

Chapter 5: Tax Treaty Mechanisms to Resolve Cross Border Tax Disputes: The Mutual Agreement Procedure¹

[NB –

- the **turquoise** shading is the work done on Chapter 5 before the proposal to merge with the GMAP;
- the **yellow** shading represents text from the 2012 UN Guide to the Mutual Agreement Procedure under Tax Treaties;
(http://www.un.org/esa/ffd/tax/gmap/Guide_MAP.pdf)
- the **grey** shading represents some fresh work done on the GMAP to make it more practical.

The three parts have not yet been fully integrated with each other].

¹ Draft of this chapter (including the Guide to the Mutual Agreement Procedure) was provided (in alphabetical order) by Susana Bokobo, Sriram Govind, Claudia Pimentel, Norbert Roller and Laura Turcan, with additional contributions from Christina Dimitropoulou, Jan de Goede, Jeffrey Owens, Janos Pasztor, Johan de la Rey, Pragya Saksena)

5.1 The Mutual Agreement Procedure in Tax Treaties

5.1.1 The Purpose of the Mutual Agreement Procedure

In the broadest sense, the Mutual Agreement Procedure (MAP) is intended to resolve difficulties arising out of the interpretation and application of a bilateral tax treaty between countries in the broadest sense of the term, as well as potential double taxation situations not expressly covered by bilateral tax treaties.

The interjurisdictional disputes stemming therefrom might be resolved either through domestic mechanisms or through the specialized dispute resolution mechanism provided in the treaties themselves. Consequently, the treaties provide for the MAP where the designated 'competent authorities' appointed by the Governments of each State enter into direct discussions in an attempt to resolve the dispute.

More specifically, the MAP provides taxpayers with an alternative, bilateral remedy as opposed to domestic tax administrative remedies or litigation, which can be cumbersome and uncertain, especially since domestic action may not be able to provide effective relief from double taxation or other taxation not in accordance with the treaty. For example, domestic action may not be available in both states, or it may lead to different results in each state, thus failing to resolve the double or inconsistent taxation.

The MAP also entails a timing advantage, since the taxpayer is not obliged to wait until the taxation has been charged or notified to him in order to set the procedure in motion. It is sufficient if he establishes reasonably that the actions of one or both contracting states will probably result in taxation not in accordance with the convention. Moreover, ideally, the duration of the MAP would be shorter than the duration of most domestic court proceedings involving the Supreme Court of the respective Contracting State. Further, the availability of MAP may help developing countries in attracting foreign direct investment, which is key to their growth and development. Finally, the MAP provides for an **amicable means of resolving disputes, which does not strain the relationship between the competent authorities** and, by extent, the tax administrations of the Contracting States involved.

Developing a successful framework for MAP is also be important for developing countries, especially where tax authorities and domestic Courts are overburdened

with case volumes. A lack of specialization among judges in tax treaty cases could also be a concern.

5.1.2 The MAP as Part of Tax Treaties

MAP is included in the equivalent to article 25 of almost every tax treaty following the UN or OECD Models. The MAP can be used to eliminate economic (involving two taxpayers being taxed by two countries on the same profits) or juridical double taxation (involving a single taxpayer being taxed by two countries on the same profits), to address other taxation that is not in accordance with the treaty, and may cover taxes beyond corporate income taxes as well.

5.1.3 Preliminary Issues for Countries Considering Entering into MAP Obligations

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5.1.4 Meeting a Country’s MAP Obligations Efficiently and Effectively

[This part of the Chapter and following (paragraphs **** to ****) comprise, as well as an essential part of this Chapter, the stand-alone “United Nations Guide to the Mutual Agreement Procedure under Tax Treaties”, an update of the 2012 document of the same name.]

Executive Summary/Purpose

As agreed in the New York³⁻⁴ September 2016 meeting², the this note is to be presented at the Tax Committee meeting in October for obtaining the approval of the method and the next steps for detailed work “on possible updates to the UN

² See the paper titled: “Main Outcomes of Subcommittee Meeting on MAP, Dispute Avoidance and Resolution, Vienna, 9-10 June, 2016” by the Secretariat

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:

1. Principles (why is important to include them) (why is it useful for developing countries)
2. 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.
3. Why is useful for developing countries to have a template for MAP requests and a draft template.

A. PREFACE

1. The main purpose of this Guide is to improve the understanding and functioning of the Mutual Agreement Procedure (“MAP”), which is the procedure, provided for in Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries (“UN Model”), that provides that the representatives of the States will enter into a bilateral tax treaty to endeavor to resolve disputes, difficulties or doubts arising in relation to the interpretation or application of the treaty.

2. Such improved understanding should facilitate recourse to the MAP, in particular for tax administrations and taxpayers that have limited experience with that procedure, as well as the effective and efficient operation of the MAP.

3. While this Guide builds on other work that has been done in this area³, it has been drafted with a primary focus on the specific concerns of developing countries and countries in transition and provides tax administrations and taxpayers with basic information on the MAP and the context in which it operates.

4. This Guide does not purport to propose rules binding upon UN Member countries. It does not modify, restrict, or expand any rights or obligations contained in the provisions of any tax treaty. The information contained in this Guide complements, and should not be considered a substitute for, the guidance

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found in the UN Model and, in particular, in the Commentary on Article 25 of that Model. To the extent that there are any statements or information in this Guide which are incompatible with the provisions of a tax treaty or with the UN Model Commentary applicable to those provisions, those provisions, as interpreted by the UN Model Commentary, will obviously prevail.

5. This Guide includes a number of recommendations. These recommendations are based on international practice and experience and reflect views as to the most appropriate manner to deal with particular MAP processes and procedural issues. Although many tax administrations and taxpayers have found that the implementation of these recommendations has improved the MAP, the appropriateness of these recommendations must be evaluated in light of the specific features and characteristics of each tax system and each treaty.

1. **B. INTRODUCTION AND BACKGROUND**

1.1 **The purpose and importance of the mutual agreement procedure**

1. A tax treaty is an official agreement between two countries (“Contracting States”) the primary purpose of which is the prevention of the international double taxation that may arise when a specific transaction or taxpayer is subject to tax under the domestic tax laws of both Contracting States. Such double taxation discourages the free flow of international trade and investment and the transfer of technology, all of which play important complementary roles in the economic development process.

2. A tax treaty seeks to prevent international double taxation by providing for a uniform allocation of taxing rights with respect to specific classes of income between the residence State (that is, a taxpayer’s State of residence) and the source State (that is, the State where the relevant income is considered to arise). A tax treaty will further provide a method through which double taxation will be eliminated by the resident State in situations in which the treaty permits both the residence State and the source State to tax an item of income.⁴

3. For example, the interest Article of a tax treaty may permit interest arising in one Contracting State and paid to, and beneficially owned by, a resident of the other Contracting State to be taxed in both these States, with the tax charged in the source State limited to an agreed-upon rate. Double taxation is then eliminated by the relief from double taxation Article, under which the residence State will generally allow a deduction or credit against its tax for the tax paid to the source State, to the extent that the source State properly taxed the interest income under the treaty.

