



CENTER FOR TAXPAYER RIGHTS

International Conference on Taxpayer Rights Access to Justice: Judicial Review & Alternative Dispute Resolution

MAY 26, 2023

PANEL 5: JUDICIAL REVIEW OF CROSS-BORDER TAX DISPUTES

JUDICIAL REVIEW OF CROSS-BORDER TAX DISPUTES

Panelists:

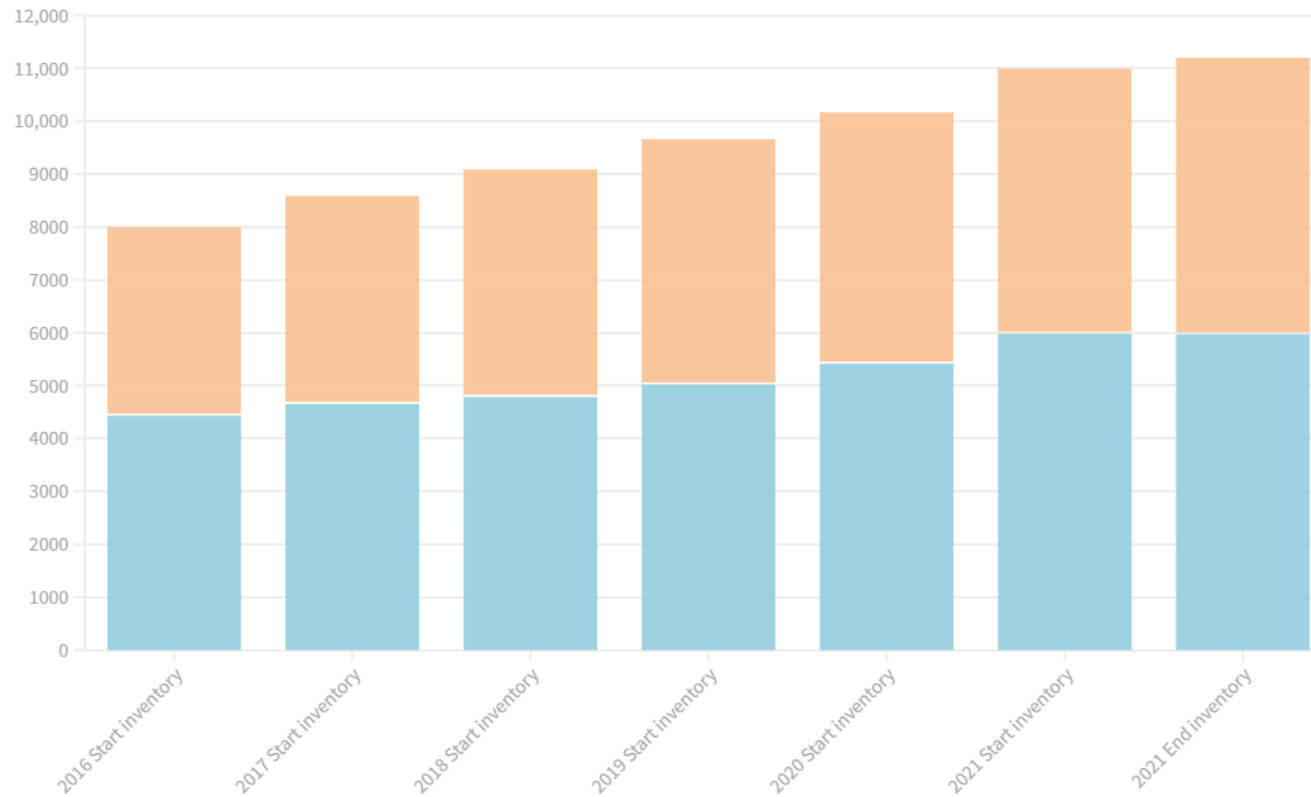
- *Philip Baker*, K.C., Field Court Tax Chamber; Visiting Professor, Oxford University, United Kingdom.
- *Liselott Kana*, Co-Chair, United Nations Committee of Experts in International Cooperation in Tax Matters; Internal Revenue Service, Chile.
- *Katerina Perrou*, Post-Doctoral Researcher and Lecturer in Tax Law, National and Kapodistrian University of Athens; Legal Counsel of the Governor of the IAPR, Greece.
- *Luis Salinas*, Creel, García-Cuéllar, Aiza y Enríquez, S.C., México.

Moderator:

- *Manuel Alcalde*, Carey Law Firm, Chile.

INTRODUCTION

MAP inventory evolution (all cases)*



Source: OECD - Mutual Agreement Procedure Statistics 2021 – Inventory trends

- Expectation of increase in cross-border tax disputes.
- How can taxpayers access justice and effective legal remedies?
- Criteria or common elements for a single and effective judicial remedy.

