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Mutual agreement procedure
— dispute avoidance and resolution

Coordinator's Report on Work of the Subcommittee on the Mutual Agreement Procedure—Dispute Avoidance and Resolution

I. Introduction

The following report on the activities of the Subcommittee on the Mutual Agreement Procedure—Dispute Avoidance and Resolution is presented by the Coordinator of the Subcommittee, Kim-Jacinto Henares. The Report includes a series of background papers which have been discussed in the Subcommittee as a whole as Annexes. The Subcommittee has not sought to reach consensus on all the issues addressed in those papers, but rather to cover as much relevant ground as possible for consideration by this and future Memberships of the Committee, and to form the basis of further Subcommittee work until the end of June 2017, as well as any future Subcommittee formed with a similar mandate. Great thanks are due to all who have worked on those papers.

I.1. Mandate

The Subcommittee was formed by the Committee at its eleventh session in 2015. It was given the following mandate:

> The Subcommittee is to consider and report back to the Committee on dispute avoidance and resolution aspects relating to the Mutual Agreement Procedure, with a view to reviewing, reporting on and, as appropriate, considering possible text for the UN Model and its Commentaries, as well as related guidance, on issues such as, in particular:
>
> - Options for ensuring the MAP procedure under Article 25 (in either of its alternatives in the UN Model) functions as effectively and efficiently as possible;

- Other possible options for improving or supplementing the MAP procedure, including the use of non-binding (such as mediation) forms of dispute resolution;
- Explore issues associated with agreeing to arbitration clauses between developed and developing countries;
- Means of dispute avoidance, such as Advance Pricing Agreements (APAs), while recognizing the primary role of the Subcommittee on Article 9 (Associated Enterprises) and the UN Practical Manual on Transfer Pricing for Developing Countries in addressing APAs; and
- The need or otherwise for any updates or improvements to, the Guide to the Mutual Agreement Procedure under Tax Treaties approved by the Committee at its Annual Session in 2012.

The Subcommittee is to focus especially on issues affecting developing countries, possible means of addressing them in a practical manner, and possibilities for improving guidance and building confidence in dealing with the issues in this area. It is mandated to initially report to the Committee at its October session in 2016, particularly addressing, as its major priority, such improvements, if any, as are most likely to be accepted by the Committee for inclusion in the next version of the UN Model.

I.2. Composition and activities of the Subcommittee

The members of the Committee are as follows (serving in their personal capacities – countries and organizations are listed for information only):

Kim Jacinto-Henares (Coordinator), Noor Azian Abdul Hamid (Malaysia), Johan de la Rey (South Africa), Henry Louie (USA), Eric Mensah (Ghana), Ignatius Mvula (Zambia), Christoph Schelling (Switzerland), Stig Sollund (Norway), Ingela Willfors (Sweden), Ulvi Yusifov (Azerbaijan), Enrico Martino (Italy), Andrew Dawson (UK), , Pragya Saksena (India), Bernadette May Evelyn Butler (Bahamas), El Hadji Ibrahima Diop (Senegal), Toshiyuki Kemmochi (Japan) Armando Lara Yaffar (Mexico), Xiaoyue Wang (China), Jorge Rachid (Brazil), Mohammed Amine Baina (Morocco), Susana Bokobo (Repsol), Morgan Guillou (EC), Cym Lowell (ICC), Sol Picciotto (BMG), , Claudia Pimentel da Silva (Brazil), Jeffrey Owens (Vienna University of Economics and Business (WU), Richard Stern (World Bank), Jacques Sasseville (OECD), Christophe Waerzeggers (IMF), Juliane Groeper (Siemens), Adebiola Bayer (Austria), Jan de Goede (IBFD), and Norbert Roller (World Bank). The assistance of others supporting the Committee in preparing papers is also gratefully acknowledged.

The Committee met twice in 2016, at the Vienna University of Economics and Business (WU), hosted by the Austrian Federal Ministry of Finance and supported by WU, and once in New York City, hosted by the UN and with some logistical assistance from EY.

II. The Current Economic and Tax Environment

The Subcommittee discussions took place against the background of growing political and economic uncertainties. International organizations have been cutting their growth forecasts, and the IMF now expects the world economy to grow by just less than 3 percent. UNCTAD data shows that foreign direct investment remains below the 2007 crisis peak level, despite

MNEs having trillions of dollars in cash offshore. The growth of world trade remains below its trend levels and, unlike in the 1990s, and early 2000s, it remains below the rate of growth of GDP.

Also relevant to the Subcommittee's discussions are the following trends:

- The G20 / OECD BEPS debate will fundamentally influence international tax rules. 15 action points set out the changes that are being proposed by the participating countries. The next stage is to move toward their implementation. The expectation is that because there remain some significant differences of views on how to interpret these action points, this could lead to problems in the application of tax treaties and transfer pricing related actions. It is already clear that some countries will, as they go about the implementing these actions, modify them to suit their own circumstances. This may lead to an increase in the number of cross border tax disputes, as a result of increasing focus internationally and at domestic level on the tax rules which should apply in the new circumstances.
- The expected increase in availability of information on the transfer pricing practices of multinational enterprises, due to the implementation of Country by Country reporting, the master and local transfer pricing files, disclosure provisions and an increased use of exchange of information provisions, will enable developing countries to take a more informed view on whether MNEs are paying their appropriate share of taxes. And this is likely to lead to more robust audits and challenges of the transfer prices which in turn could lead to more disputes, including between developing and developed countries.
- This trend will be reinforced by the fact that more and more developing countries are putting in place sophisticated transfer pricing legislation and creating large business units.
- The growth of global value chains, the increase in international activities of small and medium-sized enterprises, particularly in the digital sector, will put pressure on existing international tax rules.
- Developing countries continue to extend their tax treaty networks, and are using the treaties as a tool not only to avoid double taxation, but also to avoid double non-taxation.

As a result, that it was important to develop best practices to avoid such disputes arising and to resolve them when they occur.[1]

III. Present Difficulties – Developing a Common Understanding of Key Concepts and the Current Position of Developing Countries on MAP

The Subcommittee's meetings have revealed that different countries and stakeholders have a different understanding as to the concepts and terms governing the current Mutual Agreement Procedure (MAP). Those countries with limited or no experience with alternative dispute resolution practices also tend to present a limited knowledge and understanding of the circumstances surrounding the Mutual Agreement Procedure and what it takes to conduct one. As a result, those countries experience greater difficulty in conducting mediation and arbitration. This could be one of the causes for the general reluctance of some countries towards the Mutual Agreement Procedure in general and towards arbitration and non-binding dispute resolution mechanisms in particular.

[1] See Annex 5 on statistical trends for more information.

From the debates among the Subcommittee members it has become apparent that there is a need to go back to the basics and define what each of the dispute resolution mechanisms mean, at least under the UN Model, the UN Model commentaries and the UN Guide to the Mutual Agreement Procedure Under Tax Treaties (herein UN Guide to MAP) in order to ensure that every party to the dispute understands what is meant when talking about alternative dispute resolution (ADR), MAP, mediation, arbitration, and expert evaluation/determination. The work on improving the various elements of the procedure is best served by a common understanding of the terms used and the functioning of the different procedures.

Developing a common understanding entails (i) the precise description of each mechanism; (ii) a concrete statement as to whether the respective mechanism is generally regarded to be mandatory or voluntary and (iii) whether the result is meant to be binding or non-binding. There may be further distinctions to be carefully specified. Countries may still deviate from these definitions in their respective DTTs, but it is important to clarify what the UN and in particular this Subcommittee means when talking about the various aspects of ADR, especially when considering drafting a Handbook on Dispute Resolution. Were that to be the case, the introduction could lend itself to define the terms used in the proposed Handbook, which would be expected to be concluded in June of 2017.

In order to propose guidance on the resolution of cross-border tax disputes, it is important to first understand the circumstances leading to the dispute. The identification of the contributing factors leading to a dispute will be telling in identifying the most appropriate mechanisms to avoid or resolve other supervening disputes. There is little information on the nature of the disputes occurring currently. The OECD statistics allow a quantitative but not a qualitative analysis and there is almost no information on developing and Least Developed countries. The little information available indicates that developing countries have only been involved in a handful of cases. Most developing countries have had no MAP case thus far although the BRICS' competent authorities tend to deal with MAP cases more regularly.[2] It is important to further examine the reasons that have led developing countries not to engage in MAP in order to determine the underlying causes, and the measures by which these could be addressed.

It was pointed out during the Subcommittee meetings that limited knowledge of the MAP procedures was one of the main reasons, besides capacity constraints, for developing countries' lack of engagement. This has, in some cases, led to a situation where taxpayers do not even attempt to initiate MAP in some countries. It was therefore suggested that the UN could work on further describing the procedural elements involved in initiating and conducting a MAP on a step-by-step basis. The Subcommittee believes that it would be helpful to update the UN Guide to the Mutual Agreement under Tax Treaties with a more case study oriented approach, including examples of all documents to be prepared during MAP for illustration purposes.

Additionally, the discussion briefly touched upon the question of whether those countries that have not yet had any MAP requests initiated by the taxpayer should be concerned that they are potentially losing tax revenue by not entering into a bilateral or multilateral tax dispute resolution framework. This could certainly be further assessed.

[2] See Annex 5 on statistical trends for more information.

IV. Existing Mechanisms to Avoid and Resolve Cross-Border Tax Disputes

IV.1. Mechanisms to Avoid Cross-Border Disputes

When the Committee established the subgroup, it made it clear that the group should not only look at how to resolve cross border tax disputes but also at measures countries could take to prevent such disputes from arising (see section I.1.). The subgroup discussed both domestic and international approaches which may help to avoid such cross border tax disputes.

IV.1.1. The Domestic Taxing Environment

- **The need for clear laws and regulations:**
- **The need for consistent, impartial and transparent application of tax legislation rules and tax treaty provisions**.

IV.1.2. The International Taxing Environment

The Subcommittee discussed two approaches that could provide greater certainty to taxpayers and tax administrations and thereby minimize the risk of cross border tax disputes. These approaches are discussed in more detail in the annexed input papers. The Subcommittee has not sought consensus on whether and how these approaches could be implemented. Rather, it presents them as possible topics for further consideration by this and future Memberships of the Committee.

(1) Advance Pricing Agreements (APA)

The Subcommittee examined two papers on this topic (see **Annexes 1 and 2**). These papers show that an increasing number of countries, including economies in transition and developing countries, are using APAs. The Subcommittee had an extensive discussion of the advantages and disadvantages of APAs, concluding that - when implemented effectively - bilateral APAs can avoid disputes, in the case of roll-back procedures even resolve existing disputes, and do provide certainty to business and tax administrations.

On the other hand, a successful APA program requires a country to have tax officials who are highly skilled and the resources necessary to engage in the process of negotiating an APA, which could last anywhere from eight to eighty months. Some administrations prefer to focus limited technical resources in the early years of transfer pricing regimes on what they may see as taxpayers less likely to be compliant. Tax administrations also need the resources to closely monitor the application of APAs. Another prerequisite for a successful of APA program is to have well drafted Transfer Pricing legislation and regulations. There were also some concerns among members of the Subcommittee that APAs may be difficult to negotiate due to sometimes rapid turnover of staff within tax administrations and a potentially high risk of corruption.

Nevertheless, the Subcommittee would like to ask for the Committee's approval in further examining how successful APAs are in avoiding cross border tax disputes as well as whether and under which circumstances they can be recommended. The results of this work could be incorporated in an update of the UN MAP Guide or in the possible Handbook on Dispute Resolution.

(2) Cooperative Compliance

At the first meeting of the Subcommittee, the participants briefly discussed "Cooperative Compliance". The discussions focused on how this approach could be used in emerging and developing economies. The underlying idea of this approach is to offer a way to develop a more constructive dialogue between tax administrations and multinationals, one based upon trust, openness and mutual understanding.

IV.2. Mechanisms to Resolve Cross-Border Disputes

IV.2.1. Objectives for an Effective Dispute Resolution Framework

During the Subcommittee's discussions, several overarching objectives have been pointed out which may serve to orientate any dispute resolution process. These include the following:

- It should not interfere with the need for countries to derive an appropriate level of tax revenue from economic activities conducted within their respective borders from their tax base.
- It should not affect countries' ability to conduct examinations and make assessments based on the application of internationally agreed standards for transfer pricing and other rules and principles of international tax law.
- It should promote an "investment climate" in which the taxation of cross-border investments is predictable, by enhancing the effectiveness of tax treaties and reducing double taxation.
- It should provide comfort to competent authorities participating in dispute resolution that these processes are not overly burdensome, as well as efficient and fair, also taking into account the different levels of experience and the unequal capacities of countries with MAP and related procedures.

IV.2.2. Non-Binding Dispute Resolution Mechanisms (NBDR)

During the first meeting of the Subcommittee, non-binding dispute resolution was proposed as a means of improving the efficiency of the MAP, while at the same time preserving the amicable nature of MAP negotiations. There was agreement among the Subcommittee members that NBDR should be further explored and the Subcommittee requested a report on this topic, which was presented and discussed during the second Subcommittee meeting (see **Annex 3**).

During the discussion of the report as part of the second Subcommittee meeting, it became clear that there was no consensus among Subcommittee members regarding the terminology of binding and non-binding dispute resolution mechanisms (see also Section III). If the Committee wishes to further explore this topic, for instance for the purposes of the UN Model Convention and its Commentary or with a view to inclusion in the UN Guide to MAP or in a possible future Handbook on Dispute Resolution, there would be value in ensuring that some terms, such as "good offices", "mediation", "conciliation", "expert evaluation", "expert determination", "arbitration", "mandatory or voluntary", "binding or non-binding" are defined for these purposes in order to avoid misunderstanding.

The Subcommittee had an extensive discussion of the advantages and disadvantages of NBDR. A potential advantage of non-binding procedures (such as mediation or expert

evaluation, or a combination of both) is that they could help balance the different experience levels between the parties to a MAP and facilitate an earlier amicable resolution of the procedure. While the concerns surrounding mandatory binding dispute resolution (MDS) would not apply to non-binding procedures, NBDR does not guarantee the resolution of a dispute.

As an increasing number of countries, including developing countries, are looking for means of improving their tax treaty dispute resolution mechanisms, they seek guidance on the measures that could or should be envisaged in order to ensure a level playing field, to support requisite capacity-building and further the effectiveness of MAP. NBDR could fulfil these requirements.

Since to date the UN Model, does not provide guidance on the use of NBDR in a tax treaty context, the inclusion of such guidance into the updated Commentary could be useful. One suggestion for the wording of such an addition can be found in the annexed note on NBDR (**Annex 3 ,G (1)**).

The Subcommittee would furthermore like to ask for the Committee's approval in further examining NBDR as means of amicably resolving tax treaty disputes. The results of this work could ultimately be incorporated in an update of the UN Guide to MAP or in the proposed Handbook on Dispute Resolution.

IV.2.3. Mandatory Dispute Settlement (MDS) Mechanisms

The mutual agreement procedure provided in Art. 25(1) and (2) of the UN Model takes the form of a consultation process through which the competent authorities of both States endeavor to resolve a case presented by a taxpayer. While these paragraphs do not require the two States to reach an agreement, Alternative B of Article 25 of the UN Model includes an additional paragraph (Art. 25(5)) that provides for the mandatory binding arbitration of any issue that prevents these States from reaching an agreement.

As part of its mandate, the Subcommittee was tasked with exploring issues associated with agreeing to arbitration clauses between developed and developing countries. There were constructive discussions concerning mandatory binding dispute resolution (MDS) during the two meetings of the Subcommittee, which offered a diversity of perspectives and raised a variety of issues that could not yet be fully considered. The members of the Subcommittee agreed that it should not be the task of the Subcommittee to make recommendations as to whether or not countries should provide for MDS in their tax treaties. However, the discussions also revealed different perceptions on the terminology used when discussing this topic, as well as a lack of practical information regarding the agreement to and the implementation of MDS procedures. . There appears to be a need to clarify the characteristics of different MDS mechanisms in order to allow a more informed discussion, help countries determine their policies and ensure a level playing field between countries wishing to agree to MDS clauses.

The Subcommittee drew upon the 2015 Secretariat paper on this issue[3] and also requested a report on binding forms of dispute resolution, which was presented and discussed during its

[3] E/C.18/2015/CRP.8

second meeting (See Annex 4). The report identifies different types of MDS mechanisms and outlines their possible advantages and disadvantages. While the Subcommittee has not sought to reach consensus on all the issues addressed in the report, we would like to ask for the Committee's approval of further analysis of this topic, which could result in further guidance for developing countries on the issues to be considered when agreeing to MDS and the practicalities of its implementation, to be included as part of a possible update to the UN Commentary, the UN Guide to MAP or in a future Handbook on Dispute Resolution.

V. Recommendations on how to take forward the work

V.1. Possible Updates to the UN Model Tax Convention and its Commentary

Recognizing the limited time for discussion of possible updates by the Committee, the Subcommittee as a whole has not proposed at this stage specific updates, but in the annexed paper on non-binding dispute resolution (**Annex 3**) a suggestion is made to draw upon and expand some UN and OECD Commentary acknowledging the possibility of non-binding dispute resolution options in the context of the Mutual Agreement Procedure. This would appear suitable, in the Coordinator's view, as balancing the possibility of countries' use of *binding* mechanisms through the option of Article 25 B.

V.1.1. Possible Updates to the UN MAP Guide

The Subcommittee discussed and considered areas in which the UN Guide to MAP could be updated, including issues such as access to MAP, use of APA and cooperative compliance, NBDR and MDS and use of technology to expedite the MAP process and cut costs. A comparison between the minimum standards and best practices mentioned in BEPS Action 14 (**Annex 5**) was used for background information purposes. A working group considered to what extent principles (such as good faith, timeliness, access to MAP, transparency, appropriate resources etc.), process-related guidance (initiation of MAP, interaction with domestic law, document handling, taxpayer involvement, form and implications of mutual agreements, enforcement etc.) and templates could be included in the UN Guide to MAP. Discussions concerning BEPS Action 14, which may provide some useful insights on the issues the Committee may want to consider to include in the UN Guide to MAP, are still ongoing. Against this backdrop, it was expressed during the meetings of the Subcommittee that proposing specific amendments regarding the UN Guide to MAP seemed currently premature, but there was agreement that proposals for such amendments should be worked on after the October 2016 Committee meeting, with the Committee's agreement.

V.2. Possibility of Preparing a UN Handbook on Dispute Avoidance and Resolution

There was wide support from the members of the Subcommittee for a handbook which offers guidelines, particularly for emerging and developing countries, on how to avoid and resolve cross border tax disputes. This is an approach that the Committee has already used successfully in the area of Transfer Pricing and is being asked to consider in the area of taxation of the extractive industries. If the Committee agrees with this proposal (recognizing that such work would need to be endorsed by the next Membership of the Committee), the Subcommittee felt the handbook should take the form of a living document which will be regularly updated as developing countries gain more experience with the different dispute

avoidance and/or resolution mechanisms. It also felt that the handbook should focus on practical issues and use instructive case studies, drawn from anonymized real life examples.

In this respect, it was suggested that one such case study could examine the documents that are required to initiate, conduct and to finalize a MAP, as well as the way the negotiations are normally carried out between competent authorities. This should also include examples as to when and how the competent authorities could communicate with the taxpayer. This handbook would also set out sample forms or agreements that could be used for MAP negotiations, consider different NBDR and/or MDS stages that countries could embed into their MAP procedures, suggest possible deadlines for each stage of the procedure, and identify best practices in relevant areas. The handbook could cover the use of experts, mediation, MAP resolution and implementation of mutual agreements, as well as other elaborations of MAP dispute resolution processes.

In addition, the Subcommittee feels that all countries will benefit from practical guidance on how to use modern communication technology to improve the effectiveness of the MAP. The Subcommittee had a brief discussion of this topic and would, if the Committee agrees, like to encourage the organizing of a special hands-on session with an IT company to explore how such technology could be used both to improve communication between competent authorities and between competent authorities and taxpayers, and to manage the MAP process, store the documents, facilitate the MAP discussions, as well as to produce comparative or statistical data while at the same time ensuring the confidentiality of sensitive information.

V.3. Improving MAP

The paper on improving MAP (**Annex 6**) provides general guidance with respect to the next steps required in order to proceed with the proposed "updates to the UN Guide to MAP – considering BEPS and any other potentially relevant recent developments".

The paper describes the basic features of the MAP process and makes general recommendations on the procedure to update the UN Guide to MAP.

A background paper on trends in MAP. (prepared by WU) was presented at the first meeting of the Subcommittee. An updated version is attached as **Annex 7.**

VI. Annexes

These background notes have been prepared by working groups of the Subcommittee that were established at the first meeting of the Subcommittee in June 2016. The working groups were composed of participants representing diverse backgrounds and provided a basis for the discussions of the Subcommittee.

The papers should not be interpreted as necessarily representing the views of all members of the Subcommittee, but they do set out some of the issues that the Subcommittee believes should be considered for future work.

ANNEXES

Annex 1

APAs

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APA – A look at benefits and risks

Background

The last years brought significant changes in the area of international tax law. Discontent with different stakeholders with the international tax law framework increased during the early 2010s, resulting in public discussions on questions of fairness and reasonableness of the system in place[4]. Policy makers reacted and in 2013 the Base Erosion Profit Shifting (BEPS) project was initiated by the G20 states. The starting point of the work, that was conducted by OECD together with the G20 states, was the September 2013 Action Plan which defined 15 areas for immediate improvement. In 2015 13 final reports[5] were released referring to these actions, of which four define a set of minimum standards on the treatment of cross-border transactions (Action 5 - harmful tax practices, Action 6 – treaty abuse, Action 13 - transfer pricing documentation and Action 14 - dispute resolution). Since then OECD and G20 are focusing on the implementation of the minimum standards leading into the initiation of the inclusive framework in 2016[6].

The recent changes increased uncertainty for all stakeholders. The work that has been done in the course of the BEPS project left -in some respects- room for different interpretations. Yet a common interpretation and much less a commonly accepted case-by-case practice has not been found. Advance Pricing Arrangement (APAs) are one way for reducing such uncertainty as they lock in mutually agreed prices, timing and definitions between the multinational enterprise and the tax authority.

Definition

An advance pricing arrangement ("APA") is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables, an appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. An APA is formally initiated by a taxpayer and requires negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations[7].

An APA can be concluded unilaterally and bi- or multilaterally. Questions of transfer prices can occur on different levels. Firstly, they are discussed between a taxpayer and the tax authority (TA) of the country of residence and secondly –since they only arise in cross border transactions – they can be a matter between TAs of different jurisdictions. The legal basis for unilateral APAs can be found in the respective domestic tax law, either in legislation on transfer pricing, in specific legislation or in general procedural rules. Legal basis for bi- or multilateral APAs can be found in international treaties such as double taxation treaties

[4] Maybe link to discussion in the UK parliament
[5] http://www.oecd.org/ctp/beps-2015-final-reports.htm
[6] http://www.oecd.org/tax/beps/first-meeting-of-the-new-inclusive-framework-to-tackle-base-erosion-and-profit-shifting-marks-a-new-era-in-international-tax-co-operation.htm
[7] OECD TPG Para 4.123 – other definitions?

(DTCs), where usually provisions implementing Article 25 of OECD or UN model treaties on the Mutual Agreement Procedure (MAP) serve as basis for APAs. While some countries consider such international treaty provision alone as sufficient basis for a bi- or multilateral APA others require more specific domestic and international legislation for the conclusion of such arrangement.

An APA as defined and used by OECD and UN is based on the Arm's Length Principle (ALP)[8]. No matter if an APA is concluded unilaterally or bi- or multilaterally its purpose is to find a common interpretation of the ALP in a certain case and not to arbitrarily define tax burdens for involved taxpayers. An APA is not a civil law contract but an instrument of public law. TAs will lack the authority to autonomously reduce or increase a taxpayer's tax burden and they will certainly be bound by the rule of law to apply their countries transfer pricing legislation including the ALP. Nevertheless, it could seldom be observed that some jurisdictions use favorable and unilateral APAs going beyond the ALP as incentive to attract businesses. Within the EU such use of APAs was recently challenged by the ECJ as illegitimate state-aid[9]. If APAs are used in this way they will potentially lead to new uncertainty and might result in double taxation or double non-taxation.

An APA is something different than a safe harbor. A distinction has to be made to unilateral and bi- or multilateral safe harbor rules. An APA is an arrangement on a case level, whereas a safe harbor[10] –while addressing the same type of transfer pricing questions- introduces more general rules. Additionally, an APA usually is negotiated with involvement of the concerned taxpayer, while this behavior is not typical for introducing a safe harbor. Nevertheless, there is some proximity between these two instruments. First, in jurisdictions where APAs are published (usually anonymized) this will influence other similar cases and therefore decisions on cases can become quasi-safe-harbors and second, a safe harbor for a specific sector, where only one player acts in a certain jurisdiction, could actually have the effect of an APA. In its recently revised work on safe harbors OECD[11] changed its old view to not at all recommend them into endorsing bi- and multilateral safe harbors while rejecting unilateral ones. Whether this has any influence on OECDs approach toward unilateral or bi-or multilateral APAs remains unclear. So far OECD favored in its guidelines bi- and multilateral APAs but did not clearly recommend not using unilateral ones. Nevertheless, the argumentations used for rejecting unilateral safe harbors because of their imminent risk to create double- or double non-taxation will also apply on unilateral APAs

APAs are a common instrument in OECD countries and big emerging economies but are rarely used in small and /or poor countries. So far it can be considered that most of the

[8] The ALP is incorporated in Article 9 of both the OECD and UN Model Tax Convention. This provision says: *[Where] conditions are made or imposed between two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.*

[9] http://europa.eu/rapid/press-release_IP-15-5880_en.htm

[10] In the current work of the OECD on the revision of their TPG (https://www.oecd.org/ctp/transfer-pricing/Revised-Section-E-Safe-Harbours-TP-Guidelines.pdf) a safe harbor is defined as follows: *A safe harbor in a transfer pricing regime is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules.*

[11] https://www.oecd.org/ctp/transfer-pricing/Revised-Section-E-Safe-Harbours-TP-Guidelines.pdf

OECD countries and big emerging economies use the instrument of APAs while a lot of other countries don't[12]. This might be caused by these countries TAs lack of resources and/or their distrust in procedures with typically intense taxpayer involvement. For better knowledge on the motivation of policy makers to use or not use APAs further research would be needed.

An APA can be a tool for avoiding future disputes between TAs. A bi- or multilateral APA serves the purpose of avoiding conflicts between TAs in the future. Legally they are usually based on the same provisions in DTCs as common dispute resolution mechanisms and they follow comparable procedures.

An APA is an individual arrangement between its signatories. Therefore, standardized templates are usually not available. At the same time some key elements are included in (almost) all APAs. Such key elements are: (i) the parties of the agreement, (ii) methodology, (iii) comparability analysis, (iv) critical assumptions[13] and (v) duration/termination of the APA.

The benefits and risks of concluding an APA

So far there is no set of comprehensive data on risks and benefits of APA programs. Not all the countries that do have such programs evaluate them, and if they do they are only rarely published and accessible. Therefore, the subsequent paragraphs are not a complete and final analysis but a collection of various practical experiences of the authors.

Benefits for a Tax Authority

A valid APA increases certainty for the involved TA. Generally, every transfer pricing case should be solved based on the same set of rules. In so far there is no distinction between an APA case and any other case. But an APA case is solved in advance of the concerned transactions or a tax audit on the transactions whereas other cases are sometimes solved only years later after a tax audit took place. This earlier solution is favorable for TAs for some reasons. One of such reasons is that the benefit can be an organizational one. Certainty on APA cases allows TAs to use their scarce resources more targeted. A taxpayer that did apply for an APA has to reveal certain information on its undertakings and this data will allow for a more accurate risk analysis and a reduced risk of needless audits.

During negotiations for an APA the TAs can get deep insights in the taxpayer's organization and strategies, allowing them to learn and educate their personnel. Usually APA negotiations are held in an open and cooperative atmosphere where TAs are working together closely with the taxpayer. Since the taxpayer initiates an APA procedure his willingness to share information on the concerned transactions will typically be higher than during an audit procedure. The fact that during an APA on the side of the taxpayer the same persons that designed the TP system of the respective transactions will negotiate the APA will further improve the quality of information at hand while during an audit the responsible

[12] see paragraph on country examples

[13] Critical assumptions are a core element of an APA since they reflect the factual assumptions under which the applied method is considered to be appropriate. Generally, an APA applies only under the condition that the critical assumptions are met.

persons in a company sometimes themselves lack deeper knowledge of past transactions. These insights will allow the TAs personnel to learn more about the thinking of taxpayers, a knowledge that later can be shared within the organization or can be use in different areas of work (e.g. risk analysis or auditing).

Offering the opportunity to conclude an APA may increase the attractiveness for businesses of a certain jurisdiction. Business decisions on where to locate activities are complex and include various aspects. Tax is one of these aspects and in this field it is not only the statutory tax rate companies are looking at. A reliable and well working TA can certainly positively influence a company's decision to invest in a country and availability of APAs can signal this reliability.

Benefits for a taxpayer

A valid APA increases certainty on future taxation, allowing for more accurate planning that being important in particular in creditor relations. Businesses have to plan their undertakings as accurately as possible. This is for internal and external reasons. Internally, a company has to know how much resources are available in order to make sound investment decisions. Externally, in order to attract new investors or to satisfy demands of their creditors a company has to provide a clear picture of its financial situation. Uncertainty as to how much tax has to be paid and when they have to be paid counteracts these demands and thus companies are interested in certainty regarding their tax liabilities as early as possible.

The typically cooperative atmosphere during APA negotiations allows for a better presentation of the taxpayers position. During APA negotiations taxpayers and TAs usually work together closely in a cooperative atmosphere and TAs tend to not act as deterrent towards taxpayers positions as during an audit. This can sometimes allow the taxpayer to present its undertakings and underlying strategies more accurately and comprehensive.

Usually an APA does not change the overall tax-burden a business has to bear. An APA is based on the same principles as any other decision of a TA on transfer pricing questions. Hence, the outcomes regarding taxes payable should not be influenced negatively by the fact that a case was solved by way of an APA.

The risks for a Tax Authority

Asymmetries in the skill and training level between the TA and taxpayers or between different tax administrations can influence the outcome negatively. An APA is the outcome of a process of negotiations. Either they are -if the APA is unilateral- conducted between a TA and a taxpayer or they are conducted -if the APA is bi- or multilateral- between more than one TA with the involvement of a taxpayer. During such negotiation every party has to nominate and authorize its negotiating team. If there are significant discrepancies between the resources the teams can rely on this will probably influence the outcomes favoring the resource-rich parties. If for example one party can rely on the expertise of an economist specialized specifically in transfer pricing and the other party

cannot rely on such person there is the risk that facts in favor of the latter parties' position are overlooked. It has to mention that asymmetries as described above will also occur in other situation like audits or MAPs and are therefore not an exclusive problem of APA negotiations but potential negative effects certainly will be fostered by the cooperative character of an APA procedure.

APAs may lead tax administrations to focus scarce resources on compliant rather than non-compliant taxpayers, thus "squeezing the wrong end". TAs with very narrow personal resources may have to wind down their audit attempts to be able to run an APA program, resulting in an overall decrease in collected taxes. At the beginning of a TAs work in the field of transfer pricing personal resources are typically very scarce. If only a small group of skilled employees is available in a TA a decision where to use them has to be made. Often this group will work in an audit program first, since this promises countable monetary results and at the same time is a strong signal to the business community. Moreover, audits that are a based on prudent risk assessment allow to focus on taxpayers that are unlikely to be compliant, while taxpayers that reveal their transfer pricing system voluntarily are more likely to be compliant anyway. Thus, introducing an APA program at an early stage could withdraw skilled auditors and result in unreasonable allocation of scarce resources.

Unilateral APAs can facilitate double non-taxation (or double taxation) if countries do not coordinate their efforts. Every international transfer pricing case has two sides and only looking at both of them guarantees a uniform treatment of a certain transaction. If one TA doesn't act coordinated with the other TA that is involved in the same transaction, taxpayers could use or may be forced to use different approaches to the same transaction in these countries resulting in an untaxed mismatch or double taxation. For example a taxpayer could apply a cost+5% safe harbor provision in one jurisdiction where a service provider is located, while using a cup for the same transaction in the other jurisdiction where the receiving company is located. If the cup allows for a price that reflects cost+10% an amount of cost+5% will remain untaxed at all. If one or both of the involved jurisdictions allow for unilateral APAs the taxpayer could use this to get approval for his behavior and thus hamper later audit adjustments.