4. In certain cases, however, international double taxation may arise even where there is a tax treaty between two countries. Such double taxation may result, for example, from the incorrect application of the treaty by one of the Contracting States, or from differing views between the Contracting States (*e.g.* with respect to the relevant facts or the characterisation of an item of income under domestic law) as to how the treaty should apply in a particular situation or context.

5. In order to resolve such issues, tax treaties typically provide for a mutual agreement procedure along the lines of what is provided for in Article 25 (Mutual Agreement Procedure) of the UN Model. Essentially, the negotiation of an agreement pursuant to the MAP is a government-to-government process.

6. The MAP is the mechanism that Contracting States use to resolve any disputes or difficulties that arise in the course of implementing and applying the treaty. The MAP thereby ensures that these disputes will not frustrate the treaty’s goal of preventing international double taxation. In order to achieve that goal, the competent authorities should make every effort to reach a timely agreement on each issue submitted to the

Where the provisions of a tax treaty permit both Contracting States (that is, the residence State and the source State) to tax an item of income, double taxation is eliminated through either the “exemption method” or the “credit method”. See Articles 23A (Exemption Method) and 23 B (Credit Method) of the UN Model. Under the exemption method, the residence State will generally exempt from its tax an item of income that, in accordance with the provisions of the treaty, may be taxed in the source State. Under the credit method, where an item of income may, in accordance with the provisions of the treaty, be taxed in the source State, the residence State will generally allow as a deduction from its tax on the item of income an amount equal to the tax paid in the source State (but not exceeding its own tax on that item of income).

MAP.

The Legal Basis of MAP

7. The Mutual Agreement Procedure (MAP) is intended to resolve difficulties arising out of the interpretation and application of the Convention in the broadest sense of the term, as well as potential double taxation situations not expressly covered by bilateral tax treaties. The interjurisdictional disputes stemming therefrom might be resolved either through domestic mechanisms or through the specialized dispute resolution mechanism provided in the treaties themselves. Consequently, the treaties provide for the MAP where the designated 'competent authorities' appointed by the Governments of each State would enter into diplomatic discussions in an attempt to resolve the dispute.

MAP is included in the equivalent to article 25 of almost every DTC following the UN or OECD Models. The MAP can be used to eliminate economic or juridical double taxation and may cover taxes beyond corporate income taxes as well.

International juridical double taxation can be defined as the imposition of income taxes in two (or more) states on the same taxpayer in respect of the same income. Juridical double taxation can arise, for example, where a resident of one country derives income from sources in the other country, and both countries' domestic tax legislation would tax that income. It can also arise where each country considers the taxpayer to be resident in that country under domestic tax laws.

Economic double taxation means the inclusion, by more than one state's tax administration, of the same income in the tax base when the income is in the hands of different taxpayers. Transfer pricing cases are the best example of economic double taxation.

The importance of MAP Procedures

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 resorting 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 actions, 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 the actions of 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 domestic procedures 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 an appropriate MAP.

Under article 25, three different types of procedures are envisioned.

First, article 25(1) of the UN Model, both option A and B, as well as article 25(1) of the OECD Model (MAP in a “narrower sense”) provides for relief from taxation not in accordance with the tax treaty. Only the taxpayer may initiate such proceedings, if it believes that taxation is not or will not be in accordance with the tax treaty. This is the most common type of procedure since taxpayers are most likely to raise a claim when they feel that taxation is not in accordance with the tax treaty.

Initiation

INITIATION of the proceedings:

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

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

1.3 What is the procedural relation between domestic law and MAP? 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 should be that the taxpayer clearly states 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 at least includes 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.

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)				
Requested Solution				
Is it an interpretation problem?		Y/N	Is it an application problem?	Y/N
<i>Explanation</i>				
List of documentation				
Signed in [Location] , By [name]				

1.7 Documentation requirements.

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

The taxpayer-initiated MAP under the UN and OECD Models is divided into two stages. Pursuant to article 25(1), a taxpayer may submit a request to the competent authority in its residence state if it considers that the actions of one or both contracting states have resulted in or if it reasonably believes that such action will result in taxation not in accordance with the provisions of the convention.

The OECD Model (2017) differs here as a result of BEPS Action 14, allowing the taxpayer to submit the request to the competent authority in either the residence or the source State. This deviation is slated to be implemented by means of Article 16 (1) of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). However, it will not affect all treaties covered by the MLI since the states can make a reservation to keep the wording of Article 25 (1) of the old OECD Model (2016). Seeing as the MLI did not come into force until February 1st 2018 and it only applies to a given tax treaty after having been ratified by both Contracting States, the practical impact of the deviation can be expected to be very limited, at least for the time being.

The Conduct of the MAP

DEVELOPMENT of the proceedings: **MAP discussions between CAs are a government-to-government process. As a general comment, despite the fact that decisions 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 must 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)

The requested competent authority is obliged to take the objection raised by the taxpayer into consideration and, if they feel it is justified, to take action. If the taxation not in accordance with the convention is due entirely to its actions, then it must remove the grounds for objection by granting an adjustment or relief.

This constitutes the first stage of the MAP and takes place exclusively between the taxpayer and the requested competent authority.

Should the competent authority not be able to arrive at a satisfactory solution on its own, because the issue is caused, at least in part, by the actions of the other contracting state, then it must initiate the second stage of the proceedings, the MAP proper, as soon as possible. The second stage of MAP takes place exclusively between the competent authorities of the contracting states. In this second stage, per Article 25 of the UN Model, the competent authorities of the Contracting States are obliged to “endeavour” to resolve the case by mutual agreement. The same is true of the OECD Model. In the 2017 OECD Model Commentary, this obligation was clarified as follows:

“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.” (see m.no. 5.1.)

In most bilateral tax treaties, Article 25 also provides for the possibility of MAP in two other two areas. The provision corresponding to Article 25(3) of the UN or OECD Model Tax Conventions adds questions of “interpretation or application of the Convention” and the elimination of double taxation in cases not otherwise provided for in a convention to the scope of the MAP.

The second type of MAP, pursuant to Article 25(3) of the UN and OECD Model, first sentence, can be used for removing difficulties regarding the interpretation or application

of the DTC. The competent authorities are free to initiate proceedings in order to eliminate difficulties concerning the interpretation and application of the treaty as well as double taxation. This applies to legal as well as factual matters of a general nature that concern a category of taxpayers. More precisely, it allows the competent authorities to complete or clarify the definition of a term in the convention, settle difficulties arising from changes in national law and determine the conditions under which interest may be treated as dividends as a result of domestic thin cap rules. This type of MAP is fairly rare in practice, but such agreements on interpretation between the competent authorities could be published as well, so that future practice as regards the tax treaty may be influenced.

Third, Article 25(3) of the UN Model, second sentence, allows the competent authorities to consult together in cases of double taxation not provided for in the convention. This category does not deal with the interpretation or application of the convention, but is general and allows competent authorities discretion to take action against double taxation of any kind, including economic double taxation and, arguably, even cases involving indirect taxes, such as VAT. However, some countries prefer to exclude this type of MAP from their bilateral tax treaties because of incompatibilities with domestic law.

The second and third types of MAP are usually related to issues of a general nature and may be initiated by the competent authorities. As is the case for a taxpayer-initiated MAP, the agreements reached under Article 25(3) are binding.

The inclusion of the two sentences of Article 25(3) in bilateral tax treaties is a minimum standard under BEPS Action 14 and will be implemented by means of Article 16 (3) of the MLI.