CROSS-BORDER DISPUTES: WHERE ARE WE STANDING?

Country Experience and challenges with MAAT, MAP and tax arbitration.

Administrative cooperation procedures between tax authorities in the EU and LATAM.

CROSS-BORDER DISPUTES: Chile and MAAT



Council of Europe-OECD Multilateral Convention

Open for signature in Strasbourg, 25.1.1988

BUT in force since 1995

Updated 27.5.2010, after Protocol

Call by G20 - developing countries take benefit of the new cooperative tax environment

Now open up to non-members!

Today 147 participating jurisdictions, including 17 jurisdictions covered by territorial extension



CROSS-BORDER DISPUTES: Chile and MAAT

In force in Chile since November 2016

It covers comprehensive assistance:
exchange of information, service of documents & recovery of taxes

Allows for exceptions and reservations:

Chile declares that its authorities may inform its resident before transmitting information concerning them.

Chile will not accept, as a general rule, requests by a foreign tax authority to take part in an auditing procedure in Chile.



CROSS-BORDER DISPUTES: Chile and MAAT

Chile reserves the right not to provide any form of assistance in relation to the taxes of other Parties, save for the ones included by Chile in Annex A to the Convention:

- Tax included in the Income Tax Act
- Sales and Services Tax Act
- Estate, inheritance or gift taxes

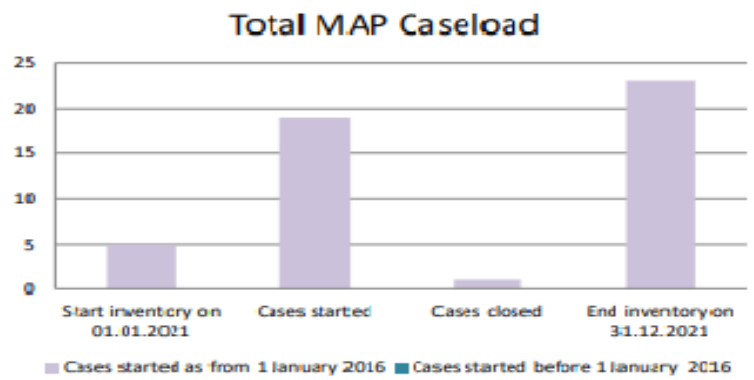
Chile reserves the right not to provide any assistance in the recovery of any tax claim or in the recovery of an administrative fine, for all taxes.

Chile reserves the right not to provide assistance in the service of documents.



CROSS-BORDER DISPUTES: Chile and MAP

Cross-border disputes statistics:



Cases started before 1 January 2016	2021 Start inventory	Cases started	Cases closed	2021 End inventory
Transfer pricing cases	0	0	0	0
Other cases	0	0	0	0

Cases started as from 1 January 2016	2021 Start inventory	Cases started	Cases closed	2021 End inventory
Transfer pricing cases	3	19	1	21
Other cases	2	0	0	2

<https://www.oecd.org/tax/dispute/2021-map-statistics-chile.pdf>



CROSS-BORDER DISPUTES: Chile and MAP

- Chile, as a member country of the OECD/Inclusive Framework, has committed to the implementation of the minimum standard established in Action 14 of the BEPS Project:

Make Dispute Resolution Mechanisms More Effective

- As part of this commitment, Chile has undergone various peer reviews to assess the implementation of the minimum standard.
- Chile should bilaterally modify more than 30 tax agreements, to include the second sentence of paragraph 2 of Article 25 of the OECD Model
“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting State.”



CROSS-BORDER DISPUTES: Chile and Arbitration

- Chile, has reserved the right not to include paragraph 5 of Article 25 of the OECD Model in its tax treaties.

“... any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing.”