Particularly unilateral APAs are vulnerable to be used in some unintended manners. First, the close cooperation between TA and taxpayers may lay the ground for corrupt behavior. The facts that only a small number of TA employees will have the skills to verify the integrity of an APA and domestic appeal procedures are usually ruled out in an APA can further leverage this risk. Second, the broad range of potential interpretations of the ALP may tempt TAs to use APAs as a tool for harmful tax competition. Especially in European and OECD countries this opportunity was seen problematic and countermeasures have been considered already in the past. In the EU relevant cross boarder APAs had to be exchanged spontaneously[14] and from 2017 onwards have to be exchanged automatically[15], on the level

[14] See Article 9 EU Directive on Administrative Cooperation (dir 2011/16 - http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0016&from=en)
[15] EU Directive on Administrative Cooperation (Dir 2015/2376 - http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2376&from=DE)

of the OECD the BEPS Final Report on Action 5[16] established a new minimum standard on the mandatory exchange of APAs.

The risks for a taxpayer

An APA can lead to increased administrative costs. An APA usually does not guarantee that a certain transaction is not audited at all, since the TA will reserve its right to audit if the factual assumptions taken in an APA did proof to be right. If for any reason the factual assumptions do not reflect what happened, the TA could decide the case differently, thus resulting in doubled administrative cost for the company.

Risk mitigation through transparency

Some of the risks mentioned in the paragraphs above can be mitigated through increased transparency. Risks that are rooted in the one-sidedness of unilateral APAs are minimized if all interested jurisdictions are informed at an early stage, and if later APAs are exchanged[17] between the jurisdictions involved in the transactions. Taxpayers are then not able to take different approaches[18] and thus the risks of unwanted double non-taxation and other forms of misuse are reduced. At the same time the risk of double taxation is reduced as well, if jurisdictions openly share their opinions. Further transparency will facilitate the closing of the gap in asymmetric situations, this is particularly true when APAs are published and can therefore be studied by anyone who is interested.

Some countries clearly preference bi- and multilateral APAs. This is to avoid the risks as described in the paragraphs above in the first place. Germany, for example, generally offers unilateral advance rulings but is not willing to grant such rulings in two sided transfer pricing cases[19]. Such policies guarantee a high level of transparency towards the other involved jurisdiction and are independent of the proper functioning of exchange of information procedures.

Taxpayers may oppose transparency for legitimate reasons. It can well be that APAs include secret information on a company's undertakings and it's understandable that such companies are reluctant to widely share this information. At the same time lack of transparency can easily facilitate tax avoidance. Both risks have to be considered and balanced, but in the end taxpayers should accept transparency as they can always chose to not apply for an APA.

[16] http://www.oecd.org/tax/countering-harmful-tax-practices-more-effectively-taking-into-account-transparency-and-substance-action-5-2015-final-report-9789264241190-en.htm

[17] Automatic exchange of APAs is from 2017 onwards obligatory according to the Directive on Administrative Assistance (see footnote 16) and is part of the new BEPS minimum standard (see footnote 17)

[18] OECD TPG 2010 Paragraph 4.129 advocates information of the other jurisdiction in cases of unilateral APAs; BEPS final report on Action 5 foresees for a sophisticated system of exchange of ruling

[19] http://www.nera.com/content/dam/nera/publications/archive2/PUB_APA_Germany_0710.pdf

Initiating an APA Program

Data collection and analysis

In order to enable countries to make a fact based and well-reasoned decision on whether to start an APA program or not more data should be collected and analyzed. Countries that have introduced APA programs should be encouraged to evaluate positive and negative effects of these programs and as far as possible make this data available to other TAs. This would not only help countries considering starting a new program but also countries that introduced APAs already. All stakeholders including businesses should be involved in this process of data gathering and it should be looked at the whole duration of validity of an APA.

Key features of an APA Program

Running an APA program needs time. Countable results cannot be expected quickly. Contrary to audit programs an APA program will very likely not directly result in increased revenue of a TA. The goals of an APA program, which are in particular avoiding future conflicts and offering an attractive governance environment, need sustainable and enduring commitments.

In order to be able to run a well-functioning APA program suitable employees with specific skills are needed. These skills are first and foremost skills in the respective areas of tax law, which are in particular transfer pricing and domestic procedural law. At the same time soft skills should be looked at as well, like communicative and organizational abilities. Some TAs made the experience that for long serving auditors it can sometimes be hard to get used to more cooperative forms of communication with taxpayers in an APA process, which may result in enduring conflicts between taxpayer and TA and hence a reduction of potential benefits of APAs.

The persons as described above cannot always be found within a tax administration. Hence hiring personnel from outside the organization could be considered, if sufficiently skilled persons can't be found there. At the same time this may be difficult looking at the gap in salaries between private and public employers. This fact could even lead to situations where it is not only difficult to hire new employees from outside the organization but jobs in the TA are used, by some employees, merely as an education-platform. To avoid a constant drain of skills a TA has to seek to offer incentives for employees to stay and to change from private to public sector. For example, such incentives could be more flexibility regarding working hours and places.

The personnel running an APA program need to be sufficiently equipped. In fact their needs will not differ much from what is needed for transfer-pricing auditors. Meaning that the most expensive equipment will be – besides office space - access to commercial databases to allow them to conduct a proper comparability analysis. Such access to commercial databases usually efforts high upfront investments[20], but in many countries such investments paid back soon through the increased quality of a TAs transfer pricing work.

[20] The negotiating power of a TA to reduce such costs should not be considered as well.

Eventually potential travel expenses of an APA team should be considered. Bi- and multilateral APAs will necessitate face-to-face meetings between representatives of the TAs. While such costs can certainly be reduced by other ways of communication, like telephone- or videoconferences, traveling can't be avoided completely, since experience indicates that the willingness to compromise is still highest in personal meetings. Traveling expenses can add up to significant amounts, but should be seen in relation to the amounts at stake in the respective APAs. In some countries, like Canada, taxpayers have to carry traveling expenses of a TA during APA negotiations directly.

Funding of an APA Program

Alternative sources for funding an APA program can be considered by TAs wishing to initiate such program. Usually the expenses (personal, equipment, offices etc.) of a TA are covered by the general budget of a country. But looking at the cost benefit analysis of APA programs above, it can be concluded such programs promise significant benefits to taxpayers and thus costs of such program may be charged to the taxpayer more directly. Therefore, some countries consider it appropriate to claim a certain fee for the opportunity to obtain an APA. The so gained additional revenue of a TA can be reinvested in the program and help reducing the potential resource constraints as described above.

Specific fees can have a regressive effect hampering smaller business from applying for an APA. Paying additional fees will pose -in relation to their income- a higher burden for smaller businesses. Even if fees may vary depending on the size of the taxpayer this effect usually can't be completely avoided. This adds to the fact that the administrative burden of applying for an APA is typically relatively higher for smaller businesses. Countries with mainly small and medium size companies may want to take this into account.

Country practices

According to the Worldwide Transfer Pricing Reference Guide 2015-16 that was published by EY[21], 62[22] of 117 jurisdictions allow for APAs. Access to APAs is not equally distributed around the globe; while in Europe and North America 70% of the studied jurisdictions offer an APA program, it were only 33% in Africa, 49% in Asia and 56 % in Latin America. Some countries have not yet implemented an APA program tailored for transfer pricing cases but do offer rulings under general procedural rules, leaving it open

[21] http://www.ey.com/Publication/vwLUAssets/EY-Worldwide-transfer-pricing-reference-guide-2015-16/$FILE/EY_Worldwide_Transfer_Pricing_Reference_Guide_2015-16.pdf

[22] In Europe an North America these jurisdictions are: Albania, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Rumania, Slovak Republic, Spain, Sweden, Switzerland, Ukraine, United Kingdom, Canada and United States.
In Latin America these jurisdictions are: Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Peru and Uruguay.
In Asia these jurisdictions are: China, Georgia, Hong Kong, India, Indonesia, Israel, Japan, Kazakhstan, Malaysia, Philippines, Russia, Singapore, South Korea, Sri Lanka, Taiwan, Thailand, Turkey and Vietnam.
In Africa these Jurisdictions are: Egypt, Gabon, Mauritius, Morocco, Nigeria and Uganda
In Oceania these jurisdictions are Australia, Guam and New Zealand

whether they are willing to accept transfer-pricing cases under such rules[23]. Further it was observed that jurisdictions introduced APA programs, but did not apply them so far[24]. Only few jurisdictions publish statistical data on their APA program including case numbers and duration of proceeding[25].

In some developing countries new APA guidelines were recently introduced or existing guidelines have been amended. For example in Colombia, Georgia, and Albania new guidelines have been prepared. And in Ukraine, Romania and Vietnam existing guidance has been updated. Unfortunately most of these countries do not publish their guidelines in English, making it difficult for other jurisdictions to use them as reference. Therefore, other jurisdictions can sometimes only draw on the work of international organizations, like OECD[26] etc., or on material that is publicized by more experienced jurisdictions with typically bigger economies[27].

Summary

Considering all the elements argued above, it would be appropriate to summarize that further study would be needed before a general recommendation towards the use of APAs is made. In fact APAs involve significant risks for TAs while for taxpayers there are very limited risks. Any TA should be aware of the risks and benefits before starting an APA program and carefully analyze and balance them. Therefore, a general recommendation towards starting APA programs can't be given at this stage. However, based on the non-negligible costs and risks, it often seems justified to not start out with an APA program at the beginning of the introduction of new TP regimes. Whether APAs are a useful tool for avoiding later conflicts has to be decided for every jurisdiction on its own and depends very much on the capacity of the respective TA. For the proper decision-making for jurisdictions, the accumulation of comprehensive data may be indispensable in the course of future study on APA programs currently implemented around the world.

[23] In Bulgaria, Macedonia, Gibraltar, Pakistan and Algeria this can be observed.
[24] This is known for: Ukraine, Hunduras, Costa Rica, Georgia, Egypt and Nigeria.
[25] For example China, South Korea, Countries of the EU and the United States do so.
[26] For example: OECD (http://www.oecd.org/tax/transfer-pricing/guidelinesforapa.htm) or UN (http://www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf)
[27] For example: Australia (https://www.ato.gov.au/Business/International-tax-for-business/In-detail/Advance-Pricing-Arrangements/Advance-pricing-arrangements/); United Kingdom (https://www.gov.uk/government/publications/statement-of-practice-2-2010/statement-of-practice-2-2010); Germany (http://www.bzst.de/EN/Steuern_International/Advance_Pricing_Agreements/advance_pricing_agreements_node.html;jsessionid=58DB1BBF6D418225225B31CCEA34B3AC.intranet1); United States (https://www.irs.gov/businesses/corporations/apma); Canada (http://www.cra-arc.gc.ca/tx/nnrsdnts/cmp/p_rprt15-eng.html); Malaysia (http://www.hasil.gov.my/pdf/pdfam/MalaysianAPAGuidelines2012.pdf); etc.

Annex 2

Advance Pricing Agreements - Statistics

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Europe:				
Albania	yes	yes	yes	Threshold 30million; no rollback
Austria	yes	yes	yes	Fees for unilateral APAs
Belgium	yes	yes	yes	Published anonymously
Bulgaria	no	no	no	Written opinion can be requested
Croatia	no	no	no	
Cyprus	no	no	no	
Czech Republic	yes	n/a	n/a	
Denmark	yes	yes	yes	
Estonia	no	no	no	
Finland	yes	n/a	n/a	
France	yes	n/a	n/a	Simplified for SMEs
Macedonia	no	no	no	General rulings possible
Germany	yes	yes	yes	Duration 18m and more
Gibraltar	no	no	no	General tax rulings
Greece	yes	yes	yes	
Hungary	yes	yes	yes	Anonymous pre-filing is possible

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Iceland	no	no	no	
Ireland	yes	no	yes	
Italy	yes	yes	yes	
Kosovo	no	no	no	
Latvia	yes	n/a	n/a	
Lithuania	yes	yes	yes	
Luxembourg	yes	yes	yes	
Malta	no	no	no	
Montenegro	no	no	no	
Netherlands	yes	yes	yes	Most probably one of highest case numbers
Norway	yes	n/a	n/a	
Poland	yes	yes	yes	
Portugal	yes	yes	yes	
Romania	yes	yes	yes	
Serbia	no	no	no	
Slovak Republic	yes	yes	yes	
Slovenia	n/a	no	n/a	Draft published
Spain	yes	yes	yes	
Sweden	yes	yes	yes	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Switzerland	yes	yes	yes	
Ukraine	yes	yes	yes	Generally yes, but no established program so far
UK	yes	yes	yes	
Analysis:				
Total:	38			
APAs:	26	68.42%		
Maybe:	3	7.89%		
North America				
Canada	yes	yes	yes	
USA	yes	yes	yes	
Analysis:				
Total:	2			
APAs:	2	100.00%		
Europe and North America:				
Total:	40			
APAs:	28	70.00%		
Latin America				
Argentina	no	no	no	
Bolivia	no	no	no	
Brazil	no	no	no	Sometimes general rulings on interpretation of law
Chile	yes	yes	yes	

Country:	**APA yes/no**	**unilateral**	**bi- and multilateral**	**Comments:**
Colombia	yes	n/a	n/a	
Costa Rica	yes	n/a	n/a	No secondary legislation yet
Dominican Republic	yes	yes	yes	
Ecuador	yes	n/a	n/a	
El Salvador	no	no	no	
Ghana	no	no	no	
Guatemala	yes	n/a	n/a	
Honduras	yes	n/a	n/a	No secondary legislation
Mexico	yes	yes	yes	
Nicaragua	no	no	no	
Panama	no	no	no	
Paraguay	no	no	no	
Peru	yes	yes	yes	
Uruguay	yes	n/a	n/a	
Analysis:				
Total:	18			
APAs:	10	55.56%		
Asia				
Armenia	no	no	no	
Azerbaijan	no	no	no	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Bahrain	no	no	no	
Bangladesh	no	no	no	
Brunei	no	no	no	
China	yes	yes	yes	Statistics available (total 104); recently barriers were lifted
Georgia	yes	yes	yes	So far no multilateral APAs - secondary legislation is missing
Hong Kong	yes	no	yes	
India	yes	yes	yes	
Indonesia	yes	yes	yes	
Iraq	no	no	no	
Israel	yes	n/a	n/a	
Japan	yes	yes	yes	Preference for bi and multilateral APAs
Jordan	no	no	no	
Kazakhstan	yes	n/a	n/a	
Kuwait	no	no	no	
Laos	no	no	no	
Lebanon	no	no	no	
Malaysia	yes	yes	yes	
Maldives	no	no	no	
Mongolia	no	no	no	
Myanmar	no	no	no	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Oman	no	no	no	
Pakistan	no	no	no	General ruling is possible
Papua New Guinea	no	no	no	
Philippines	yes	yes	yes	
Qatar	no	no	no	
Russia	yes	n/a	n/a	Only for major taxpayers
Saudi Arabia	no	no	no	
Singapore	yes	yes	yes	
South Korea	yes	yes	yes	Annual reports are released; simplified approach for SMEs
Sri Lanka	yes	yes	yes	
Taiwan	yes	yes	yes	
Thailand	yes	n/a	yes	
Turkey	yes	yes	yes	
United Arab Emirates	no	no	no	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Vietnam	yes	yes	yes	
Analysis:				
Total:	37			
APAs:	18	48.65%		
Maybe:	1	2.70%		
Africa				
Algeria	no	no	no	General ruling might be applicable
Angola	no	no	no	
Botswana	no	no	no	
Cameroon	no	no	no	General rulings
Egypt	yes	n/a	n/a	No cases so far - ne secondary legislation
Equatorial Guinea	no	no	no	
Gabon	yes	n/a	n/a	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Kenya	no	no	no	
Libya	no	no	no	
Mauritius	yes	n/a	n/a	
Morocco	yes	n/a	n/a	
Namibia	no	no	no	
Nigeria	yes	yes	yes	Currently applications are not accepted
Senegal	no	no	no	
South Africa	no	no	no	
Tanzania	no	no	no	
Uganda	yes	yes	yes	
Zimbabwe	no	no	no	
Analysis:				
Total:	18			
APAs:	6	33.33%		
Maybe:	1	5.56%		
Oceania				
Australia	yes	yes	yes	No aggressive fact patterns, no simple fact patterns
Fiji	no	no	no	
Guam	yes	yes	yes	
New Zealand	yes	yes	yes	

Country:	APA yes/no	unilateral	bi- and multilateral	Comments:
Analysis:				
Total:	4			
APAs:	3	75.00%		
Grand Total:				
Jurisdictions	117			
APAs	62	52.99%		
Maybe:	5	4.27%		

Annex 3

Working Group Note on

Mediation and Other Forms of Non-Binding Dispute Resolution

A. The Interest of UN Member Countries in Mediation and Other Forms of Non-Binding Dispute Resolution

In recent years, tax administrations around the globe have become more active in challenging tax planning strategies of MNEs, which has led to an increase in disputes. With the implementation of Country-by-Country reporting in a wide range of countries, as well as the many other actions that are currently contemplated or about to be initiated pursuant to various international projects (G20, OECD etc.), it is likely that the range and intensity of cross-border tax disputes will further increase.

The traditional means of resolving these disputes include negotiation via a treaty-sanctioned mutual agreement procedure ("MAP"). MAP is widely viewed as a useful tool, yet non-existent in many countries and/or partly inefficient, due to lack of capacities, lack of domestic law support, inability of administrations to always reach mutual agreements, or otherwise. If such processes are not successful or cannot be implemented, "unilateral" means of dispute resolution at the domestic level are the only means of addressing the dispute. However, trying to resolve a dispute at domestic level instead of resolving it at the inter-State level frequently results in double taxation, due to a lack of effective coordination between the taxing jurisdictions.

Following recent amendments to both the UN Model (2011) and the OECD Model (2008), countries, especially those with long experience with MAP, have undertaken to resolve "stalled" MAP cases through mandatory und binding dispute settlement ("MDS") before international arbitration panels. Formally, these arbitration procedures are embedded into the MAP process as a "tie-breaker" and only take place in cases in which negotiations between Competent Authorities ("CA") have been unsuccessful.

A large number of countries, including countries which put into question the appropriateness of MDS for resolving tax disputes, would like to explore whether mediation and other forms of Non-Binding Dispute Resolution ("NBDR") could become an alternative, or a precursory step, to MDS. They also seek guidance as regards the measures that could or should be envisaged in order to ensure a level playing field for NBDR and to support requisite capacity-building.

Following the Secretariat Paper on Alternative Dispute Resolution in Taxation dated 8 October 2015 (E/C.18/2015/CRP.8) the UN Committee of Experts on International

Cooperation in Tax Matters ("Committee") in its 2015 Annual Session decided to establish a Subcommittee ("the Subcommittee") which it asks to "*consider and report back to the Committee on dispute avoidance and resolution aspects relating to the mutual agreement procedure with a view to reviewing, reporting on and, as appropriate, considering possible text for the Model Convention and its commentaries, as well as related guidance, on issues such as* […] *possible options for improving or supplementing the mutual agreement procedure, including through the use of binding or non-binding forms of dispute resolution* […]."

Against this background, the present Working Group note aims to

- Recall the objectives for an effective dispute resolution framework (**¶ B.**)
- Describe forms of non-binding dispute resolution ("NBDR") (**¶ C.**) [28]
- Consider potential ways to integrate such NBDR into the existing landscape of tax treaty dispute resolution (**¶ D.**)
- Report questions of UN Member Countries about NBDR and propose answers to these questions (**¶ E.**)
- Consider positives and negatives of NBDR for developing countries (**¶ F.**)
- Describe potential areas for further work (**¶ G.**).

B. Objectives for an Effective Dispute Resolution Framework

In the Subcommittee's discussions, several overarching objectives have been pointed out which may have to orientate any dispute resolution process for tax disputes. These include the following:

- It should not interfere with the need for Countries to derive from their tax base an appropriate level of tax revenue from economic activities conducted within their respective borders and their ability to conduct examinations and make assessments based on the application of internationally agreed standards for transfer pricing and other rules and principles of international tax law.
- It should promote an "investment climate" in which the taxation of cross-border investments is predictable, by enhancing the effectiveness of tax treaties and reducing double taxation.
- It should provide comfort to CA participating in dispute resolution that these processes are efficient, not overly burdensome and fair, taking into account also the

[28] In this paper, focus is restricted to dispute resolution under the UN Model Treaty. Similar issues exist with respect to dispute resolution in other contexts (such as other types of treaties, domestic judicial or non-judicial processes, or otherwise). Such other contexts could be explored further by the Subcommittee.

different levels of experience and the unequal capacities of Countries with MAP and related procedures.

In the discussions of the Subcommittee which have taken place in Vienna in June 2016, there was unanimous agreement that the third imperative could be fulfilled by an appropriate process of NBDR. Such process could be defined either in the tax treaty or related protocols, or on an *ad hoc* basis once a dispute has arisen.

Prior to agreeing to such process, Countries or CA's would have to consider:

- What kind of NBDR should exist, what are their potential benefits in specific circumstances and what are their limits?
- How can the suitability and appropriateness of specific forms of NBDR (e.g. mediation or expert evaluation) for specific types of disputes be assessed?
- What would be the scope of a submission to NBDR: default dispute resolution mechanism or supplementary option on a case-by-case basis?
- How, when and by whom would the NBDR process be initiated?
- How should independent persons, such as mediators or neutral experts, be selected?
- What are the duties of such independent third persons, e.g in terms of impartiality, disclosure of potential conflicts of interest etc.?
- How can the proceedings be structured (e.g. time frames, form of submissions, obtaining documentation and testimony of the taxpayer or other taxpayer involvement, rules ensuring the flexibility of the process etc.)?
- Where will the proceedings occur?
- What will be the work product of the third person and in what form will it be submitted (e.g. final expert report; non-binding proposals of a mediator for the resolution of the dispute; only oral testimony, etc.)?
- What rules and principles should be contemplated regarding the transparency and confidentiality of NBDR proceedings?
- In what form should CA's lay down their Mutual Agreement if they find one and what is its legal effect?
- How can such Mutual Agreement be enforced?

The Committee should provide guidance with respect to these issues and consider ways to promote a flexible framework for the development of such processes to reflect the interests and level of comfort of each Country.

C. Forms of Non-Binding Dispute Resolution

1. Overview of binding and non-binding forms of dispute resolution

In general, disputes can be resolved either by an agreement of the parties themselves or by submitting the dispute to an independent third person or institution (judge, arbitrator, adjudicator etc.) who decides the dispute for the parties. In both situations, the binding nature is derived from a **sovereign decision** of the parties ("party autonomy"); yet in the first situation the parties must agree with the individual case outcome whereas, in court or

arbitration procedures, the parties give their consent to accept the outcome before they actually know the content of the decision.

Dispute resolution by agreement can also happen with the help of a third person or institution (mediator, conciliator, expert etc.) who does not decide the case for the parties. These forms of dispute resolution can be called "**non-binding**" because, in the absence of an agreement between the parties, the intervention of the third person does not entail a binding outcome.

Non-binding forms of dispute resolution give some parties more comfort because they feel they can preserve control over the outcome of the dispute. If successful, NBDR is more efficient than binding dispute settlement, because it generally requires less resources and leads to a higher satisfaction of the parties (thus increasing acceptance of the outcome and smoothening its implementation). Yet, if no agreement is found, the dispute remains unresolved. In that latter sense, NBDR are less efficient than binding dispute resolution.

It is possible to combine non-binding and binding forms of dispute resolution in a **multi-tiered** process. In international treaties and in commercial contracts alike, a widespread form of multi-tiered dispute resolution is to give the parties a certain timeframe for reaching agreement through negotiation, then with the help of a mediator and finally, if these "non-binding" attempts are not successful within the fixed timeframe, the dispute can (or must) be escalated to binding dispute settlement (e.g. arbitration). The underlying objectives of a multi-tiered process are that

(a) The dispute should be resolved ideally by negotiation using the minimum third party intervention necessary;

(b) Accordingly the formality, cost and time commitment required from the parties and the level of third party intervention increases from tier to tier; and

(c) The final tier provides for a final and binding decision (such as an arbitral award).[29]

A potential downside of multi-tiered processes is that they can sometimes take longer than directly submitting the case to binding dispute settlement - depending on the timeframes fixed for non-binding dispute settlement. Yet the advantage of a multi-tiered process is that it provides the parties higher incentives to reach a mutual agreement on their own, thus increasing the efficiency of the non-binding stages of the process.

2. Mediation, Conciliation and Good Offices

Mediation is characterized by the fact that a neutral person, institution or commission participates in the negotiations as a "facilitator" helping the parties to resolve their dispute. Although there are many approaches, in classical mediation proceedings, the mediator assists the parties, notably, by

- clarifying the issues in dispute,

[29] For further details on multi-tiered proceedings in commercial dispute settlement see the note "Tax, Mediation and Expert Determination" prepared for the June 2016 Subcommittee meeting in Vienna.

- requesting documents and data,
- asking questions and « listening actively » to the parties' arguments, and
- exploring options for an agreement on mutually acceptable terms.

In international diplomacy, mediation is sometimes called "**good offices**". The United Nations has a long history of providing "good offices" and being an effective mediator in international disputes. Sometimes mediation is distinguished from **conciliation** proceedings, in which the parties request the neutral third to make final recommendations which the parties are then required to seriously consider. While distinctions between these different forms of dispute resolution can be blurred, given the non-binding nature of these procedures, it is not always necessary to strictly distinguish these variations. Thus, even a "mediator" could sometimes, formally or informally, make recommendations to the parties. Sometimes "mediation" and "conciliation" are used interchangeably. In this paper, the term "mediation" should be understood broadly, potentially covering conciliation and good offices.

The degree of activity of the mediator can range from a rather passive to a more active role, depending on the **needs of the parties** and the nature of the dispute. It can include

(a) Monitoring the process or administrating the case,
(b) Guiding the discussions,
(c) Requesting information,
(d) Focusing the debate on key issues,
(e) Discussing (and potentially actively evaluating) with the parties the strengths and weaknesses of their respective arguments,
(f) Making process-related suggestions (e.g. commissioning of an expert; agreeing on common / objective criteria; meeting with taxpayer; …),
(g) If the parties so wish, recommending concrete solutions to the dispute,
(h) Formally "authenticating" or acknowledging the outcome, especially if an agreement is reached.

In many cases the very existence of an independent third person helps the parties formulate their respective positions more rationally and more objectively, thereby **enhancing the chances of an agreement**. Thus, the use of mediation generally makes negotiations more efficient and helps the parties avoid the waste of time and resources resulting from stalemate or from litigation or arbitration proceedings. It is a well-known phenomenon that this increase of efficiency is usually underestimated by disputing parties.

Experience has shown that the effectiveness of a mediator depends on certain **key qualifications and skills**: questioning, clarifying and summarizing techniques, so-called "active listening" techniques, ability to frame or "reframe" the dispute, techniques for structuring the proceedings in a useful way, empathy, a very good sense for procedural fairness and balancing of power in communication, psychological skills and procedural experience. Perhaps most importantly, a mediator must not take sides, or be perceived as biased. The success of a mediator depends first and foremost on the **trust** of both sides in him as being an "honest broker".

Knowledge of the underlying issues is to a certain extent required to understand the dispute and be able to **engage the parties in developing solutions**. However, a technical expert does in many respects not make an ideal mediator because an expert may have a firm view on certain issues and the parties may feel overwhelmed by his expertise.

Selecting the right mediator is crucial for safeguarding the efficiency and even-handedness of the mediation. In this regard, a **vetting process** or the **proposal of a mediator by an independent institution** can provide added value for building trust with the parties as well as saving time. Institutions offer support for mediation or conciliation cases, be it by providing the parties with a list of pre-vetted independent mediators, or by making proposals on a case-by-case basis, sometimes in addition to administering certain aspects of the case for the parties and providing procedural rules and standards.

Issues frequently dealt with in different institutional frameworks (e.g. ICC Mediation Rules[30], ICSID Conciliation Rules[31], UNCITRAL Conciliation Rules[32], Energy Charter Guide on Investment Mediation[33]) include:

- selection and appointment process of mediators,
- role of mediators (are they allowed to have separate discussions with the parties? Should they be able to make recommendations? etc.),
- duties of mediators (e.g. in terms of impartiality, independence and availability disclosing potential conflicts of interests; prohibitions of representing one party in related proceedings etc.),
- conduct of the mediation (potential ways to structure the proceedings, evidence etc.)[34],
- confidentiality obligations of the parties and the mediators,
- admissibility of evidence in other proceedings,
- definition when mediation is deemed to have commenced and terminated
- the logistics of the mediation (place, language etc.),
- form of the outcome of the proceedings and ways to enforce agreements,
- sharing of costs,
- etc.

3. Expert evaluation

Another form of NBDR is **expert evaluation** or **early neutral evaluation**. In this procedure, the parties submit either their dispute as a whole or a discrete issue (which they consider crucial) to an independent third person having a specific expertise regarding such issues. The expert assesses the positions of the parties and their arguments and provides the parties with an independent opinion. The expert's evaluation can give the parties a better understanding of the strengths and weaknesses of their respective positions. It can thereby inform the

[30] See http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/
[31] See https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/ICSID-Convention-Conciliation-Rules.aspx
[32] See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html
[33] See http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf
[34] It should be noted that there are generally no detailed rules on the conduct of mediation and conciliation proceedings. Party autonomy and flexibility prevail over formalism, which is in line with the non-binding and non-adversarial nature of these proceedings.

negotiations and, ultimately, lay the basis for an agreement. It can also help the parties' representatives justify more easily their compromise vis-à-vis their principals as being "reasonable".

Expert evaluation can be **distinguished** from **expert determination**: in expert determination, the parties subject themselves to the decision of the expert which becomes binding on them.

Further, it is possible to distinguish independent expert proceedings from **"tribunal-appointed" experts**: in the latter form of proceedings, the expert conducts her operations "under the auspices" of a court or arbitration panel which has called upon her for advice. In situations in which the operations of the expert are not embedded in court or arbitration proceedings, her independent findings can be useful for subsequent proceedings (unless the parties have agreed that the report shall not be used in subsequent proceedings). In practice, reports of independent experts can have a considerable impact on the efficiency of such proceedings because they help the arbitrators or judges, as well as the parties, to focus on the key issues.

Selecting a competent and unbiased expert is important for the efficiency of expert proceedings. In some cases, the appointment of a good independent expert may even make it unnecessary for the parties to rely on party-appointed experts and thus help them save costs. A **vetting process** or the **proposal of experts by an independent institution** can provide added value for building trust with the parties. Institutions like the ICC, FIDIC etc. offer support for expert proceedings.

4. Potential Interaction Between Party-Appointed Mediators and Experts

The procedural roles of mediators and experts are to a certain extent **complementary**: Whereas the mediator relies on his ability to steer and frame the discussions between the parties and engage them in the exploration of potential solutions, the expert provides the parties with highly specialized technical expertise (in tax cases, one could for instance think of advice on comparable market prices, at "arms-length").

There are ways to combine the skill-sets of mediators and experts in order to enjoy the benefits of each of these procedures. Three possibilities shall be outlined below.

One way is for a **mediator** to help the parties find an agreement on methods and criteria, **before the dispute is submitted to an expert**. In fact, most successful mediations include a phase in which the parties discuss and agree on underlying principles, methods or criteria in order to resolve their dispute. In most disputes, there is more than one "objective" method and thus more than one "reasonable" perspective – and it is this very plurality of perspectives which often is the root of disagreement. Acknowledging, reconciling or combining the underlying rationales of the parties is crucial for reaching an agreement between the parties. Once the parties have agreed on a common methodology, an expert can carry out his operations more easily and an agreement may be at reach. In this way, mediation can effectively prepare expert evaluation (or expert determination).

Another way is to conduct **mediation on the basis of an already existing expert report**. In this scenario, the mediator would discuss the results of the expert investigations with the parties and, potentially, the expert. This can be particularly useful in cases in which the parties have a different interpretation of the expert report or in which one party contests the methodology of the expert. It shall be noted that an earlier appointment of the mediator often helps to avoid such difficulties before they arise (as in the first possibility noted above). Once differences of view on the methodology applied by the expert have arisen, it may often be difficult to solve these through non-binding mechanisms of dispute resolution.

