during face-to-face meetings. In response to this input, Japan reported it is seeking a more efficient and effective approach to communicating with its treaty partners, while ensuring that its information security requirements are met. On the other hand, in the first phase of the peer review, it was also recommended to deal with MAP cases other than face-to-face meetings, such as e-mail and telephone conferences. In response to this recommendation, Japan reported that it has recently held conference calls with some treaty partners instead of face-to-face meetings, and it has started using secure e-mails for exchanging sensitive information in the MAP process, while ensuring that the confidentiality conditions of Japan and the concerned treaty partners are met, to speed up and ease communications in the MAP process.

As for the recommendations made in the peer review of other jurisdictions, for example, the peer review report of China indicated that the average time for resolving MAP cases for 2016-2019 was 34.17 months. Some peers noted that they experienced difficulties, in partic-

[24] OECD (2021d), p. 12.
[25] Isomi (2023), p. 221.
[26] OECD (2021c)

ular in timely obtaining position papers from China's competent authority or responses to position papers issued by peers as well as earlier and more frequent communication or meetings. It was recommended that further actions should be taken to ensure a timely resolution of MAP cases, including the addition of resources.[27]

In this way, OECD collects data on the average time for resolving MAP cases and the number of MAP inventory. In order to reduce the number of MAP inventory, specific measures to improve MAP practices were pointed out based on input from the peers, and participating jurisdictions are encouraged to take such measures based on these findings. This peer review mechanism seems to raise awareness of the importance of eliminating double taxation among officials in each jurisdiction, and also motivates them to negotiate in MAP to reach an agreement on the elimination of double taxation as soon as possible.[28]

(3) Discussions to improve MAP

As described above, efforts to improve MAP in OECD seem to have produced some results, but it does not mean that tax administrations are required to agree on MAP to eliminate double taxation. MAP are conducted for taxpayers to avoid double taxation, but taxpayers' participation and submission of opinions are not provided in MAP, so MAP may be seen as a diplomatic dispute resolution mechanism.[29] Also, there is a trade-off between the prompt processing of MAP cases and the securing of Japan's right to levy tax.[30] In order to secure Japan's tax revenue and better results for taxpayers, it may be necessary to discuss with the counterparty over time. On the other hand, the results of MAP do not necessarily lead to the elimination of double taxation and do not necessarily lead to timely and effective tax certainty for taxpayers.

Consequently, it is desirable to introduce arbitration procedures as a mandatory and binding means of dispute resolution to settle disputes that cannot be agreed upon through mutual consultations. In Japan, arbitration procedures are provided in new and renewed bilateral tax treaties as they reduce the burden on taxpayers by facilitating and improving the effectiveness of MAP and contribute to improving the investment climate and promoting international investment exchanges. Furthermore, MLI has increased the number of tax treaties that include arbitration clauses, and as of December 2023, arbitration procedures have been introduced in tax treaties with 29 countries and regions.

However, the cases in which the arbitration proceedings were actually conducted in Japan have not been publicly announced. The role of the arbitration clause seems to be more significant as an incentive to resolve the cases promptly within a certain period of time before moving to the arbitration proceedings than as a means of final settlement of the cases in the MAP.[31]

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[27] OECD (2021b)
[28] Nakamura (2023), p. 17.
[29] See discussions at Taniguchi (2022), p991 and Masui (2022).
[30] Tabata and Nakayama (2022), p. 22.
[31] Isomi (2023), p. 222.

However, non-OECD member countries are particularly reluctant to introduce arbitration procedures due to restrictions on sovereignty and lack of resources. Therefore, use of arbitration is not practical to resolve MAP cases involving Japanese companies doing business in non-OECD member countries, particularly in Asian countries.

In light of these issues, it may be necessary to explore ways to resolve these issues by engaging third parties, such as experts and mediators, in order to facilitate mutual consultations through the use of non-binding dispute resolution mechanisms such as ADR,[32] and by obtaining input from experts on complex issues.

(4) Summary

As described above, OECD's efforts to improve MAP through the BEPS Project seem to have produced some outcomes, but the number of new applications for MAP has been increasing, and the number of cases carried over remains high. Also, in Japan, as the number of MAP cases carried over and the average processing period remain high, whether the dispute resolution mechanism under the two-pillar solution is sufficient may be questioned.

As the implementation of the two pillars is expected to increase disputes related to international taxation, it is necessary to consider whether the existing framework of MAP alone is sufficient to ensure tax certainty, especially with regard to Pillar 2, which will be implemented first. Discussions on dispute prevention and resolution mechanisms related to the Amount A of Pillar 1 are expected to expand to improve the existing MAP procedures.

III-2. ICAP

(1) Outline of ICAP

OECD's International Compliance Assurance Program (ICAP) is a voluntary program for a multilateral coordinated risk assessment based on transfer pricing documents by several tax administrations at the request of MNE groups. Although ICAP does not provide the same level of certainty as APA, it will provide comfort and assurance to MNEs when the participating tax administrations consider the target transaction low-risk.

Based on two pilot-programs conducted in 2018 and 2019, the program officially became an open program for all Forum on Tax Administration (FTA) members in 2021. Currently, 23 tax administrations[33] (including Japan) participate in the program.