MAPs under Article 25(3) do not have precedential value and in practice have often been disregarded by domestic courts in resolving cases where they would have been applicable. However, some States are of the view that a general mutual agreement reached under Article 25 (3) “*represents objective evidence of the competent authorities’ mutual understanding of the meaning of the Convention and its terms*” and would therefore need to be taken into account for the purposes of the interpretation of the Convention, according to the principles of international law for the interpretation of treaties according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Such language was recommended by BEPS Action Plan 14, and added to the UN Model Commentaries (2017) and the OECD Model Commentaries (2017).

Fourth, article 25(4) of the UN Model states that the tax authorities may communicate directly or may constitute a joint commission for communications in a MAP. The tax

authorities may also bilaterally develop procedures, conditions, methods and techniques for the conduct of the MAP procedure per this provision.

The OECD Forum on Tax Administration has also created a forum for competent authorities from among FTA member countries, i.e. the FTA MAP Forum, to meet regularly to deliberate on matters affecting MAPs and to develop a multilateral, strategic plan to collectively improve the effectiveness of MAPs.

Co-existence of MAP with domestic remedies

Article 25(1) stipulates that access to MAP is available “irrespective of the remedies provided by domestic law”. This means that taxpayers are allowed to initiate a MAP without first exhausting any available domestic remedies. Many countries permit this in their practice.

However, many countries take the position in practice that the MAP and domestic remedies cannot be pursued simultaneously. In other words, they take the position that either the MAP or the domestic remedies must be pursued first. Most often, this is achieved by permitting both procedures to be initiated and then putting either the MAP or the domestic procedures on hold. This approach may raise issues where a deadline applies for requesting MAP or domestic relief or where the sequencing rules are not made clear, so OECD guidance urges the adoption of flexible and transparent procedures to coordinate the procedures where they are not permitted to run in parallel.

States should, at a minimum, put into place procedures on how to deal with cases where MAP and domestic procedures have been invoked simultaneously. Many countries require that if the domestic procedures are still available, the taxpayer must first exhaust them or agree to waive its right to them before invoking a MAP proceeding. If the domestic remedies are pursued first and competent authorities are bound by the decisions of the domestic courts, then a MAP can only be pursued in order to request agreement by the other state to provide unilateral relief with respect to the outcome of the court decision. This greatly restricts the scope of application of the MAP and its attractiveness since taxpayers may be left with no solution where there is no agreement in a MAP. To avoid this issue, States where the tax administration is bound by court decisions may choose to allow taxpayers the choice to invoke the bilateral remedy first and, if an agreement is reached during the MAP, subsequently require the taxpayer to renounce his right to any domestic remedies and terminate domestic court procedures as a prerequisite for the implementation of the MAP agreement.

In any case, States must inform taxpayers of their official position on this issue.

The competent authority (CA) function

The role of the competent authority

The competent authority represents a State in matters related to the application of a tax treaty. Particularly, the conduct of MAPs under Article 25 of the UN and OECD Model and the Exchange of Information under Article 26 of the UN and OECD Model fall under those duties. The role of the competent authority received increased attention during the last years since tax transparency and exchange of information⁵ as well dispute resolution⁶ were high on the agenda of key players in international tax law.

MAP is a procedure between states, no matter if the MAP was initiated by a taxpayer under Article 25 (1) UN Model or by a state or a taxpayer under Article 25 (3) UN Model; hence MAP is always a procedure between competent authorities. There is only one rare exception here, i.e. in cases under Article 25 (1) UN Model, when the competent authority receiving the taxpayer request can solve the case without involving the other competent authority.

In performing its functions, the competent authority is to be guided first by the terms of the treaty itself. The competent authority must then refer to any guidance promulgated under the treaty. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue statistics or an overall balance of results. Moreover, and especially in light of the principle of reciprocity underlying any international agreement, competent authorities should be consistent in their approach to an issue, regardless of which Contracting State is favoured by that approach in a particular case. Notwithstanding disagreements on facts or principles, competent authorities should seek and be able to compromise in order to reach a mutual agreement that will provide relief from double taxation or taxation not in accordance with the convention⁷.

In order to improve the MAP process, competent authorities should strive to resolve cases in a timely manner⁸ and keep the taxpayer informed of the status of their request on an on-going basis. Once a decision has been made or a solution agreed to by the competent authorities on a particular case, the taxpayer should be advised of the decision in writing. It is understandable that a taxpayer may wish to know the basis of the

⁵ Ref to Global Forum

⁶ Ref to Action 14 MS

⁷ UN Guide to MAP, par. 48-49.

⁸ Ref to 24m timeframe in Action 14 Minimum Standard and OECD MC

competent authority decision or agreement on its case and therefore should be afforded a satisfactory explanation by the competent authorities⁹.

The organizational aspects of the competent authority role will be discussed below in chapter 5.1.5.2.

DECISION.

3.1. Deadline for making 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)

3.2. Deadline to communicate the decision.. (1 month after)

3.3. 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)

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

3.5. 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 the taxpayer accepts the MAP resolution, it should withdraw domestic processes.** (par. 73 and 147)

3.6. Publication of decisions. Should the decision be published? Problems related to confidential information. **CAs 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. Implementation of the decision. (par. 179-205)

The implementation of a MAP 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

⁹ Ref to the discussion of the right of a taxpayer to reject a mutual agreement between CAs

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 achieve in jurisdictions that give effect to 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 or its applicability to certain facts, this interpretation must be extended to all taxpayers that are in the same situation. This pattern is observed in jurisdictions that apply the non-discrimination principle to their taxpayers.

Conversely, when the relief results from a specific taxpayer's particularities and only may be applied from the analysis of the case, the decision should only be applicable to the taxpayer involved. Besides the aspect related to the equal treatment of different situations, to give effect to such decisions towards all could lead to issues concerning the duty of confidentiality.

Moreover, the decision's effects will determine its form: decisions with *erga omnes* the effect of being applicable to all may (in fact, it is advisable) be enforced through the issue of an administrative act or notice, 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 the taxpayer agrees with all its conditions. However, situations exist that are based on both taxpayer particularities and new general legal interpretations. In such cases, if the taxpayer does not agree with the conditions imposed by the competent authorities, the legal interpretations will still be valid, since they are applicable to all taxpayers.

- 3.1. Does the decision have **retroactive effect**?
- 3.2. Does the decision have *erga omnes* effect towards all 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?

Organizational and Administrative Aspects of the CA function

The competent authority is mentioned as part of the definitions in Article 3 of the UN and OECD Models. However, the actual definition is left to the Contracting States, since the organization of the tax administration typically varies widely between States. The competent authorities designated in a tax treaty are often officials at the highest level of a Contracting State's tax administration (e.g. the Minister of Finance). For practical and administrative reasons, the power and authority to perform the competent authority function will typically be delegated to a subordinate official (the "authorized representative") who carries out the day-to-day functions of the competent authority¹⁰. However, practical experience with the MAP process has shown that the efficiency and effectiveness of a MAP program is enhanced if the senior tax officials to whom the competent authority function has been delegated are actively and directly engaged in the MAP process¹¹.