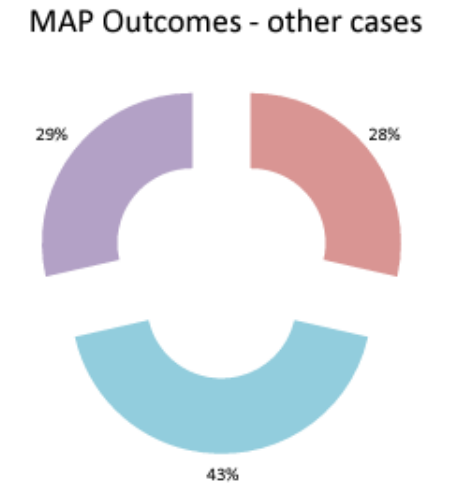
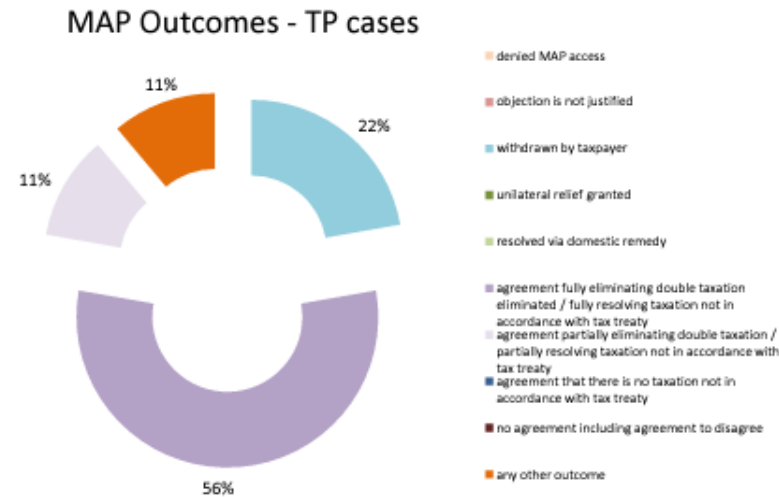
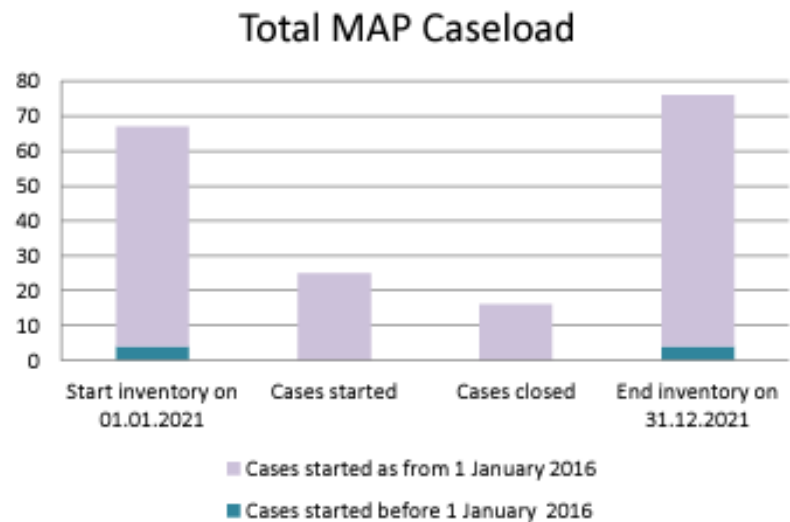
- Chile does include an arbitration clause in various tax treaties, however none as an obligation, only if both contracting States have approved to submit to such a procedure.

Japan-Chile:

*“... any unresolved issues arising from the case shall be submitted to arbitration if the person so requests **and the competent authorities of the Contracting States so agree.**”*



CROSS-BORDER DISPUTES: Mexico's Experience



Source: OECD - Mutual Agreement Procedure Statistics 2021 – Mexico

CROSS-BORDER DISPUTES: Mexico's Experience

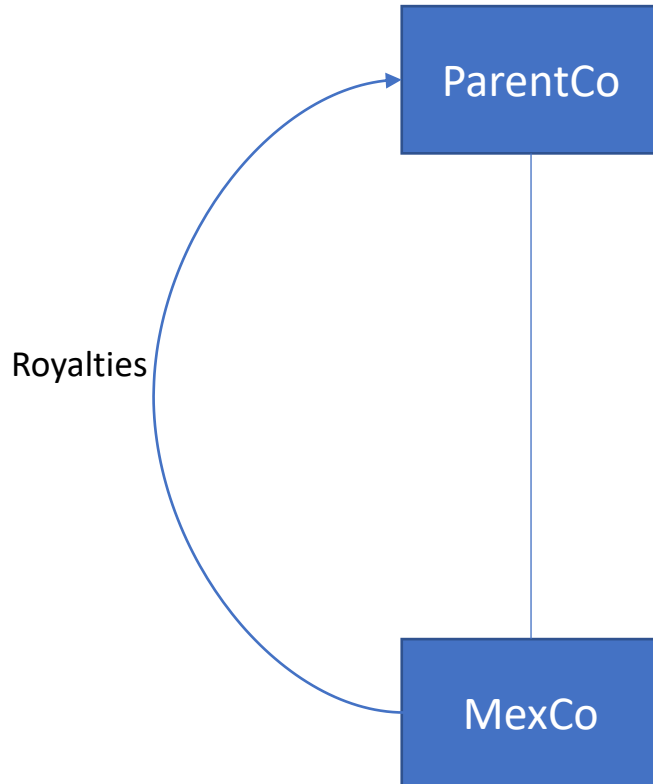


Article 26. Mutual Agreement Procedure

“...Provided that the competent authority of the other Contracting State is notified of the case within four and a half years from the due date or the date of filing of the return in that other State, whichever is later...”