A third way of combining these means of dispute resolution is to **embed expertise into mediation**, while the mediator and expert are working **in parallel**. The mediator would have a more procedural role and be responsible for moderating the overall discussions, whereas the expert – usually under the "direction" of the mediator – would inject valuable expertise and provide guidance for the discussions between the parties. The expert's work can be made useful either through a single written expert report or oral expert testimony, or on a continuing basis throughout the discussions. In certain circumstances, it may also be useful to allow the mediator to have separate discussions with the expert, if the mediator feels that he needs more information in order to better orientate the discussions.

Combining mediation and expert evaluation allows for much flexibility. Engaging both a mediator and an expert at the same time is certainly costlier than engaging either one of these: Yet, the costs of a lingering dispute or of submitting the dispute to binding dispute resolution (such as arbitration) will in most cases be higher.

D. Potential Ways to Integrate NBDR into the Existing Landscape of Tax Treaty Dispute Resolution

1. Potential Benefits of Enriching MAP with Mediation and/or Expert Evaluation

Using mediation and/or expert evaluation for tax treaty disputes could provide significant benefits, both when compared to classical MAP and MAP with an arbitration extension (MDS). Some of these benefits are summarized in the table below:

NBDR compared to classical MAP	- A neutral third party increases the **efficiency** of the process - More **level playing field**, as the inclusion of a neutral third party increases the objectivity of the debate and decreases the effect of "inequality of arms" - **More principled** decisions - More **predictability** in the long run, if extracts from agreements are published - Helps MAP negotiators **justify** their "concessions" within their own administration

NBDR compared to MDS	- **Amicable** solutions are more acceptable and more sustainable than "win-lose" outcomes - Preservation of **fiscal sovereignty** - **Less costly** than arbitration

2. NBDR as an Alternative or a Precursor to Arbitration

NBDR could be envisaged either as an **alternative** to arbitration[35] or as a **supplementary means** of dispute resolution, preceding arbitration.

Designing NBDR as an **alternative to arbitration** would accommodate the concerns of tax administrations attached to their fiscal sovereignty. This may be a useful tool, especially for CAs having currently no experience with both MAP negotiations and tax treaty arbitration, or for countries which feel that an independent third party could help them level the playing field. It would allow them to gain experience and confidence in an international dispute resolution system.

On the other hand, some States may find it more useful to provide for a binding form of dispute resolution -- e.g. arbitration or binding expert determination, as a follow-up to NBDR. In this scenario -- NBDR would be an **intermediate tier in a multi-tiered procedure**. In such a multi-tiered approach, binding dispute resolution would serve as an *ultima ratio*, a tiebreaker in cases of stalemate. It would, indirectly, increase the efficiency of NBDR as CA's usually prefer to avoid binding dispute resolution.

Providing for mandatory and binding dispute resolution (MDS) as a measure of last resort would further the effectiveness of the tax treaty provisions because it gives CAs an additional incentive to apply the tax treaty consistently. At the same time, a multi-tiered approach including NBDR would ensure that cases are, as a rule, solved by mutual agreement rather than by the decision of arbitrators.

Further, NBDR as a precursory step to arbitration can increase the efficiency of an arbitration, notably because the debate can more easily be focused on the key issues ("terms of reference"). If, during the NBDR phase, an independent expert has carried out specific fact-finding tasks or economic evaluations, the parties may agree that the expert report is used during an ensuing arbitration.

In multi-tiered procedures it is, however, crucial that the sequence of stages does **not delay** the proceedings overall. This should be ensured by providing for strict (default) timelines, which the CAs can only extend jointly and not indefinitely. NBDR should be completed at the point in time when referral to arbitration would otherwise become mandatory, so that it does not extend the maximum duration of the proceedings by delaying the initiation of arbitration. As a consequence, a few months time will need to be reserved within the overall timeline for NBDR. This could be done, for example, by providing that NBDR should (either

[35] In this section, the term "arbitration" sould be understood to refer MAP arbitration to as reflected in Article 25(B) of the UN Model Convention ("mandatory and binding dispute settlement" or "MDS").

mandatorily, or on a voluntary *ad hoc* basis) be initiated or considered 12, 15 or 20 months after the initiation of MAP.

The Subcommittee could explore whether an amendment to article 25 or an alternative article 25 could include a clause for NBDR, either as an alternative to arbitration or as a precursor to arbitration within a multi-tiered process.

E. Questions of UN Member Countries About NBDR

In the discussions of the Subcommittee, there was unanimous agreement that, in accordance with the objectives noted in ¶ **B**, NBDR could be a useful tool for the resolution of tax treaty disputes. Members of the Working Group on NBDR raised a variety of questions, which are noted below together with proposed responses:

1. Is it possible to develop or revise the current Article 25 of the UN Model or its Commentary to make it more user-friendly for developing countries wishing to explore NBDR for tax treaty disputes?

Proposed Response: As our Subcommittee has addressed dispute resolution, this is a consistent question we have heard from the tax administrations of Member countries. We believe that an appropriate approach would be to revise Article 25 of the UN Model Convention and its Commentary to identify a range of procedures and model clauses which countries could agree to utilize for the implementation of their tax treaty. It may be that this could be accomplished most efficiently by **including references to and guidance on NBDR** procedures (such as mediation/ conciliation and expert evaluation) into the Model and its Commentary. These could either be agreed upon by the Contracting States generally, in which case they would apply as a rule. In the alternative, it would be possible for the Contracting States to permit (and encourage) their CAs to apply NBDR **on a case-by-case basis**. This would allow them to gain practical experiences with NBDR before they commit to these procedures on a more general basis.

> *Illustration:* For example, assuming a MAP dispute exists between Country A and Country B. Country A has little experience in MAP proceedings and is cautious about its position being respected by Country B. Accordingly, it seeks to take advantage of the NBDR procedures offered under the amended UN Model (assuming this to be the case) and a **sample NBDR agreement** provided for in the Commentary (assuming this to be the case). Accordingly, the CAs of Countries A and B take the sample procedural agreement as a basis and enter into a memorandum of understanding ("MOU") in order to engage in an expert evaluation process for a 6 month period, the results of which are confidential and will have no binding effect on the parties.
>
> Alternatively, Countries A and B could also agree, at the outset of their MAP, to have recourse to a non-binding procedure (such as mediation) if the respective case is not solved within, for example, 18 months.

If Countries A and B feel sufficiently comfortable with the experiences they have made on a case-by-case basis, they could translate their usual individual agreements into a more general agreement applying to an undefined number of cases.

The procedures, and the respective sample agreements and model clauses, should be evolutionary in nature so that countries can develop confidence in the processes they have agreed to.

A potential change to the Article 25 Commentary is set out in **¶ G.**, below.

2. **How can a CA lacking experience in MAP ascertain whether it has authority under domestic law to undertake NBDR, whether related to a MAP proceeding or otherwise?**

For example, in the illustration in the *Response to Question 1*, above (the *Illustration*), the CA of Country A has little experience in MAP. Before undertaking an expert evaluation process by way of a MOU, the CA of Country A may wonder whether it needs to confirm that its domestic law allows it to undertake such a process.

Proposed Response: It is unlikely that a country which has committed to MAP has a serious domestic law issue with NBDR since the contemplated processes are not binding. As a rule, if an authority has the capacity to enter into an agreement regarding a dispute, it also the has authority to commit to a process whose outcome is not binding upon it without its consent. There is extensive practical and legal experience in non-tax areas in most countries that can be consulted for guidance on such issues.

3. **Will it be possible to develop a common framework for UN Member countries interested in NBDR?**

Proposed Response: Yes. This could be done through (i) harmonized model clauses for the treaties itself, (ii) harmonized sample agreements, (iii) multilateralized institutional support for capacity building or assistance with case management or even (iv) through a multilateral agreement on procedural issues.

4. **What would be the procedures to initiate NBDR between member countries or parties to a tax treaty?**

Proposed Response: An update of Article 25 of the UN Model and its Commentary could provide for broad flexibility and various approaches in this respect. For example, the MOU procedure suggested in the *Illustration* (above), would be a flexible and informal means of allowing Countries A and B to develop experience and confidence in the process at their own pace. It would certainly be possible for the UN to provide model forms of such MOUs.

5. **What would be the legal effect of a decision arrived at after NBDR?**

Proposed Response: Unlike for binding arbitration or expert determination, the outcome of NBDR would not have any legal effect. Only if the parties arrive at a mutual agreement after NBDR, this would be binding upon them to the same extent as a mutual agreement reached through classical MAP.

It could, however, be explored whether countries could make use of additional enforcement mechanisms, e.g. by providing in their treaty that any mutual agreement reached between their CAs should be implemented into domestic law and have the same value as a domestic court judgment of last instance.[36] Or countries could draw inspiration from the current UNCITRAL discussions on the preparation of an "*instrument on enforcement of international commercial settlement agreements resulting from conciliation*".[37]

6. **Can NBDR processes be formulated to achieve the following elements:**

a. Countries retain the final **decision-making authority** (so that full sovereignty is not compromised)?

Proposed Response: Yes, under NBDR countries retain the final decision-making authority. As compared to MDS, there should be no sovereignty concerns for participating countries.

b. Countries have **control of costs**?

Proposed Response: Yes, in formulating the process, determining the mission and agreeing on e conditions of engagement of the neutral expert or mediator. It could also be provided that disputes whose value does not exceed a certain threshold are not eligible for NBDR (*de minimis* rule). Including time-limits and using modern technology (e.g. video-conferencing; electronic means of communication and case administration) can further help to control costs.

c. If a one CA party to a dispute seeks to **engage an expert unilaterally** to assess the merits of its position, can this be arranged without the knowledge of the other CA?

Proposed Response: Yes. This is not a form of NBDR which needs to be formally included in the treaty or be subject to an agreement between the parties. However, in practice, having the possibility to obtain the views of an

[36] See the wording of article 54 (1) of the Washington Convention of 18 March 1965: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state." (http://www.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965)

[37] See https://documents-dds-ny.un.org/doc/UNDOC/LTD/V16/040/09/PDF/V1604009.pdf?OpenElement

independent expert on a "unilateral" basis can be very useful for resolving a dispute. The UN could provide assistance by identifying, publishing and/or proposing suitable candidates for such expert operations (e.g. former members of the UN Tax Committee).

d. How can the **independence** of mediators and other experts be assured?

Proposed Response: There is experience in international dispute resolution institutions in developing lists of specialists and vetting procedures, aiming to assess the independence and impartiality of such specialists. Moreover, there is extensive guidance on how conflicts of interest can be identified, classified and dealt with.[38]

An element of a successful UN program on NBDR would need to include developing lists of NBDS specialists and experts as well as a process for training procedures so that every Member country has the possibility to promote its own experts. These will be essential elements of an effective and trusted procedural framework.

e. Can the results of any NBDR process be kept **confidential**?

Proposed Response: Yes, as with any other treaty or MAP-related information.

However, countries should contemplate to what extent **transparency** principles should apply to MAP proceedings (including NBDR) in order not to jeopardize trust of the civil society in the international tax framework, without disclosing sensitive information (e.g. business secrets). In this regard, investment and trade lawyers have carried out intense debates and developed significant principles.

The UN could provide guidance with respect to transparency in tax treaty dispute resolution, as it has done for investment arbitration.[39]

f. Is it possible to develop a means of **publishing** information from NBDR cases to facilitate the development of a data base of experience?

Proposed Response: There is vast experience in non-tax areas regarding the redacting and publication of extracts from specific cases (including the outcome framed in a manner to preserve confidentiality). Likewise, the UN could perform monitoring tasks in this respect and provide redacted extracts from mutual agreements following NBDR or aggregated statistical data.

[38] See for example the voluminous IBA Guidelines on Conflicts of Interest in International Arbitration (http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).
[39] See United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

7. **Have such NBDR processes been used in the tax area by some UN Countries?**

Response: Yes, but to our knowledge only on the domestic level. For example, Mexico has developed a successful program. The process in Mexico includes the following characteristics:

- Tax authority must attend if requested by the taxpayer
- Mediators have expertise and autonomy
- Amicable environment
- Discussions are not binding or precedential
- Flexible process
- Partial resolution is acceptable
- If the process does not achieve resolution, it will at least achieve a clarification of the issues to be addressed

Similarly, a NBDR process is authorized for certain tax disputes in the U.K., France and the Netherlands, among others.

8. **In case NBDR turns out to be useless, can CA's terminate the procedure or will they be stuck in a process which would just come down to a waste of resources?**

Proposed Response: In general, no party to a dispute can be forced to remain within NBDR, if the latter has no prospects of success.

In commercial contracts, it sometimes happens that parties commit themselves to meet at least once or several times for amicable discussions or to wait for a certain period of time before any one of them can seize a court or arbitral tribunal. Such agreements aim at increasing the incentives for the parties to attempt amicable settlement. However, it is difficult in practice to enforce such obligations and to sanction breaches. Further, parties can obviously get rid of such obligations by mutual consent.

It is submitted that the suspension or termination of NBDR of tax disputes should always be possible if at least one CA, after serious consideration, comes to the conclusion that NBDR will not be effective. Flexibility should prevail over formalism, given in particular that CA's have already demonstrated their good will to find an amicable solution through the participation in a MAP.

F. Positives and Negatives of NBDR for Developing Countries (in light of the apparent disregard of non-binding dispute resolution in the OECD Model and BEPS discussions)

1. Potential Positives

- Establish a process to develop expertise, and confidence

in dispute international tax dispute resolution under the UN Model in a manner consistent with each Country's comfort level

- Coordinate such confidence and experience with tax base defense processes, including examination and domestic dispute resolution processes

- Avoid the concerns that MDS provokes due to some countries' experiences with or perceptions of investment and some forms of commercial arbitration

- Use the experience, positive or negative, from investment or other form of commercial arbitration to design international tax dispute resolution processes to achieve the objectives of all participating Countries (as in ¶ **B.**, above)

- Long-term support for tax administrations, international relations, and cross-border investment by having tax dispute resolution processes that are accepted by taxpayers and Countries alike

2. **Potential Negatives:**

- Investment of time and expense in developing such NBDR processes

G. Potential Areas for Further Work

If as a result of the October 2015 Secretariat paper and the discussions of the Subcommittee, the Committee should consider taking further steps. The working group on NBDR is in agreement that there are short, medium and longer-term steps that could be considered:

1. Potential Short-Term Measure: Adding a Paragraph to Model Commentary

The Subcommittee could develop language for the 2017 amendment of the UN Model Commentary to Article 25, with the purpose of providing guidance on non-binding forms of dispute resolution and describing one or several NBDR either as alternatives to arbitration, or as a precursory step to arbitration within a multi-tiered process, or both.

Regarding a potential amendment to the Commentary, several sets of proposals were discussed during the meeting of the Subcommittee in New York on 2-3 September. They are reflected in the following

combined proposal of a paragraph to be inserted into the UN Model Commentary, e.g. after its current paragraph # 7:

"*There is a range of **non-binding means** of resolving issues between Competent Authorities at various stages of the Mutual Agreement Procedure, which may be used on a stand-alone basis or in combination with other methods of dispute resolution (including arbitration if agreed upon between the Contracting States).Such non-binding mechanisms include, inter alia, (a) mediation, conciliation, or good offices; (b) expert evaluation and (c) a combination of mediation, conciliation or good offices with expert evaluation.*

Those favoring use of such methods note, inter alia, the following potential benefits:

- *A neutral intermediary can enhance the efficiency of the mutual agreement procedure, while allowing Contracting States to preserve their fiscal sovereignty;*
- *the inclusion of a neutral intermediary can increase the objectivity of the debate and decrease the effect of "inequality of arms";*
- *from a political point of view, an amicable non-binding solution may be more acceptable and more sustainable than a binding "win-lose" decision;*

Those not favoring such methods note the following concerns:

- *Potential increase of the overall duration of procedures, in cases in which a pending non-binding procedure delays the initiation of arbitration and in which no reasonable timeframes for the interaction between non-binding procedures and binding arbitration are foreseen;*
- *Investment of time and expense in developing such non-binding dispute resolution processes.*

The development of such processes could be undertaken either on a generic basis, by additional protocols to the Treaty, or with respect to specific cases, by means of memoranda of understanding setting forth the terms of agreement between the Competent Authorities. Such Protocols or memoranda of understanding could include appropriate rules on issues such as the following:

(i) Nature of the process and the non-binding and without-prejudice effect of its outcome,

(ii) Commencement of the process and interaction with other processes provided by te Treaty (timeframes etc.),

(iii) Method of agreeing upon the intermediary person or persons,

(iv) Status of the intermediary or intermediaries as persons to whom confidential information may be disclosed under Article 26,

(v) Obligations of the intermediaries to observe the confidentiality provisions of the Treaty and other applicable laws, and to disclose potential conflicts of interest,

(vi) Such other terms and practical guidelines as may be appropriate.

The Committee notes that there is currently a lack of experience of using non-binding dispute resolution processes to assist the Competent Authorities in meeting their Mutual Agreement Process responsibilities, but recognizes their important role in commercial dispute resolution. Countries wishing to consider such an option in the context of the Mutual Agreement Procedure may wish to consider this broader experience in their Mutual Agreement Procedures."

2. Potential Medium and Long-Term Measures

(a) The Subcommittee could develop and propose sample procedural agreements providing for NBDR. Such sample agreements could potentially be included in the Commentary and inspire Member countries willing to use NBDR for tax treaty disputes.

(b) The Subcommittee could identify areas in which capacity building is required and develop proposals for capacity building ensuring, in particular, that the needs of developing countries are taken into account;

(c) The Subcommittee could explore and identify the qualifications that independent specialists involved in NBDR should possess;

(d) The Subcommittee could identify suitable candidates available to assist CAs through NBDR proceedings, ensuring that these candidates have diverse backgrounds and occupations (lawyers, economists, judges). These lists could be published on the UN website and Countries could be encouraged to choose mediators from the list;

(e) The Subcommittee could monitor the implementation of NBDR in tax treaties and assess their usefulness for the resolution of tax treaty disputes;

(f) The Subcommittee could develop and update rules and best practices for NBDR, based on the experiences made with NBDR;

(g) The Subcommittee could explore how new communication technologies can speed up NBDR processes and lower costs, e.g. by replacing face-to-face meetings with video conferences;

(h) The Subcommittee could identify further measures that can be useful in promoting the use of NBDR for tax treaty disputes, such as training measures, cost-cutting measures, services or assistance for parties regarding the administration of NBDR cases, the long-term development of a multilateral framework or other;

(i) To the extent the Committee concludes that the Subcommittee does not have the resources to carry out the above tasks, the Subcommittee should make proposals for the development of an effective institutional framework taking care of these medium and long-term objectives.

Annex 4

Arbitration and other binding forms of dispute avoidance and resolution

This input paper, which has been drafted by Jeffrey Owens, Arno Gildemeister, Laura Turcan and Juliane Gröper and which was reviewed by the other members of the Working Group on Arbitration (Morgan Guillou, Henry Louie, Pragya S. Saksena and Ignatius Mvula) was discussed at the second meeting of the Subcommittee for its meeting on the 3rd -4th September in New York. It was revised to take account of the discussions at that meeting. The views expressed should not necessarily be taken as representing the positions of all members of the Subcommittee.

1. Setting the Context

The issue of binding dispute resolution is one of the more controversial topics in the Subcommittee mandate, with many developing and some developed countries having political and procedural concerns with the way in which mandatory arbitration works in existing tax and in non-tax agreements, particularly in BITs.[40] This note tries to address the concerns that have been expressed by developing countries over MDS (mandatory dispute settlement) and hopefully will help them consider the issues involved in entering into MDS. This seems particularly appropriate given that developed countries are increasingly approaching developing countries with suggestions to insert such clauses in their treaties and that the number of disputes between developing countries is increasing.

This note does not make any firm recommendations as to whether a country should or should not adopt MDS, but merely sets out some issues that would need to be addressed if a country takes a sovereign decision to pursue this option which is foreseen in the mandate given to the sub group, which states:

"The mandate of the Subcommittee on the Mutual Agreement Procedure —Dispute Avoidance and Resolution is to consider and report back to the Committee on dispute avoidance and resolution aspects relating to the mutual agreement procedure with a view to

[40] *See*, among others, *Guirrea, A.,* The growing pains of investment treaties available at http://oecdinsights.org/2014/10/13/the-growing-pains-of-investment-treaties/; *The Economist,* Investor-state dispute settlement - The arbitration game - Governments are souring on treaties to protect foreign investors (11th October 2014), as well as the recent UNCTAD resolutions on ISDS reform. These concerns have prompted several Latin American countries and South Africa to slowly move away from arbitration for ISDS.

reviewing, reporting on and, as appropriate, considering possible text for the Model Convention and its commentaries, as well as related guidance, on issues such as:

[…]The exploration of issues associated with agreeing to arbitration clauses between developed and developing countries."

The need to resolve cross border tax disputes in an efficient and principled way has risen up the political agenda as an increasing number of commentators recognize that tax must not add to an already uncertain political and economic environment. All the major international organizations have cut back on their forecasts for world growth over the next 2 years, with the World Bank now expecting less than 4 percent. Three of the BRICS, which have been the engine of growth over the last decade, are in or risk going into recession. Europe, Japan and the US are experiencing a weak and jobless recovery. The African Development Bank now expects that growth on the continent will be less than 4 percent. At the July meeting of UNCTAD in Kenya Ministers noted that FDI levels were still below the pre-crisis levels with MNEs holding back on investment because of increased uncertainty in the economic environment, despite having trillions of dollars on cash reserves. Growth in world trade continues to lag behind growth in GDP.

The G20 leaders at their September 2016 summit responded to these pressures by deciding to launch work on the impact of tax uncertainty on investment and innovation on the basis of reports prepared by the OECD, IMF and World Bank. Avoiding and resolving cross border tax disputes will be an integral part of that project.

The data presented to the Subcommittee in June and which is updated in a separate note shows that since 2009 the number of MAP cases has trebled, that an increasingly number of the cases take more than two years to resolve and in some cases no resolution is found. There is a widespread expectation that as countries begin to implement the BEPS recommendations (many of which are subject to diverse national interpretations and some of which still have to be finalized), we will see a significant increase in tax disputes and that if these are not resolved in a timely manner this could negatively impact on FDI.

This short note draws upon the discussion and papers prepared for the June 2016 meeting of the Subcommittee in Vienna and the Secretariat Paper published in October 2015.[41] To limit the length of the note cross references are made to these documents.

[41] UN Tax Committee Subcommittee on MAP, Dispute Avoidance and Resolution, Background Paper Session II – International Tax Disputes: Current Trends; UN Secretariat Paper on Alternative Dispute Resolution in Taxation

2. A Survey of the Landscape

2.1. The Current Experience with Arbitration

2.1.1. In Non-Tax Agreements

Arbitration has a long history and track-record of successfully resolving international disputes where domestic judicial mechanisms are unable to reach results acceptable to all parties concerned. Delicate issues such as trade, customs, tariffs and taxes, war or peace, border disputes, compensation claims due to war, civil war or occupation, or the treatment or protection of nationals abroad have been submitted to arbitration panels since the antiquity.

In treaties of international economic law, two salient applications for arbitration include free trade regimes such as the WTO system and investment treaties. Newer treaties or treaty projects (such as NAFTA, TPP, TTIP, CETA etc.) cover both trade and investment law provisions, albeit subject to different dispute resolution regimes. Trade and investment treaties have figured prominently in recent debates and have been subject to criticism. Parts of this criticism may enable the tax community to learn from experience (e.g. with regard to transparency issues, costs, conflicts of interest and even-handedness of certain procedures), and build on the experience trade and investment lawyers have recently developed in order to address legitimate concerns. Other parts of the criticism seem less relevant for tax treaty disputes (e.g. to the extent that they specifically concern investor-State, rather than State-State disputes).

The **dispute settlement system of the WTO** has developed interesting approaches taking account of the inherent "inequality of arms" and economic disparity between developed and developing countries. These include funding mechanisms for procedural costs, pro-bono legal assistance. training and capacity building measures, pre-vetting of panel members and the appointment of panel members having a sufficiently diverse background and the requisite sensitivities for the concerns of developing countries.[42]

Investor-State-Arbitration has worked towards binding together flexible dispute resolution tools and effective enforcement mechanisms within a multi-faceted and multilateral framework. Although the law of foreign investments is to date still essentially composed of bilateral investment treaties (BIT), the procedural framework is to some extent harmonized on a multilateral basis: parties to a dispute usually have an option in the BIT's arbitration clause pursuant to which the dispute can be submitted to ICSID, an organization of the World Bank. ICSID administers arbitration and conciliation cases and provides different sets of (default) rules to that end. Whereas the multilateral Convention which has established ICSID ("Washington Convention") and lays its fundamental administrative statutes can only be modified with the consent of all Contracting States, the procedural rules are somewhat more flexible and are updated from time to time to accommodate current

[42] For further details see the Note prepared for the June 2016 Subcommittee meeting, Session II: "Relevant Trends in Non-Tax Dispute Settlement Mechanisms".

trends. The applicable substantive law can be updated at the will of the parties to the BIT. The **enforcement of ICSID arbitration awards** is secured by Article 54 of the Washington Convention which provides:

> *(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*
>
> *(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*
>
> *(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*

The Subcommittee explored at its June and September meetings to what extent positive and negative lessons can be drawn from the different trends pertaining to non-tax agreements, including the increasing number of tax-related cases brought forward under BITs.[43]

2.1.2. In Tax Agreements[44]

International tax disputes can be resolved domestically, bilaterally or multilaterally. It is, however, difficult to satisfactorily resolve cross-border disputes by unilateral actions of a domestic court system. The most commonly used cross-border dispute resolution mechanism in international taxation is the Mutual Agreement Procedure (MAP) found in most Double Tax Treaties across the world. Some of these also include as part of the MAP an arbitration clause.

Generally speaking, there are limited statistics and data available on international tax dispute resolution. The data available is mainly from OECD Member States and therefore only partially representative.[45] The fact that there is hardly any data on Non-OECD countries is partially due to the fact that there is no such monitoring mechanism in place at the UN level, but also because there are not so many dispute resolution mechanisms

[43] More than 40 tax-related cases have been brought forward under BITs, see *Provost*, Taxes on Trial, available at https://www.tni.org/en/publication/taxes-on-trial. For further details see the Note prepared for the June 2016 Subcommittee meeting, Session II: "Relevant Trends in Non-Tax Dispute Settlement Mechanisms".

[44] For a more detailed analysis, see: UN Tax Committee Subcommittee on MAP, Dispute Avoidance and Resolution: Background Paper Session II – International Tax Disputes: Current Trends; Background Paper Session II – Relevant Trends in Non-Tax Dispute Settlement Mechanisms; Background Paper Session III – Cooperative Compliance The Essential Features; Background Paper Session III – Minimizing International Tax Disputes – APAs; Background Paper Session IV – Implications of Action 14 for the UN MAP Guide; Background Paper Session IV – Tax Mediation and Expert Determination; Background Paper Session V Baseball Arbitration; Background Paper Session V – Proposal for a New Institutional Framework for Mandatory Dispute Settlement; Background Paper Session V – Technology and Arbitration; .

[45] http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.

incorporated into the treaties or efficiently made use of. The FTA MAP Forum is intended by the OECD to fill this gap.

What can be seen from the data available is that the cases that are resolved under the MAP are conducted between a limited group of countries, including the US, the UK, Germany, France, Belgium and Canada.[46]

Amongst Non-OECD countries China and India are the countries with the most reported MAPs. Although India has traditionally been rather cautious towards dispute resolution, they have signed a new framework agreement with the US in 2015[47] and as a result the resolution rate of international tax disputes between the two countries has increased significantly.

Nevertheless, the timely resolution of disputes is still an issue. Therefore, some countries have introduced certain time-frames, usually between two and three years, to conduct the MAP. After this period has elapsed the dispute is referred to an arbitral panel, which then resolves the dispute within the MAP in another prescribed time-frame.

2.2. Types of Arbitration

2.2.1. Overview

This section provides a short overview of the different types of arbitration clauses found in tax law as well as other areas of law and group them into different categories based on their features. The strengths and weaknesses of each feature as well as its practical importance will also be outlined.

Arbitration clauses can be classified based on their **main features**:

Feature	Type of arbitration	
Material scope of the clause (**dispute subjects** covered)	Limited scope	Unlimited scope
Personal scope of the clause (**parties** to the dispute)	State – state	Private party - state
Geographical scope	Domestic	International
Arbitration trigger	Voluntary	Mandatory

[46] http://www.oecd.org/ctp/dispute/map-statistics-2014.htm Note, that MAPs including two OECD Member States are counted twice.

[47] http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--US-and-India-Tax-Authorities-agree-on-framework-for-resolving-certain-double-tax-cases and http://www.internationaltaxreview.com/Article/3570741/A-fresh-look-at-transfer-pricing-in-India.html and http://www.business-standard.com/article/economy-policy/india-and-us-settle-100-tax-disputes-116012800624_1.html , For more general insights on Indian tax dispute resolution, see: http://www.internationaltaxreview.com/Article/3485393/India-How-to-resolve-disputes-in-India.html.

Type of tribunal to be selected	Ad hoc	Institutional
	Independent arbitrators members	Arbitrators affiliated with the parties
	Number of arbitrators: 1, 3, 7 etc.	
How the **decision** is **reached**	Short-form (Final Offer)	Long form (Independent opinion)
What **effect** the **decision** has on the **parties**	Binding	Non-binding
How the proceedings **are conducted**	Ad hoc	Institutional
	Online	Brick-and-mortar

2.2.2. Voluntary vs Mandatory Arbitration

Voluntary or consensual arbitration is an adversarial[48] dispute resolution process in which the disputing parties choose to submit the conflict/ dispute to an impartial authority (the arbitral tribunal) after it has arisen. All parties to the dispute must agree to the submission; in other words, the arbitral clause contained in the treaty does not compel them to enter into an arbitration procedure. Regardless of the fact that its initiation is not mandatory, voluntary arbitration can also result in a binding decision.

Mandatory or compulsory arbitration is an adversarial dispute resolution process where the parties have bound themselves, through an arbitration clause, to enter into arbitration procedures, without any further acceptance being required on their part once the particular dispute has arisen. When one of the parties feels aggrieved by an act of the other, it may submit the dispute to arbitration. Under some tax treaties, arbitration is mandatory for both Competent Authorities if a MAP dispute remains unresolved after a certain period of time and the taxpayer requests the initiation of arbitration.

"Hybrid" versions are also possible, for instance, an **opt-out clause**: if both competent authorities agree that a dispute for which arbitration has been requested by the taxpayer is not suitable for arbitration they can prevent the case from being submitted to an arbitration panel. Perhaps most famously, Article 25 of the DTT between the US and Canada includes such an opt-out clause: a case is eligible for arbitration only if it *"Is not a particular case that the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, is not suitable for determination by arbitration"*.

[48] This characterization refers to arbitration in general. Arbitration under tax treaties is of a somewhat different nature. Since it is carried out within the envelope of the MAP and the award is implemented by means of a mutual agreement between the competent authorities, there is a stronger emphasis on the cooperation of the parties.