For taxpayers it is essential to know how to contact the competent authority. Only if such information is publicly available will taxpayers have access to MAP. Hence, Contracting States should publicize the identity of the officials responsible for carrying out the competent authority function, as well as information on how to contact the competent authority. Publicity of the identity of the officials engaged in MAP will ensure the trust of taxpayers and improve the transparency of the procedure. Many countries already provide this information to taxpayers as part of their general public guidance on how to seek MAP assistance.¹²

The organizational setup of a competent authority will depend upon the specific circumstances of a Contracting State's tax administration, including the resources available and the present (or anticipated) MAP caseload. A country that is rarely involved in MAP cases might prefer to delegate the competent authority functions to the (centralized) officials in charge of the negotiation of tax treaties due to the established experience of these officials as to the interpretation of the tax treaty provisions.

On the other hand, a Contracting State that has to deal with a very large number of MAP cases may want to separate its competent authority function into various (decentralized)

¹⁰ Based on administrative practice, the person usually engaged in the CA's function is a subordinate official who has been legally authorised following a delegation by the Minister of Finance. In addition, in jurisdictions where an independent administrative body is established to deal with local or international tax disputes, the CA's function in MAP is performed by the directors of that independent body, for eg. Greece.

¹¹ e.g. where officials with decision-making authority with respect to MAP cases remain informed of the details of MAP cases and are closely involved in detailed bilateral MAP discussions, UN MAP guide, par. 56

¹² However, J. Morgan, *New Developments in the Resolution of International Tax Disputes*, 43 *TNI* 77 (2006), points out that shifting trade patterns may imply that MAPs will have to be conducted by officials less familiar with the cultural backgrounds of their counterparts.

groups based on regions, taxpayer industry, or type of taxpayer (individual, corporate, etc.). Regardless of whether the competent authority function is organized in a centralized or decentralized manner, it is important that the responsible officials implement a system of recordkeeping in order to guarantee consistency. Such diligence shall also enhance tax certainty, especially where complex factual issues are involved.¹³

Countries are to a very large extent free to structure their competent authorities in the ways they see fit. The UN Model Convention or Commentaries do not contain respective rules. Neither do the OECD Model or Commentaries. However, as part of the BEPS Action 14 minimum standard certain restrictions are placed on this freedom with respect to the resolution of MAP cases and the implementation of MAP agreements. The minimum standard requires that:

- MAP cases should be resolved within an average timeframe of 24 months. In order to achieve this, States will need to ensure that the competent authority function is adequately resourced and staffed when taking into account its current competence fields (which may involve not only the conclusion of MAP agreements, but also participation in the work of the UN and OECD and the negotiation of bilateral tax treaties). As part of their commitment to the minimum standard, States are required to prepare and submit for public release statistics in accordance with the agreed reporting framework developed by the G20, the OECD, and other participating countries. The statistics need to include information concerning the average duration of a case, which will be used to monitor whether the minimum standard is upheld, as well as other information regarding the handling of MAP requests.
- Moreover, States are required to 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. This requires independence from the tax administration personnel who made the adjustments at issue, whose approval or the direction should not affect the outcome of the MAP case. In addition, the CA should not be influenced by considerations of future tax treaty policy.
- Finally, the minimum standard prohibits countries from using performance indicators based on the amount of revenue generated for their CA functions, with the aim of preventing incentives that would jeopardize the willingness of CAs to reach a compromise (and thus an agreement) during the MAP.

¹³ i.e Transfer Pricing disputes, see indicatively Gary M. Thomas, Adequacy of International Dispute resolution mechanisms: The quest for procedural comparability in the competent authority process, 10 Geo. Mason L. Rev. 995, 1034 (2002)

The competent authority's proper functioning depends on the existence of adequate resources. Particularly, human resources, in the form of skilled personnel, will often be the most crucial factor in operating an efficient and effective MAP program. Maintaining and developing the skills of the competent authority staff also require that a tax administration devote appropriate resources to their training.

Competent authorities are embedded in tax administrations but need a high degree of independence to be effective. Competent authorities have to make decisions on factual as well as legal questions in the cases they are dealing with. Typically, they will not have sufficient own personnel to deal with all these tasks but will have to rely on the cooperation of other parts of their tax administration, such as e.g. the audit department which has established the facts of the case in the first place. The functionality of this internal communication is crucial for the effectiveness of the competent authority function. Usually, the relationship between the competent authority and the audit function will not be a hierarchical one, since it would neither be useful if the actions of the competent authority depended on the approval of auditors nor if audits depended on the competent authority. Hence horizontal structures like in a project setup may fit the purpose best.

The effectiveness of the MAP process could be measured via performance indicators such as the time taken to the competent authorities to resolve a case, the number of cases solved as well as consistency, and principled and objective outcomes. Such performance indicators would ensure that MAP cases are given priority among the other duties of the competent authorities and that the CA endeavours to resolve cases in a timely and principled manner. At the same time, the number of audit adjustments sustained through the MAP or the amount of tax revenue kept / lost should not be used to determine the effectiveness of the competent authority's performance, as suggested by the BEPS Minimum Standard on Action 14.

1.1.1 What value does the MAP add?

The importance of the MAP stems from the fact that it provides taxpayers with an alternative, bilateral remedy as opposed to domestic tax litigation, which can be cumbersome and uncertain, especially since domestic action may need to be taken up in both of the contracting states for effective relief from double taxation. Domestic action may lead to different results in each state, thus failing to resolve the double taxation. The MAP also entails a timing advantage, since the taxpayer is not obliged to wait until the taxation has been charged or notified to him in order to set the procedure in motion. It is sufficient if he establishes reasonably that the actions of one or both contracting states will probably result in taxation not in accordance with the convention. Moreover, ideally, the duration of the MAP would be shorter than the duration of most domestic court

proceedings involving the Supreme Court of the respective Contracting State. Further, the availability of MAP may help developing countries in attracting foreign direct investment, which is key to their growth and development. Finally, the MAP provides for an amicable means of resolving disputes, which does not strain the relationship between the competent authorities and, by extent, the tax administrations of the Contracting States involved.

Developing a successful framework for MAP would also be important for developing countries, especially where tax authorities and domestic Courts are overburdened with case volumes. A lack of specialization among judges in tax treaty cases could also be a concern.

B. Principles governing the 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”.¹⁴

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”.¹⁵

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, it is believed 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.

¹⁴Cheng, Bin. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge, UK: Cambridge University Press, 2006.

¹⁵ General Principles of Law, Marcelo Kohen, Bérénice Schramm
<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml>

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”

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 function, 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.

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

1.2 Typical cases dealt with in the MAP

MAP disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a convention. Since most probable occurrences of double taxation are dealt with automatically in tax conventions through tax credits, exemptions, or the determination of taxing rights of the contacting states, the

majority of MAP cases are situations where the taxation of an individual or entity is unclear.