CROSS-BORDER DISPUTES: Mexico's Experience



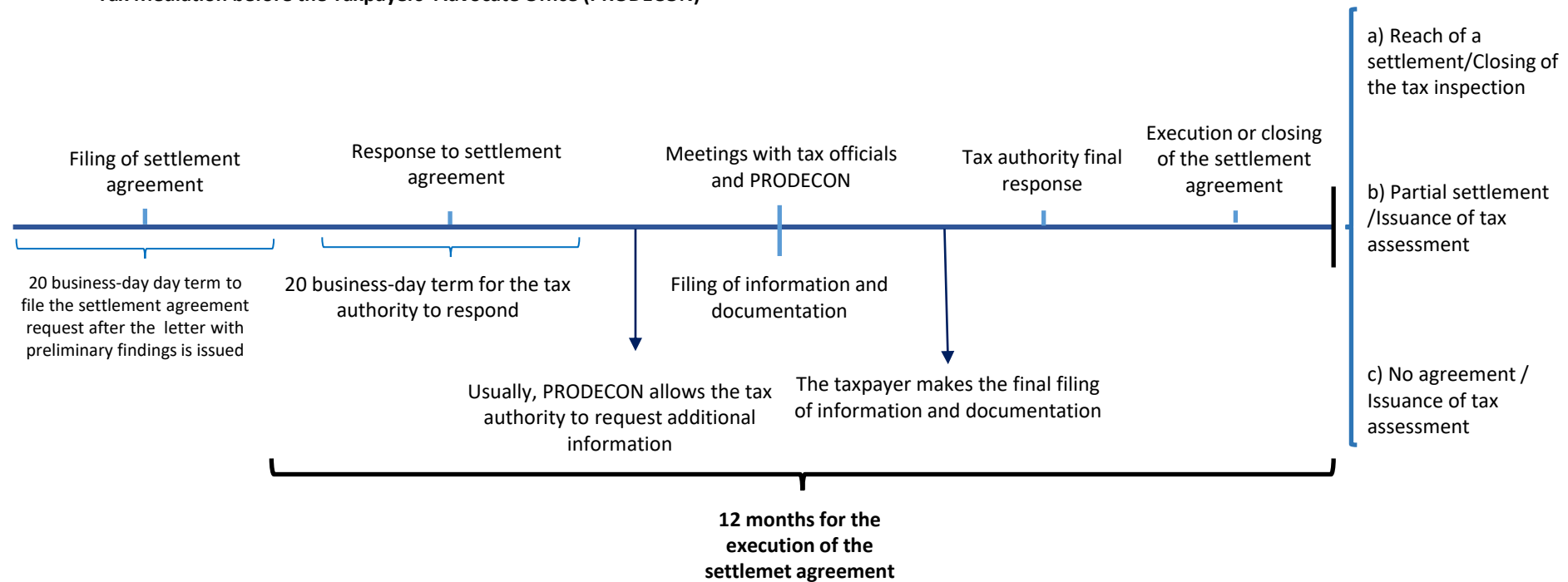
Tax authority will question:

- Agreed royalty rate
- Legal ownership of the IP
- Transfer of technology
- Treaty benefits
- Notional dividend
- Fomalistic issues



