

System of Dispute Resolution and Prospects for Mediation for Cross-Border Tax Disputes

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Mediation is...

“[a] **flexible** process conducted confidentially in which a neutral person actively **assists** parties in working towards a negotiated settlement of a dispute [...] with the parties in ultimate control of the decision to settle and the terms of resolution”*.

Strengths (benefits):

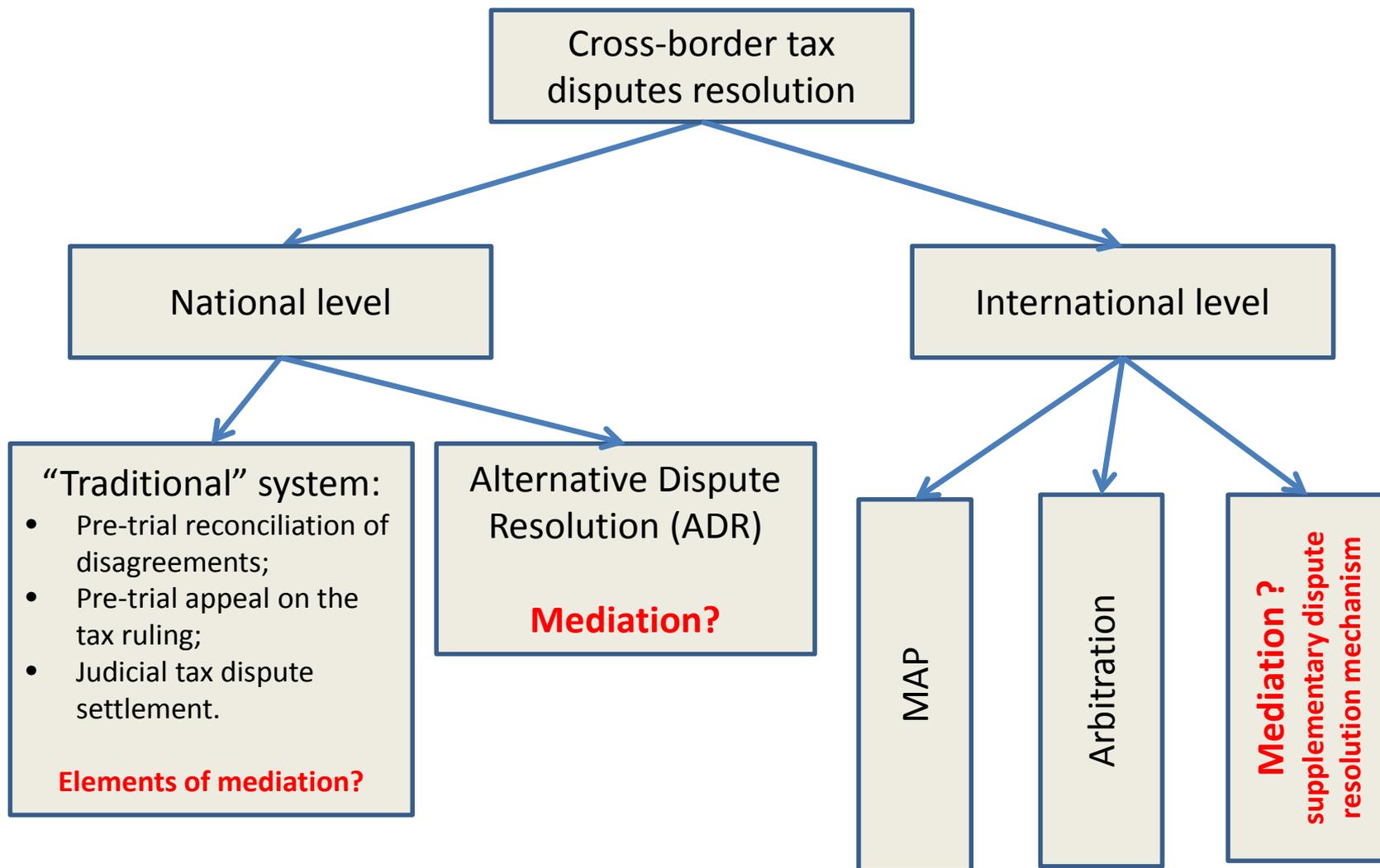
- The mediator can help unlock the deadlock that parties may have reached due to entrenched positions or irreconcilable interests.
- Mediation is relatively swift.
- Mediation is relatively inexpensive.
- Mediation is relatively simple.
- Mediation allows the parties to revise and adjust the scope of their conflict.
- Mediation allows for flexible solutions and settlements.
- Settlements reached in mediation are more agreeable to both parties than ones reached for them by third side (court, etc.).

* Centre for Effective Dispute Resolution (CEDR) (<https://www.cedr.com/>).

