

Tax Certainty Options for Developing Countries in the Context of BEPS 2.0

Natalia Quiñones

Former Head of the International Tax Office at DIAN

nquinones@quinonescruz.com

Strategic choices

Pillar 1 MLC

Need to reconsider signature and/or ratification- subject to US and China ratifying

Economic impact of the elimination of unilateral measures- ensure that withholding taxes will not be considered unilateral measures

Dispute prevention and resolution

Active involvement in rule-making process

United G24 front on design aspects for both mechanisms, regardless of optionality for issues related to Amount A

Request either a permanent exclusion for non OECD countries and non-G20 countries or legal certainty on when they will be asked to join the mechanisms.

Capacity building

Strengthen MAP capacity and develop thorough understanding of mandatory binding resolution rules

Request transparency and publicity of dispute prevention and dispute resolution decisions in the context of Pillar 1 in order to establish a learning curve

Design suggestions for a united front

1. Cost related strategies

- Propose virtual meetings and case accumulation for cost efficiency.
- Propose common funding of total costs split proportionately to the GDP of participating jurisdictions in each mechanism.
- Propose ceilings to the costs borne by developing countries expressed as a percentage of GDP.
- Propose the creation of a developing country fund to be financed by developed countries and by a percentage of the amounts in discussion for each panel to be contributed by the levying country.
- Take advantage of national legal defense agencies to use the resources to retain legal or accounting advice, or to bring an expert witness to the procedure.
- Demand clarity in the rules that allow for a Determination Panel or any other mechanism for appeals.

2. Panel composition

- Propose sole participation of CAs for the Review Panel.
- Propose an intermediate independent CA stage where CAs from similar countries are called in to see if a solution may be jointly proposed by them. This stage would operate before independent experts are brought in, but only if both CAs consider that a set of independent CAs may reach an agreement
- Accept independent members in the Review and Resolution Panel, as long as they comply with strict disclosure and conflict of interest rules.
- Promote diversity in independent panel members by limiting non-CA panel members to a maximum of one panel per fiscal year and prevent the same panel member from sitting in a procedure involving the same taxpayer in a period of five years.
- Put together lists of experts/panel members that either come from G-24/developing countries or fully understand their views.

3. Administrating body

- Allow for the appointment of additional alternative administrating bodies, such as the United Nations, especially for the Resolution panels, even if presently they may lack capacity in terms of funding or personnel.
- Ensure that the procedural decisions are all established in the rules, and that any lack of agreement between potential parties will be resolved in a neutral way.

Design suggestions for a united front

4. Mechanism design

- Accept final offer as the default mechanism for the Determination and Resolution Panels in order to preserve sovereignty and reduce costs.
- Require reasoned decisions in order to increase transparency and establish a learning curve.
- Demand the publication of redacted briefs for each Determination and Resolution Panel.

5. Transparency

- Request the publication of redacted briefs for each panel decision including the facts, competing proposals, issues or principles involved, and the reason for choosing one or the other proposal.
- Taxpayers must be given access to procedural information and should be allowed to request the redaction of specific information that may be sensitive from a business point of view.
- Enforcement recommendations for G-24 countries
- Clarify that countries are only bound by the Resolution Panel decision (or any panel decision, for that matter) if the taxpayer does not challenge the MAP that adopts the decision in either country.
- Request that countries disclose any binding judicial decisions before a Resolution Panel is initiated.
- Create rules for an international appeals mechanism that balances costs with the opportunity to insist on a particular position

6. Capacity building

- Request a specific capacity-building program on mandatory binding dispute resolution for developing countries.
- Train CAs in MAP while the elective mechanism is still elective, for those countries who are members of the IF or if the country desires to expand its treaty network in the long term.