The arbitration clause in the OECD Model Convention is a mandatory clause because the arbitration trigger is a request by the taxpayer and the competent authorities are, to the extent they are unable to reach a mutual agreement, obliged to enter into an arbitration. The UN Model Convention (Alternative B of Article 25) deviates from the OECD Model in this regard - it contains a mandatory arbitration clause but it requires the arbitration to be initiated by one of the Contracting States rather than by the taxpayer –. Nevertheless, the UN Model Commentary on Article 25 provides Member States with an alternative, voluntary, arbitration clause, which has been a part of the Model since 2001, before the introduction of the arbitration clause into Alternative B of the OECD Model Convention.[49] It reads as follows:

> "*If the competent authorities are unable to resolve by mutual agreement a case pursuant to paragraph 2, the case, may, if both competent authorities and the person who has presented the case pursuant to paragraph 2 agree, be submitted for arbitration, provided any person directly affected by the case agrees in writing to be bound by the decision of the arbitration board. If the competent authorities are unable to resolve by mutual agreement a difficulty or a doubt pursuant to paragraph 3, the difficulty or doubt may also, if both competent authorities agree, be submitted for arbitration. The decision of the arbitration board in a particular case shall be binding on the Contracting States with respect to that case. Where a general difficulty of interpretation or application is submitted to arbitration, the decision of the arbitration board shall be binding on the Contracting States as long as the competent authorities do not agree to modify or rescind the decision. The competent authorities shall by mutual agreement settle the procedures for such an arbitration board.*"

However, it appears that voluntary arbitration clauses are not favored in practice. The Report of the Subcommittee on Dispute Resolution with regard to possible changes to the Model, which resulted in the inclusion of an arbitration clause into Article 25 (5) Alternative B, did not propose the inclusion of a voluntary arbitration clause into the text of the Model.[50] Moreover, of the 156 arbitration clauses in double tax treaties currently in force, 73 provide for submission of the request by one of the Contracting States, while 83 provide for a request by the taxpayer. In addition, 19 of the 20 arbitration clauses already in force but not yet active provide that only the countries may submit a request. All currently active arbitration clauses are mandatory.[51]

The **advantages** of a **voluntary arbitration** clause would be that it allows the competent authorities greater control over the types of issues that will proceed to arbitration. It could thus restrict the potential number of cases that could proceed to arbitration and reduce the potential costs of dispute resolution procedures. Nevertheless, **this flexibility could also lead to a competent authority's refusal to submit any issues to arbitration**, with the result that the MAP cases could remain unresolved. This would render the arbitration clause ineffective. Moreover, a **mandatory arbitration** clause has the **advantage** that it could lead to a faster and, overall, less expensive resolution of cases during the MAP. When faced with a potential

[49] See UN Model Commentary on Article 25, m.no. 14.
[50] See UN Tax Committee, Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the Mutual Agreement Procedure, E/C.18/2010/CRP.2, New York, 2010, available at: http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf.
[51] See *Turcan/Vock*, An Analysis of Existing Arbitration Clauses, BIT 2016 (*in print*).

referral of the case to an arbitral panel, the competent authorities may be more amenable to reach a mutual agreement before such arbitration takes place.[52]

According to the UN Commentary, the disadvantages of voluntary arbitration seem to outweigh the advantages: "*The arbitration of issues on which the competent authorities disagree is essential to ensure that treaty disputes are effectively resolved in a consistent manner in both States. In this respect, arbitration that may be requested by either competent authority gives more certainty that unresolved issues will effectively be submitted for arbitration than voluntary arbitration which needs the agreement of both competent authorities.*"[53] The Report of the Subcommittee on Dispute Resolution opined: "*Voluntary arbitration presents the same shortcoming as the mutual agreement procedure and is therefore largely useless.*"[54] This could be the reason why the voluntary clause has remained merely an alternative.

For states which do not wish to submit all disputes to arbitration, a mandatory arbitration clause with a limited material scope (see section 2.2.6.) or an opt-out clause may be an option. Alternatively, for states not yet willing to commit to arbitration but which would like to consider this option in the future, the UN Commentary proposes an arbitration clause whose entry into force is delayed.[55]

A different approach could be the insertion of a **limited MFN clause**.[56] This clause would have to be designed in such a way that it would not inhibit countries from moving towards MDS. For example, rather than committing to a full MFN clause, a country could limit it geographically or specify the circumstances in which it becomes effective and the effects that it may have.

Arbitration under double tax treaties requires the lapse of a certain amount of time – 2 years under the OECD Model and 3 years under the UN Model. In practice, 31 of the 156 arbitration clauses use the longer timeframe suggested by the UN Model, while the rest allow the submission of a request for arbitration after 2 years.[57] As opposed to the Model Conventions, the EU Arbitration Convention only provides for lapse of time (2 years) as an "automatic" arbitration trigger.[58] However, in practice the automatic trigger may be

[52] For instance, it may be argued that the mandatory arbitration provision under the EU Arbitration Convention has proven to be very effective due to the fact that the number of MAPs initiated has more than doubled between 2012 and 2014 and 85% of cases are resolved in under 2 years, as of 2014, see EU JTPF 2012-2014 statistics, available at http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm.
[53] See UN Model Commentary on Article 25, m.nos. 15 & 16.
[54] UN Tax Committee, Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the Mutual Agreement Procedure, E/C.18/2010/CRP.2, New York, 2010, m.no. 70.
[55] See UN Model Commentary on Article 25, m.no. 3.
[56] See UN Tax Committee, Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the Mutual Agreement Procedure, E/C.18/2010/CRP.2, New York, 2010, available at: http://www.un.org/esa/ffd/wp-content/uploads/2015/10/11STM_CRP8_DisputeResolution.pdf.
[57] See *Turcan/Vock*, An Analysis of Existing Arbitration Clauses, BIT 2016 (*in print*).
[58] Art 7 EU Arbitration Convention (90/463/EC). Nevertheless, under certain circumstances such as mutual consent, this time frame may be extended. The possibility of extension is used fairly often in

circumvented, since the absence of default appointment rules and a general enforcement framework allows Member States to stall the establishment of a panel (the so-called advisory commission).[59]

2.2.3. Binding vs Non-Binding Arbitration

One question in the design of arbitration clauses is whether the decision of the arbitral panel should be binding on the parties. As per the usual definition of the term, an "arbitration" results in an award which is binding upon the parties. In a **binding arbitration**, the parties can, in principle, not deviate from the decision. The opposite would be a **non-binding procedure** (such as mediation or expert evaluation),[60] in which each of the parties can reject the outcome. The binding nature of an arbitral award does, however, usually not prevent the parties to reach a different agreement if *both* are unwilling to abide by the arbitral award.[61]

For tax treaty disputes, the "binding" nature of arbitral awards is subject to variations. Due to the fact that tax treaty disputes affect the rights of one or more third persons (namely: taxpayers) who are not formally party to the proceedings, it is possible that an award is binding on the competent authorities, but not on the taxpayer, or vice versa.

Art 25 (5) OECD Model provides for a decision which is **binding on the Contracting States**. The taxpayer, however, has the option to either accept the decision or reject it (in which case the dispute may remain unresolved). As a consequence, the binding effect of a decision depends on the will of the taxpayer. Without his consent, the competent authorities are not allowed to reach a mutual agreement after the termination of the arbitration which deviates from the arbitral award. Under the UN Model, the arbitration award is **binding for the Contracting States**, but allows them a certain amount of flexibility since they must abide by it unless they can agree on a different solution within 6 months after the arbitrators have ruled upon the case. If they are unable to reach an agreement, they must implement the decision of the arbitrators. The EU Arbitration Convention allows Contracting States to come to a different decision than the arbitral body by mutual consent (see Article 12) within 6 months.[62] In practice, only 18 of the 156 active arbitration clauses and none of the not yet active clauses are patterned after the UN Model, all others stipulate for a binding decision patterned after the OECD Model.

Non-binding clauses have the **advantage** that they preserve the power of the Competent Authorities to resolve the dispute on their own terms. The decision of the arbitral panel may

practice, see *EU JTPF*, Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the End of 2014, p. 7.

[59] See *Pit*, Improving the Arbitration Procedure under the EU Arbitration Convention (I), EC Tax Review 2015, 18 et seq.

[60] See the note on "Mediation and Other Forms of Non-Binding Dispute Resolution" prepared for the Subcommittee.

[61] This depends on the clause included in the respective DTT.

[62] However, since only the decision made by the competent authorities after the lapse of the 6 month period (whether it is the same as the decision of the advisory commission or deviates from it) is binding, formally the procedure under the Convention is **not binding**.

serve as an incentive to resolve the dispute in the suggested way, but it can be adapted to the needs of the competent authorities, for instance to take into account the restrictions imposed on them by domestic tax, administrative and constitutional laws. Nevertheless, there are also several **disadvantages**: it can be argued that the costs of a procedure lacking a binding outcome would outweigh its usefulness, for all parties concerned. An expert evaluation or a mediation would serve a similar purpose and be conducted at lower cost and in most cases in a shorter timeframe, since they would usually be carried out by a single person instead of an arbitral panel and with less procedural formality. Finally, the very purpose of the procedure is to solve a dispute which could not be solved through a MAP. The key aspect of a binding decision is that the states have committed to its implementation despite its cross-border nature. Therefore, the shortcomings as regards the effectiveness of the MAP, among which the lack of a guaranteed and binding result was considered one of the main weaknesses[63] cannot be completely remedied by non-binding forms of dispute resolution.

2.2.4. Long-form vs Short-form Arbitration (Independent Opinion vs Baseball Arbitration)

Long-form (independent opinion arbitration) is a process where the arbitrators are provided with the facts and arguments of the parties based on applicable law and reach their own independent decision, generally based upon a written, reasoned analysis of the facts involved and the applicable legal sources. It is called "long-form" arbitration, because it generally involves lengthier procedures than the final offer approach, often including several hearings.

Short-form (last best offer/ final offer/ streamlined/ baseball) arbitration is a process wherein each party submits a proposal for an award, i.e. in most cases an amount of money sometimes contained in a position paper detailing its stance on the issues at stake. The arbitrator(s) then choose(s) one of the proposed awards, without having the power to modify the respective proposal or find a middle ground.

While the current Sample Mutual Agreement on Arbitration contained in the OECD Model Commentary on Article 25 suggests the independent opinion approach as the default type of procedure,[64] its counterpart in the UN Model Commentary reflects a preference for short-form arbitration.[65] It appears that the OECD is now leaning more towards using short-form arbitration. The vast majority of arbitration clauses in double tax treaties lack any procedural rules.[66] In practice, last best offer arbitration has thus far only been provided for in some of the US tax treaties.[67] The procedural rules implemented by the US and its treaty partners in their MOUs contain some very specific requirements regarding the duration of the procedure,

[63] See, for example, *OECD*, Transfer Pricing and Multinational Enterprises: Three Taxation Issues (1984); *OECD*, Improving the Resolution of Tax Treaty Disputes (2007).
[64] OECD Model Commentary 2014 Art 25, Annex, para 1(15) and para 12. Nevertheless, the Sample Mutual Agreement allows the use of baseball arbitration as an alternative, primarily for transfer pricing cases (sec 13 of the Sample).
[65] UN Model Commentary 2011 Art 25 (B), Annex, para 1, sec 11
[66] See *Groen*, Arbitration in Bilateral Tax Treaties, Intertax 2002, Issue 1, 14.
[67] For instance, the treaties with: Austria, Belgium, Canada, France, Germany, Spain and Switzerland.

which is carried out entirely in writing, the lack of written submissions, evidence rules etc., which are not obligatory for baseball arbitration in general, but have been specifically adapted to be used in the context of the above-mentioned treaties.[68] However, last-best-offer arbitration procedures could also be designed differently, and notably include hearings and written, reasoned opinions, depending on the preferences of the negotiating states.

There is an ongoing debate on the pros and cons of these two approaches. **Short-form arbitration** has several **advantages**: low costs, speedy resolution, confidentiality and prevention of formal as well as informal precedents. Its advocates argue that it forces competent authorities to make more reasonable claims. It also requires less arbitration expertise and experience from the panel members. Since the arbitrators are limited in their powers, there is less danger of negative perceptions as to neutrality of the process. Nevertheless, **there are also some disadvantages**, such as the opaqueness of the proceedings due to the lack of reasoning and the potential deviation from the provisions of the treaties, since the positions of the parties may both deviate from the treaty.[69] Moreover, it requires a high degree experience on the part of the tax official preparing the submission to the arbitral panel in order to make sure that the arbitrators understand fully the position of the country since this is the only opportunity to make their case. Also, reasoned decisions are more likely to be acceptable to parliament since they will be in a better position to understand the process and the reasons that led to the outcome.

2.2.5. Ad Hoc vs Institutional Arbitration

The experience in tax and non-tax agreements shows that there are many possible variations to the design of arbitration procedures. Depending on whether the arbitration is "administered" by an arbitration organization (the institution) or not, there are two different kinds of arbitration: "institutional" and "ad hoc" arbitration. In an **institutional arbitration**, an arbitration organization such as the LCIA, ICC or ICDR takes care of the administration of the arbitration, such as receiving the documents and filings, distributing them to the arbitrator(s), maintaining files and records, providing lists of potential arbitrators if requested by the parties, selecting the arbitrator if the parties cannot agree, and a score of other useful administrative duties.

In an **ad hoc (non-administered) arbitration**, the parties are responsible for the administration of the arbitration. An ad-hoc arbitration court is solely assembled to make a decision in one special dispute. Whereas in other areas of law arbitrations are often "administered", tax arbitration provisions patterned after the OECD and UN Models are ad hoc. This is also true for the tax treaties of the US, which contain the most detailed

[68] For a detailed comparison of the North American Model, i.e. baseball arbitration as envisioned by the US, with independent opinion arbitration, see *Turcan/Petruzzi/Koch*, Baseball Arbitration in Comparison to Other Types of Arbitration in *Lang/Owens (eds.)* International Arbitration in Tax Matters, IBFD 2016.

[69] For a detailed analysis of the advantages and disadvantages of this form, see UN Tax Committee, Secretariat Paper on Alternative Dispute Resolution in Taxation, E/C.18/2015/CRP.8, New York, 2015, m.nos. 39-45 and *Turcan/Petruzzi/Koch*, in *Lang/Owens (eds.)* International Arbitration in Tax Matters, IBFD 2016.

procedural rules. The advisory commission under the EU Arbitration Convention is also an ad hoc body, see Article 9.

The **advantages** of **institutional arbitration** include that cumbersome and time-consuming duties such as the filing and distribution of documents and the identification of potential arbitrators are carried out by the institution, thus reducing costs and duration of the proceedings and allowing parties to focus on substantive matters. An institutional setting also reduces the need for the arbitral panel to establish detailed procedural rules for each case, since most of these are detailed (on a default-basis) in the rules and statutes of the institution. Delegating some of the organizational matters to an institution facilitates the logistics of the procedure in many ways, e.g. when it comes to finding suitable and not too costly locations for oral hearings. An institution could fix and help administer fees to be paid by the taxpayers and/ or competent authorities seeking resolution of disputes, use part of these funds to cover administrative expenses and provide financial assistance to developing countries and capacity building.[70] Such an institution could perhaps also provide internships and fellowships as well as training courses for potential arbitrators and keep a list of available arbitrators from each of the member countries. It could also serve a clearing house or monitoring function, by keeping a database of relevant statistical information.[71]

There are also several **drawbacks** to an **institutional setting**: a common set of procedural rules limits the opportunity to adapt the arbitration process to the needs of Contracting States. This can be remedied by ensuring that the rules provided by the institution are to the largest extent "default rules" that can be modified by the parties, either by way of their tax treaty or during dispute settlement. Depending on the size and efficiency of an institution, it may make the arbitration more time consuming and even more expensive, if the institution provides services perceived as unnecessary. The fees should therefore be adapted to the services used and funding of general institutional costs should be ensured by relevant stakeholders (States, business community etc.) in accordance with their financial capabilities. Some commentators have also expressed the view that institutional arbitration could encourage countries to see arbitration as a "first" resort which could be counterproductive.

Nevertheless, considering the need to facilitate the access of developing countries to MAP including binding and non-binding dispute resolution mechanisms, it would be helpful to have a set of standard procedures that establish a framework for resolving disputes by means of such mechanisms.

2.2.6. Other Forms of Arbitration

Based on the geographical scope of the dispute, **domestic and international arbitration** may be distinguished. This paper only discusses **international tax arbitration**, meaning disputes arising between two different Contracting States. However, when designing arbitration clauses for double tax treaties and the corresponding procedural rules, the

[70] See UN Tax Committee, Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the Mutual Agreement Procedure, E/C.18/2010/CRP.2, New York, 2010, m.nos. 90-95.
[71] *Idem*, m.no. 101.

Contracting State could take inspiration from domestic arbitration. While few countries provide for domestic tax arbitration, most have domestic commercial arbitration rules.

Depending on the nature of the parties involved in the dispute, **state-state arbitration, private person** (usually an **investor)-state arbitration** and **private party arbitration** can be distinguished. International tax arbitration is a state-state procedure, as only the Contracting States are parties to the dispute. Even where the taxpayer is allowed to present evidence and take part in the hearings, it has no official standing in the procedures. Under the OECD and UN Model Conventions, and especially the latter, taxpayer participation is extremely limited. According to the Sample MAP in the UN Model Commentary, taxpayers have no right to request the submission of a case to arbitration, suggest terms of reference or have a role in the appointment of arbitrators, and they have no formal right to make oral presentations.

The distinction between state-state arbitration and investor-state arbitration should be kept in mind when designing arbitration clauses and procedures. There are several international organizations, such as UNCITRAL, developing legal rules in order to harmonize investment arbitration procedures. However, the guidelines developed by these organizations cannot be directly implemented for international tax arbitration, since the nature of the procedure is completely different. Nevertheless, international developments concerning arbitration in other areas of law can highlight solutions applicable to tax law arbitration.

The last distinction can be made between **online and brick-and-mortar** arbitration. Traditionally, arbitration takes place in a brick-and-mortar context, with face-to-face meetings in a selected location. However, there are many **arguments** in **favor** of an **online procedure**. First of all, traditional arbitration leads to high travel costs. Furthermore, the administrative burden could be reduced if there existed an easier way to exchange documents. Overall, time can be saved by using new communication technology.[72] Online arbitration has been discussed and applied in a commercial or consumer law based context for some time. For instance, as of 2004 already, there were 25 providers of online arbitration services, with over 10.000 non-binding decisions and over 400 binding decisions delivered.[73] Unfortunately, international tax arbitration is lagging behind these developments – while competent authorities regularly exchange documents electronically, face-to-face meetings are still much more common than video conferencing.

As was suggested in section 2.2.2., states which are reluctant to submit all disputes to arbitration may opt to **limit the material scope of the arbitration clause**. Currently, both the UN and the OECD Model Convention allow for the submission of all unresolved issues in a MAP initiated pursuant to Article 25 (1) to arbitration. Nevertheless, in practice, several of the arbitration clauses negotiated in bilateral tax treaties have included limitations, for instance:

[72] See *Trent/Rule*, Moving Arbitration Online: The Next Frontier, New York Law Journal.
[73] *Kaufmann-Kohler/ Schultz*, Online Dispute Resolution: Challenges for Contemporary Justice, Kluwer Law International, 2004, 34.

- DTT Australia – New Zealand (2009): only issues of fact + only issues/provisions agreed upon may be submitted
- DTTs of Switzerland with Canada/France (Protocols of 2009): only issues concerning the existence of a PE and the allocation of profits between an enterprise and its PE(s) may be submitted
- DTT Japan - Portugal (Protocol of 2011): only TP cases;
- DTT Japan – Sweden (Protocol of 2013): not available for the attribution of capital to a PE and other cases agreed upon by the CAs
- DTTs of Norway with the Netherlands/UK: only for norm prices under the Norwegian Petroleum Act.[74]

Moreover, the scope of the EU Arbitration Convention is limited to transfer pricing cases.[75]

The OECD itself has suggest limiting the scope of arbitration clauses as a possible way forward in the Draft Report on Action 14, though such suggestions were removed from the Final Report:[76]

- Application only for disputes concerning specific treaty articles (eg: Articles 4, 5, 7, 9 and 12 OECD-MC)
- Only cases of „*actual double taxation*"
- Exclusion of cases involving anti-abuse rules
- Mutual agreement of CAs that arbitration is not appropriate on a case-by-case basis – this last option would amount to an opt-out clause (see section 2.2.2.).

The interpretation of arbitration clauses with limited scope can sometimes be delicate in practice and may give rise to controversies regarding the qualification of a dispute. If there is disagreement between the competent authorities in this regard, it would normally be up to the arbitral body to decide whether it is allowed to decide on a particular issue. Contracting States should therefore exercise care in drafting the limitations in order to ensure that they are clear and unambiguous, so that the limitations can be interpreted in line with their intent.

Nevertheless, such clauses also have **potential advantages**: if adopted on a provisional basis, arbitration could help States familiarize themselves with the process and perfect its functioning over time. As they grow more comfortable with their experience, they may then remove the initial restrictions of scope. Even though an unrestricted arbitration clause would lead to a quicker resolution of the MAP cases which have already been pending for a long time, a limited clause would also help reduce the backlog of cases.

[74] See *Pit*, Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation, Intertax 2014, 453 for additional examples.
[75] The convention covers transfer pricing issues arising between associated enterprises and enterprises and their PEs (Art 1 para 1, roughly corresponding to Arts 7 and 9 OECD MC (see also Art 3 para 2 of the Convention) - one important difference is that corresponding adjustments are not covered. Further details on the topic of the Convention would exceed the scope of this paper.
[76] See *OECD*, Draft Report on Action 14, Option 23.

2.3. Other Forms of Binding Resolution Mechanisms

In the universe of manifold dispute resolution procedures, arbitration [77] is only one among several forms of binding dispute resolution. Other prominent (out-of-court) forms of binding dispute resolution include "adjudication" and "dispute boards" as well as expert determination.

Adjudication and dispute boards are mainly used in the field of construction law and aimed at quick and pragmatic preliminary solutions to a dispute (e.g. about a change of the scope of works) in parallel to ongoing projects, in order to prevent and mitigate damages ("work/pay now, argue later"). Adjudications and dispute board procedures are usually followed by arbitration or litigation procedures.[78] These concepts seem of limited use for tax treaty disputes which are normally not subject to the same time constraints.

Expert determination is a procedure in which the parties to a dispute submit a discrete issue or question to an expert, promising to each other that they will accept the response of the expert as binding. The issue or question submitted is usually only a part of the dispute, which the parties consider crucial for finding an agreement. Expert determination often relates to a disagreement on technical or factual issues and requires specific technical or economical expertise. Expert determination has to be **distinguished from expert evaluation** (sometimes also called neutral evaluation) the outcome of which is not binding on the parties. Expert evaluation serves an advisory function, either to the parties directly, or to a neutral third (arbitration panel, court or mediator) who moderates the proceedings. A form of arbitration that is essentially very similar to expert determination is applied in **gas pricing disputes**. Gas supply contracts usually contain a price formula which can be adapted in accordance with changed market conditions, either through a contractually-sanctioned renegotiation or by the binding decision of an arbitrator. In gas pricing disputes, the arbitrator is either an expert of the gas pricing market or heavily dependent on expert witnesses having knowledge of this market.[79] The dependence on economic expertise makes gas pricing arbitrations somewhat similar to transfer pricing disputes.

Binding expert determination, as well as non-binding expert evaluation, could be useful in helping to resolve MAP cases which are stalled, either due to diverging positions of the competent authorities (e.g. considered "matters of principle") or because the competent authorities lack technical or economical expertise to reach an informed assessment of facts

[77] The term arbitration refers to a multitude of different models whose common denominator is that the parties submit their dispute to an independent third person, panel or institution requiring them to render a decision which becomes binding upon them. Institutional forms of arbitration also allow for fast-track procedures or preliminary and conservatory measures (see e.g. the Fast-Track-Arbitration of the Stockholm Chamber of Commerce, or the possibility of an "Emergency Arbitrator" or the so-called pre-arbitral referee-procedure of the International Chamber of Commerce.

[78] See for example Article 20 of the famous FIDIC Rules, extensively commented in "The Working of the Dispute Adjudication Board (DAB)", available at http://fidic.org/sites/default/files/11%20DAB.pdf.

[79] See Dean Mark Levy, "Gas Price Arbitrations: A Practical Handbook", London 2013; for a practical insight summarizing the experiences of the Stockholm Chamber of Commerce with gas pricing disputes, see http://www.sccinstitute.com/media/30005/magnusson_gasdisputes_thescc_experience.pdf

(e.g. arms-length-prices). Independent external expertise could for instance be useful in disputes concerning transfer pricing or the existence of permanent establishments.

If the outcome of an expertise is binding upon the parties, negotiators of competent authorities may find it easier to compromise on any remaining issues, settle the dispute and justify the mutual agreement reached on the basis on the expert's findings vis-à-vis their governments. Even in cases where the parties, in spite of the expert's findings, reach no mutual agreement, the expertise may contribute to the resolution of the dispute, by narrowing the issues in dispute and providing valuable input for the decision-making process of a panel of arbitrators.

Issues that could be considered by the UN Committee of Tax Experts with regard to expert determination and evaluation procedures include:

(i) how competent, independent and impartial experts can be identified and selected by the parties;
(ii) what kind of procedural mechanisms should be agreed between the Contracting States or the competent authorities in order to ensure an unbiased selection process and an impartial and objective conduct of expert operations;
(iii) how such procedural mechanisms could be reflected in the UN Model, its Commentary or any other form of guidance;
(iv) what could be done to support capacity building and training measures for UN member state administrations having little or no experience with such procedures;
(v) what can be done to draw up and continuously update a list of pre-vetted independent experts;
(vi) what measures, including training and educational measures, could be taken in order to build and enlarge a pool of experts having a diversity of backgrounds and particular understanding for the concerns of both resident and source countries;
(vii) whether any sort of institutional framework could assist in undertaking the above-mentioned measures and reaching the above-mentioned objectives.

3. Identifying and Addressing the Concerns of Developing Countries

This section summarizes the extensive discussion of these concerns, which were put forward in the Secretariat's note for the October 2015 meeting of the UN Tax Committee.[80]

[80] For a more detailed analysis, see: UN Secretariat Paper on Alternative Dispute Resolution in Taxation.

3.1. Sovereignty[81]

3.1.1. Introduction

An issue often stressed by countries and their representatives with regards to binding alternative dispute resolution and in particular arbitration is national sovereignty. Generally speaking, countries are sovereign to tax. By signing double tax treaties with other countries they have decided to allocate taxing rights between countries in cross- border cases in accordance with these treaties. Countries have, thus, in a sovereign act decided to give up parts of their rights to tax. They thereby seek to encourage cross-border trade and investment, but also to ensure the collection of tax revenue where the profit is created.

When disputes arise, some countries may be reluctant to leave the decision to an independent panel, because: Firstly, they fear a situation in which they cannot question the outcome of a decision from an independent tribunal. Secondly some governments have raised the concern that there might be constitutional barriers in their jurisdiction. Thirdly, others have argued that they would have to treat all taxpayers equal and if they were to allow for mechanisms like arbitration in their treaties, they would also have to do so domestically.

3.1.2. Unconstitutionality

Some countries fear constitutional constraints may prevent them from implementing arbitration. Such constitutionality concerns could be based on the argument that the rule of law does not allow for arbitration because it requires a clear separation of powers, where only domestic courts function as the interpreter of the law,[82] although others have argued that an international arbitral tribunal can equally be bound to apply and strictly abide by the law, thereby giving full effect to the treaty embodying the common will of the parties.[83] Only an "international" procedure is able to secure the effectiveness of the treaty and ensure that an individual case is decided pursuant to a consistent and uniform interpretation thereof.

Another issue might be that a civil servant of a state may not be in a position to act on a decision of an arbitral tribunal as opposed to a local court or tribunal. This, however, must be conciliated with the duty of the governments of Contracting States to ensure the effectiveness and good-faith-application of the treaty in accordance with customary international law.[84] Enhanced enforcement mechanisms could be considered, including a treaty-sanctioned rule that the decision of an arbitral panel should be equivalent in effect to a domestic court judgement of last instance.

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[81] For a more detailed analysis, see: UN Secretariat Paper on Alternative Dispute Resolution in Taxation, m.no. 49-74.

[82] *Pistone/Dourado*, "Some Critical Thought on the Introduction of Arbitration in Tax Treaties", *Intertax*, 42/3, 2014, p.158.

[83] Ibid.

[84] See article 26 and 27 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith. … A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

3.1.3. Undesired Side Effects

Some countries have argued that even though arbitration clauses are not unconstitutional, they might entail unsurmountable complications because of their knock-on effects. In this regard the fear has been expressed that if allowing for alternative dispute resolution or arbitration in tax treaties, States would have to grant a similar mechanism to citizens in purely domestic cases.

Such an equal treatment requirement may become an issue insofar as it implies that all domestic cases would have to become eligible for arbitration as well. In practice, this seems unlikely, as traditional non-discrimination principles which exist in a multitude of legal orders are commonly considered to mandate equal treatment only for persons when these are in the same (or similar) circumstances. In many instances, tax laws in different jurisdictions have confirmed that purely domestic situations with no cross-border element (e.g. resident taxpayers) and international situations (e.g. non-resident taxpayers) can reasonably be distinguished from each other and do not have to be treated on the same footing. The same should normally be true as far as international tax treaty disputes are concerned.

3.2. Costs and Lack of Resources

Developing countries have legitimate concerns over their lack of resources to engage in MAP and MDS. They lack officials who are skilled in the negotiation of disputes: in many developing countries the competent authority is limited to one official who has to deal with all aspects of the implementation of tax treaties. Also these countries have concerns over the financial costs associated with bilateral negotiations of MAP and engaging outside expert counsel. The Secretariat Paper on Alternative Dispute Resolution in Taxation as well as the notes prepared for the first meeting of the Subcommittee in June set out a number of suggestions on how these concerns could be alleviated.[85] For details, see section 4.

3.3. Selection of Arbitrators, Qualifications and the Even- Handedness of Arbitration

One of the main concerns raised with regards to arbitration is that there is only a small pool of arbitrators available. Developing countries claim that most arbitrators in this already limited pool mainly come from developed countries and tend to have a better understanding of those countries' perspectives.

Some claim that those arbitrators may be unconciously biased towards developed countries. The issue is not so much that arbitrators from developed countries do not have sufficient knowledge on taxation in developing countries, but there is more a concern that these arbitrators might not be so familiar with the challenges competent authorities might face in developing countries. In order to assure that this is not the case, it is important to carefully select the arbitrators to the proceedings. Under current tax treaties the usual approach is that both competent authorities get to choose one arbitrator, who then together choose a third

[85] See Note on the New Institutional Framework for Mandatory Dispute Resolution; UN Secretariat Paper on Alternative Dispute Resolution in Taxation, m.no. 75-98.

arbitrator, who will function as the chair to the panel. Consequently, decisions are taken by majority vote.

Arbitrators can also be expensive and may have very similar profiles. One solution is to train more tax specialists from developing countries in arbitration and thereby broaden the pool and diversity of arbitrators. The UN as part of its capacity building program could undertake such actions. Additionally the UN could provide a list of possible arbitrators in accordance with their specialties and assist countries in assigning an arbitrator. This is currently done by many arbitral institutions.[86]

Nevertheless, whatever approach is adopted, it is essential to ensure the overall impartiality of the arbitrators. There is the perception that professional arbitrators may be interested in being reappointed which could influence their decision. The selection of arbitrators could be conducted in accordance with guidelines like the IBA Guidelines on Conflict of Interest[87]. These have proven to work effectively and are illustrative and thus easy to understand and apply. Additionally, they have been designed to generally apply to arbitration and not to one specific type of arbitration.[88] Thereby they are easily accessible for the tax world. As a result, greater independence can be ensured. The UN Tax Committee could build on this experience.

Another valuable experience can be drawn from the WTO, whose secretariat provides any of the member countries with assistance with regards to dispute resolution upon their request. Moreover, developing countries can ask for special assistance and will be supported in technical issues, but also legal inquiries.[89] The UN would be an appropriate platform for such support as it is the most diverse body with great representative capacity.

3.4. Transparency vs Confidentiality[90]

One of the main problems that arises when one attempts to argue for or against mandatory dispute settlement is the lack of data, which makes it almost impossible to estimate its effectiveness and, most importantly, to build confidence in the system. However, this need for openness has to be balanced against the need for the confidentiality of sensitive data for governments and businesses.

Since the outcomes of the MAP itself are confidential and international tax arbitration takes place in the MAP envelope, the decisions are also confidential. Under both the UN and the

[86] See, for example, the UN (http://www.un.org/depts/los/settlement_of_disputes/conciliators_arbitrators.htm) or the American Bar Association (https://www.adr.org/aaa/faces/arbitratorsmediators/arbitratormediatorselection?_afrLoop=975377817868414&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D975377817868414%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18v1qtq6mz_4).

[87] Can be retrieved from http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[88] http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf p.29.

[89] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm.

[90] For a more detailed analysis, see: UN Secretariat Paper on Alternative Dispute Resolution in Taxation, m.no. 120-134.

OECD Sample Mutual Agreements, the decision may not be made public without the consent of both competent authorities as well as the taxpayer. The UN Sample Mutual Agreement states that:

"11. […] a)[…] With the permission of the person who presented the case and both competent authorities, the decision of the arbitral panel will be made public in redacted form without mentioning the names of the parties involved or any details that might disclose their identity and with the understanding that the decision has no formal precedential value."

This emphasis on confidentiality over transparency is reflected in the Arbitration Board Operating Guidelines for several US tax treaties.