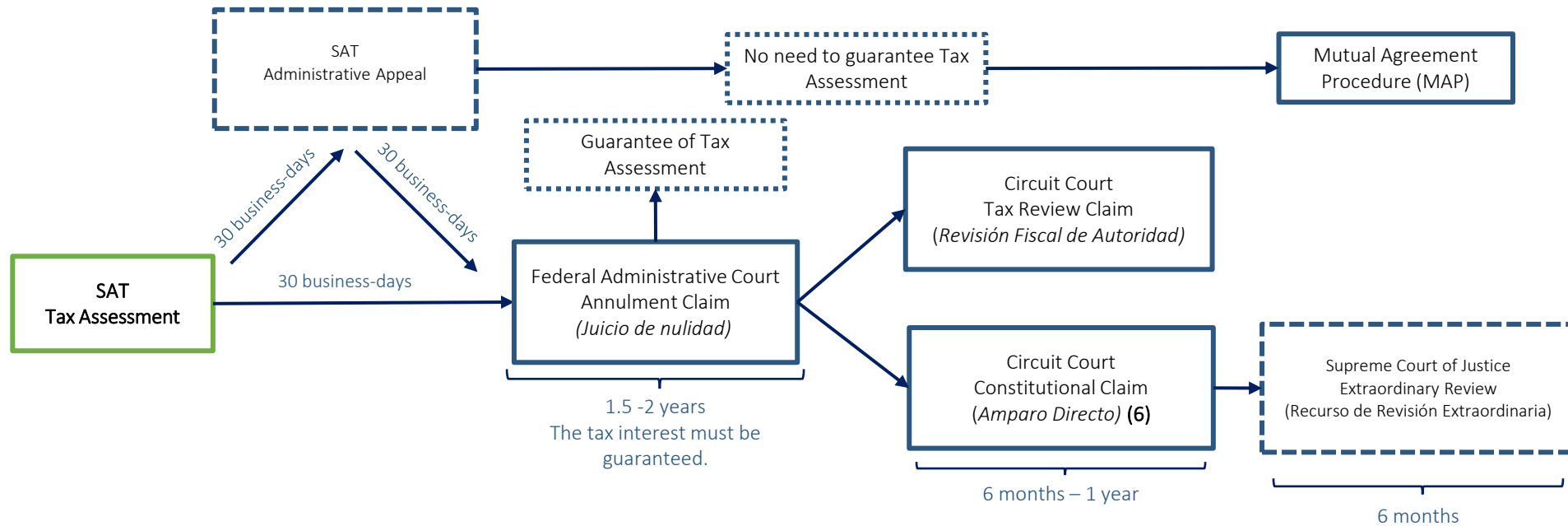
JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Cases, country approach and justice access

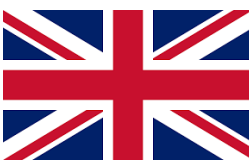
Tax Mediation before the Taxpayers' Advocate Office (PRODECON)



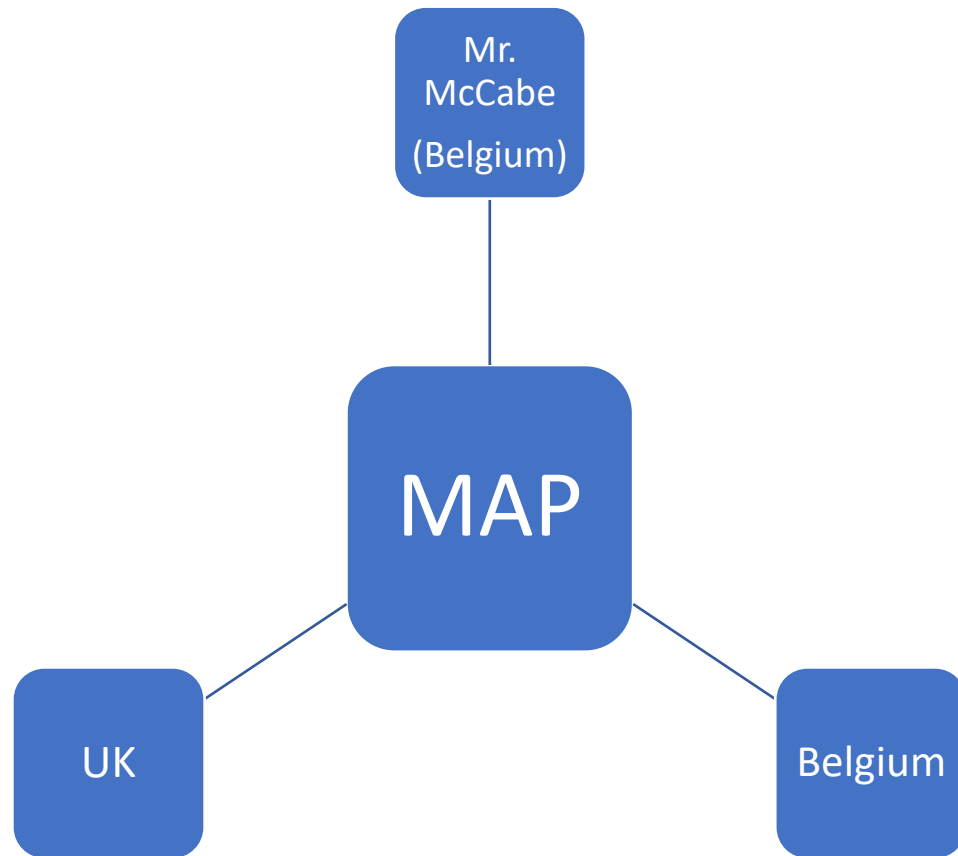


JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Cases, country approach and justice access





JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Case Study & Country Approach