ICAP enables both MNEs and tax administrations to utilize resources more efficiently through cooperative relationships.[34] MNEs can explain CbC reports and cross-border activities to tax administrations. Tax administrations can gen better understanding of cross-border transactions and also determine tax risks at an early stage. MNE groups can discuss simultaneously with multiple tax administrations. ICAP is implemented within a clear timeline so that resources can be used efficiently to ensure early multilateral tax certainty.

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[32] Maeda (2021)
[33] See website of OECD (https://www.oecd.org/en/about/programmes/icap.html).
[34] OECD (2021a)

Coordinated risk-assessment is carried out at an early stage, which enhances tax administrations' consistent understanding of transactions and reduces the number of cases that result in tax disputes and MAP. ICAP covers transfer pricing risks, PE risks, and other internationally taxable risks agreed upon by the MNE group and the tax administrations (e.g., hybrid mismatches, withholding taxes, and tax treaty benefits). The procedures are, in principle, led by the tax administrations of the host jurisdiction of the MNE group's ultimate parent company, and are implemented with a clear timeframe.

According to statistics published by OECD,[35] there were 20 ICAP cases completed by October 2023, with three to nine tax administrations (five tax administrations on average). In 68% of risk assessments of a particular core risk area, all tax administrations concluded that the area was low-risk. In 15% of risk assessments of a particular core risk area, only one tax administration concluded that the area was not low-risk. Issue-resolution was used in 32% of the cases, and in some cases, transfer pricing adjustments and corresponding adjustments could be agreed within ICAP process without MAP. Therefore, issue resolution is a major advantage of ICAP.

The average time taken to complete "Phase 1: Selection" is 10.4 weeks, 42.4 weeks for "Phase 2: Risk Assessment" (including issue resolution), and 8.3 weeks for "Phase 3: Outcomes". Although the average time exceeds the target timeframe (due to factors such as restrictions on face-to-face discussions during the COVID-19 pandemic), it is still shorter than that of APA and MAP, and useful as a tax certainty framework to facilitate multilateral coordination.

The participating MNEs also positively evaluated ICAP, in terms of obtaining "practical certainty" (though not legal certainty), avoiding tax audits that overlapped with ICAP, and open communication with tax authorities in a cooperative atmosphere. They also stated that transparency and cooperation with tax authorities are crucial to prevent and resolve increasingly complex international tax disputes.[36]

Thus, unlike APA or MAP, ICAP can be used in a multilateral framework with a clear and prompt timeframe, which seems to be an advantage.

While it is not a highly recognized framework in Japan, practitioners have pointed out that for low-risk related parties transactions, ICAP provides an effective means of reducing the resources associated with tax risk for MNEs whose value chains are formed, particularly in Europe, where there are many ICAP participants.[37] It can be a more powerful option than APA for taxpayers in terms of costs incurred, processing time, and administrative burden. If ICAP members expand to OECD non-member countries, it would also be beneficial for tax administrations, which have many carryover cases with these countries.[38]

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[35] "International Compliance Assurance Programme: Aggregated results and statistics." (https://www.oecd.org/content/dam/oecd/en/about/programmes/icap/icap-statistics-january-2024.pdf)

[36] See presentation at OECD Tax Certainty Day 2023.

[37] Jochi and Yamato (2021)

[38] Asakura, etc. (2023)

(2) Summary

Although the ICAP program has been gradually taken up in some articles in Japan, its achievements are not widely recognized. Keidanren (Japan Business Federation) has requested that Japan should actively participate in ICAP initiatives and that ICAP is hoped to continue expanding the depth and breadth of its work.[39] However, at present, the number of participating tax administrations is limited to 23 countries, mainly Europe and the United States, and non-Japanese member countries, including Asian countries where many Japanese companies do business, do not participate.

Such a multilateral tax certainty framework can be used as a dispute prevention mechanism in the two pillars, and is expected to expand in the future. In other words, the tax certainty framework in Pillar 1 is considered to refer to the ICAP mechanism as it is led by a tax administration in the jurisdiction of the ultimate parent company and has a clear timeframe.

On the other hand, with regard to Pillar 2, a similar framework like ICAP may be used in individual cases, but it is not clear what exactly the framework is supposed to be. With regard to Pillar 2 (GloBE), early dispute prevention is desirable in order to reduce the risk of disputes arising from differences in interpretation/application. It is also desirable to establish a multilateral mechanism with a clear timeline and binding effect. At the same time, the number of jurisdictions participating in ICAP may increase through these experiences.

IV. CONCLUSION

The dispute resolution mechanism currently being discussed under the two pillars in the event of disagreements in interpretation/application seems to be inadequate, particularly with regard to Pillar 2 (GloBE), which will be implemented by domestic laws. In particular, with regard to Pillar 2 (GloBE), there are concerns that implementation is hastened without sufficient coordination in the application and enforcement of domestic laws in each jurisdiction, resulting in an increase in disputes that place a heavy burden on taxpayers.

Proactive guidance by OECD and coordination between tax administrations are desirable so that Japanese companies that do proper tax payment without excessive tax planning do not struggle with the compliance burden and dealing with tax disputes. For example, even if non-binding, multilateral fora such as ICAP and the panel planned under Pillar 1, or neutral panels including experts, may be useful in both dispute prevention and resolution.

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[39] Keidanren (2019)

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