The need for confidentiality is meant to protect trade secrets, as well as allow the competent authorities more flexibility in achieving a compromise. The confidentiality does, however, have several downsides. Politicians and the public may be reluctant to endorse an approach under which decisions involving significant revenue flows emerge from what they perceive to be a "black box". The argument has been put forth that a publication of redacted decisions would protect the interests of the parties to the dispute and the taxpayer, while at the same time allowing greater transparency and thus promoting consistency and confidence in the process and allowing a more informed assessment of the weaknesses and merits of individual cases, and a more informed debate surrounding tax arbitration in general. Increased transparency would also be in line with current developments in the field of investment arbitration, where UNCITRAL has recently published its Rules on Transparency in Treaty-based Investor-State Arbitration.[91]

Some commentators have suggested that certain key details of decisions could be considered for publication, while at the same time respecting the need for confidentiality:[92]

1. the name of the parties and competent authorities involved
2. the date on which the case started and terminated
3. the relevant articles under the treaty
4. the transfer pricing method used where appropriate
5. the total costs of the case.

Others have argued that increased transparency could change the nature of the dialogue between competent authorities and may lead to a reluctance to enter into MAP.

3.5. Other measures to build confidence in the integrity and fairness of binding resolution mechanisms

The discussions at the Tax Committee meeting in Geneva in October 2015 showed that many developing and developed countries have concerns about the integrity and fairness of the existing procedures for binding arbitration, particularly under BITs. The NIF note discussed by the Subcommittee group in June 2016 attempted to address these issues by setting out a series of actions that countries could take either individually or collectively.

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91 See: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

92 See Note on the New Institutional Framework for Mandatory Dispute Resolution.

Overall, the key is to put in a process which ensures that those countries that wish to engage in arbitration can do so by a gradual process which would help them familiarize themselves with the procedures and build up expertise. Further details of these proposals can be found in the New Institutional Framework Note.

4. Potential Areas for Future Work

As noted in the introduction, the UN Tax Committee will need to proceed carefully in this debate. The aim should be to familiarize countries with both the legal and practical issues which would arise if they choose to gradually move towards some form of MDS. This concluding section identifies some areas and issues which the Committee may wish to pursue. The suggestions could be further examined by the Subcommittee on MAP, Dispute Avoidance and Resolution, with the full Tax Committee providing guidance in terms of priorities and what is politically feasible. The suggestions are grouped in short, medium and longer term proposals.

4.1. Proposals that could be examined in the Short Term

Providing guidance on the following issues:

1. **Examining how** throughout the MDS process the competent authorities can have the **flexibility** to find solutions as well as **options for terminating the procedure** by mutual agreement. These options may include non-binding dispute resolution procedures, as reflected in the note to the Subcommittee.[93]
2. Exploring the possibility of using **limited MFN clauses**.
3. Suggesting a **different selection procedure for arbitrators**, for instance **establishing lists** of eligible persons from each country, as well as diverse cultural backgrounds and occupations (lawyers, economists, judges). These lists should be published on the UN website.
4. Exploring ways in which the **cost of MDS for developing countries could be reduced**, such as:
    - setting a **cap on the costs**, limiting the number of pages of any submissions and setting strict deadlines for their submission
    - Establishing a **"de minimis" rule** under which cases involving tax claims below a certain threshold would not be eligible for MAP[94]
    - Agreeing on **the grouping of cases** which raise similar issues – the Model Commentary could provide examples for such clauses.
    - Using a **short-form dispute resolution procedure** for cases involving articles 4, 5 7 and 9 which the authorities would agree to in advance for every dispute

[93] See the note on "Mediation and Other Forms of Non-Binding Dispute Resolution" prepared for the Subcommittee.

[94] Such a rule is already suggested in the UN Sample Mutual Agreement on Arbitration, but the wording should be provided.

- Exploring how **new communication technologies** could speed up the process and lower costs, e.g. replacing face-to-face meetings with video conferences

5. Encouraging countries to **make available their dispute statistics** in order to achieve a better understanding of the dispute resolution process.

4.2. Proposals that could be examined in the Medium Term

1. **Adapting the Sample Mutual Agreement on Arbitration** to the current needs of developing countries, e.g. providing more detailed procedural rules implementing the cost-cutting suggestions etc.
2. Putting in place **capacity building programs** for officials from developing countries by, for example, insisting that arbitrators would be " shadowed " by these officials and thereby gain on the job experience
3. Seeking **funds to assist low income countries** to meet part of the cost of dispute resolution, along the lines of the approach adopted by the International Criminal Court, the WTO and others.

4.3. Proposals that could be examined in the Longer Term

1. Using the selection criteria for arbitrators to **set up a standing panel** of arbitrators which would be balanced in terms of geographical spread, personal background and experience.
2. **Improving the transparency of MAP and binding dispute settlement** by publishing summary details of cases (see section 3.4.). Transparency would have to be balanced against the need to maintain the confidentiality of the taxpayer affairs.
3. **Changes to the UN Model:** if, after exploring the advantages and disadvantages of such mechanisms, the Tax Committee considers they may prove useful, it could **consider changes to Article 25** to implement the dispute resolution mechanisms that have found the approval of developing countries. Such mechanisms could include: a **limited MFN clause**, a **mediation clause** in Article 25 Alternative A, **changes to** the **arbitration clause** in Article 25 Alternative B.
4. Developing a **new institutional framework** under the auspices of the UN Tax Committee to develop a procedural framework for using mandatory dispute settlement by those countries that wish to move in the direction.

Annex 5

Changes to the OECD Model Tax Convention Resulting from the BEPS Report on Action 14

This note includes all the changes to the OECD Model Tax Convention resulting from the BEPS Report on Action 14. It includes the changes that were included in the Report itself as well as the changes that were subsequently drafted by the OECD as part of the follow-up work on the Report.

Although these changes have not yet been formally approved by the OECD, they are presented to the Committee of Experts on International Cooperation in Tax Matters because a number of these changes affect parts of the OECD Model that are similar or identical to what is included in the UN Model.

While the UN Subcommittee on Dispute Resolution agreed that these changes should be presented to the UN Committee for discussion at its October 2016 meeting, it did not discuss any of these changes and does not, therefore, make any recommendation as to whether these changes, or similar changes, should also be made to the UN Model, which is matter to be discussed at the October 2016 meeting of the UN Committee.

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CHANGES TO THE OECD MODEL TAX CONVENTION RESULTING FROM THE BEPS REPORT ON ACTION 14

Introduction

1. A number of the elements of the minimum standard and best practices contained in the Report on BEPS Action 14 (Making dispute resolution mechanisms more effective) ('the Report") of the BEPS Action Plan were accompanied by changes to the OECD Model Tax Convention. As indicated in paragraph 5 of that Report, additional changes to the OECD Model needed to be adopted subsequently in order to reflect fully the conclusions of the Report.

2. This note includes both the changes that appeared in the Report and the changes that were subsequently drafted by the OECD as part of the follow-up work on the Report. The Members of the Committee should note that Art. 25(5) of the OECD Model Tax Convention and its Commentary (which deal with arbitration) will need to be amended to reflect the work done on Part VI (Arbitration) of the multilateral instrument that will implement the treaty changes recommended as a result of the BEPS project. Since Part VI of that multilateral instrument will only be finalised at the end of 2016, work on incorporating the provisions of Part VI into the OECD Model Tax Convention will only be done after the finalisation of that instrument.

3. The following sections include the changes to be made to the OECD Model in the order of the various elements of the minimum standard and best practices included in the Report. Each section reproduces the relevant minimum standard/best practice, the description of the changes to be made that was provided in the Report, the changes to be made to the OECD Model and the relevant parts of the UN Model.

A. Changes with respect to minimum standard 1.1

i) Relevant part of the Report on BEPS Action 14

4. Minimum standard 1.1 reads as follows:

> ***1.1 Countries should include paragraphs 1 through 3 of Article 25 in their tax treaties, as interpreted in the Commentary and subject to the variations in these paragraphs provided for under elements 3.1 and 3.3 of the minimum standard; they should provide access to MAP in transfer pricing cases and should implement the resulting mutual agreements (e.g. by making appropriate adjustments to the tax assessed).***

5. Paragraph 12 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Article 25 of the OECD Model Tax Convention as part of the next update of the OECD Model Tax Convention in order to clarify the treaty

obligation to undertake to resolve by mutual agreement cases of taxation not in accordance with the Convention."

ii) Changes to be made to the OECD Model

6. The following change to the Commentary on Article 25 was adopted as a result of the follow-up work on the Report:

Add the following paragraph 5.1 to the Commentary on Article 25:

5.1 The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority "shall endeavour" to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties.

iii) Relevant part of the UN Model

7. Paragraph 5.1 of the OECD Model is a new addition to the OECD Model resulting from the work on BEPS Action 14 and there is currently nothing equivalent in the UN Model.

B. Changes with respect to minimum standard 1.2

i) Relevant part of the Report on BEPS Action 14

8. Minimum standard 1.2 reads as follows:

1.2 Countries should provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

9. Paragraph 17 of the Report indicated that "[i]t is intended to make amendments to the Commentary on Article 25 as part of the next update of the OECD Model Tax Convention in order to clarify the circumstances in which a Contracting State may deny access to the mutual agreement procedure."

ii) Changes to be made to the OECD Model

10. The following change to the Commentary on Article 25 was adopted as a result of the follow-up work on the Report:

Replace paragraph 26 of the Commentary on Article 25 by the following:

> 26. Some States may deny the taxpayer the ability to initiate the mutual agreement procedure under paragraph 1 of Article 25 in cases where the transactions to which the request relates are regarded as abusive. This issue is closely related to the issue of "improper use of the Convention" discussed in paragraph 9.1 and the following paragraphs of the Commentary on Article 1. In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure, however. The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure ~~should~~ ***must*** be made clear in the Convention.

iii) Relevant part of the UN Model

11. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraph 26 of the OECD Model, together with its footnote, and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 26. Some States may deny the taxpayer the ability to initiate the mutual agreement procedure under paragraph 1 of Article 25 in cases where the transactions to which the request relates are regarded as abusive. This issue is closely related to the issue of "improper use of the Convention" discussed [in paragraph 8 and the following paragraphs of the Commentary on Article 1 of the United Nations Model Convention]. In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure, however. The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement. However, where serious violations of domestic laws resulting in significant penalties are involved, some States may wish to deny access to the mutual agreement procedure. The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention.[48]
>
> _____
>
> *[Footnote 48]* See also paragraph 2 above concerning the access to the mutual agreement procedure where a convention includes paragraph 3 of Article 9 of the United Nations Model Convention [this footnote is not part of the quoted OECD paragraph].

C. Changes with respect to minimum standard 1.7

i) Relevant part of the Report on BEPS Action 14

12. Minimum standard 1.7 reads as follows:

1.7 Countries should provide transparency with respect to their positions on MAP arbitration.

13. Paragraph 23 of the Report indicated that:

In order to provide transparency with respect to country positions on MAP arbitration, the footnote to paragraph 5 of Article 25 will be deleted and paragraph 65 of the Commentary on Article 25 will be appropriately amended when the OECD Model Tax Convention is next updated. Consequential changes to the Commentary on Article 25 would also be made at the same time as these amendments. These changes to the Commentary on Article 25 will include in particular suitable alternative provisions for those countries that prefer to limit the scope of MAP arbitration to an appropriately defined subset of MAP cases.

ii) Changes to be made to the OECD Model

14. The following change to Article 25 was adopted as a result of the follow-up work on the Report:[95]

Replace paragraph 5 of Article 25 by the following:

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.[1]

~~1 In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition,~~

95. As noted in the introduction, other changes to Art. 25(5) and its Commentary will likely be made as a result of the work on Part VI of the Multilateral Instrument.

~~some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 65 of the Commentary on the paragraph. As mentioned in paragraph 74 of that Commentary, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals.~~

15. The following consequential changes to the Commentary on Article 25 were also adopted:

Replace paragraphs 65 and 66 of the Commentary on Article 25 as follows:

65. ***Before [year of next update] a footnote to paragraph 5 indicated*** ~~It is recognised, however,~~ that in some States, national law, policy or administrative considerations may not allow or justify the type of arbitration process provided for in the paragraph ***and gave the*** ~~. For~~ example~~, there may be~~ ***of*** constitutional barriers preventing arbitrators from deciding tax issues. ~~In addition, some countries may only be in a position to include this paragraph in treaties with particular States. For these reasons, the paragraph should only be included in the Convention where each State concludes that the process is capable of effective implementation.~~ ***The footnote was deleted, however, in recognition of the importance of including an arbitration mechanism that ensures the resolution of disputes between the competent authorities where these disputes would otherwise prevent the mutual agreement procedure from playing its role.***

66. ~~In addition, s~~***S***ome States may wish to include paragraph 5 but limit its application to a more restricted range of cases. For example, access to arbitration could be restricted to cases involving issues which are primarily factual in nature. It could also be possible to provide that arbitration would always be available for issues arising in certain classes of cases, for example, highly factual cases such as those related to transfer pricing or the question of the existence of a permanent establishment, whilst extending arbitration to other issues on a case-by-case basis.

iii) Relevant part of the UN Model

16. Since Alternative A of Article 25 of the UN Model does not include a MAP arbitration provision, the footnote to Article 25 of the OECD Model and the related Commentary are not relevant for the UN Model.

D. Changes with respect to minimum standard 2.6

i) Relevant part of the Report on BEPS Action 14

17. Minimum standard 2.6 reads as follows:

2.6 Countries should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If countries have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, countries may limit access to the MAP with respect to the matters resolved through that process. Countries should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

18. Paragraph 32 of the Report indicated that:

It is expected that the issue of MAP access for cases in which there has been an audit settlement will be addressed in amendments to the Commentary on Article 25 when the OECD Model Tax Convention is next updated. These amendments would address in particular the policy considerations that support the provision of MAP access in such cases, notably the double taxation that may result where a taxpayer is required to give up the right to have questions related to the interpretation and application of a treaty resolved bilaterally through the mutual agreement procedure.

ii) Changes to be made to the OECD Model

19. The following change to the Commentary on Article 25 was adopted as a result of the follow-up work on the Report:

Add the following paragraph 45.1 to the Commentary on Article 25:

45.1 In some States, audit settlements may be used as a mechanism to promote the closing of audit files. As the word "settlement" implies, there are usually concessions made by both the taxpayer and the tax administration involved, which may create difficult issues where an audit involves questions related to the interpretation or application of a tax treaty which could potentially be resolved through the mutual agreement procedure. One concession tax administrations sometimes seek is a limit on further recourse by the taxpayer, which in some cases may include an agreement by the taxpayer not to initiate the mutual agreement procedure with respect to issues covered by the audit settlement. Double taxation can often be a consequence of such arrangements, which preclude the competent authorities from reaching a bilateral resolution through the mutual agreement procedure, and may indeed cause the other Contracting State to deny relief under its domestic law for the tax paid to the first Contracting State upon settlement of the audit. A taxpayer should thus not be required, as part of an audit settlement, to give up the right provided by paragraph 1 of Article 25 to present its case to a competent authority since this may impede the proper application of a tax treaty. For the purposes of this paragraph, however, an "audit settlement" does not include the settlement of a treaty dispute that is the result of an administrative or statutory dispute settlement/resolution process that is independent from the audit and examination functions and that can only be accessed through a request by the

taxpayer. Countries should inform their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

iii) Relevant part of the UN Model

20. Paragraph 45.1 of the Commentary on Article 25 of the OECD Model is a new addition to the OECD Model resulting from the work on BEPS Action 14 and there is currently nothing equivalent in the UN Model.

E. Changes with respect to minimum standard 3.1

i) Relevant part of the Report on BEPS Action 14

1. Minimum standard 3.1 reads as follows:

3.1 Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected. In order to achieve this, countries should either:

- ***amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the competent authority of either Contracting State, or***
- ***where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).***

ii) Changes to be made to the OECD Model

2. The following changes to paragraph 1 of Article 25 and the Commentary on Article 25 were included in the Report with respect to that minimum standard (see paragraph 36 of the Report):

Replace paragraph 1 of Article 25 by the following:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of ***either*** ~~the~~ Contracting State ~~of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national~~. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

Replace paragraph 7 of the Commentary on Article 25 by the following:

7. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. When taxation not in accordance with the Convention arises from an incorrect application of the Convention in both States, taxpayers are then obliged to litigate in each State, with all the disadvantages and uncertainties that such a situation entails. So paragraph 1 makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure which is called the mutual agreement procedure because it is aimed, in its second stage, at resolving the dispute on an agreed basis, *i.e.* by agreement between competent authorities, the first stage being conducted exclusively ***in one of the Contracting States***~~the State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national)~~ from the presentation of the objection up to the decision taken regarding it by the competent authority on the matter.

Replace paragraphs 16 to 19 of the Commentary on Article 25 by the following:

16. To be admissible objections presented under paragraph 1 must first meet a twofold requirement expressly formulated in that paragraph: ~~in principle,~~ they must be presented to the competent authority of ***either Contracting State***~~the taxpayer's State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national)~~, and they must be so presented within three years of the first notification of the action which gives rise to taxation which is not in accordance with the Convention. The Convention does not lay down any special rule as to the form of the objections. The competent authorities may prescribe special procedures which they feel to be appropriate. If no special procedure has been specified, the objections may be presented in the same way as objections regarding taxes are presented to the tax authorities of the State concerned.

17. The ~~requirement laid on~~***option provided to*** the taxpayer to present his case to the competent authority of ***either Contracting***~~the~~ State ***is intended to reinforce the general principle that access to the mutual agreement procedure should be as widely available as possible and to provide flexibility. This option is also intended to ensure that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure (i.e. be discussed by the competent authorities of both Contracting States) is open to consideration by both competent authorities. Paragraph 1 permits a person to present his case to the competent authority of either Contracting State; it does not preclude a person from presenting his case to the competent authorities of both Contracting States at the same time (see paragraph 75 below). Where a person presents his case to the competent authorities of both Contracting States, he should appropriately inform both competent authorities, in order to facilitate a co-ordinated approach to the case.***~~of which he is a resident (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) is of general application, regardless of whether the taxation objected to has been charged in that the other State and regardless of whether it has given rise to double taxation or not. If the taxpayer should have transferred his residence to the other Contracting State subsequently to the~~

~~measure or taxation objected to, he must nevertheless still present his objection to the competent authority of the State in which he was a resident during the year in respect of which such taxation has been or is going to be charged.~~

18. ~~However, in the case already alluded to where a person who is a national of one State but a resident of the other complains of having been subjected in that other State to an action or taxation which is discriminatory under paragraph 1 of Article 24, it appears more appropriate for obvious reasons to allow him, by way of exception to the general rule set forth above, to present his objection to the competent authority of the Contracting State of which he is a national. Finally, it is to the same competent authority that an objection has to be presented by a person who, while not being a resident of a Contracting State, is a national of a Contracting State, and whose case comes under paragraph 1 of Article 24.~~

~~19.~~ On the other hand, Contracting States may~~, if they~~ consider ~~it preferable, give~~***that*** taxpayers ***should not have*** the option of presenting their cases to the competent authority of either State***, but should, in the first instance, be required to present their cases to the competent authority of the State of which they are resident. However, where a person who is a national of one State but a resident of the other complains of having been subjected in that other State to taxation (or any requirement connected therewith) which is discriminatory under paragraph 1 of Article 24, it appears more appropriate for obvious reasons to allow him, by way of exception to the alternative rule which obliges the taxpayer to present his case to the competent authority of his State of residence, to present his objection to the competent authority of the Contracting State of which he is a national. Similarly, it appears more appropriate that***~~Finally,~~ it ~~is~~***would be*** to the same competent authority that an objection ~~has to~~***should*** be presented by a person who, while not being a resident of a Contracting State, is a national of a Contracting State, and whose case comes under paragraph 1 of Article 24. ***To accommodate the alternative rule and the exception for cases coming under paragraph 1 of Article 24***, paragraph 1 would have to be modified as follows:

> 1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of ~~either~~***the*** Contracting State ***of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national***. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

Contracting States that prefer this alternative rule should take appropriate measures to ensure broad access to the mutual agreement procedure and that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure is appropriately considered by both competent authorities.

19. It may be noted that if the taxpayer becomes a resident of the other Contracting State subsequently to the taxation he considers not in accordance with the Convention, he must, under the alternative rule in paragraph 18 above, nevertheless still present his objection to the competent authority of the State of which he was a

resident during the period in respect of which such taxation has been or will be charged.

Replace paragraphs 31 to 35 of the Commentary on Article 25 by the following:

31. In the first stage, which opens with the presentation of the taxpayer's objections, the procedure takes place exclusively at the level of dealings between him and the competent authorities of ~~his~~ ***the*** State ***to which the case was presented*** ~~of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national)~~. The provisions of paragraph 1 give the taxpayer concerned the right to apply to the competent authority of ~~the~~***either*** State ~~of which he is a resident~~, whether or not he has exhausted all the remedies available to him under the domestic law of each of the two States. On the other hand, the competent authority is under an obligation to consider whether the objection is justified and, if it appears to be justified, take action on it in one of the two forms provided for in paragraph 2.

31.1 The determination whether the objection "appears … to be justified" requires the competent authority to which the case was presented to make a preliminary assessment of the taxpayer's objection in order to determine whether the taxation in both Contracting States is consistent with the terms of the Convention. It is appropriate to consider that the objection is justified where there is, or it is reasonable to believe that there will be, in either of the Contracting States, taxation not in accordance with the Convention.

32. If the competent authority duly approached recognises that the complaint is justified and considers that the taxation complained of is due wholly or in part to a measure taken in ***that*** ~~the taxpayer's~~State ~~of residence~~, it must give the complainant satisfaction as speedily as possible by making such adjustments or allowing such reliefs as appear to be justified. In this situation, the issue can be resolved without ***moving beyond the first (unilateral) stage of***~~resort to~~ the mutual agreement procedure. On the other hand, it may be found useful to exchange views and information with the competent authority of the other Contracting State, in order, for example, to confirm a given interpretation of the Convention.

33. If, however, it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other State, it will be incumbent on it, indeed, it will be its duty – as clearly appears by the terms of paragraph 2 – to set in motion the ***second (bilateral) stage of the*** mutual agreement procedure ~~proper~~. It is important that the ***competent*** authority in question carry out this duty as quickly as possible, especially in cases where the profits of associated enterprises have been adjusted as a result of transfer pricing adjustments.

34. A taxpayer is entitled to present his case under paragraph 1 to the competent authority of ***either*** ~~the~~ State ~~of which he is a resident~~ whether or not he may also have made a claim or commenced litigation under the domestic law of ***one (or both) of the*** ~~that~~ State***s***. If litigation is pending ***in the State to which the claim is presented***, the competent authority of ***that*** ~~the~~ State ~~of residence~~ should not wait for the final

adjudication, but should say whether it considers the case to be eligible for the mutual agreement procedure. If it so decides, it has to determine whether it is itself able to arrive at a satisfactory solution or whether the case has to be submitted to the competent authority of the other Contracting State. An application by a taxpayer to set the mutual agreement procedure in motion should not be rejected without good reason.

35. If a claim has been finally adjudicated by a court in ***either*** ~~the~~ State ~~of residence~~, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.

iii) Relevant part of the UN Model

21. Paragraph 1 of both Alternatives A and B of Article 25 of the UN Model currently reads as follows:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

22. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraphs 7, 16 to 19 and 31 to 35 of the Commentary on Article 25 of the OECD Model and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

7. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. When taxation not in accordance with the Convention arises from an incorrect application of the Convention in both States, taxpayers are then obliged to litigate in each State, with all the disadvantages and uncertainties that such a situation entails. So paragraph 1 makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure which is called the mutual agreement procedure because it is aimed, in its second stage, at resolving the dispute on an agreed basis, *i.e.* by agreement between competent authorities, the first stage being conducted exclusively in the State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a

national) from the presentation of the objection up to the decision taken regarding it by the competent authority on the matter.

…

16. To be admissible objections presented under paragraph 1 must first meet a twofold requirement expressly formulated in that paragraph: in principle, they must be presented to the competent authority of the taxpayer's State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national), and they must be so presented within three years of the first notification of the action which gives rise to taxation which is not in accordance with the Convention. The Convention does not lay down any special rule as to the form of the objections. The competent authorities may prescribe special procedures which they feel to be appropriate [paragraphs 22 ff. below, under the heading "Necessary cooperation of the person who makes the request", include a number of suggestions concerning such special procedures]. If no special procedure has been specified, the objections may be presented in the same way as objections regarding taxes are presented to the tax authorities of the State concerned.

17. The requirement laid on the taxpayer to present his case to the competent authority of the State of which he is a resident (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) is of general application, regardless of whether the taxation objected to has been charged in that or the other State and regardless of whether it has given rise to double taxation or not. If the taxpayer should have transferred his residence to the other Contracting State subsequently to the measure or taxation objected to, he must nevertheless still present his objection to the competent authority of the State of which he was a resident during the year in respect of which such taxation has been or is going to be charged.

18. However, in the case already alluded to where a person who is a national of one State but a resident of the other complains of having been subjected in that other State to an action or taxation which is discriminatory under paragraph 1 of Article 24, it appears more appropriate for obvious reasons to allow him, by way of exception to the general rule set forth above, to present his objection to the competent authority of the Contracting State of which he is a national. Finally, it is to the same competent authority that an objection has to be presented by a person who, while not being a resident of a Contracting State, is a national of a Contracting State, and whose case comes under paragraph 1 of Article 24.

19. On the other hand, Contracting States may, if they consider it preferable, give taxpayers the option of presenting their cases to the competent authority of either State. In such a case, paragraph 1 would have to be modified as follows:

> 1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the

first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

…

31. In the first stage, which opens with the presentation of the taxpayer's objections, the procedure takes place exclusively at the level of dealings between him and the competent authorities of his State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national). The provisions of paragraph 1 give the taxpayer concerned the right to apply to the competent authority of the State of which he is a resident, whether or not he has exhausted all the remedies available to him under the domestic law of each of the two States. On the other hand, that competent authority is under an obligation to consider whether the objection is justified and, if it appears to be justified, take action on it in one of the two forms provided for in paragraph 2.

32. If the competent authority duly approached recognises that the complaint is justified and considers that the taxation complained of is due wholly or in part to a measure taken in the taxpayer's State of residence, it must give the complainant satisfaction as speedily as possible by making such adjustments or allowing such reliefs as appear to be justified. In this situation, the issue can be resolved without resort to the mutual agreement procedure. On the other hand, it may be found useful to exchange views and information with the competent authority of the other Contracting State, in order, for example, to confirm a given interpretation of the Convention.

33. If, however, it appears to that competent authority that the taxation complained of is due wholly or in part to a measure taken in the other State, it will be incumbent on it, indeed it will be its duty— as clearly appears by the terms of paragraph 2—to set in motion the mutual agreement procedure proper. It is important that the authority in question carry out this duty as quickly as possible, especially in cases where the profits of associated enterprises have been adjusted as a result of transfer pricing adjustments.

34. A taxpayer is entitled to present his case under paragraph 1 to the competent authority of the State of which he is a resident whether or not he may also have made a claim or commenced litigation under the domestic law of that State. If litigation is pending, the competent authority of the State of residence should not wait for the final adjudication, but should say whether it considers the case to be eligible for the mutual agreement procedure. If it so decides, it has to determine whether it is itself able to arrive at a satisfactory solution or whether the case has to be submitted to the competent authority of the other Contracting State. An application by a taxpayer to set the mutual agreement procedure in motion should not be rejected without good reason.

35. If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.

F. Changes with respect to minimum standard 3.3

i) Relevant part of the Report on BEPS Action 14

3. Minimum standard 3.3 reads as follows:

> ***3.3 Countries should include in their tax treaties the second sentence of paragraph 2 of Article 25 ("Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States"). Countries that cannot include the second sentence of paragraph 2 of Article 25 in their tax treaties should be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.***

ii) Changes to be made to the OECD Model

23. The following changes to the Commentaries on Article 7 and Article 9 were included in the Report with respect to that minimum standard (see paragraph 40 of the Report):

Replace paragraph 62 of the Commentary on Article 7 by the following:

> 62. Like paragraph 2 of Article 9, paragraph 3 leaves open the question whether there should be a period of time after the expiration of which a State would not be obliged to make an appropriate adjustment to the profits attributable to a permanent establishment following an upward revision of these profits in the other State. Some States consider that the commitment should be open-ended — in other words, that however many years the State making the initial adjustment has gone back, the enterprise should in equity be assured of an appropriate adjustment in the other State. Other States consider that an open-ended commitment of this sort is unreasonable as a matter of practical administration. This problem has not been dealt with in the text of either paragraph 2 of Article 9 or paragraph 3 but Contracting States are left free in bilateral conventions to include, if they wish, provisions dealing with the length of time during which a State should be obliged to make an appropriate adjustment (see on this point paragraphs 39, 40 and 41 of the Commentary on Article 25). ***Contracting States may also wish to address this issue through a provision limiting the length of time during which an adjustment may be made pursuant to paragraph 2 of Article 7; such a solution avoids the double taxation that may otherwise result where there is no adjustment in the other State pursuant to paragraph 3 of Article 7 following the first State's adjustment pursuant to paragraph 2 of Article 7. Contracting States that wish to achieve that result may agree bilaterally to add the following paragraph after paragraph 4:***
>
> > ***5. A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after [bilaterally agreed period] from the end of the taxable year in which the profits would have been attributable to the permanent***

establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.

Replace paragraph 10 of the Commentary on Article 9 by the following:

10. The paragraph also leaves open the question whether there should be a period of time after the expiration of which State B would not be obliged to make an appropriate adjustment to the profits of enterprise Y following an upward revision of the profits of enterprise X in State A. Some States consider that State B's commitment should be open-ended — in other words, that however many years State A goes back to revise assessments, enterprise Y should in equity be assured of an appropriate adjustment in State B. Other States consider that an open-ended commitment of this sort is unreasonable as a matter of practical administration. In the circumstances, therefore, this problem has not been dealt with in the text of the Article; but Contracting States are left free in bilateral conventions to include, if they wish, provisions dealing with the length of time during which State B is to be under obligation to make an appropriate adjustment (see on this point paragraphs 39, 40 and 41 of the Commentary on Article 25). ***Contracting States may also wish to address this issue through a provision limiting the length of time during which a primary adjustment may be made pursuant to paragraph 1 of Article 9; such a solution avoids the economic double taxation that may otherwise result where there is no corresponding adjustment following the primary adjustment. Contracting States that wish to achieve that result may agree bilaterally to add the following paragraph after paragraph 2:***

3. A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after [bilaterally agreed period] from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.

iii) Relevant part of the UN Model

24. Since Article 7 of the UN Model does not include a provision equivalent to paragraph 3 of Article 7 of the OECD Model, the change to paragraph 62 of the Commentary on Article 7 of the OECD Model seems irrelevant for the UN Model.

25. Paragraph 7 of the Commentary on Article 9 of the UN Model (as recently modified by note E/C.18/2014/4) includes the following version of paragraph 10 of the Commentary on Article 9 of the OECD Model:

10. The paragraph also leaves open the question whether there should be a period of time after the expiration of which State B would not be obliged to make an appropriate adjustment to the profits of enterprise Y following an upward revision of the profits of enterprise X in State A. Some States consider that State B's commitment should be open-ended—in other words, that however many years State A goes back to revise assessments, enterprise Y should in equity be assured of an appropriate adjustment in State B. Other States consider that an open-ended commitment of this sort is

unreasonable as a matter of practical administration. In the circumstances, therefore, this problem has not been dealt with in the text of the Article; but Contracting States are left free in bilateral conventions to include, if they wish, provisions dealing with the length of time during which State B is to be under obligation to make an appropriate adjustment […].

G. Changes with respect to best practice 2

i) Relevant part of the Report on BEPS Action 14

26. Best practice 2 reads as follows:

2. Countries should have appropriate procedures in place to publish agreements reached pursuant to the authority provided by the first sentence of paragraph 3 of Article 25 "to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention" that affect the application of a treaty to all taxpayers or to a category of taxpayers (rather than to a specific taxpayer's MAP case) where such agreements provide guidance that would be useful to prevent future disputes and where the competent authorities agree that such publication is consistent with principles of sound tax administration.