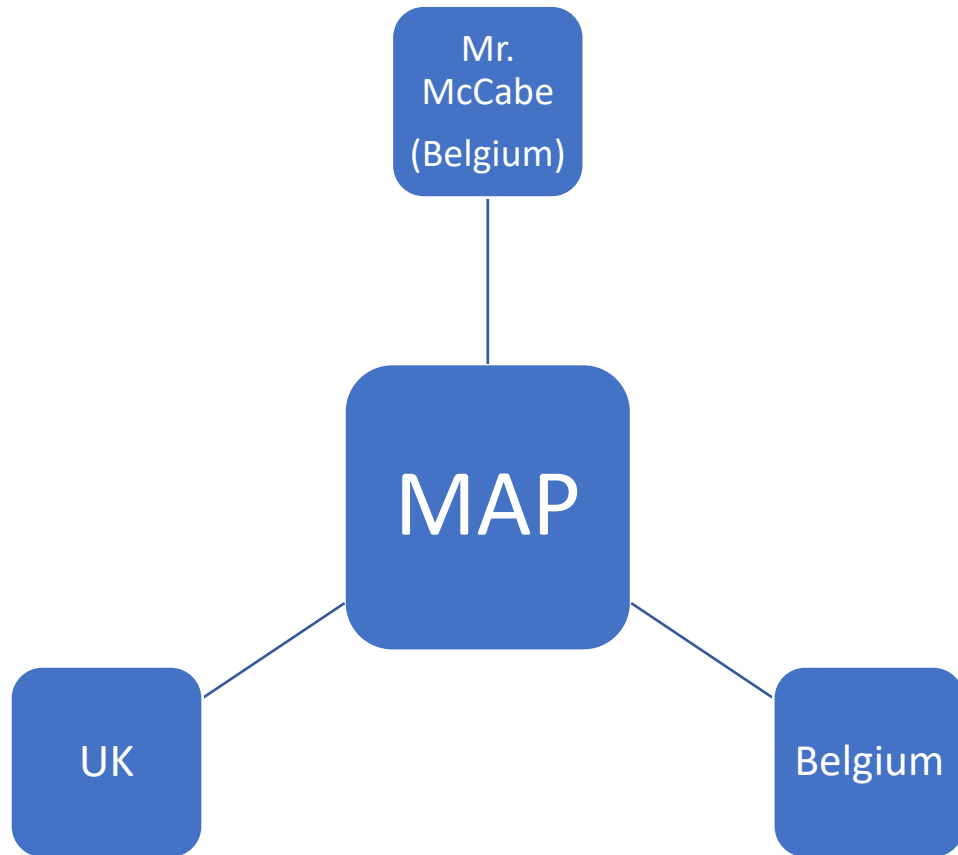


McCABE CASE

- Mr. McCabe claimed he was a resident of Belgium, not the UK.
- A MAP was held between the UK and Belgium, but did not resolve the case.
- For UK litigation purposes, McCabe required disclosure of documents regarding the MAP between the UK and Belgium.



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Case Study & Country Approach



McCABE CASE

- Mr. McCabe was unable to obtain the documents in the UK – see (2020) 23 ICLR 267 (Upper Tribunal) – not of sufficient probative value.
- In Belgium, disclosure was ordered – see (2020) 23 ICLR 221.