The lack of clarity can be the result of several factors:

- The Contracting States can have a different understanding of the facts of the case. Such situations are fairly common with respect to cases involving provisions whose application depends on the situational aspects of the case and that therefore require a thorough investigation into the facts as well as a holistic interpretation. The more complex the fact pattern, the more likely it is that there will be a different understanding of it among the Contracting States. Therefore, transfer pricing cases, which are commonly regarded as very complex are often considered to be primarily disagreements concerning the facts.
- There can also be a different legal understanding of a case among the Contracting States. This difference is very often due to differences in domestic law with respect to the categorization and treatment of different legal forms (often resulting in so-called “conflicts of attribution”) as well as different types of income (so-called “conflicts of qualification”). A “conflict of attribution” is a situation in which the income in question is attributed to different persons by the Contracting States under domestic law, leading to a difference in the application of the Convention and either to double taxation or to double non-taxation. A “conflict of qualification” is a situation in which the two Contracting States apply a different qualification under the Convention to the income in question, thus leading to double taxation or double non-taxation.

As previously mentioned, the vast majority of MAPs requested and concluded in practice are MAPs under the bilateral equivalent of Article 25 (1), initiated by the taxpayer in a specific case.

There are several common categories of MAP cases, the incidence of which in a country’s inventory depends on the nature of its economic relations with other countries and of its domestic economy:

- transfer pricing adjustment requests;
- attribution of profits of a permanent establishment;
- dual residence of individuals and persons other than individuals;
- withholding tax levied beyond what is permitted by the applicable DTA;
- cases falling under an anti-abuse provision in one of the Contracting States;
- cases involving hybrid entities or instruments.

The organizational aspects of the competent authority role will be discussed below in chapter 5.1.5.2.

7. Article 25 of the UN Model sets out two broad areas in which the Contracting States shall

endeavour to resolve their differences by mutual agreement:

- (1) cases in which a taxpayer considers that the acts of one or both of the Contracting States result or will result for the taxpayer in taxation not in accordance with the provisions of the treaty (covered by paragraphs 1 and 2 of Article 25); and
- (2) cases in which there are difficulties or doubts as to the interpretation or application of the treaty (covered by paragraph 3 of Article 25).

8. A MAP article will also generally permit the Contracting States to consult together for the elimination of double taxation in cases not provided for in the treaty. The different types of cases that are dealt with in the MAP are briefly discussed below.

1.2.1 Article 25(1) cases - taxation not in accordance with the treaty

9. Paragraph 1 of Article 25 of the UN Model permits a taxpayer who considers that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the provisions of the treaty to present its case to the Contracting State of which it is a resident. A taxpayer's presentation of such a case to the Contracting State of which it is a resident is often referred to as a "request for MAP assistance" or a "request for competent authority assistance".

10. Most disputes that arise under tax treaties involve "taxation not in accordance with the provisions of the Convention". Paragraph 1 is thus the most commonly referred to provision of the MAP article.

11. A Contracting State's taxation of a person or transaction in a manner inconsistent with provisions of a treaty will in most cases result in international double taxation - that is, either (i) the imposition of tax in both Contracting States on the same taxpayer in respect of the same income ("juridical double taxation") or (ii) the imposition of tax in both Contracting States on the same income in the hands of different taxpayers ("economic double taxation").

12. The MAP may not be used to challenge the application of domestic legislation in cases where there is no alleged violation of the provisions of the treaty.

13. Common examples of MAP cases under paragraph 1 include the following cases.

Transfer pricing cases

Transfer pricing cases (Allocation/Attribution cases)

Perhaps the most common variety of MAPs are the transfer pricing cases, i.e. concerning the correct allocation of profits between permanent establishments and their head office or between separate entities.

The economic double taxation that may arise in a transfer pricing case can be illustrated by the following example. State S makes an adjustment increasing the taxable profits of a subsidiary company that is resident of that State with respect to a transaction between that company and its parent company resident of State P, and taxes such increased amount. The income reported in State P by the parent company, however, reflects the original (pre-adjustment) income. As a result, State P will have already charged tax on

that same income in the hands of the State P resident. Similar situations may also arise in case of transactions involving a head office in State P and a PE in State S. In such cases, States P and S may be required to enter into a MAP to resolve the ‘double taxation’ arising from such actions.

The relief from double taxation is provided in the form of a “corresponding adjustment” pursuant to Article 9 (2) UN and OECD Model. Article 9 (2) UN Model and OECD Model is included in most tax treaties. It should be stressed, however, that even where tax treaties do not contain a provision for ‘corresponding’ adjustments (i.e. Article 9(2) UN Model or similar provisions), the UN Model envisages that economic double taxation arising from transfer pricing would fall within the scope of the: *“the inclusion of paragraph 1 of Article 9 is sufficient to indicate that the intention of the Contracting States was to have economic double taxation covered by the convention”* (see m.no. 2 of the UN Model Commentary).

The granting of access to MAP for transfer pricing cases is also one of the minimum standards of BEPS Action 14, which is intended to be implemented by means of Article 17 of the MLI.

For the first time, the 2017 OECD MAP statistics differentiate between transfer pricing and other cases. They show that most countries have a larger volume of transfer pricing cases than “other” cases pending and that they, on average, have taken more time to resolve transfer pricing cases than “other” cases through MAP.

Transfer pricing cases are thus, of great significance for the MAP procedure and States should put in place adequate machinery to deal with such cases, considering case volumes. Countries may also employ the MAP in tandem with their domestic advance pricing agreement frameworks to achieve a bilaterally acceptable result.

Under the laws of some states, the taxpayer may be permitted under appropriate circumstances to amend a previously filed tax return to adjust the price for a controlled transaction between associated enterprises, or to adjust the profits attributable to a permanent establishment, in order to reflect a result in accordance (in the view of the taxpayer) with the arm’s length principle.

A taxpayer-initiated adjustment is any action permitted under the domestic laws of a treaty partner and undertaken at the initiative of the taxpayer to adjust the previously reported results of controlled transactions, or the attribution of profits to a permanent establishment, in order to reflect an arm’s length result.

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.¹⁶

Since such an adjustment would normally take place after the initial tax assessment in the contracting states involved, it will in most cases lead to double taxation. In order to ensure that competent authorities may resolve the double taxation that can arise in the case of a bona fide taxpayer-initiated foreign adjustment, taxpayers would need to be allowed to access the MAP in such cases.

Action 14 of the BEPS Action Plan recommends requires that access to the MAP be granted in such cases and that this be made explicit in countries' MAP guidance. However, the UN Tax Committee agreed not to accept such changes in the Commentaries in the 2017 update.

Possible benefits of allowing such adjustments are that they reflect the true financial situation of the enterprises involved. Taxpayers would thus have more incentive to truthfully report arm's length prices for transactions if they do not result in the economic burden of double taxation.

However, given the capacity constraints of competent authorities in developing and emerging economies, MAP cases resulting from taxpayer-initiated adjustments would put an additional (perhaps significant) strain on their resources and may prevent or at the very least encumber the resolution of MAP cases pertaining to adjustments made by the tax administrations. At the same time, taxpayers have an obligation to file their year-end tax reports accurately and on time. It can be argued that a breach of these obligations should not negatively impact the competent authorities, but the taxpayer, who is responsible.

14. Historically, a large number of paragraph 1 cases have involved transfer pricing issues and the economic double taxation that may result when a Contracting State makes adjustments to income from related party non-arm's length transactions among and between the members of a multinational group of enterprises.