27. Paragraph 45 of the Report indicated that "[i]t is intended to make amendments to the Commentary on Articles 3 and 25 of the OECD Model Tax Convention as part of the next update of the OECD Model Tax Convention in order to clarify the legal status of a mutual agreement entered into under Article 25(3)."

ii) Changes to be made to the OECD Model

28. The following changes to the Commentary on Article 25 were adopted as a result of the follow-up work on the Report:

Add the following paragraphs 6.1 to 6.3 to the Commentary on Article 25:

6.1 Through Article 25, the Contracting States have delegated to the competent authorities broad powers concerning the application and interpretation of the provisions of the Convention. Paragraph 2 authorises the competent authorities to resolve by mutual agreement cases presented by taxpayers in order to avoid taxation which could otherwise result from domestic laws but would not be in accordance with the Convention. Paragraph 3 similarly authorises the competent authorities to resolve by mutual agreement difficulties or doubts concerning the interpretation or application of the Convention, both in individual cases (e.g. with respect to a single taxpayer's case) and more generally (e.g. through the joint interpretation of a provision of the treaty applicable to a large number of taxpayers). Under paragraph 3, the competent authorities can, in particular, enter into a mutual agreement to define a term not defined in the Convention, or to complete or clarify the definition of a defined term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention. Such circumstances could

arise, for example, where a conflict in meaning under the domestic laws of the two States creates difficulties or leads to an unintended or absurd result. In order to ensure a proper resolution of such cases, an agreement reached under paragraph 3 concerning the meaning of a term used in the Convention should prevail over each State's domestic law meaning of that term.

6.2 Whilst the status under domestic law of a mutual agreement reached pursuant to Article 25 may vary between States, it is clear that the principles of international law for the interpretation of treaties, as embodied in Articles 31 and 32[1] of the Vienna Convention on the Law of Treaties, allow domestic courts to take account of such an agreement. The object of Article 25 is to promote, through consultation and mutual agreement between the competent authorities, the consistent treatment of individual cases and the same interpretation and/or application of the provisions of the Convention in both States. Article 25 also authorises the competent authorities to resolve, by mutual agreement, difficulties or doubts as to the interpretation or application of the Convention; such a mutual agreement, reached pursuant to the express mandate contained in paragraph 3 of the Article, represents objective evidence of the competent authorities' mutual understanding of the meaning of the Convention and its terms. For these reasons, an agreement reached by the competent authorities under Article 25 is a relevant consideration to take into account for purposes of the interpretation of the Convention.

[Footnote to paragraph 6.2]

1. Paragraph 3 of Article 31 of the Convention provides that

There shall be taken into account, together with the context

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

(c) any relevant rules of international law applicable in the relations between the parties.

Article 32 allows broad access to supplementary means of interpretation.

6.3 There are some cases, however, where the application of certain treaty provisions has been expressly delegated by the Contracting States to the competent authorities and the agreements reached by the competent authorities in these matters legally govern the application of these provisions. Subparagraph d) of paragraph 2 of Article 4, for example, provides that the competent authorities shall resolve by mutual agreement certain cases where an individual is a resident of both Contracting States under paragraph 1 of that Article. Some treaties similarly delegate to the competent authorities the power to determine jointly the status of various entities or arrangements for the purposes of certain treaty provisions (see, for example, subparagraph b) i) of the suggested provision in paragraph 6.21 of the Commentary on Article 1) or the power to supplement or modify lists of entities, arrangements or domestic law provisions referred to in these treaties.

iii) Relevant part of the UN Model

29. Paragraphs 6.1 to 6.3 of the Commentary on Article 25 of the OECD Model are new additions to the OECD Model resulting from the work on BEPS Action 14 and there is currently nothing equivalent in the UN Model.

H. Changes with respect to best practice 6

i) Relevant part of the Report on BEPS Action 14

30. Best practice 6 reads as follows:

> *6. Countries should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.*

31. Paragraph 50 of the Report indicated that "[w]hen the OECD Model Tax Convention is next updated, it is expected that amendments related to this best practice will be made to the Commentary on Article 25, in particular to expand on existing Commentary describing the policy considerations that support a suspension of collection procedures during the period a MAP case is pending."

ii) Changes to be made to the OECD Model

32. The following changes to the Commentary on Article 25 were adopted as a result of the follow-up work on the Report:

Replace paragraphs 47 and 48 of the Commentary on Article 25 by the following:

> 47. Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. [*the rest of the paragraph has been moved to new paragraph 47.1*]
>
> ***47.1 Unlike disputes that involve solely the application of a Contracting State's domestic law, the disputes that are addressed through the mutual agreement procedure will in most cases involve double taxation.*** States therefore should as far as possible take into account ~~the~~ cash flow ~~and possible double taxation~~ issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. [*the following three sentences are currently in paragraph 48 of the Commentary on Article 25*] ***Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer***

the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement that the taxpayer pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. ***States may wish to provide so expressly in the Convention by adding the following text to the end of paragraph 2:***

> ***The suspension of assessment and collection procedures during the period that any mutual agreement proceeding is pending shall be available under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.***

It also appears, as a minimum, that if the mutual agreement procedure is initiated prior to the taxpayer's being charged to tax (such as by an assessment), a payment should only be required once that charge to tax has occurred.

48. ***For the*** ~~There are several~~ reasons ***described in the preceding paragraph,*** ~~why~~ suspension of the collection of tax pending resolution of a mutual agreement procedure can be a desirable policy~~, although many States may require legislative changes for the purpose of its implementation~~. ***Moreover,*** ~~A~~***a***ny requirement to pay a tax assessment specifically as a condition of obtaining access to the mutual agreement procedure in order to get relief from that very tax would generally be inconsistent with the policy of making the mutual agreement procedure broadly available to resolve such disputes. [***the following three sentences have been moved to paragraph 47.1***] ~~Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. Finally, a~~***A***nother unfortunate complication ***of such a requirement*** may be delays in the resolution of cases if a country is less willing to enter into good faith mutual agreement procedure discussions when a probable result could be the refunding of taxes already collected. [***the rest of the paragraph has been moved to new paragraph 48.1***] ***In many States, the suspension of***

the assessment and/or collection of tax pending the resolution of a mutual agreement procedure may require legislative changes for the purpose of its implementation. States may also wish to provide expressly in the Convention for the suspension of assessment and collection procedures by adding the following text to the end of paragraph 2:

> ***Assessment and collection procedures shall be suspended during the period that any mutual agreement proceeding is pending.***

In connection with any suspension of collection of tax pending the resolution of a mutual agreement procedure, it is important to recall the availability of measures of conservancy pursuant to paragraph 4 of Article 27.

48.1 As there may be substantial differences in the domestic law assessment and collection procedures of the Contracting States, it may be important to verify, during the course of bilateral negotiations, how those procedures will operate in each State pending the resolution of a mutual agreement procedure, in order to address any obstacles such procedures may present to the effective implementation of the Article. For example, ~~W~~***w***here ***a*** State~~s~~ take***s*** the view that payment of outstanding tax is a precondition to the taxpayer initiated mutual agreement procedure, this should be notified to the treaty partner during negotiations on the terms of a Convention. Where both ***Contracting*** States ~~party to a Convention~~ take this view, there is a common understanding, but also the particular risk of the taxpayer's being required to pay an amount twice. Where domestic law ***(or a treaty provision such as that in the preceding paragraph)*** allows it, one possibility which States might consider to deal with this would be for the higher of the two amounts to be held in trust, escrow or similar, pending the outcome of the mutual agreement procedure. Alternatively, a bank guarantee provided by the taxpayer's bank could be sufficient to meet the requirements of the competent authorities. As another approach, one State or the other (decided by time of assessment, for example, or by residence State status under the treaty) could agree to seek a payment of no more than the difference between the amount paid to the other State, and that which it claims, if any. Which of these possibilities is open will ultimately depend on the domestic law (including administrative requirements) of a particular State ***and the provisions of the applicable treaty***, but they are the sorts of options that should as far as possible be considered in seeking to have the mutual agreement procedure operate as effectively as possible. Where States require some payment of outstanding tax as a precondition to the taxpayer initiated mutual agreement procedure, or to the active consideration of an issue within that procedure, they should have a system in place for refunding an amount of interest on any underlying amount to be returned to the taxpayer as the result of a mutual agreement reached by the competent authorities. Any such interest payment should sufficiently reflect the value of the underlying amount and the period of time during which that amount has been unavailable to the taxpayer.

iii) Relevant part of the UN Model

33. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraphs 47 and 48 of the Commentary on Article 25 of the OECD Model and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 47. Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. States therefore should as far as possible take into account the cash flow and possible double taxation issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. It also appears, as a minimum, that if the mutual agreement procedure is initiated prior to the taxpayer's being charged to tax (such as by an assessment), a payment should only be required once that charge to tax has occurred.
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> 48. There are several reasons why suspension of the collection of tax pending resolution of a mutual agreement procedure can be a desirable policy, although many States may require legislative changes for the purpose of its implementation. Any requirement to pay a tax assessment specifically as a condition of obtaining access to the mutual agreement procedure in order to get relief from that very tax would generally be inconsistent with the policy of making the mutual agreement procedure broadly available to resolve such disputes. Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. Finally, another unfortunate complication may be delays in the resolution of cases if a country is less willing to enter into good faith mutual agreement procedure discussions when a probable result could be the refunding of taxes already

collected. Where States take the view that payment of outstanding tax is a precondition to the taxpayer initiated mutual agreement procedure, this should be notified to the treaty partner during negotiations on the terms of a Convention. Where both States party to a Convention take this view, there is a common understanding, but also the particular risk of the taxpayer's being required to pay an amount twice. Where domestic law allows it, one possibility which States might consider to deal with this would be for the higher of the two amounts to be held in trust, escrow or similar, pending the outcome of the mutual agreement procedure. Alternatively, a bank guarantee provided by the taxpayer's bank could be sufficient to meet the requirements of the competent authorities. As another approach, one State or the other (decided by time of assessment, for example, or by residence State status under the treaty) could agree to seek a payment of no more than the difference between the amount paid to the other State, and that which it claims, if any. Which of these possibilities is open will ultimately depend on the domestic law (including administrative requirements) of a particular State, but they are the sorts of options that should as far as possible be considered in seeking to have the mutual agreement procedure operate as effectively as possible. Where States require some payment of outstanding tax as a precondition to the taxpayer initiated mutual agreement procedure, or to the active consideration of an issue within that procedure, they should have a system in place for refunding an amount of interest on any underlying amount to be returned to the taxpayer as the result of a mutual agreement reached by the competent authorities. Any such interest payment should sufficiently reflect the value of the underlying amount and the period of time during which that amount has been unavailable to the taxpayer.

I. Changes with respect to best practice 8

i) Relevant part of the Report on BEPS Action 14

5. Best practice 8 reads as follows:

8. Countries should include in their published MAP guidance an explanation of the relationship between the MAP and domestic law administrative and judicial remedies. Such public guidance should address, in particular, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice.

ii) Changes to be made to the OECD Model

34. The following changes to the Commentary on Article 25 were included in the Report with respect to that best practice (see paragraph 53 of the Report):[96]

Replace paragraph 35 of the Commentary on Article 25 by the following:

[96] As noted above, other changes to the first sentence of paragraph 35 of the Commentary on Article 25 will be made as a result of the adoption of minimum standard 3.1.

35. If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision ***(i.e. it is obliged, as a matter of law, to follow the court decision) or will not depart from the court decision as a matter of administrative policy or practice***. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.

Replace paragraph 42 of the Commentary on Article 25 by the following:

42. The case may arise where a mutual agreement is concluded in relation to a taxpayer who has brought a suit for the same purpose in the competent court of either Contracting State and such suit is still pending. In such a case, there would be no grounds for rejecting a request by a taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of the mutual agreement procedure until the court had delivered its judgment in that suit. Also, a view that competent authorities might reasonably take is that where the taxpayer's suit is ongoing as to the particular issue upon which mutual agreement is sought by that same taxpayer, discussions of any depth at the competent authority level should await a court decision. If the taxpayer's request for a mutual agreement procedure applied to different tax years than the court action, but to essentially the same factual and legal issues, so that the court outcome would in practice be expected to affect the treatment of the taxpayer in years not specifically the subject of litigation, the position might be the same, in practice, as for the cases just mentioned. In either case, awaiting a court decision or otherwise holding a mutual agreement procedure in abeyance whilst formalised domestic recourse proceedings are underway will not infringe upon, or cause time to expire from, the two year period referred to in paragraph 5 of the Article. Of course, if competent authorities consider, in either case, that the matter might be resolved notwithstanding the domestic law proceedings (because, for example, the competent authority where the court action is taken will not be ***legally*** bound or constrained by the court decision) then the mutual agreement procedure may proceed as normal. ***A competent authority may be precluded as a matter of law from maintaining taxation where a court has decided that such taxation is not in accordance with the provisions of a tax treaty. In contrast, in some countries a competent authority would not be legally precluded from granting relief from taxation notwithstanding a court decision that such taxation was in accordance with the provisions of a tax treaty. In such a case, nothing (e.g. administrative policy or practice) should prevent the competent authorities from reaching a mutual agreement pursuant to which a Contracting State will relieve taxation considered by the competent authorities as not in accordance with the provisions of the tax treaty, and thus depart from a decision rendered by a court of that State.***

iii) Relevant part of the UN Model

35. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraphs 35 and 42 of the Commentary on Article 25 of the OECD Model, together with the addition between brackets in paragraph 42 and footnote to that

paragraph, and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 35. If a claim has been finally adjudicated by a court in the State of residence, a taxpayer may wish even so to present or pursue a claim under the mutual agreement procedure. In some States, the competent authority may be able to arrive at a satisfactory solution which departs from the court decision. In other States, the competent authority is bound by the court decision. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.
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> …
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> 42. The case may arise where a mutual agreement is concluded in relation to a taxpayer who has brought a suit for the same purpose in the competent court of either Contracting State and such suit is still pending. In such a case, there would be no grounds for rejecting a request by a taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of the mutual agreement procedure until the court had delivered its judgment in that suit.[49] [One member of the Committee considers, however, that a taxpayer should not be allowed to defer acceptance of the mutual agreement until a court has delivered its judgment in a suit. Once an agreement has been reached between the competent authorities, the taxpayer should decide within a reasonable period of time whether to accept that agreement.] Also, a view that competent authorities might reasonably take is that where the taxpayer's suit is ongoing as to the particular issue upon which mutual agreement is sought by that same taxpayer, discussions of any depth at the competent authority level should await a court decision. If the taxpayer's request for a mutual agreement procedure applied to different tax years than the court action, but to essentially the same factual and legal issues, so that the court outcome would in practice be expected to affect the treatment of the taxpayer in years not specifically the subject of litigation, the position might be the same, in practice, as for the cases just mentioned. In either case, awaiting a court decision or otherwise holding a mutual agreement procedure in abeyance whilst formalised domestic recourse proceedings are underway will not infringe upon, or cause time to expire from, the [three year period referred to in paragraph 5 of alternative B of the Article]. Of course, if competent authorities consider, in either case, that the matter might be resolved notwithstanding the domestic law proceedings (because, for example, the competent authority where the court action is taken will not be bound or constrained by the court decision) then the mutual agreement procedure may proceed as normal.

[Footnote 49] As noted in paragraph 45, however, in most countries, a mutual agreement cannot be finalized before the taxpayer has given agreement and renounced domestic legal remedies. If the taxpayer chooses to wait until the domestic legal proceedings have been concluded, the risk exists that a court decision will prevent a competent authority from implementing the proposed agreement and the taxpayer cannot be guaranteed that the proposed agreement will still be available at the

conclusion of the legal proceedings [this footnote is not part of the quoted OECD paragraph].

J. Changes with respect to best practice 9

i) Relevant part of the Report on BEPS Action 14

7. Best practice 9 reads as follows:

9. Countries' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments – i.e. taxpayer-initiated adjustments permitted under the domestic laws of a treaty partner which allow a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust (i) the price for a transaction between associated enterprises or (ii) the profits attributable to a permanent establishment, with a view to reporting a result that is, in the view of the taxpayer, in accordance with the arm's length principle. For such purposes, a taxpayer-initiated foreign adjustment should be considered bona fide where it reflects the good faith effort of the taxpayer to report correctly the taxable income from a controlled transaction or the profits attributable to a permanent establishment and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the tax laws of the two Contracting States.

ii) Changes to be made to the OECD Model

8. The following changes to the Commentaries on Articles 7, 9 and 25 were included in the Report with respect to that best practice (see paragraph 55 of the Report):

Add the following paragraph 59.1 to the Commentary on Article 7:

59.1 Under the domestic laws of some countries, a taxpayer may be permitted under appropriate circumstances to amend a previously-filed tax return to adjust the profits attributable to a permanent establishment in order to reflect an attribution of profits that is, in the taxpayer's opinion, in accordance with the separate entity and arm's length principles underlying Article 7. Where they are made in good faith, such adjustments may facilitate the proper attribution of profits to a permanent establishment in conformity with paragraph 2 of Article 7. However, double taxation may occur, for example, if such a taxpayer-initiated adjustment increases the profits attributed to a permanent establishment located in one Contracting State but there is no appropriate corresponding adjustment in the other Contracting State. The elimination of such double taxation is within the scope of paragraph 3. Indeed, to the extent that taxes have been levied on the increased profits in the first-mentioned State, that State may be considered to have adjusted the profits attributable to the permanent establishment, and to have taxed, profits that have been charged to tax in the other State. In these circumstances, Article 25 enables the competent authorities

of the Contracting States to consult together to eliminate the double taxation; the competent authorities may accordingly, if necessary, use the mutual agreement to determine whether the initial adjustment met the conditions of paragraph 2 and, if that is the case, to determine the amount of the appropriate adjustment to the amount of the tax charged on the profits attributable to the permanent establishment so as to relieve the double taxation.

Add the following paragraph 6.1 to the Commentary on Article 9:

6.1 Under the domestic laws of some countries, a taxpayer may be permitted under appropriate circumstances to amend a previously-filed tax return to adjust the price for a transaction between associated enterprises in order to report a price that is, in the taxpayer's opinion, an arm's length price. Where they are made in good faith, such adjustments may facilitate the reporting of taxable income by taxpayers in accordance with the arm's length principle. However, economic double taxation may occur, for example, if such a taxpayer-initiated adjustment increases the profits of an enterprise of one Contracting State but there is no appropriate corresponding adjustment to the profits of the associated enterprise in the other Contracting State. The elimination of such double taxation is within the scope of paragraph 2. Indeed, to the extent that taxes have been levied on the increased profits in the first-mentioned State, that State may be considered to have included in the profits of an enterprise of that State, and to have taxed, profits on which an enterprise of the other State has been charged to tax. In these circumstances, Article 25 enables the competent authorities of the Contracting States to consult together to eliminate the double taxation; the competent authorities may accordingly, if necessary, use the mutual agreement procedure to determine whether the initial adjustment met the conditions of paragraph 1 and, if that is the case, to determine the amount of the appropriate adjustment to the amount of the tax charged in the other State on those profits so as to relieve the double taxation.

Replace paragraph 23 of the Commentary on Article 25 by the following:

23. In self assessment cases, there will usually be some notification effecting that assessment (such as a notice of a liability or of denial or adjustment of a claim for refund), and generally the time of notification, rather than the time when the taxpayer lodges the self-assessed return, would be a starting point for the three year period to run. ***Where a taxpayer pays additional tax in connection with the filing of an amended return reflecting a bona fide taxpayer-initiated adjustment (as described in paragraph 14 above), the starting point of the three year time limit would generally be the notice of assessment or liability resulting from the amended return, rather than the time when the additional tax was paid.*** There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of "notification" would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention. This could, for example, be when information recording the transfer of funds is first made available to a taxpayer, such as in a bank balance or statement. The time begins to run whether or not the taxpayer actually regards the taxation, at that stage, as contrary to the Convention, provided that a

reasonably prudent person in the taxpayer's position would have been able to conclude at that stage that the taxation was not in accordance with the Convention. In such cases, notification of the fact of taxation to the taxpayer is enough. Where, however, it is only the combination of the self assessment with some other circumstance that would cause a reasonably prudent person in the taxpayer's position to conclude that the taxation was contrary to the Convention (such as a judicial decision determining the imposition of tax in a case similar to the taxpayer's to be contrary to the provisions of the Convention), the time begins to run only when the latter circumstance materialises.

Replace paragraph 14 of the Commentary on Article 25 by the following:

14. It should be noted that the mutual agreement procedure, unlike the disputed claims procedure under domestic law, can be set in motion by a taxpayer without waiting until the taxation considered by him to be "not in accordance with the Convention" has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the "actions of one or both of the Contracting States" will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention. Thus, for example, if a change to a Contracting State's tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income. Other examples include filing a return in a self assessment system or the active examination of a specific taxpayer reporting position in the course of an audit, to the extent that either event creates the probability of taxation not in accordance with the Convention (*e.g.* where the self assessment reporting position the taxpayer is required to take under a Contracting State's domestic law would, if proposed by that State as an assessment in a non-self assessment regime, give rise to the probability of taxation not in accordance with the Convention, or where circumstances such as a Contracting State's published positions or its audit practice create a significant likelihood that the active examination of a specific reporting position such as the taxpayer's will lead to proposed assessments that would give rise to the probability of taxation not in accordance with the Convention). Another example might be a case where a Contracting State's transfer pricing law requires a taxpayer to report taxable income in an amount greater than would result from the actual prices used by the taxpayer in its transactions with a related party, in order to comply with the arm's length principle, and where there is substantial doubt whether the taxpayer's related party will be able to obtain a corresponding adjustment in the other Contracting State in the absence of a mutual agreement procedure. ***Such actions may also be understood to include the bona fide taxpayer-initiated adjustments which are authorised under the domestic laws of some countries and which permit a taxpayer, under appropriate circumstances, to amend a previously-filed tax return in order to report a price in a controlled transaction, or an attribution of profits to a permanent establishment, that is, in the taxpayer's opinion, in accordance with the arm's length principle (see paragraph 6.1 of the Commentary on Article 9 and paragraph 59.1 of the Commentary on Article 7).*** As indicated by the

opening words of paragraph 1, whether or not the actions of one or both of the Contracting States will result in taxation not in accordance with the Convention must be determined from the perspective of the taxpayer. Whilst the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established, the tax authorities should not refuse to consider a request under paragraph 1 merely because they consider that it has not been proven (for example to domestic law standards of proof on the "balance of probabilities") that such taxation will occur.

iii) Relevant parts of the UN Model

36. Since Article 7 of the UN Model does not include a provision equivalent to paragraph 3 of Article 7 of the OECD Model, the addition of new paragraph 59.1 to the Commentary on Article 7 of the OECD Model seems irrelevant for the UN Model.

37. Paragraph 6.1 of the Commentary on Article 9 of the OECD Model is a new addition to the OECD Model resulting from the work on BEPS Action 14 and there is currently nothing equivalent in the UN Model.

38. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraphs 14 and 23 of the Commentary on Article 25 of the OECD Model and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 14. It should be noted that the mutual agreement procedure, unlike the disputed claims procedure under domestic law, can be set in motion by a taxpayer without waiting until the taxation considered by him to be "not in accordance with the Convention" has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the "actions of one or both of the Contracting States" will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention. Thus, for example, if a change to a Contracting State's tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income. Other examples include filing a return in a self assessment system or the active examination of a specific taxpayer reporting position in the course of an audit, to the extent that either event creates the probability of taxation not in accordance with the Convention (*e.g.* where the self assessment reporting position the taxpayer is required to take under a Contracting State's domestic law would, if proposed by that State as an assessment in a non-self assessment regime, give rise to the probability of taxation not in accordance with the Convention, or where circumstances such as a Contracting State's published positions or its audit practice create a significant likelihood that the active examination of a specific reporting position such as the taxpayer's will lead to proposed assessments that would give rise to the probability of taxation not in accordance with the

Convention). Another example might be a case where a Contracting State's transfer pricing law requires a taxpayer to report taxable income in an amount greater than would result from the actual prices used by the taxpayer in its transactions with a related party, in order to comply with the arm's length principle, and where there is substantial doubt whether the taxpayer's related party will be able to obtain a corresponding adjustment in the other Contracting State in the absence of a mutual agreement procedure. As indicated by the opening words of paragraph 1, whether or not the actions of one or both of the Contracting States will result in taxation not in accordance with the Convention must be determined from the perspective of the taxpayer. Whilst the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established, the tax authorities should not refuse to consider a request under paragraph 1 merely because they consider that it has not been proven (for example to domestic law standards of proof on the "balance of probabilities") that such taxation will occur.

…

23. In self assessment cases, there will usually be some notification effecting that assessment (such as a notice of a liability or of denial or adjustment of a claim for refund), and generally the time of notification, rather than the time when the taxpayer lodges the selfassessed return, would be a starting point for the three year period to run. There may, however, be cases where there is no notice of a liability or the like. In such cases, the relevant time of "notification" would be the time when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation that is in fact not in accordance with the Convention. This could, for example, be when information recording the transfer of funds is first made available to a taxpayer, such as in a bank balance or statement. The time begins to run whether or not the taxpayer actually regards the taxation, at that stage, as contrary to the Convention, provided that a reasonably prudent person in the taxpayer's position would have been able to conclude at that stage that the taxation was not in accordance with the Convention. In such cases, notification of the fact of taxation to the taxpayer is enough. Where, however, it is only the combination of the self assessment with some other circumstance that would cause a reasonably prudent person in the taxpayer's position to conclude that the taxation was contrary to the Convention (such as a judicial decision determining the imposition of tax in a case similar to the taxpayer's to be contrary to the provisions of the Convention), the time begins to run only when the latter circumstance materialises.

K. Changes with respect to best practice 10

i) Relevant part of the Report on BEPS Action 14

39. Best practice 10 reads as follows:

10. Countries' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.

40. Paragraph 57 of the Report indicated that "[i]t is intended to make amendments to the Commentary on Article 25 of the OECD Model Tax Convention as part of the next

update of the OECD Model Tax Convention in order to address issues related to the consideration of interest and penalties in the mutual agreement procedure."

ii) Changes to be made to the OECD Model

41. The following changes to the Commentaries on Articles 2 and 25 were adopted as a result of the follow-up work on the Report:

Replace paragraph 4 of the Commentary on Article 2 by the following:

4. Clearly a State possessing ***the right to tax an item of income or capital under the Convention*** ~~taxing powers – and it alone –~~ may levy the taxes imposed by its legislation together with any duties or charges accessory to them: increases, costs, interest, ***penalties*** etc. It has not been considered necessary to specify this in the Article, as it is obvious that ~~in the levying of the tax~~ ***a Contracting State that has the right to levy a tax may also levy*** the accessory duties or charges ***related to*** ~~depend on the same rule as~~ the principal duty***. Most States, however, do not consider that interest and penalties accessory to taxes covered by Article 2 are themselves included within the scope of Article 2 and, accordingly, would generally not treat such interest and penalties as payments to which all the provisions concerning the rights to tax of the State of source (or situs) or of the State of residence are applicable, including the limitations of the taxation by the State of source and the obligation for the State of residence to eliminate double taxation. Nevertheless, where taxation is withdrawn or reduced in accordance with a mutual agreement under Article 25, interest and administrative penalties accessory to such taxation should be withdrawn or reduced to the extent that they are directly connected to the taxation (i.e. a tax liability) that is relieved under the mutual agreement.*** ~~Practice among member countries varies with respect to the treatment of interest and penalties. Some countries never treat such items as taxes covered by the Article. Others take the opposite approach, especially in cases~~ ***This would be the case, for example,*** where the additional charge is computed with reference to the amount of the underlying tax ***liability and the competent authorities agree that all or part of the underlying taxation is not in accordance with the provisions of the Convention. This would also be the case, for example, where administrative penalties are imposed by reason of a transfer pricing adjustment and that adjustment is withdrawn because it is considered not in accordance with paragraph 1 of Article 9.***

Replace paragraph 49 of the Commentary on Article 25 by the following:

49. ***Paragraph 4 of the Commentary on Article 2 clarifies that whilst most States do not consider interest and administrative penalties accessory to the taxes covered under Article 2 to themselves be covered by Article 2, where such interest and administrative penalties are directly connected to taxes covered under Article 2, they***

should be appropriately reduced or withdrawn to the same extent as the underlying covered tax is reduced or withdrawn pursuant to the mutual agreement procedure. Consequently, a Contracting State that has applied interest or an administrative penalty that is computed with reference to an underlying tax liability (or with reference to some other amount relevant to the determination of tax, such as the amount of an adjustment or an amount of taxable income) and that has subsequently agreed pursuant to a mutual agreement procedure under paragraphs 1 and 2 of Article 25 to reduce or withdraw that underlying tax liability should proportionally reduce the amount of or withdraw such interest or administrative penalty. ~~States take differing views as to whether administrative interest and penalty charges are treated as taxes covered by Article 2 of the Convention. Some States treat them as taking the character of the underlying amount in dispute, but other States do not. It follows that there will be different views as to whether such interest and penalties are subject to a taxpayer initiated mutual agreement procedure.~~

Add the following paragraphs 49.1 to 49.3 to the Commentary on Article 25:

49.1 In contrast, other administrative penalties (for example, a penalty for failure to maintain proper transfer pricing documentation) may concern domestic law compliance issues that are not directly connected to a tax liability that is the object of a mutual agreement procedure request. Such administrative penalties would generally not fall within the scope of the mutual agreement procedure under paragraphs 1 and 2 of the Article. Under paragraph 3 of Article 25, however, the competent authorities may consult together and agree, in a specific case, that a penalty not directly connected with taxation not in accordance with the Convention was not or is no longer justified. For instance, where an administrative penalty for negligence, wilful conduct or fraud has been levied at a fixed amount and it is subsequently agreed in the mutual agreement procedure that there was no fraudulent intent, wilful conduct or negligence, the competent authorities may agree that the Contracting State that applied such penalty will withdraw it. Under paragraph 3 of the Article, the competent authorities may also enter into a general mutual agreement pursuant to which they will endeavour through the mutual agreement procedure to resolve under paragraphs 1 and 2 issues related to interest and administrative penalties that give rise to difficulties or doubts as to the application of the Convention. Contracting States may, if they consider it preferable, expressly provide in paragraph 2 of Article 25 for the application of that paragraph to interest and administrative penalties in mutual agreement procedure cases presented in accordance with paragraph 1 by adding the following as a second sentence:

> ***The competent authorities shall also endeavour to agree on the application of domestic law provisions regarding interest and administrative penalties related to the case.***

49.2 Criminal penalties imposed by a public prosecutor or a court would generally not fall within the scope of the mutual agreement procedure. In many States, competent authorities would have no legal authority to reduce or withdraw those penalties.

49.3 A mutual agreement will often result in a tax liability being maintained in one Contracting State whilst the other Contracting State has to refund all or part of the tax it has levied. In such cases, the taxpayer may suffer a significant economic burden if there are asymmetries with respect to how interest accrues on tax liabilities and refunds in the two Contracting States. This will, for instance, be the case where the first Contracting State has charged late payment interest on the tax that was the object of the mutual agreement procedure request and the second Contracting State does not grant overpayment interest on the amount it has to refund to the taxpayer. Therefore, Contracting States should seek to adopt flexible approaches to provide relief from interest accessory to the tax liability that is the object of a mutual agreement procedure request. Relief from interest would be especially appropriate for the period during which the taxpayer is in the mutual agreement process, given that the amount of time it takes to resolve a case through the mutual agreement procedure is, for the most part, outside the taxpayer's control. Changes to the domestic law of a Contracting State may be required to permit the competent authority to provide interest relief agreed upon under the mutual agreement procedure.

iii) Relevant part of the UN Model

42. Paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraph 49 of the Commentary on Article 25 of the OECD Model and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 49. States take differing views as to whether administrative interest and penalty charges are treated as taxes covered by Article 2 of the Convention. Some States treat them as taking the character of the underlying amount in dispute, but other States do not. It follows that there will be different views as to whether such interest and penalties are subject to a taxpayer initiated mutual agreement procedure. Where they are covered by the Convention as taxes to which it applies, the object of the Convention in avoiding double taxation, and the requirement for States to implement conventions in good faith, suggest that as far as possible interest and penalty payments should not be imposed in a way that effectively discourages taxpayers from initiating a mutual agreement procedure, because of the cost and the cash flow impact that this would involve. Even when administrative interest and penalties are not regarded as taxes covered by the Convention under Article 2, they should not be applied in a way that severely discourages or nullifies taxpayer reliance upon the benefits of the Convention, including the right to initiate the mutual agreement procedure as provided by Article 25. For example, a State's requirements as to payment of outstanding penalties and

interest should not be more onerous to taxpayers in the context of the mutual agreement procedure than they would be in the context of taxpayer initiated domestic law review.

L. Changes with respect to best practice 11

i) Relevant part of the Report on BEPS Action 14

43. Best practice 11 reads as follows:

11. Countries' published MAP guidance should provide guidance on multilateral MAPs and advance pricing arrangements (APAs).