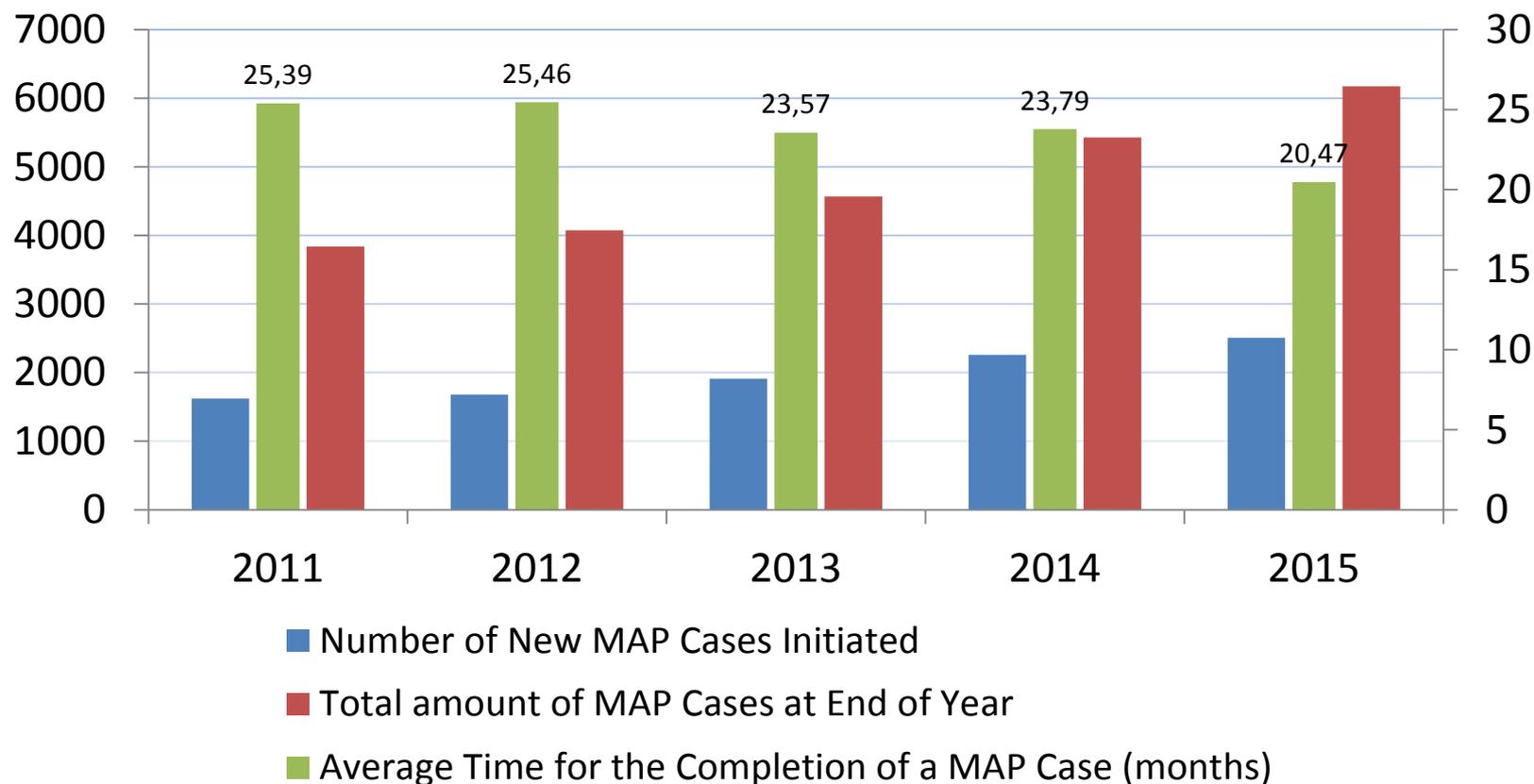
Types (forms) of mediation depending mainly on the role of the mediator

- **First (mediator as facilitator):** his role is to assist, in a neutral manner, in the reaching of resolution between the parties.
- **Second:** the mediator has more of an evaluative role and may be asked to give a view as to the merits of one or more of the issues between the parties.
- **Third:** med-arb, the mediation is a prelude to arbitration, if and to the extent that the mediation does not lead to a complete resolution of matters.

Second and third less suitable in tax disputes to which the tax authority is a party.