15. The economic double taxation that may arise in a transfer pricing case can be illustrated by the following example. State A makes an adjustment increasing the taxable profits of a subsidiary company that is resident of that State with respect to a transaction between that company and its parent company resident of State B (e.g. State A reduces the amount of royalties deducted by the subsidiary with respect to a patent licensed to the subsidiary by the parent company). Following the adjustment, State A charges tax on the resulting additional income in the hands of the subsidiary resident of State A. The income reported in State B by the parent company, however, reflected the original (preadjustment) amount of royalties. As a result, State B will have already charged tax on that same income (the amount by which State A reduced the amount of royalties deducted) in the hands of the State B resident.

16. In the factual scenario described in the preceding paragraph, the issue has

¹⁶ OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241633-en>; p. 35.

sometimes

arisen whether State B can provide relief to the parent company resident of State B if there is no provision in State B's domestic law or in Article 9 (Associated Enterprises) of the State A-State B tax treaty to provide such relief (sometimes referred to as a "correlative" or "corresponding" adjustment).

17. Paragraph 2 of Article 9 (Associated Enterprises) of the UN Model provides for such relief as follows:

Where a Contracting State includes in the profits of an enterprise of that State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits.

18. Certain tax treaties, however, may not contain a provision similar to paragraph 2 of Article 9.

19. In this circumstance, it should be noted that the Commentary on Article 25 of the UN Model Tax Convention makes clear that Article 25 provides machinery to enable competent authorities to consult with a view to resolving the economic double taxation that may arise in transfer pricing cases. The Commentary expressly States that "the corresponding adjustments to be made in pursuance of paragraph 2 of [Article 9] ... fall within the scope of the mutual agreement procedure, both as concerns assessing whether they are well-founded and for determining their amount".⁴

20. The Commentary further states that even when a tax treaty does not contain rules similar to those of Article 9(2), the mere fact that the Contracting States have included Article 9(1) in a treaty demonstrates the intent to have economic double taxation covered by the treaty: "As a result, most countries consider that, in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation resulting from adjustments made to profits by reason of transfer pricing falls within the scope of the mutual agreement procedure set up under Article 25 [...]. Some countries consider, however, that in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation arising from transfer pricing adjustments does not fall within the scope of the mutual agreement procedure provided for under paragraphs 1 and 2 of Article 25. Contracting states that do not include paragraph 2 of Article 9 in a convention should therefore clarify during the negotiations the consequences of the absence of paragraph 2 as to the scope of the mutual agreement procedure."¹⁷

1.1.1.1 *Other cases*

Among other cases, common types include residency cases where each contracting state considers the taxpayer a resident of its own, both under the treaty and under domestic law, and thus taxes the world-wide income of the taxpayer. Similarly, **cases**

⁴ See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 10 of the Commentary on Article 25 of the OECD Model).

⁵ See paragraph 2 of the Commentary on Article 25 of the UN Model Convention.

relating to the application of anti-avoidance rules, cases relating to whether a permanent establishment exists or otherwise and cases concerning cross-border employment situations have also come up often under MAP.

Developing countries are now starting to see cases resulting from differing interpretations of expressions such as ‘permanent establishment’ or ‘royalties’ in developed and developing jurisdictions. Such cases require special attention since close coordination between the two States is required to reach a workable solution here.

The application of anti-avoidance rules, both those foreseen in bilateral tax treaty (such as the Principle Purpose Test – PPT) and domestic rules, would generally lead to double taxation. While it has been clarified, both under the 2017 UN Model and under Action 6 of the BEPS Action Plan as implemented by Article 6 of the MLI that it is not the object and purpose of tax treaties to create opportunities for tax avoidance or tax evasion, there is no general rule denying MAP access in cases of perceived abuse in the UN Model and its Commentaries or the OECD Model and its Commentaries. The interpretation and/or application of an anti-abuse rule in the tax treaty would clearly fall within the scope of the interpretation and application of the tax treaty as a whole and thus the scope of the MAP. Similarly, the relationship between a domestic anti-abuse rule applied in a cross-border situation and the relevant tax treaty would depend on the interpretation of the tax treaty, which in turn can be dealt with under the MAP. Therefore, **most States believe that access must be granted to cases involving anti-avoidance rules under MAP as a best practice.** At the very least, this applies to cases concerning the conditions for the application of a treaty anti-abuse provision or a potential conflict between a domestic law anti-abuse provision and the provisions of a treaty.

The UN Model Commentary (2017), as well as BEPS Action Plan 14, and the OECD Model Commentary (2017) provide that States should avoid excluding anti-avoidance cases from the scope of MAP, especially in the absence of an explicit agreement with the treaty partner to this effect and without notifying the treaty partner.

However, States may choose to exclude cases involving criminal actions such as tax evasion, fraud etc. from the scope of MAP, as foreseen under Article 9 (3) of the UN Model.

21.

Permanent establishment cases

22. Under Article 7 (Business Profits) of the UN Model, the business profits of an enterprise of a Contracting State are taxable only in that State, unless the enterprise carries on a business in the other Contracting State through a permanent establishment.

23. Taxpayers frequently use the MAP where they disagree with a Contracting State’s conclusion that their presence or activities in that State give rise to a permanent establishment - and thus that part of their business profits are taxable in that State. Requests for MAP assistance are also often made in

connection with the determination of the profits attributable to a permanent establishment.

24. Permanent establishment cases may often involve juridical double taxation. For example, consider a State A enterprise that does business in State B. In State B's view, these activities give rise to a State B permanent establishment. State B thus taxes the State A enterprise on the profits it considers attributable to this State B permanent establishment as well as other profits referred to in subparagraphs b) and c) of paragraph 1 of Article 7. State A, on the other hand, does not consider the State A enterprise to have a State B permanent establishment and, accordingly, takes the view that only State A may tax the profits attributable to the State B business. As a result, the State A enterprise is subject to tax in both States on the profits attributable to its State B business.

Dual-residence cases

25. Article 4 (Resident) of the UN Model provides that an individual is a resident of a Contracting State for purposes of the treaty if he is liable to tax in that State by reason of domicile, residence, place of incorporation, place of management or any other criterion of a similar nature. Differences in the domestic law criteria used to determine the comprehensive liability to tax that will give rise to residence for treaty purposes, however, may often cause an individual to be considered a resident under the tax laws of both Contracting States.

26. Paragraph 2 of Article 4 thus sets out a series of tie-breaker tests to determine a single State of residence for purposes of the treaty. Given the fact-intensive nature of many of these tests, requests under the MAP may often arise because an individual disagrees with how the tests have been applied by one (or both) of the Contracting States.

27. For example, subparagraph 4(2)(a) provides that an individual with a permanent home in both Contracting States will be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests). The application of this test may require the examination of many factors - family and social relations, occupations, political and cultural activities, place of business, etc. Different views on how these factors should be weighed may lead to different conclusions as to an individual's centre of vital interests, and thus his residence for purposes of the treaty. Through the MAP, the Contracting States may reach agreement on how the test should be applied to a taxpayer's facts.

Withholding tax cases

28. Tax treaties usually permit source State taxation of dividends, interest, and royalties paid to, and beneficially owned by, a resident of the other Contracting State, but limit the tax charged by the source State to an agreed-upon percentage of the gross amount of such payments (see Articles 10 (Dividends), 11 (Interest), and 12 (Royalties) of the UN Model). The tax charged by the source State will typically take the form of a withholding tax.