44. Paragraph 59 of the Report indicated that "[i]t is intended to make amendments to the Commentary on Article 25 as part of the next update of the OECD Model Tax Convention in order to address the issue of multilateral MAPs and APAs."

ii) Changes to be made to the OECD Model

45. The following changes to the Commentary on Article 25 were adopted as a result of the follow-up work on the Report:

Add the following paragraphs 37.1 to 37.6 to the Commentary on Article 25:

37.1 The combination of bilateral tax conventions concluded among several States may allow the competent authorities of these States to resolve multilateral cases by mutual agreement under paragraphs 1 and 2 of Article 25 of these conventions. A multilateral mutual agreement may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.

37.2 This may, for instance, be the case to determine an appropriate allocation of profits between the permanent establishments that an enterprise has in two different States with which the State of residence of the enterprise has tax conventions. In such case an adjustment made with respect to dealings between the two permanent establishments may affect the taxation of the enterprise in its State of residence. Based on paragraphs 1 and 2 of Article 25 of the tax conventions between the State of residence of the enterprise and the States in which the permanent establishments are situated, the competent authority of the State of residence of the enterprise clearly has the authority to endeavour to resolve the case by mutual agreement with the competent authorities of the States in which the permanent establishments are situated and to determine the appropriate attribution of profits to the permanent establishments of its resident in accordance with both tax conventions. Where the tax conventions between the State of residence of the enterprise and the States in which the permanent establishments are situated contain different versions of Article 7 (e.g. the version included in the OECD Model in 2010 in one convention and the previous version of Article 7 in the other convention), the competent authorities may have regard to considerations of equity as mentioned under paragraph 38 below in order to find an appropriate solution with a view to ensuring taxation in accordance with the provisions of the applicable conventions.

37.3 This may, for instance, also be the case where a number of associated enterprises resident in different States are involved in a series of integrated controlled transactions and there are bilateral tax conventions among the States of residence of all the enterprises. Such a series of integrated controlled transactions could exist, for example, where intellectual property is licensed in a controlled transaction between two members of a multinational enterprise (MNE) group and is then used by the licensee to manufacture goods sold by the licensee to other members of the MNE group. Based on paragraphs 1 and 2 of Article 25 of these tax conventions, the competent authorities of the States of residence of these enterprises clearly have the authority to endeavour to determine the appropriate arm's length transfer prices for the controlled transactions in accordance with the arm's length principle of Article 9.

37.4 As recognised in paragraph 55 below, in the multilateral case described in paragraph 37.2, paragraph 3 of Article 25 of the tax convention between the States in which the permanent establishments are situated enables those two States to consult together to ensure that the convention operates effectively and that the double taxation that can occur in such a situation is appropriately eliminated.

37.5 The desire for certainty may result in taxpayers seeking multilateral advance pricing arrangements ("APAs") to determine, in advance, the transfer pricing of controlled transactions between associated enterprises resident in several States. Where there exist bilateral tax conventions among all these States and it appears that the actions of at least one of these States are likely to result for the taxpayer in taxation not in accordance with the provisions of a convention, Article 25 of these conventions allows the competent authorities of these States to negotiate on a multilateral basis an appropriate set of criteria for the determination of the transfer pricing for the controlled transactions. A multilateral APA may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements.

Replace paragraph 52 of the Commentary on Article 25 by the following:

52. Under this provision the competent authorities can, in particular:

- where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;
- where the laws of a State have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes;
- determine whether, and if so under what conditions, interest may be treated as dividends under thin capitalisation rules in the country of the borrower and give rise to relief for double taxation in the country of residence of the lender in the same way as for dividends (for example relief under a parent/subsidiary regime when provision for such relief is made in the relevant bilateral convention)**;**

– ***conclude bilateral advance pricing arrangements (APAs) as well as conclude multilateral APAs with competent authorities of third States with which each of the Contracting States has concluded a bilateral tax convention in cases where difficulties or doubts exist as to the interpretation or application of the conventions (especially in cases where no actions of the Contracting States are likely to result in taxation not in accordance with the provisions of a convention). A multilateral APA may be concluded either through the negotiation of a single agreement between all the competent authorities of the concerned States or through the negotiation of separate, but consistent, bilateral mutual agreements;***

– ***determine appropriate procedures, conditions and modalities for the application of paragraphs 1 and 2 as well as the second sentence of this paragraph to multilateral cases (see paragraphs 37.1 to 37.6 above and paragraphs 55 to 55.2 below) and for the involvement of third States in the mutual agreement procedure where the resolution of the case may affect or be affected by taxation in third States.***

Replace paragraph 55 of the Commentary on Article 25 by the following:

55. The second sentence of paragraph 3 enables the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. *[rest of existing paragraph 55 is moved to new paragraph 55.1]* ***The second sentence of paragraph 3 allows the competent authorities of the Contracting States to consult with each other in order to eliminate double taxation that may occur with respect to dealings between the permanent establishments. This could for instance be the case where one or both of the Contracting States have no bilateral tax convention with the third State. Where both Contracting States have a convention with the third State, the combination of these two conventions may, however, allow the competent authorities of all three States to resolve the case by mutual agreement under paragraphs 1, 2 and 3 of Article 25 of these conventions (see paragraphs 37.2 and 37.4 above). A multilateral agreement between the competent authorities of all involved States is the best way of ensuring that any double taxation can be eliminated.***

Add the following paragraphs 55.1 and 55.2 to the Commentary on Article 25:

55.1 ~~It is not merely desirable, but in most cases also will particularly reflect the role of Article 25 and the mutual agreement procedure in providing that the competent authorities may consult together as a way of ensuring the Convention as a whole operates effectively, that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation. The opportunity for such matters to be dealt with under the mutual agreement procedure becomes increasingly important as Contracting States seek more coherent frameworks for issues of profit allocation involving branches, and this is an issue that could usefully be discussed at the time of negotiating conventions or protocols to them.~~ There will be Contracting States whose domestic law prevents the Convention from being complemented on points which are not explicitly or at least implicitly dealt with in the

Convention. ~~however, and i~~***I***n these situations the Convention could be complemented by a protocol dealing with this issue. ~~In most cases, however, the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles, will sufficiently support issues involving two branches of a third state entity being subject to the paragraph 3 procedures.~~ ***The second sentence of paragraph 3 does not, however, allow the Contracting States to eliminate double taxation where the provision of such relief would contravene their respective domestic laws or is not authorised by the provisions of other applicable tax treaties. That sentence only allows the Contracting States, in cases not provided for in the Convention, to consult each other in order to eliminate double taxation in accordance with their respective domestic laws or in accordance with a tax treaty one of the Contracting States has concluded with a third State. Thus, for instance, in the case of a resident of a third State having permanent establishments in both Contracting States, the second sentence of paragraph 3 allows the competent authorities of the Contracting States to agree on the facts and circumstances of a case in order to apply their respective domestic tax laws in a coherent manner, in particular with respect to any dealings between those permanent establishments; the Contracting States could provide relief from any double taxation of the profits of such permanent establishments, however, only to the extent allowed by their respective domestic laws or by the provisions of a tax treaty concluded between a Contracting State and that third State (i.e. applying the provisions of Article 7 and Article 23 of a tax treaty between a Contracting State and the third State). As shown by these examples, paragraph 3 therefore plays a crucial role to allow competent authority consultation to ensure that tax treaties operate in a co-ordinated and effective manner.***

55.2 Under the first sentence of paragraph 3, the competent authorities may agree on a general basis that they shall endeavour to resolve a case presented under paragraph 1 with the competent authority of any third State in circumstances where taxation on income or on capital in that third State is likely to affect or be affected by the resolution of the case. Contracting States that wish to make express provision for multilateral mutual agreement procedures may agree to use the following alternative formulation of paragraph 2:

> ***2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Where the resolution of the case may affect or be affected by taxation on income or on capital in any third State, the competent authorities shall endeavour to resolve the case by mutual agreement with the competent authority of any such third State provided there is a tax convention in force between each of the Contracting States and that third State and the competent authority of that third State agrees within the three-year period provided in paragraph 1 to consult with the competent authorities of the Contracting States to resolve the case by mutual agreement. In order to resolve the case, the competent authorities shall take into consideration the relevant provisions of this Convention together with the relevant provisions of the tax conventions between the Contracting States and any third State involved in the***

procedure. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

iii) Relevant part of the UN Model

46. Paragraphs 31.1 to 31.6 of the Commentary on Article 25 of the OECD Model are new additions to the OECD Model resulting from the work on BEPS Action 14 and there is currently nothing equivalent in the UN Model.

47. Paragraph 10 of the Commentary on Article 25 of the UN Model currently includes the following version of paragraphs 52 and 55 of the Commentary on Article 25 of the OECD Model, together with its footnote, and indicates that "[t]he Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25":

> 52. Under this provision the competent authorities can, in particular:
>
> — where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;
>
> — where the laws of a State have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes;
>
> — determine whether, and if so under what conditions, interest may be treated as dividends under thin capitalisation rules in the country of the borrower and give rise to relief for double taxation in the country of residence of the lender in the same way as for dividends (for example relief under a parent/subsidiary regime when provision for such relief is made in the relevant bilateral convention).
>
> …
>
> 55. The second sentence of paragraph 3 enables the competent authorities to deal also with such cases of double taxation as do not come within the scope of the provisions of the Convention. Of special interest in this connection is the case of a resident of a third State having permanent establishments in both Contracting States. It is not merely desirable, but in most cases also will particularly reflect the role of Article 25 and the mutual agreement procedure in providing that the competent authorities may consult together as a way of ensuring the Convention as a whole operates effectively, that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation. The opportunity for such matters to be dealt with under the mutual agreement procedure becomes increasingly important as Contracting States seek more coherent frameworks for issues of profit allocation involving branches, and this is an issue that could usefully be discussed at the time of negotiating conventions or protocols to them. There will be Contracting States whose domestic law prevents the Convention from being complemented on points which are not explicitly or at least implicitly dealt with in the Convention, however, and in these situations the Convention could be complemented by a protocol dealing with this issue. In most cases, however, the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles, will sufficiently support issues

involving two branches of a third state entity being subject to the paragraph 3 procedures.

Annex 6

Improving MAP -

Discussion Draft Prepared Bby:

Susana Bokobo and Claudia Pimentel

Executive Summary/Purpose

As agreed in the New York 3-4 September 2016 meeting[97], the aim of this note is to be presented by the Tax Committee meeting in October for obtaining the approval of the method and the next steps to go in-depth in the work "on possible updates to the UN Guide to the MAP – considering BEPS and any other potentially relevant recent developments".

Therefore, as agreed, this note is going to focus on what possible updates would be appropriate to do to the UN Guide to MAP (GMAP). For achieving this goal this paper analyzes:

Principles (why is important to include them) (why is it useful for developing countries)

1. Process (specially focused on developing countries): What are the questions that a country should resolve for designing and implementing a MAP process in a proper manner? Some of the questions are already answered in the current GMAP and the paragraphs where the solution is adopted or the issue is treated are highlighted. More work should be done to identify if these parts of the GMAP should be improved.
2. Why is useful for developing countries to have a template for MAP requests and a draft template.

[97] See the paper titled: "Main Outcomes of Subcommittee Meeting on MAP, Dispute Avoidance and Resolution, Vienna, 9-10 June, 2016" by the Secretariat

PRINCIPLES GOVERNING MAP

Broadly speaking, a principle "expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence." In the field of law, and specifically in International Law, "principles are general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of law".[98]

Principles are important because "they constitute necessary rules for the very functioning of the system and, as such, are inducted from the legal reasoning of those entitled to take legal decisions in the process of applying the law, notably the judiciary. They also constitute integrative tools of the system as they fill actual or potential legal gaps".[99]

The Subcommittee, as agreed in the New York meeting 3-4 September 2016, proposes the inclusion of a set of principles in the GMAP. The main reason to propose this inclusion is the recognition that developing countries, or whatever country with little or no existing MAP experience, ought to start at the foundations as a way to get confidence with MAP. Moreover, we belief that the inclusion of a set of principles in the Guide would make it more relevant because it provides countries a useful tool in the case of gap of positive legislation. The adoption of principles promotes equal treatment of similarly situated taxpayers and helps the tax administration avoid integrity issues.

The principles the Subcommittee proposes are inspired by the "minimum standard" agreed in the Final Report of BEPS Action 14, in so far as they can be suitable for developing countries, but they do not necessarily follow it.

A. Good faith and the MAP should be resolved in a timely manner:

a. **Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views** on whether the request is accepted or rejected.

b. **MAP cases should be resolved in a timely manner**. Countries should include in their tax treaties (art 25) "Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States"

[98] Cheng, Bin. *General Principles of Law as Applied by International Courts and Tribunals.* Cambridge, UK: Cambridge University Press, 2006.
[99] General Principles of Law, Marcelo Kohen, Bérénice Schramm http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml

Comments: I suggest deleting the second part of the principle because it is not of interest of the developing country. The UN MAP Guide has a provision about the first part of the principle on paragraphs 201 - 205.

c. **Countries should commit to a timely resolution of MAP cases**:

BEPS proposal: Countries commit to seek to resolve MAP cases **within an average timeframe of 24 months.**

UN Proposal: 36 month attending the developing country's needs.

d. **Countries should provide access to MAP in transfer pricing cases and should implement the resulting mutual agreements** (e.g. by making appropriate adjustments to the tax assessed).
Comments: Although this is one of the principles listed in the Action 14 final report, I am not sure if we should mention this principle to be followed by developing countries. The reason is that they usually do not have transfer pricing rules in their domestic legislation and, even when they have, they have no experience and knowledge to face discussion with developed countries.

e. **Countries should provide MAP access in cases in which there is a disagreement between the taxpayer** and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

It is advisable to mention that when corporate tax is involved there are always at least two taxpayers (normally one is the Parent and the other is a subsidiary or a branch/ or two subsidiary-branches), consequently the adjustment involved the two of them.

B. The existence of administrative processes that promote the prevention and timely resolution of treaty-related disputes.

a. **Countries should publish rules, guidelines and procedures to access and use the MAP** and take appropriate measures to make such information available to taxpayers. Countries should ensure that their MAP guidance is clear and easily accessible to the public.

b. Countries should publish their country MAP profiles on a shared public Platform

The MAP Profile published should respect the secrecy of taxpayer's information in the process. For example, the MAP Profile should present the number of cases opened and closed during the year, and the time to solve them.

c. **Countries should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases** in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the country would like to see reflected in future amendments to the treaty

d. Countries should ensure that **adequate resources are provided to the MAP** function.

e. **Countries with bilateral advance pricing arrangement (APA) programs should provide for the roll-back of APAs in appropriate cases**, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

C. Taxpayers should have access to MAP when eligible.

a. **Countries should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP.** If countries have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions can only be accessed through a request by the taxpayer, countries may limit access to the MAP with respect to the matters resolved through that process. Countries should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP program guidance.

b. **Countries should either**: amend paragraph 1 of Article 25 **to permit a request for MAP assistance** to be made to the competent authority of either Contracting State, **or where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process** for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).

c. **Countries' published MAP guidance should identify the specific information and documentation that a taxpayer is required to submit** with a request for MAP assistance. Countries should not limit access to MAP based on the argument

that insufficient information was provided if the taxpayer has provided the required information.

Which are the consequences of the process infringement (e.g. time limits or not to give the information or not to reach an agreement?)

MAP PROCESS

Dispute avoidance and resolution procedures, if properly designed and implemented, make it possible to resolve differences between tax administrations and taxpayers regarding the interpretation and application of the laws in a fair and expedited manner. They reduce the uncertainty, expense, and delay associated with a general resort to litigation or a failure to provide any recourse.

Procedure is extremely important for various reasons:

- ✓ It is important because it describes how things are done and determines how successful the outcomes will be. Consequently, a process structures a model of action, i.e., a step by step method.
- ✓ A proper procedure avoids bad practices and minimizes risks of fraud and integrity issues.
- ✓ Moreover, a process aligns all participants, so they know what to do, when doing it and the consequences of their behavior. This is equally important for tax administrations, which need such guidance to apply the law properly and equitably, and for taxpayers, which must comply with the law.
- ✓ It helps to align the internal law with the international standards. This point is crucial in MAP because of the nature of the process.
- ✓ Finally, a properly designed process helps to create and maintain statistics that can be analyzed in order to improve the process itself.

According to the agreement reached by the Subcommittee, we are including in this part of the draft the questions that we consider should be answered to have a right MAP.

INITIATION of the proceeding:

1.1 **Who can initiate the process? Can the taxpayer initiate it or also the Administration of one country if there is any information about the infringement of the Tax Treaty? Before whom the process can be initiated?**

1.2 **If the taxpayer initiates the process, can it initiate it before one administration or both?**

1.3 What is the relation between domestic law and MAP in the procedural aspect? Can the MAP suspend the domestic procedures, a tax audit or reclamation?

1.4 Competent authority. How concrete should the designation of the competent authority be? What if there is no competent authority? (par. 45-66)

1.5 Are there time limits to initiate the process? (par.111-118)

1.6 **Format to initiate the process: model form/template. Paper or by email (signing and encryption of documents).** The only requirement would be that the taxpayer clearly stets that is requesting access to a MAP. No formal model should be established to make the MAP as inclusive as possible but it is advisable to have a simple template that contemplates at least the inclusion of the following information:

A. The taxpayers,
B. The countries involved,
C. The Tax Treaty involved,
D. The articles of the Tax treaty that are considered infringed and if it is an application or an interpretation problem;
E. A brief description of the issue (s) and the proposed resolution, and
F. List of documentation

It is important to include a template because it makes it easier for checking if the requirements are fulfilled. It is easier for tax administrations and taxpayers alike.

1.7 Documentation requirements**.**

1.8 Who decides whether the MP request will be accepted? The requests should be rejected only in very rear circumstances.

DEVELOPMENT of the proceeding: **MAP discussions between CAs are a government-to-government process. As a general comment, despite the decision should be made by the tax administrations, it would be important that the taxpayer is involved in the process (the taxpayer should be considered as a participant in the process)**

All statements, documents or other information supplied to one competent authority shall be communicated to the other party:

2.1 How to communicate it. (- par. 168 to 171)

2.2 Deadline to communicate it. (3 months p. 34)

2.3 The taxpayer should be informed of the exchange of documentation between administrations (par. 207) so that the taxpayer has an opportunity to provide additional input before the decision is made.

2.4 Possibilities of presentations by taxpayer to both competent authorities – preferable joint presentations (alternatives to face to face presentations – Videoconferences) (par. 174 and 175)

DECISION.

3.1. Deadline to take a decision. What if the negotiations are blocked? There should be the opportunity to use alternative techniques – mediation, conciliation, arbitration? **Reference is made to 2.** (par. 215 and p. 36)

2.2. Deadline to communicate the decision.**.** (1 month after)

2.3. How to communicate the decision (the use of technology) **As far as receipt is confirmed by the taxpayer, any reliable means of communication should be acceptable.** (As any other internal notification. It is possible to foster the use of technology, however it is not a particular issue concerning MAP)

2.4. Is the decision binding or not binding? **Taxpayer should be permitted to either accept or reject the resolution.** (par. 137 and 148)

2.5. Compatibility of the decision with the local law and other local or international procedures. **If taxpayer withdraws from MAP it should be entitled to pursue other domestic processes. If with the taxpayer accepts the MAP resolution, it should withdraw domestic processes.** (par. 73 and 147)

2.6. Publicity of decisions. Should the decision be published? Problems related to confidential information. **CA should take the decision, but always seeking the prior approval of the taxpayer. Non-confidential version could be published after having reviewed and agreed with taxpayer.** (par. 61, 102,155 and 189)(Difficult)

6. Enforcement of the decision. (par. 179-205)

The enforcement of MAP's decision may raise questions related to the effects, the extent and even the correct legal form that must be employed in order to avoid taxation not in accordance with the treaty. The answers to these questions depend on the structure of countries' legal systems, the moment when they occur and, notably, the legal foundations that justify the relief.

Thus, in jurisdictions that establish a very strong connection between the legal form and the tax incidence, or in which local law has precedence over international treaties, competent authorities may find it more difficult to implement tax relief, especially in situations not expressly foreseen in the treaty. On the other hand, such relief may be easier to reach in jurisdictions that privilege the "spirit of the treaty".

Notwithstanding, some patterns seem to be a constant across the international tax environment, and they concern the decision's foundations: when the relief derives from the interpretation of law itself or its applicability to certain facts, this interpretation must be extended to all taxpayers that lie in the same situation. This pattern is observed in jurisdictions that apply the non-discrimination principle to its taxpayers.

Conversely, when the relief results from specific taxpayer's particularities and only may be applied from the analysis of the case, such decision should only be applicable to the taxpayer involved. Besides the inadequacy related to the equal treatment of different situations, to give erga omnes effects to such decisions would lead to issues concerning the duty of confidentiality.

Moreover, the decision's effects will determine its form: decisions with erga omnes effects may (in fact, it is advisable) be enforced through the edition of some administrative act, in order to publicize the result of the tax administration understanding; nevertheless, decisions only applicable to the taxpayer involved should be notified exclusively to such taxpayer.

When a decision is tailored to a specific taxpayer, it should only be implemented if taxpayer agrees with all its conditions. Situations exist, however, which are based both in taxpayer particularities as in new general legal interpretations. In such cases, if the

taxpayer does not agree with the conditions imposed by competent authorities, referred new legal interpretations will still be valid, since they are applicable to all taxpayers.

3.1. Does the decision have **retroactive effects**?

3.2. Does the decision have ***erga homnes*** **effects** or is it only applicable to the taxpayer who initiated the process.

3.3 What if the **decision is partly positive**? Is it that possible?

3.4 **Who** has to implement the decision? Should the taxpayer do it? What if the decision affects some tax periods or other taxes or different countries or jurisdictions?

TEMPLATE

Request for MAP			**Date** mm/dd/yy
TAXPAYERS			
Countries involved		**Entity**	
Tax Treaty Involved			
Articles of Tax Treaty infringed			
Amount € (cash impact)			
Origin of Conflict			
Other opened procedures (if any)			
Solution			

Is it an interpretation problem?		Y/N	**Is it an application problem?**	Y/N
Explanation				
List of documentation				
Signed in [Location] , **By** [name]				

Annex 7

International Tax Disputes: Current Trends

Prepared by

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This note s an updated version of a note submitted to the UN Subcommittee on Disputes at its Vienna meeting in June 2016 by the WU dispute team.

1. Trends in the Mutual Agreement Procedure in OECD countries

The aim of this paper is to present the status quo in international tax disputes, as well as any trends that can be discerned when analyzing recent developments. There are multiple mechanisms to resolve international tax disputes, both domestic and bi- or even multilateral. While in certain countries, tax disputes are mainly resolved by national courts, tax litigation is generally an unpopular means of addressing cross-border tax disputes due to the lack of a bilateral solution. Therefore, the data in this paper mostly concerns disputes submitted to international dispute resolution mechanisms, more specifically the Mutual Agreement Procedure (MAP) under double tax treaties and the mechanism under the European Arbitration Convention.[100]

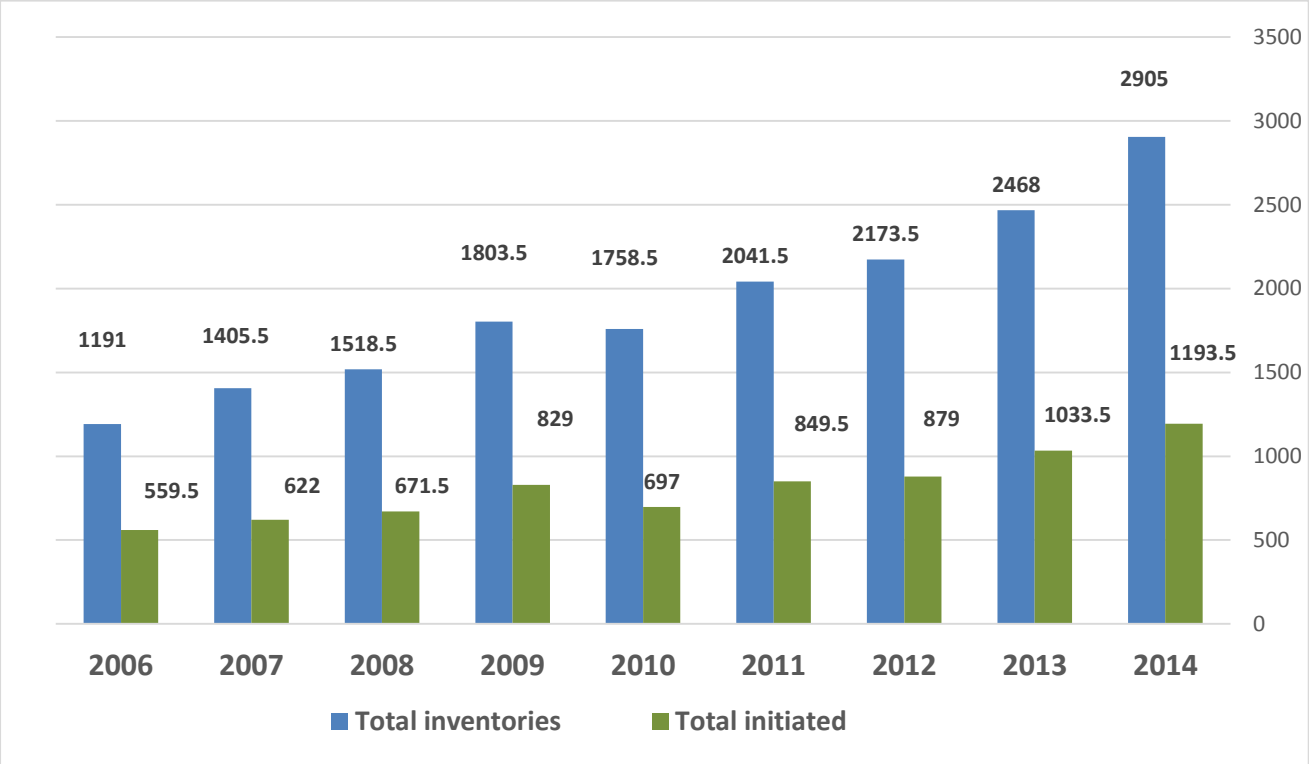
The MAP data for OECD countries and some partner economies[101] is easily accessible on the OECD website. The OECD has been keeping statistical records of MAP cases since 2006. These records paint an apparently clear picture: the number of MAP disputes has been increasing at an alarming rate. At the end of the 2014 reporting period, the total number of open MAP cases reported by OECD member countries was 5.423, an 18.77% increase as compared to the 2013 reporting period and a 130.57% increase as compared to the 2006 reporting period.[102] Moreover, each year, more and more cases are submitted to the MAP. In 2014, 2.266 new cases had been submitted, an 18.63% increase compared to the previous year and a 118.72% increase over the period 2006-2014.[103]

Despite the seemingly easy accessibility of the OECD MAP data, the numbers published on the OECD website are in fact less illuminating than they appear to be at first glance. Firstly, the aggregate numbers for each year are strikingly high. This is in large part due to the fact that a MAP case which is initiated between two OECD countries[104] is counted twice, as both countries report it in their inventories, when in reality those two reported cases are one and the same case. Therefore, in order to give an accurate representation of the total number of initiated and pending MAP cases this double counting has been corrected in the paper. This correction is possible due to the fact that in the individual reports submitted by the countries each year[105] MAP cases with OECD countries are counted separately from those with non-OECD countries. Thus by, firstly, subtracting cases with non-OECD countries from the total number of cases reported and then dividing the remainder of cases by

[100] Convention 90/463/EEC, OJ L 225/1990, 10.
[101] The partner economies are: Argentina, China, Costa Rica, Latvia and South Africa. Argentina and South Africa started reporting their MAP statistics in 2008, while the other partner economies have only been reporting since 2013, see http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm. Any reference to the OECD statistics in this paper is understood to include the reporting partner economies.
[102] http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm. However, it should be noted that the MAP cases involving two OECD member countries are double-counted in this total.
[103] http://www.oecd.org/ctp/dispute/map-statistics-2014.htm.
[104] Or an OECD country and a partner economy.
[105] These are linked to on the OECD website, see http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm. All data throughout this paper is based on these individual reports, except where otherwise indicated. In some cases, there is a discrepancy between the numbers published by the OECD for each country and the individual reports. These discrepancies are highlighted in an Annex of the paper in order to allow a verification of the calculations. No explanation is provided by the OECD for these differences, though in some cases the reason can be ascertained.

two, the accurate number of cases can be determined.[106] In the years 2006 and 2007, the reports did not make a distinction between MAP cases with OECD countries and cases with non-OECD countries. For these years, in order to allow a comparison with other years, it was assumed for calculation purposes that the no. of cases with non-OECD countries corresponds to the one reported in 2008.

Graphic 1. Development of MAP inventories from 2006 to 2014



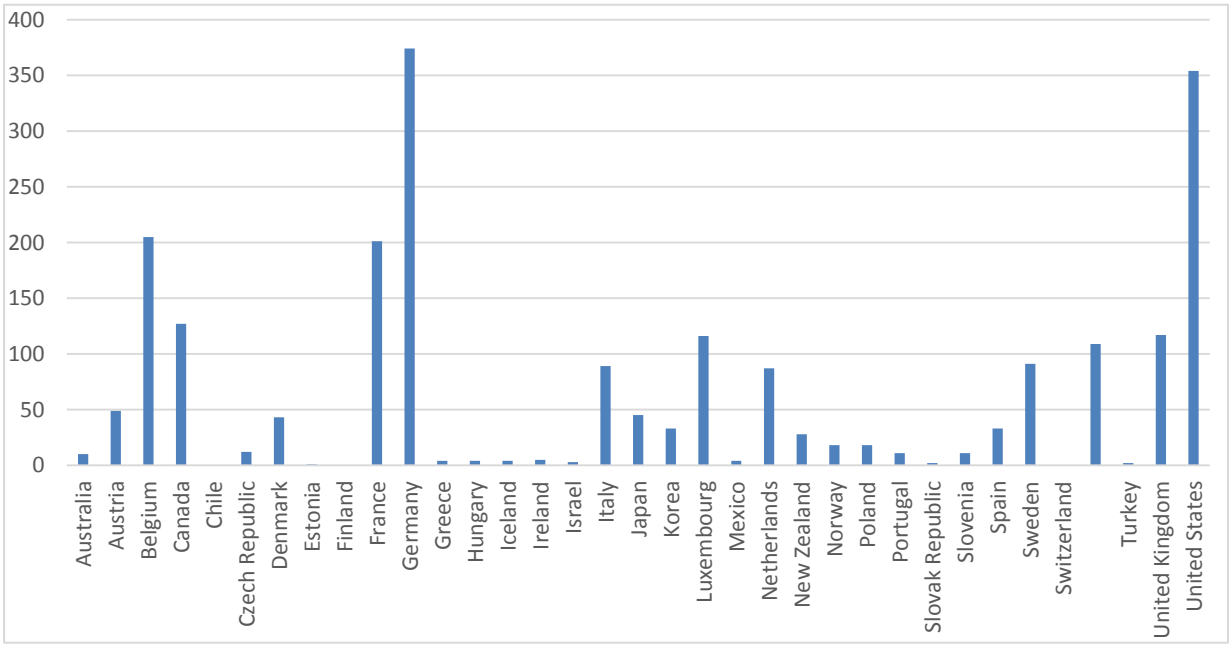
While the actual MAP inventories are indeed significantly lower, only amounting to approximately half of the OECD numbers,[107] the observable trend is not only unaffected by this correction, it even becomes more pronounced. The total year-end inventories show an increase of 143.91 % from 2006 to 2014 compared to only 130.57 % when calculating with the original OECD data. In the case of the new MAP cases submitted each year, there was an increase of 113.31 % for the reviewed period, as opposed to 118.72% as calculated with the OECD numbers.[108] A more detailed analysis of these trends leads one to the conclusion that although the staggering increase in the amount of pending cases can largely be traced back to the increase in new cases, that factor does not account for the

[106] In the case of the reporting partner economies, the double reporting may also occur for cases with non-OECD countries, since the partner economies themselves would be counted among this group. It is not possible to correct for this type of double reporting. Nevertheless, due to the overall very low number of cases reported by partner economies (in the single digits between 2006 and 2012, 52 cases for 2013 and 67 cases for 2014, most of which belong to China) this does not have a significant impact on the accuracy of the corrected numbers.
[107] For instance, the actual total year-end inventory 2014 is 53.57% of the number reported by the OECD.
[108] Since the overall number of new MAP cases is significantly lower than the case inventories, the calculation of the growth rate was likely more strongly affected by the assumption of non-OECD cases for 2006 and 2007, which may explain why the increase seems to be lower in this case.

entire difference in case inventories (14.66% of the increase in pending cases cannot be traced back to newly initiated cases). Thus, other factors, such as the longer duration of cases, must have played a role (see section 4.).