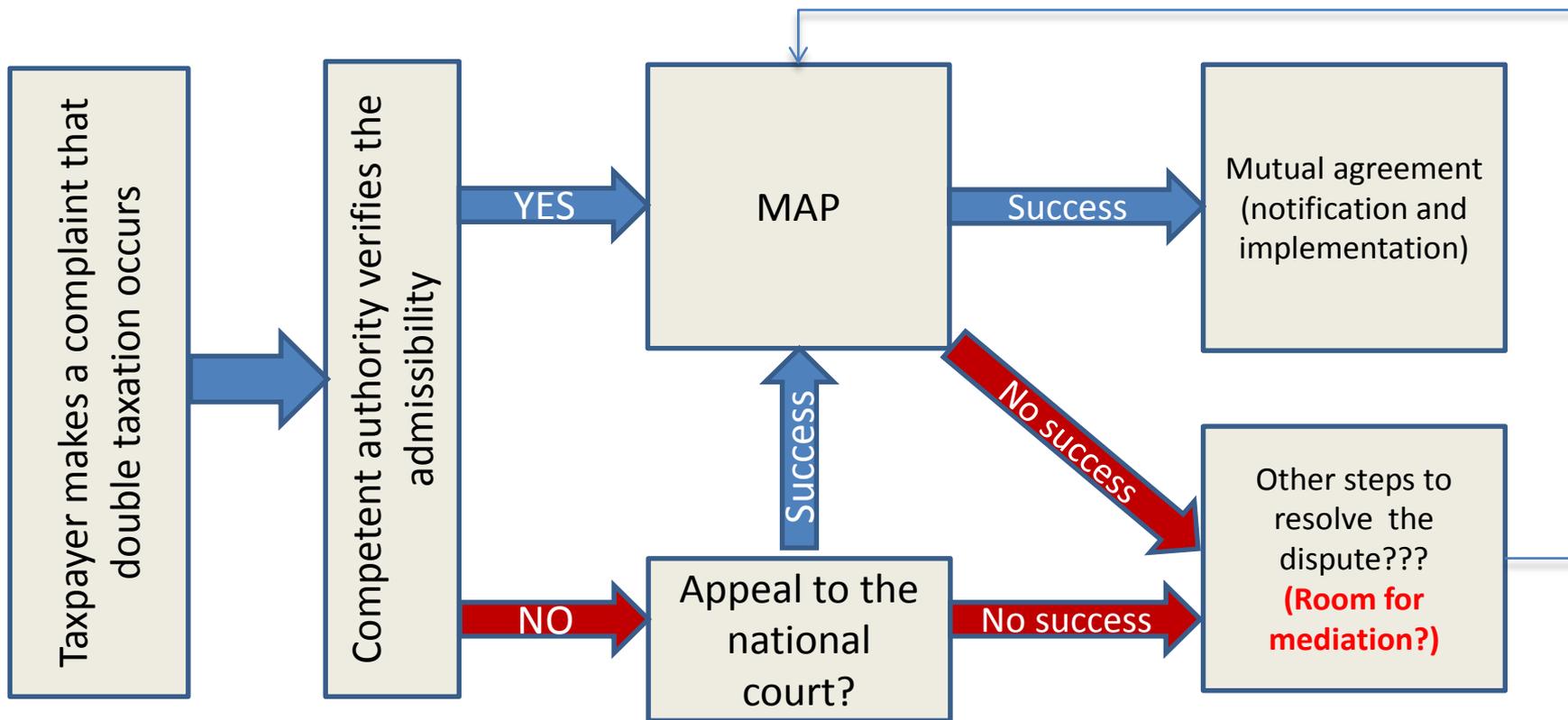
MAP Statistics (for the OECD countries)



Steps that created possibilities and need for mediation

1. Article 25 of the OECD Model (1995) was updated in the OECD Model (2008) to **add an arbitration clause** in article 25(5). It provides for mandatory (at the request of the taxpayer concerned) and binding arbitration as an extension of MAP procedure.
2. Paragraphs 86 and 87 were added to the Commentary on Article 25 of the OECD Model (2008) to **allow for implementation of other supplementary dispute resolution mechanisms as part of the MAP.**
3. On 5th October 2015, the final report on improving the effectiveness of dispute resolution mechanisms under BEPS Action 14 was released.
4. Multilateral Tax Convention (Instrument).

Current state of MAP



Cases more suitable for mediation on national level

Opinion: The most suitable tax cases for mediation are those which are substantially fact dependent and where matters of principle are not or not absolutely central to the dispute.

Examples:

- the correct computation of profits for tax VAT purposes;
- cases involving technical non-tax matters such as whether certain items of equipment constitute plant or machinery for capital allowance;
- some transfer pricing matters;
- whether a company is an investment company;
- cases concerning whether the conditions for reliefs are factually met;
- etc.*

Addition: mediation can be an appropriate way to deal with individual issues in complex cases.

Principal of horizontal equity between taxpayers should be considered.

*G.Lightman and F.Cullen

When the mediator can be involved in resolving of tax dispute (the Russian Federation)

- Tax monitoring and mutual agreement procedure during tax monitoring;
- Pre-trial reconciliation of disagreements;
- Pre-trial appeal on the tax ruling (when taxpayer can attend this pre-trial procedure);
- Judicial tax dispute settlement (plea agreements (art. 138 APC of the RF), recognition of circumstances (art.70 APC of the RF)).

Possibility of introduction of the mediation as ADR?

Issues that need to be addressed in the law (in international treaty) for introduction of mediation

- 1. The mediator** (requirements, rights, responsibility, mediation organizations, etc.).
- 2. Mediation agreement** (task of the mediator, boundaries of dispute, who should be responsible for costs, etc.).
- 3. Settlement agreement** (transparent or confidential, essential clauses, etc.).

Thank you for attention!

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