29. Where the source State levies a withholding tax on a payment to a resident of the other Contracting State in excess of that allowed under the applicable treaty and has failed to refund the excess, the taxpayer may make a request under the MAP to the competent authority of its State of residence to address the taxation not in accordance with the treaty.

30. For example, in a situation in which a company resident of State A pays a dividend to an individual resident of State B, the company withholds State A tax from

the dividend at the tax rate provided by State A's domestic law. If the rate of the State A withholding tax is greater than the rate applicable under the dividends article of the tax treaty between State A and State B, the individual may make a MAP request to the State B competent authority in connection with the excess State A withholding.

31. Under Article 15 (Employment income) of the UN Model, remuneration derived by a resident of a Contracting State with respect to employment exercised in the other State may be taxed in that other State unless the person is present therein for 183 days or less and the remuneration is neither paid by, or on behalf of, an employer who is not a resident of that State nor is borne by a permanent establishment situated in that State. Different interpretations of the facts or domestic law differences in the meaning of employment may result in the two States reaching different conclusions as to how the article applies in a given situation.

32. Where the source State levies tax on such remuneration but the residence State considers that such taxation is contrary to the provisions of the convention and does not, therefore, provide relief of double taxation under Article 23, double taxation will likely result from these inconsistent actions. In such a case, the taxpayer may make a request under the MAP to the competent authority of his State of residence in order to address that problem.

1.2.2 Article 25(3) cases - interpretation and application of the treaty/double taxation in cases not provided for in the treaty

33. The first sentence of paragraph 3 of Article 25 of the UN Model provides that the Contracting States will endeavour to resolve by mutual agreement "difficulties or doubts" as to the interpretation or application of the treaty. Pursuant to this provision, the Contracting States undertake to discuss and resolve by mutual agreement any issues or questions related to the treaty that require clarification or interpretation.

34. These issues and questions will often be of a general nature. For example, as discussed below, paragraph 3 of Article 25 may be used to agree on the definition of a specific term used in the treaty, or on procedures to give effect to a specific treaty provision. The resolution reached through the MAP will thus potentially concern a number of taxpayers, rather than solely a specific taxpayer or the parties to a specific transaction (as in a case under paragraph 1 of Article 25).

35. Article 3(2) of the UN Model provides that a term not defined in the treaty will, unless the context requires otherwise, have the meaning that it has under the domestic law of the Contracting State applying the treaty. In some cases, however, a term used in the treaty may not have a precise meaning under a Contracting State's domestic law, or the use of a domestic law meaning may not be appropriate given the context in which the term is used in the treaty. The first sentence of paragraph 3 of Article 25 allows the competent authorities to clarify what meaning should be given to such terms.

36. Some countries have found that the use of the authority provided by Article 25(3) helps the implementation of the provisions of the treaty. In addition, where mutual agreements reached under Article 25(3) apply to all taxpayers or a general category of taxpayers, the publication of such agreements, which are not specific to particular cases and therefore do not mention any taxpayer-specific information, may serve to provide guidance and prevent potential future disputes. Countries are therefore encouraged to follow these practices in order to provide greater guidance in cases that affect a large number of taxpayers.

37. Contracting States may also rely on the first sentence of Article 25(3) to reach agreement on the procedures to be used to apply or otherwise give effect to the treaty. Such agreements could concern, for example, the procedures for confirming a

taxpayer's status as a resident of a Contracting State, or the procedures and criteria used to grant treaty benefits to fiscally transparent entities.

38. The second sentence of Article 25(3) provides that the Contracting States may consult together to eliminate double taxation in cases that are not otherwise provided for in the treaty. The most often cited example arises in the case of a third-country resident that has permanent establishments in both of the Contracting States.

39. In such a context, the Contracting States where the permanent establishments are located (State A and State B) may not agree on the amount of the profits attributable to each of the third-country resident's permanent establishments. Such a disagreement could occur, for example, where State A and State B have differing views on the contributions made by each permanent establishment to the third-country resident's global operations. As a result, there is the potential for juridical double taxation because a portion of the income of the third-country resident may be subject to tax in both State A and State B. Such cases may be addressed under the second sentence of Article 25(3) or through reciprocal mutual agreements between the two permanent establishment States and the third country.

40. The use of Article 25(3) to reach a MAP resolution in cases not otherwise covered by the treaty may be considered to fulfil one of the fundamental purposes of the treaty - the elimination of international double taxation. Countries may accordingly consider it appropriate to make active use of this Article 25(3) authority.

1.3 What is a competent authority?

41. The UN Model uses the term "competent authority" to refer to the person or body within a Contracting State with responsibility for resolving issues that arise in connection with the treaty. Under the terms of Article 25, the competent authority of a Contracting State:

- (1) Accepts taxpayer requests for MAP assistance and endeavours (where it is unable itself to arrive at a satisfactory solution) to resolve these cases by mutual agreement with the competent authority of the other Contracting State;
- (2) Resolves difficulties or doubts as to the interpretation or application of the treaty by mutual agreement with the competent authority of the other Contracting State; and
- (3) May consult with the competent authority of the other Contracting State to eliminate double taxation in cases not covered by the treaty.

42. Other articles of the UN Model also make reference to the competent authorities and specifically provide for competent authority assistance with respect to particular matters; see, for example, paragraph 2 of Article 9 (Associated Enterprises)¹⁸ and subparagraph 2(d) of Article 4 (Resident).¹⁹

1.3.1 Role of the competent authority and performance of its functions

43. In broad terms, the role of the competent authority is to ensure that a tax treaty is properly applied and to endeavour in good faith to resolve any disputes that may arise

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Article 9(2) provides that the competent authorities shall consult, if necessary, to determine the appropriate corresponding adjustment to be made by a Contracting State (see under "Transfer Pricing Cases" in section 1.2.1 above).

Article 4(2)(d) of the UN Model Tax Convention provides that the competent authorities shall determine the residence of an individual by mutual agreement where the Article 4 tie-breaker tests do not resolve the matter.

in its application or interpretation.

44. In performing its functions, the competent authority is to be guided first by the terms of the treaty itself. The competent authority must then refer to any guidance promulgated under the treaty.

Such guidance may include, for example, an agreed-upon memorandum of understanding or technical explanation to the treaty, or an agreement of general application concluded by the competent authorities pursuant to the MAP. Model tax treaties (such as the UN Model) upon which the treaty was based, and their commentaries, are an additional important source of guidance.

45. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue statistics or an overall balance of results. Moreover, and especially in light of the principle of reciprocity underlying any international agreement, competent authorities should be consistent in their approach to an issue, regardless of the Contracting State that is favoured by that approach in a particular case. Nevertheless, each case must be decided on its own facts, so that even though the same principles apply, different outcomes may be appropriate. Notwithstanding disagreements on facts or principles, competent authorities should seek to compromise in order to reach a mutual agreement that will provide relief from double taxation.

1.3.2 Who is the competent authority?

46. Under subparagraph (1)(e) of Article 3 (General Definitions) of the UN Model, the definition of the term “competent authority” - that is, the designation of a governmental official, agency, or entity as a Contracting State’s competent authority - is left to each of the Contracting States. In the typical case, the competent authority will be identified, for example, as “the Minister of Finance or his authorised representative” or “the Secretary of the Treasury or his delegate”.