In a second step, the increase of the number of MAP cases between OECD countries and MAP cases between an OECD and a non-OECD country were separately reviewed. Among OECD countries, the number of pending MAP cases increased by 81.54 %, from 1,366 in 2008 to 2,479 in 2014, whereas pending cases with non-OECD countries showed an increase of 178.43 % in the same period, from 153 in 2008 to 426 in 2014.[109] The number of newly initiated cases increased by 66.88 % among OECD countries and 240.48 % for cases with non-OECD countries. As far as cases with non-OECD countries are concerned, the increase in pending cases can be fully explained by the amount of new cases. The much higher growth rate in the inventories of MAP cases with non-OECD countries and the large increase in new cases for these countries show beyond a doubt that the MAP procedures no longer take place mostly among developing countries. This trend is likely due to the increased activity of multinationals in developing countries, as well as the introduction of more and more sophisticated transfer pricing legislation by these countries and the growing expertise of their tax authorities. It is to be anticipated that this trend will continue.

Graphic 2. New MAP cases initiated in 2014[110][111]



[109] The years 2006 and 2007 were left out, as it is not possible to distinguish between cases among OECD countries and cases with non-OECD countries for these two years.
[110] In this graphic, the numbers included have not been corrected for double reporting, since the aim is to show the case load from the perspective of each country.
[111] From 2011 on, the German individual report contains a note stating that the "initiated" and "completed" dates reported do not correspond to the OECD definitions. Under the definition applied by the German CA, a case is treated as initiated as soon as the German CA receives a request (which is earlier than under the OECD definition of "initiated"). This deviation results in a larger MAP case inventory and a seemingly longer period until the case is completed. The difference is due to the fact that the German

Thirdly, as the graphic shows, MAP cases are not equally divided among countries. A few of the countries have almost all of the cases and the countries with the highest number of cases tend to also see the most new cases. For instance, of the 2.210 new cases reported by OECD countries in 2014, almost a third (32.9% or 728 cases) were reported by the US and Germany alone. The United States saw an increase of slightly over 30%, from 733 outstanding cases to 956. The table below shows the number of new MAPs initiated in 2014. As can be seen, over half of all new cases (56.6% or 1.251 cases) stem from 5 countries: the US, Germany, Belgium, France and the UK.

Table 1. Opening and closing inventories of countries with highest number of MAP cases[112]

	2013	2014	2013	2014
Country name	**Number of new cases**	**Number of new cases**	**Number of cases at end of reporting period**	**Number of cases at end of reporting period**
Germany[113]	267	374	858	1029
United States	403	354	732	956
France	216	201	618	549
Belgium	124	205	317	492
Switzerland	131	109	256	271
Canada	127	127	235	257
Italy	52	89	174	250
Netherlands	75	87	123	198
United Kingdom	79	117	160	190
Sweden	65	91	183	186
Austria	41	49	156	180
Total number of cases for the top 6 countries	**1,268 (66.39%)**	**1,370 (60.46%)**	**3,016 (66.05%)**	**3,554 (65,54%)**
Total number of cases for the top 11 countries	**1,580**	**1,803**	**3,812**	**4,378**
Total cases (OECD members + partner economies)	**1,910 (82.72%)**	**2,266 (79.57%)**	**4,566 (83.49%)**	**5,423 (80.73%)**

competent authority (CA) internal case database does not currently allow the recording of following OECD definitions.

[112] In this table, the numbers included have not been corrected for double reporting, since the aim is to show the case load from the perspective of each country. The overall total has also not been corrected, otherwise the table would not show the accurate proportion of the case load of the top 15 countries.

[113] See fn 12 above.

2. Trends in the MAP in Non- OECD Countries

The MAP data for non-OECD countries is much more difficult to ascertain since very few of them report their cases.[114] Nevertheless, some information can be gleaned. In general, most non-OECD countries have yet to see a single MAP case and even the largest and most important countries, such as the BRICS, have cases in the single or low double digits.

To be more precise, as concerns South America, Argentina had 3 MAP cases up to 2014,[115] while Brazil, Colombia, Peru, Uruguay, Venezuela had no MAP cases up to 2013.[116] China had between 10 and 30 MAP cases per year. The number of MAP cases initiated during 2014 increased to 29, up from 23 in 2013, while the inventory increased from 43 cases to 55.[117] Until recently, India had only experienced a few MAP cases.[118] This changed drastically as a result of the framework agreement it signed with the US under the MAP provision contained in the India-USA DTT.[119] Since the framework was signed on 15-16 January 2015, India and the US have solved over 100 transfer pricing disputes of the more than 250 pending cases, some of them as old as 2006.[120] Of the other Asian countries, Taiwan had its first and only case in 2013, while Indonesia, Malaysia, Philippines, Thailand and Vietnam, like India, had no official information concerning the number of MAP cases initiated.[121] Similarly, in Eastern Europe, Romania and Russia had no information either. Egypt, Kazakhstan and Latvia had no MAP cases up to 2013.

3. The Topics Generating Controversy

The available data indicates that a significant amount of MAP cases involve transfer pricing (TP) disputes. In some countries, the majority of MAP cases are transfer pricing cases. The US *Large Business & International Competent authority* statistics,[122] which only cover transfer pricing MAP

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[114] The situation might improve in the near future, as more and more countries sign up to the FTA MAP Forum. However, it is unlikely that most developing countries will sign up.
[115] See http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.
[116] See EY 2014 global transfer pricing tax authority survey, available at http://www.ey.com/Publication/vwLUAssets/EY-global-transfer-pricing-tax-authority-survey/$FILE/ey-2014-global-transfer-pricing-tax-authority-survey.pdf. While the information provided in this survey is not official, it is based on the responses of the individual tax administrations to a questionnaire sent out by EY.
[117] See http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.
[118] See See Butani, Branch Report on India in IFA Cahiers Vol. 92a. (2007) Transfer pricing and intangibles, 339; Nayak/Rao Chapter 10-India in Bakker/ Levey (Eds.), Transfer Pricing and Dispute Resolution; based on information available until October 15th, 2010; Vohra, Litigation Strategies, Options and Solutions in BIT, 2014, 207 (210); *EY India*, International Taxation in India, Issues & Concerns, 2008, 32. Unfortunately, there is no official data available on the exact number of MAP cases.
[119] Article 27 para 4 India - United States Income Tax Treaty (12 September 1989), effective since 1 January 1991 (U.S.A.); 1 April 1991 (India).
[120] http://www.ey.com/Publication/vwLUAssets/US_and_India_Tax_Authorities_agree_on_framework_for_resolving_certain_double_tax_cases/$FILE/2015G_CM5155_TP_US%20and%20India%20TA%20agree%20on%20framework%20for%20resolving%20certain%20double%20tax%20cases.pdf.
[121] EY 2014 global transfer pricing tax authority survey.
[122] Available at https://www.irs.gov/businesses/corporations/annual-competent-authority-statistics for the years 2011 – 2015.

cases, are identical to the numbers reported to the OECD. In other words, 100% of the US case inventories in the OECD statistics consist of transfer pricing cases. Similarly, the official MAP Program report of the Canadian CA shows that a large percentage of the case inventories consists of transfer pricing cases: 88.94% in 2013,[123] 90.27% in 2014[124] and 88.97% in 2015.[125] Moreover, 80.7% of the cases completed in 2013, 71.43% of the cases completed in 2014 and 86.96% of the cases completed in 2015 were transfer pricing cases. Since 2011, the individual reports of the German CA to the OECD have specified how many of the cases in the year-end inventories and how many of the requests received are transfer pricing cases.

Table 2. German TP cases[126]

Year	Germany					
	requests	TP case requests	TP case requests in %	year-end inventories	year-end TP inventories	Year-end TP inventories in %
2011	306	120	39,22%	702	308	43,87%
2012	277	104	37,55%	787	355	45,11%
2013	267	106	39,70%	858	367	42,77%
2014	374	194	51,87%	1029	483	46,94%

While it cannot be said that in the case of Germany most MAP cases are indeed transfer pricing cases, the transfer pricing cases do make up almost half of the overall case inventories and approximately 40% of the new requests received each year.

In the UK, the HMRC Transfer Pricing Statistics do not include the year-end inventories. However, they provide the number of admitted and resolved transfer pricing cases for each year.[127] The following table compares the HMRC report against the report of the UK to the OECD.

Table 3. TP cases in the UK

Year	UK					
	cases submitted	TP cases submitted	TP cases in %	cases resolved	TP cases resolved	TP cases in %

[123] See the 2012–2013 MAP Program Report, available at http://www.cra-arc.gc.ca/tx/nnrsdnts/cmp/mp_rprt_2012-2013-eng.html.
[124] See the 2013–2014 MAP Program Report, available at http://www.cra-arc.gc.ca/tx/nnrsdnts/cmp/mp_rprt_2013-2014-eng.html.
[125] See the 2014–2015 MAP Program Report available at http://www.cra-arc.gc.ca/tx/nnrsdnts/cmp/mp_rprt_2014-2015-eng.html.
[126] The individual German reports can be found on the OECD website, at http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm. The requests and year-end inventories were not corrected for double reporting since the table is only meant to show the German perspective.
[127] See HMRC Transfer Pricing statistics: 2013 to 2014, available at https://www.gov.uk/government/publications/transfer-pricing-statistics-2013-to-2014/transfer-pricing-statistics-2013-to-2014.

2010	68	51	75,00%	56	45	80,36%
2011	54	39	72,22%	48	40	83,33%
2012	69	45	65,22%	54	46	85,19%
2013	79	40	50,63%	56	47	83,93%
2014	117	61	52,14%	83	46	55,42%

As can be seen, transfer pricing cases make up more than half of all cases submitted by the UK CA and over 80% of the cases resolved in a given year, with the exception of 2014, where they were still the majority of resolved cases.

In order to ascertain the overall importance of transfer pricing MAP cases, the statistics published by the EU Joint Transfer Pricing Forum (JTPF), concerning the cases submitted under the EU Arbitration Convention, also need to be taken into account. The Convention only allows the submission of transfer pricing disputes concerning articles 7 and/or 9 of the UN and OECD Model Conventions.[128] However, the geographical scope of application of the Convention is restricted to EU countries.[129] The table below compares the number of MAP cases reported to the OECD with the EU JTPF statistics for selected countries:[130]

Table 4. Comparison of year-end inventories under the EU Arbitration Convention and the OECD MAP Statistics[131]

Country name	2012			2013			2014		
	year-end inven-tory OECD	year-end invent-tory EU Arb Conv.[132]	EU in %	year-end inven-tory OECD	year-end invent-tory EU Arb Conv.[133]	EU in %	year-end inven-tory OECD	year-end inventory EU Arb Conv.[134]	EU in %

[128] Art 1 (1) states that the Convention shall apply where profits are included in the profits of two separate enterprises (and thus taxed twice) due to the fact that the arm's length principle laid down in Art 4 was not observed. This phrase is not defined in the Convention, though Art 1 (2) states that the PE of an enterprise of a Contracting State in another Contracting State shall be considered an enterprise of that State, therefore the Convention also applies to the allocation of profits between a head office and its PE.
[129] The territorial scope of the Convention according to Art 16 (1) of the Convention is identical with that of the TFEU, with the exception of the territories referred to in Art 299 (2), (3) and (4) EC Treaty (current Art 355 TFEU), see *Terra/Wattel*, EU Tax Law, 719.
[130] The countries in this table were selected on the basis of having the highest OECD year-end inventories in 2014, thus they are the same countries as those in table 1.
[131] The year-end inventories were not corrected for double reporting as the table shows the perspective of individual countries, not aggregated data.
[132] See EU JTPF Statistics 2012, available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_013_2013_en.pdf.
[133] See EU JTPF Statistics 2013, available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2014/jtpf_008_2014_en.pdf.

Germany	787	229	29,10%	858	232	27,04%	1029	315	30,61%
France	551	165	29,95%	618	185	29,94%	549	192	34,97%
Belgium	305	22	7,21%	317	24	7,57%	492	30	6,10%
Italy	130	111	85,38%	174	168	96,55%	250	263	105,20%
Netherlands	140	33	23,57%	123	32	26,02%	198	50	25,25%
United Kingdom	143	57	39,86%	160	54	33,75%	190	68	35,79%
Sweden	198	37	18,69%	183	51	27,87%	186	59	31,72%
Austria	137	21	15,33%	156	22	14,10%	180	35	19,44%
TOTAL	1676	855	51%	1907	983	51,54%	2210	1280	57,91%

The submission of a request for a MAP under a DTT is entirely independent of the submission of a request under the EU Arbitration Convention. In other words, a case may have been submitted to only the procedure under the EU Arbitration Convention (and thus not reflected in the OECD statistics), only a DTT MAP (and thus reflected in the OECD statistics for the OECD countries) or both. Thus, it is impossible to tell whether and how many of the cases pending under the EU Arbitration Convention are included in the OECD statistics. Nevertheless, the importance of transfer pricing cases can easily be ascertained due to the sheer number of cases. Even if none of the cases pending under the EU Arbitration Convention was reflected in the OECD statistics, the number of transfer pricing cases would still be significant (33.78% in 2012, 34% in 2013 and 36,67% in 2014). On the other hand, if all of the cases submitted under the EU Arbitration Convention were included in the OECD statistics, based on these cases alone, more than half of all cases would be transfer pricing disputes. Taking into account the strong prevalence of transfer pricing disputes in Canada and the US reinforces the assumption that most cases in the OECD statistics are indeed transfer pricing cases, even if not all EU cases are included.

Other sources corroborate the importance of transfer pricing cases:

[134] See EU JTPF Statistics 2014, available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf.

Table 5. Number of Transfer Pricing Cases in Various Countries in 2013[135]

		2013[136]
Americas	**Canada**	98(1)
	Mexico	4(2)
	United States	266
Asia	China	10-20(3)
	Japan	20-30(3)
	Singapore	3(3)
EMEA	Austria	50-70(3)
	Denmark	20(3)
	Finland	20-30(3)
	Germany	20(3)
	Lithuania	1
	Netherlands	50
	Norway	15-20(3)
	Sweden	20(3)
	Switzerland	13(3)

Nevertheless, within the broad area of "transfer pricing" there are a multitude of possible topics for controversy. An analysis of the transfer pricing cases in the IBFD database gives some insight into the main areas of controversy. The IBFD publishes selected tax cases resolved by the courts of countries around the world. When filtering these cases by topic using IBFD's own "transfer pricing" filter, one can easily recognize that a substantial number of tax disputes deal with transfer pricing issues. 1.273 cases of a total of 4.283 cases on double tax conventions, to be specific. Of the transfer pricing court cases contained in the database, 87.5% (1.115 of 1.273 cases) concern India. Most of the Indian disputes (310 cases) revolved around comparability and the correct choice of transfer pricing method (200 cases), with related parties coming in a distant third (119 cases). Moreover, the vast majority of cases (1.101 cases) concerned associated enterprises. However, one should be very cautious when extrapolating this information for the MAP cases. First, the cases to be found in the IBFD database were decided by the domestic courts of the countries involved and not by their competent authorities. Secondly, India's situation with respect to international tax disputes is quite unique concerning both the number of cases and their nature. However, one could also argue that

[135] Source: EY 2014 global transfer pricing tax authority survey.
[136] Annotations: (1): resolved
(2): in 2012
(3): yearly

the cases going to court are those where a solution by means of a MAP could either not be requested or not be agreed upon by the competent authorities, thus establishing the link with MAP.

Table 6. Articles concerned transfer pricing cases[137]

	Argentina	Belgium	Canada	France	Germany	India	Netherlands	Portugal	Spain	Switzerland	United Kingdom	United States	Others	TOTAL
Article 9	14	5	8	6	5	1101	6	8	9	0	8	34	32	**1.233**
Article 7	1		1	3	3	11	1			1	0	7	2	**33**
Article 5						3						2	1	**5**

Table 7. Main areas of controversy in transfer pricing cases

	Argentina	Canada	France	Germany	India	Italy	Netherlands	Portugal	Spain	Sweden	United Kingdom	United States	Others	TOTAL
Related party	8	1	2	4	119	3	3	8	5		4	16	6	**179**
ALP	1	5	2	1	12	1	2		1	2	1	8	4	**42**
Methodo-logy	7	3			200		2					2	6	**219**
Comparabil ity	7				310									**317**

[137] Source: IBFD database, accessed May 24th, 2016. The cases in the database were filtered using IBFD's own filters "transfer pricing", "ALP" etc. and sorted by country. It should be borne in mind that the same case may concern multiple topics and/ or Articles of the UN Model Convention.

Of the 219 cases primarily concerning the correct choice of TP method, 113 concern the Comparable Uncontrolled Price [CUP] method, 22 the resale price method, 27 the cost-plus method and 102 the Transactional Net Margin Method [TNMM], while only 11 dealt with the profit split method.[138]

4. Is the MAP Effective in Resolving the Disputes?

The commonly held view concerning the MAP as a mechanism for resolving cross-border tax disputes, especially in OECD countries, is that it is inefficient and ineffective. The large increase in the number of reported outstanding MAP cases is often cited as a problem.[139] Some may argue that the increase in MAP cases should be seen as positive, since more cases gain access to the procedure and more taxpayers and competent authorities make use of the means available to them. Others contend that the increasing contentiousness of the correct allocation of taxing rights under a double tax treaties is a bad sign and that the number of controversial topics will only increase as a result of current developments, such as the BEPS project. Nevertheless, it is important to take into account that, as we have shown (see section 1), a few countries have a disproportionate impact on the overall statistics and thus the problem may only relate to these 5 or 6 countries.

Regardless of how one looks at the statistics, the question arises whether the competent authorities can effectively cope with so many new cases and whether the MAP is the best means of resolving them. The increase in the number of outstanding cases clearly shows that the case workload, at least for cases among OECD countries, increases faster than the competent authorities can come to an agreement (see also section 1). However, in order to determine whether another mechanism, such as mandatory dispute resolution (MDR), would need to be employed, one needs to answer two essential questions:

1. Does the resolution of cases take longer than it should?
2. Are all cases eventually satisfactorily resolved?[140]

In order to answer the first question, it is necessary to establish how long a case should take. There are different approaches to this. The OECD Model Convention deems a time frame of 2 years from the presentation of the case to the second competent authority as appropriate, while the UN Model has extended this period to 3 years. Taking this into account, the analysis focused on these two deadlines.

A first look at the OECD statistics seems to answer the first question very clearly: the average time for the completion of MAP cases with other OECD member countries (and partner economies) was 23.79 months in the 2014 reporting period and, between 2006 and 2014, it only rose above the preferred 24 month period once, in 2010.[141] However, the

[138] The number of cases was determined by using the IBFD's own filters. One case can concern multiple methods, for instance, according to the database, 30 of the CUP cases also involve the TNMM, the search was carried out on May 24th, 2016.
[139] See, among others, *Herzfeld*, News Analysis: MAP Statistics Tell a Sorry Tale, Tax Notes Today (9 Dec. 2014), *Welty/ Thomas/ Gavioli/ Lowell*, Preparing for a Tsunami of International Tax Disputes, *TaxNotesInt'l, 2015*, p. 1047.
[140] For the purposes of the current analysis, other pertinent considerations, such as the costs of resolution or the potential increased workload associated with MDR were left out, since they are difficult to quantify.
[141] http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.

average completion time is imprecise for a number of reasons. Firstly, some countries simply do not report average completion times, so the actual average time may be higher. Secondly, the fact that the statistics arise from self-reporting makes it difficult to compare experience across countries, especially because countries have different points of view on when a case is considered to have commenced.[142] Thirdly, because the average "completion" time measures the time for a case to be successfully completed, closed or withdrawn, it does not reflect those cases that simply languish.

Accordingly, it is important to look more closely at the data. Reviewing the individual country reports available on the OECD website provides some good news, confirming that a relatively large number of cases are in fact resolved within about 2 years. The calculation was performed by marking the date the cases were initiated according to the individual reports and comparing this with the resolution date.[143] Unfortunately, this comparison is potentially inaccurate by 2 years, in the worst case, since only the year of initiation and completion are specified and not the months.[144] For this reason, the table below gives the maximum and minimum possible completion times of a case.

The calculation was performed for those countries with the highest number of pending MAP cases which provided the requisite information in their individual reports (see also Table 1). However, the US could not be included, since it only publishes aggregated data in its individual report, as well as an average completion time.[145] As the cases were not disaggregated according to the year of initiation, the completion time could not be calculated. Moreover, the completion times of Germany are based on initiation dates that do not correspond to the OECD understanding of the term. Germany records a case as having been initiated when it first receives a MAP request, which is earlier than the OECD understanding. Thus, Germany's completion times are longer than they would be when applying the OECD standard.[146]

[142] Germany is a good example of this, see fn 12 above.
[143] The inventories of cases (beginning and end) as well as the resolved cases were grouped by initiation date in the reports of the countries we analyzed, which allowed the comparison.
[144] An example may serve to illustrate this: Assume that a case is recorded as being initiated in 2005 and completed in 2006. Since the months of initiation and completion are not recorded, the case could have started and ended anywhere between 01.01.2005 and 31.12.2006. The maximum possible duration of the case is a little under 2 years. This assumes that the case began on 01.01.2005 and was completed on 31.12.2006. At the same time, the case could (at least in theory) also have begun on 31.12.2005 and been completed on 01.01.2006, thus lasting only 2 days.
[145] The average completion times reported by the US ranged from 19 months in 2007 to 29 months in 2010, though for most of the period 2006-2014 they were close to the 24 month mark (specifically for the years 2006, 2009, 2012 and 2013), see http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.
[146] See fn 12 above.

Table 8. Duration of MAPs:[147]

	less than 2y	1-3y	> 2y	Total
Belgium	502	128	179	809
Canada	270	228	215	713
France	441	239	499	1179
Germany	360	371	634	1365
Total	**1.573**	**966**	**1.527**	**4.066**

Looking at the length of the MAPs in the individual countries, all cases in the third column of the table took more than 2 years and would thus be potential candidates for mandatory dispute resolution procedures under the OECD Model Convention. The situation of the cases in the second column is more ambiguous. Due to the fact that countries only report the year in which the MAP started but not the exact month, it is not possible to state exactly whether or not they would be eligible for MDR. But we can assume that at least a percentage of these cases will be eligible. Similarly, of the cases taking longer than three years, a large number would also be eligible for MDR under the UN Model Convention. In Belgium 22.13% of the completed cases took more than years, in Canada 30.15 %, in France 42.32 %, while almost half of all MAPs Germany was involved in (46.45%) would have already been eligible for MDR under the OECD Model, though this number would be lower when applying the OECD initiation dates.

As a growing number of MAP requests are filed each year (see section 1), a proportionate increase in the completion times of cases is to be expected unless the resources available to tax administration do not increase at the same pace. Even then, current international developments as a result of the BEPS project as well as the progress of globalization will potentially lead to more complex cases which will be more difficult to resolve, require more specialized knowledge and take up more resources and time on the part of tax administrations.

Table 9. Percentage of cases with a long duration

	Cases completed that could eventually go to MDR (1-3y)	Percentage of cases completed that would definitely go to MDR (> 2y)
Belgium	15,82%	22,13%
Canada	31,98%	30,15%
France	20,27%	42,32%
Germany	27,18%	46,45%

For non-OECD countries, the duration of a MAP case was often even longer. India, the country with the highest number of MAP cases outside the OECD, had more than 250 pending disputes with the US, some of them as old as 2006. Almost half of these could be resolved in 2015 due to the new

[147] Source: individual country reports for the period 2006-2014, which are available at http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm.

framework agreement between the two countries, which makes it very likely that the average duration of such cases will decrease dramatically in the future. However, it should be borne in mind that the agreement only covers sectors such as information technology (software development) services (ITS) and information technology-enabled services (ITeS).[148] For all other types of businesses, an efficient solution has yet to be found.

In China, there was an overall decrease in the completion time: MAP cases between China and OECD member countries took 29.7 months in 2013 but only 19.1 months in 2014, while the processing time for cases with non OECD members decreased from 31 months to 23.5 months. The State Administration of Taxation (''SAT'') made a concerted effort to reduce the cycle time of MAP cases initiated in recent years, e.g. one case initiated in 2014 took only four months to resolve.[149]

Nevertheless, one could argue that a duration of more than four or five years until the MAP case is resolved is acceptable, since in most cases it would still be faster than the alternative, litigation before domestic courts.[150] Of course, this is assuming that the case will eventually be resolved, however, not all MAP cases end in the prevention of double taxation. While some cases languish on the inventory, sometimes for a decade, in other cases it is clear that there will be no agreement and thus the competent authorities close the case without relieving double taxation. Sometimes, the taxpayer itself withdraws the case. The tables below show how many MAPs were closed or withdrawn with remaining double taxation each year (in absolute numbers and in %) for the five countries with the highest number of MAP cases dealt with for the period 2006-2014. In order to be able to determine what percentage of the cases dealt with every year were closed or withdrawn with remaining double taxation, a reference value was calculated. This reference value states the overall number of MAPs that were decided in each year, being either successfully completed or closed / withdrawn without a solution.[151] The third column then shows the number of MAPs closed or withdrawn with double taxation as a percentage of the overall number of MAPs dealt with by each country for the time period 2006-2014 (reference value).

Between 2006 and 2014 8.04 % of all MAPs decided could not be resolved satisfactorily.[152] In these cases, unless there is unilateral relief, MDR represents the only option for the taxpayer to avoid taxation not in accordance with the convention. Although the percentage of such unresolved cases dropped from 7.32 % in 2006 to only 4.8 % in 2007, it rose steadily from 2008 to 2011 and peaked at 11.7 % in 2012. After a short decline in 2013, the percentage increased again in 2014. Taking into

[148] http://www.ey.com/Publication/vwLUAssets/US_and_India_Tax_Authorities_agree_on_framework_for_resolving_certain_double_tax_cases/$FILE/2015G_CM5155_TP_US%20and%20India%20TA%20agree%20on%20framework%20for%20resolving%20certain%20double%20tax%20cases.pdf.

[149] See *M. Mui/ Y. Hai*, Statistics Reveal High Level of Double Tax Relief in China's MAP Process, *BNA International Tax News* 04/13/2016.

[150] For instance, in India a case can take up to 20 years to reach the Supreme Court from the moment the Tax Officer first makes the adjustment. In most countries, the court procedure would probably last between 6-15 years.

[151] The reference value was calculated as follows: [total nr. of cases "decided" in some way] = opening inventory + initiated cases – ending inventory.

[152] This number was calculated from the aggregate of all cases closed or withdrawn with double taxation from 2006 till 2014, for all OECD countries and the reporting partner economies following the same procedure used for the five countries shown, ie calculation of a reference value of all cases "dealt with".

account the steep increase in new cases, further increases in the number of unresolved cases are to be expected.

In other words, the cases where double taxation is not removed by the MAP are a growing problem. For the time being, the number of affected cases is fairly low. Nevertheless, it is unclear whether it will remain so. If it should increase proportionately to the number of new cases, it could significantly affect the overall effectiveness of the MAP itself. On the other hand, it is also possible that only a small number of cases are so contentious or difficult that a resolution proves impossible and that this number depends on the specifics of the individual case and will not increase with the number of new cases, as opposed to the overall duration of a case. Nevertheless, taking into account the aim of double tax treaties, even a small number of cases with unresolved double taxation is problematic. Especially since the number of cases with unrelieved double taxation is quite high in absolute numbers.

The table below shows the situation of the five countries with the highest number of MAPs dealt with. Those countries are Belgium, Canada, France, Germany and the US. The table includes all cases from 2006 to 2014. Out of those five countries, the US has, with only 0.42%, the lowest percentage of MAPs withdrawn with remaining double taxation. It is followed by Belgium with 4.16 %, France with 7.48 % and Canada with 8.52 %. With 18.9 %, Germany has by far the highest percentage of unresolved cases. Taking into account that Germany is second only to the US in the number of resolved cases, this means that from 2006 till 2014, there were 298 cases where double taxation was not eliminated. This result can be compared to, for instance, the total number of cases under the US-India framework (250) or the total number of cases opened in China since it began reporting its MAP data (84).[153]

However, the overall number of withdrawn cases reported by Germany, which was used in the calculation, may be too high and include cases where there is no remaining double taxation. According to the footnote to the German report, which has been included since 2011, the column “closed or withdrawn with double taxation” contains three different types of closed cases: rejected requests, withdrawn requests and cases closed because it was determined that an agreement could not be found. “Rejected requests” refers to requests for which a MAP was not possible, e.g. because the time limits for requests were not respected or for other reasons, for instance that the taxes concerned were not covered by a treaty (in particular VAT). As in most other individual country reports these types of cases do not appear under "initiated", they should, for the purpose of comparability, not be included in the calculation. Subtracting the number of rejected cases, the overall number of MAPs withdrawn decreases to 252. Accordingly the percentage of MAPs withdrawn with double taxation is reduced to 15.98 %.

The requests shown as "withdrawn" are requests withdrawn by the taxpayer, for various reasons. The footnote in the German statistics states that for these cases it cannot be established whether in the cases shown under withdrawn requests double taxation remains. Therefore, while it is possible

[153] The number was calculated by adding all new cases opened in 2013 and 2014 to the opening inventory of 2013. The Chinese MAP statistics are available at http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm#china.

that such cases are in fact withdrawn because the issue the taxpayer had was resolved in some other way (e.g. by a local tax office) so that a MAP was no longer necessary and there was no double taxation remaining, this cannot be determined for certain without knowing the individual details of each case. Nevertheless, for the sake of comprehensiveness, a calculation excluding the number of withdrawn requests was also performed. Counting only the third group of cases, cases closed because it was determined that an agreement could not be found, the total number of MAPs withdrawn shrinks to 147 and consequently the percentage of MAP's withdrawn with double taxation to 9.32 %.

Table 10. % of Cases with Double Taxation for the Top 5 Countries

	Total Cases dealt with (reference value)	Total of MAP's withdrawn	Percentage of MAP's withdrawn with DT to total RV
Belgium	842	35	4,16%
Canada	763	65	8,52%
France	1.204	90	7,48%
Germany	1.577	298[154]	18,90%
US	1.915	8	0,42%

When examining non-OECD countries, the percentage of cases withdrawn or closed with double taxation is higher than the average OECD percentage. For instance, in China, the percentage of cases where taxpayers received relief remains at only 85.7% in 2014, which constitutes a slight increase compared to 83% in 2013. Nevertheless, this means that in 14.3% of cases double taxation was not resolved.[155] However, it should be borne in mind that the total number of cases for non-OECD countries is comparatively very small and therefore each case withdrawn has a disproportionate impact on the results. Thus, in China, only 2 cases were closed/withdrawn in 2014 with double taxation. Moreover, until now, China has only reported numbers for 2013 and 2014, so it is difficult to ascertain any trends.

5. Conclusion

To sum up, even though the reported OECD statistics do not offer very much information, a careful analysis enables us to draw several conclusions concerning the effectiveness of MAP. Firstly, the MAP is, on the whole, very effective. It helps prevent double taxation not in accordance with the double tax treaty in most cases. Moreover, most cases are solved within an acceptable period of time.

[154] Calculated with the total no. of cases withdrawn as shown on the country report submitted by Germany. From 2011 on this no. includes rejected requests, withdrawn requests and cases closed because it was determined that an agreement could not be found. The percentage of cases falling within these categories breaks down as follows: rejected requests 15.4 % (46 of 298); withdrawn requests 35.2 % (105 of 298) and cases where no agreement could be found 19.8 % (59 of 298).

[155] See *M. Mui/ Y. Hai*, Statistics Reveal High Level of Double Tax Relief in China's MAP Process, *BNA International Tax News* 04/13/2016.

Nevertheless, the number of cases taking exceedingly long will almost certainly increase as the case load multiplies if the competent authorities do not receive sufficient human and financial resources to cope with the increased case load. In addition, some of the countries with the most MAP cases, notably France and Germany, haven taken very long to resolve some of their cases. A separate issue is that of cases where double taxation is not resolved. As shown, a significant number of cases are, both in absolute numbers and in %, withdrawn with double taxation. In other words, while the MAP is, on the whole, an effective means of relieving international double taxation, it has proven insufficient in a significant number of cases, which either take too long or are not resolved at all. It is not the aim of this paper to propose a solution for such cases, but merely point out the need to take action.