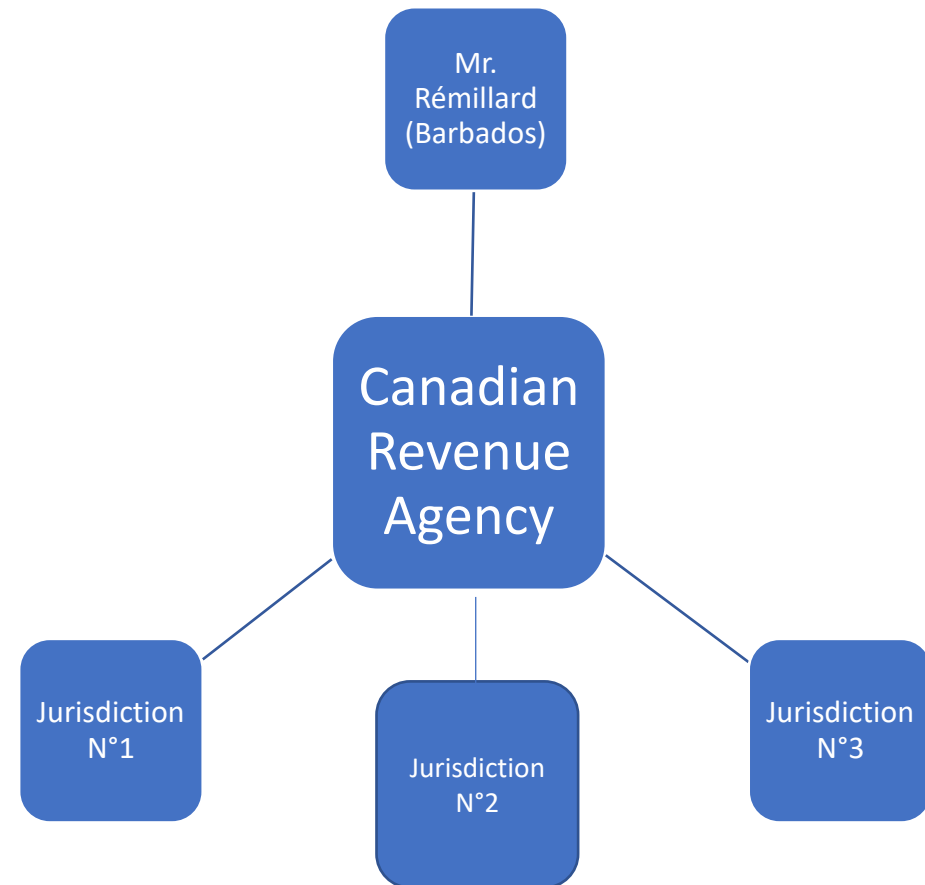


JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cases, country approach and justice access

REMILLARD CASE

- Mr. Rémillard claimed to have established himself in Barbados, thus becoming a non-resident of Canada.
- CRA issued Information exchange requests (IER) to be sent to three other jurisdictions.
- Mr. Rémillard applied for judicial review of the IERs challenging “foreseeable relevance” – see (2022) 25 ITLR 636 (CFedLCrt).



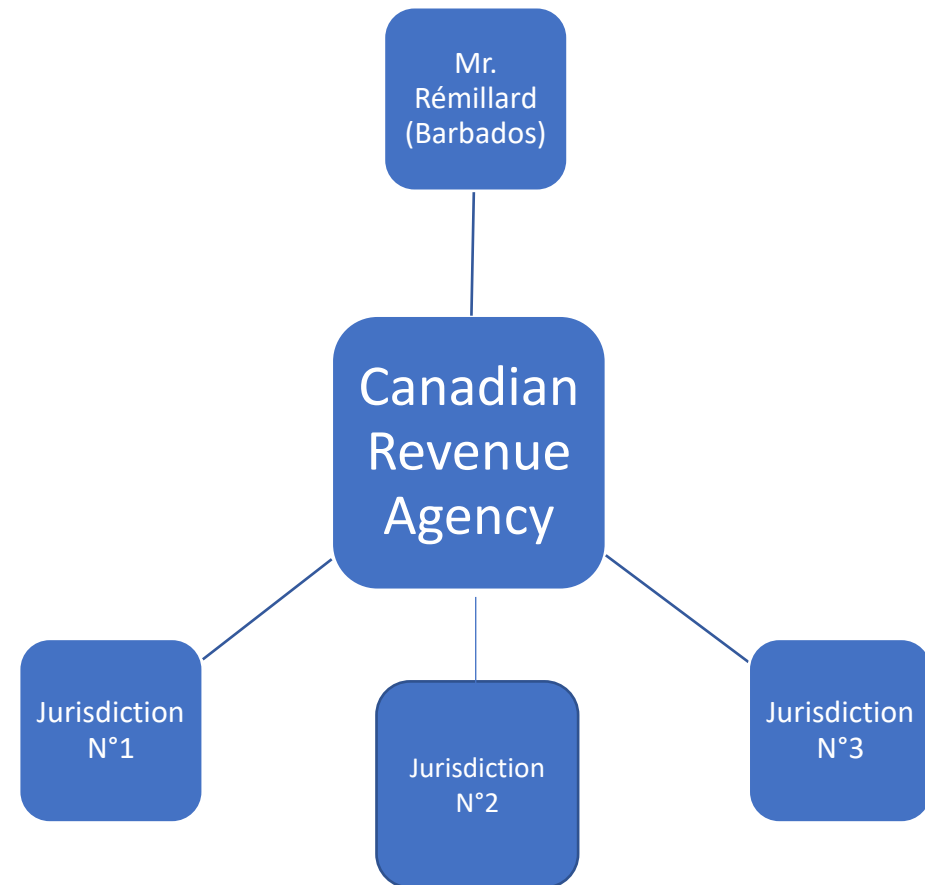


JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cases, country approach and justice access

REMILLARD CASE

- When information was received, it was included in a court file which was publicly available.
- Mr. Rémillard challenged the public disclosure under the right to privacy in the Canadian Charter of Rights – (2022) 25 ITLR 610 (FCA).
- ‘Anyone who brings a case before the courts, whether in family, commercial, administrative, tax or other matters, must expect that large parts of his or her private life will become accessible to the public’.





JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: The EU Experience

- Three areas of cooperation within the EU, raising different issues of access to justice
 - Dispute resolution
 - Exchange of Information
 - Assistance in the collection of taxes

- Even though the EU legal environment has some particularities, the issues / concerns are the same.



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cross-border Dispute Resolution in the EU

- Dispute resolution Directive ('DRD', 2017/1852; applies since 2019*)
- Provides for **MAP + Arbitration**, with **enhanced role** for the affected taxpayer; overall it is expected to be an effective remedy
- Available only to **EU tax residents** for disputes relating to the **intra-EU DTCs**
- No application to disputes between an EU MS and third countries



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cross-border Dispute Resolution in the EU

- Relationship with domestic procedures/courts → “the fork in the road”
 - Parallel recourse to domestic courts and the DRD procedure is acceptable **BUT** in States where CAs are bound by court decisions: either the taxpayer must waive his right to pursue domestic remedies or sudden death of the DRD
 - **Is this acceptable under the right to a fair trial? Only if the procedures are equivalent**



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cross-border Dispute Resolution in the EU

- Relationship with domestic procedures/courts → “the fork in the road”
 - Parallel recourse to domestic courts and the DRD procedure is acceptable **BUT** in States where CAs are bound by court decisions: either the taxpayer must waive his right to pursue domestic remedies or sudden death of the DRD
 - **Is this acceptable under the right to a fair trial? Only if the procedures are equivalent → Impact of *Achmea* judgment**



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cross-border Dispute Resolution in the EU

- Impact of *Achmea* judgment [*Slovak Republic v. Achmea B.V. \(Case C-284/16\)*](#) (6 March 2018)
 - Bilateral Investment Treaties' arbitration clauses are incompatible with EU law, as they remove disputes involving the interpretation or application of EU law from the mechanism of judicial review provided for by the EU legal framework, depriving the effective supervision by the CJEU (267 TFEU on preliminary rulings)



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Cross-border Dispute Resolution in the EU

- Impact of *Achmea* judgment:
 - The jurisdiction of the CJEU is, potentially, limited, *unless* the arbitration body can qualify as a court or tribunal of a Member State, in the context of Article 267 TFEU.
 - The same problem potentially arises in MAP+arbitration under DTCs between EU and third countries → solution?
 - Need for a “court” in all cross-border tax disputes?



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Exchange of Information in the EU

- Directive on Administrative Cooperation ('DAC', 2011/16)
- Exchange of information upon request – “foreseeable relevance”
- Who can examine and confirm that the request complies with the “foreseeable relevance” standard?
- Similar issue; who can have access to the request?
- The Impact of *Berlioz I and II* ((**C-682/15** (GC), 16-05-2017; and **C-245-246/19**, *Lux v B*, 6-10-2020)



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Exchange of Information in the EU

Berlioz I (C-682/15)

- The right to a **fair hearing by a tribunal** → *includes* **equality of arms**
- *Equality of arms requires* → (1) **access to file** and (2) **effective judicial review**
- **Access to file** → satisfied if the relevant person receives *minimum information*
- **Effective judicial review** → means that **a court must have full access**



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES: Exchange of Information in the EU

Berlioz II (Lux v B, C-245-246/19)

- Must **the order** to provide information be the subject **of actions** challenging its validity brought by
 - **(i)** the information holder? → YES (Berlioz I)
 - **(ii)** the taxpayer under investigation? → NO during investigation; later
 - **(iii)** third parties affected by the information in question? No, unless damages



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Assistance in the collection of taxes in the EU

- Mutual Assistance Directive (2010/24)
- The impact of *Heavyinstall (C-420/19)* → The case involved the extent of **the powers of the courts** of the requested Member State regarding the **assessment of the conditions of application** of precautionary measures that are possible in the applicant Member State.
- It also concerned the **division of powers between the courts** of the applicant State and the courts of the requested State



JUDICIAL REMEDIES FOR CROSS-BORDER DISPUTES:

Assistance in the collection of taxes in the EU

- Mutual Assistance Directive (2010/24) – the impact of *Heavyinstall*
- The **courts of the requested Member State**, ruling on a request for precautionary measures, are **bound by the assessment of the factual and legal compliance with the conditions** laid down for the application of those measures made by the authorities of the applicant State
- Is this only relevant under EU law? **See Art. 27§6 of the UN and OECD Models: recovery measures in the requested State**

FINAL REMARKS & QUESTIONS

Possible criteria to secure a single effective judicial remedy in cross-border tax disputes.