47. In practice, the full powers of the competent authority function, including the legal authority to conclude an agreement under the MAP, will usually be delegated within a national tax administration to the official or body with day-to-day responsibility for the administration of a Contracting State’s MAP program or, more generally, of the Contracting State’s tax treaties. Whether and how the competent authority designated in Article 3 delegates these powers will, of course, depend on the Contracting State’s domestic law and administrative practice.

48. Most often, this delegation occurs in the same manner used to delegate authority to carry out other tax administration functions. The delegation of authority may be made, for example, through an order or directive issued by the competent authority designated in the treaty, or in regulations or other administrative procedures approved by that competent authority.

49. The treaty will usually designate the competent authority by reference to the function of the person who will perform that role (*e.g.* the Minister of Finance or his authorised representative). More than one person may be designated as competent authorities by States where certain matters connected with the execution and/or implementation of a tax treaty may not fall within the exclusive jurisdiction of the Contracting State’s tax authorities, or may be reserved to the competence of other authorities.

50. It should be noted that, even though the competent authority is expressly designated in the provisions of the treaty, certain other components of a Contracting State’s government may play an important role in the application and/or interpretation

of the treaty. In some Contracting States, for example, domestic law may give other authorities (such as courts or the Ministry of Foreign Affairs) the right to interpret international treaties and agreements. It is generally essential, however, that the Ministry of Finance be consulted with respect to all treaty-related matters with a view to the consistent application and interpretation of the treaty and, more broadly, to ensure that the objectives of the treaty are achieved consistently with a State's overall domestic tax policy.

1.3.3 Structure of the competent authority function

51. As noted above, the competent authorities designated in a tax treaty are often officials at the highest level of a Contracting State's tax administration (*e.g.* the Minister of Finance). For practical

and administrative reasons, the power and authority to perform the competent authority function will typically be delegated to a subordinate official (the "authorised representative") who carries out the day-to-day functions of the competent authority.

52. Practical experience with the MAP process has shown that the efficiency and effectiveness of a MAP program is enhanced if the senior tax officials to whom the competent authority function has been delegated are actively and directly engaged in the MAP process - for example, where officials with decision-making authority with respect to MAP cases remain informed of the details of MAP cases and are closely involved in detailed bilateral MAP discussions.

53. Countries have also found that the functioning of a MAP program is enhanced if the officials performing the competent authority function are known and readily accessible to taxpayers. To this end, Contracting States may consider it useful to publicise the identity of the officials responsible for carrying out the competent authority function, as well as information on how to contact the competent authority. Many countries provide this information to taxpayers as part of their general public guidance on how to seek MAP assistance.

54. Once a Contracting State has determined who will be responsible for the day-to-day activities of the competent authority, it must also determine how the competent authority's work will be structured. The approach chosen will, of course, depend upon the specific circumstances of a Contracting State's tax administration, including the resources available and the present (or anticipated) MAP caseload.

55. A country that is rarely involved in MAP cases may well prefer to delegate the competent authority functions to the officials in charge of the negotiation of tax treaties because these officials will be familiar with the provisions of tax treaties and, often, with the treaty negotiators and competent authorities of other countries with which tax treaties have been concluded. A Contracting State that has to deal with a very large number of MAP cases, however, may want to separate its competent authority function into various groups based on regions, taxpayer industry, or type of taxpayer (individual, corporate, etc.).

56. Regardless of how the competent authority function is organised, it is important that the responsible officials implement a system of recordkeeping with respect to the receipt of requests for MAP assistance. Such records permit monitoring of the progress made in MAP cases (*i.e.* the time required to resolve a MAP case) and provide an objective measure to assess the effectiveness of a country's MAP programme.

57. It is also important that the competent authority keep records of the decisions and resolutions that have been reached through competent authority agreements. Internal records of the outcomes in MAP cases help to guarantee the consistent interpretation of a treaty in similar cases.

It should be noted in this regard that countries typically do not publish taxpayer-specific agreements reached through the MAP. Since information received from the other competent authority is subject to the confidentiality requirement of paragraph 2 of Article 26, such information cannot be publicly disclosed (except for the limited purposes provided for in that paragraph).

58. The effectiveness of a MAP program may also be improved if the competent authority function is given a certain degree of independence from the tax officials responsible for taxpayer audits and adjustments (*e.g.* auditors, assessors or inspectors). Such independence may enhance the objectivity of the competent authority and thus its ability to apply the treaty in a fair and impartial manner. An autonomous competent authority should, in addition, be best able to focus on its primary objective - relieving international double taxation.

59. Countries have similarly found it helpful where the measures used to evaluate the performance of the competent authority relate to factors such as the time taken to resolve a case, consistency, and principled and objective outcomes (and not, for example, on the number of sustained audit adjustments or amount of tax revenue). The use of these criteria reinforces the goals and objectivity of the competent authority function and thereby improves the overall effectiveness of the MAP program.

60. In structuring the competent authority function, countries with significant practical experience with the MAP process have found that it is of fundamental importance to provide the competent authority with adequate resources. Human resources, in the form of skilled personnel, will often be the most crucial factor in operating an efficient and effective MAP program. Maintaining and developing the skills of the competent authority staff also require that a tax administration devote appropriate resources to their training.

Capacity building

In order to be able to conduct MAPs a well-trained staff is needed. Such human capacity can only be built following a long-term sustainable strategy. Aid agencies and donor countries as well as countries in need of assistance will have to implement such long-term strategies. Too often capacity that was newly built got lost because of the changing priorities of the stakeholders involved.

Building capacity for conducting MAP will be facilitated by allowing all stakeholders including taxpayers to participate. Only then CAs will be able to obtain a holistic understanding of the procedure.

Capacity building is an expensive undertaking. Related costs can be limited through the use of digital means such as e-learning tools as well as through combining events with events on capacity building in related matters such as transfer pricing.

The United Nations capacity development program on international tax cooperation is undertaking several capacity building initiatives on *inter alia*, double tax treaties, transfer pricing, and protecting the tax base of developing countries. This also includes country level projects and courses including online courses. Moreover, work is also being done in the context of the platform for collaboration on tax, a joint initiative of

IMF, OECD, the United Nations and the World Bank Group aimed at strengthening tax capacity-building support to developing countries. States are encouraged to make use of such programs to build capacity for conducting MAP as well.

61. In addition to skilled personnel, the competent authority should be provided with adequate financial resources to meet its obligations under the treaty. In some cases, expenses related to face-to-face meetings with other competent authorities (such as travel and accommodation expenses) may need to be incurred, although developing countries may prefer to use telecommunications or, if a meeting is necessary, may prefer to host it in order to avoid such costs.

62. The competent authorities of many developed countries may have financial resources to pay for the services of experts or consultants (for example, economists or industry specialists consulted in complex transfer pricing cases) and for the translation of documents (for example, translations of contracts or foreign tax law) and interpretation services (for example, in the context of a face-to-face meeting of competent authorities). Developing countries may not have the financial resources to pay for such services and this should be taken into account in dealing with the competent authorities of these countries.

1.4 *The relationship between the MAP and domestic law (including domestic law recourse provisions)*

63. The mutual agreement procedure provided for by Article 25 of the UN Model is available to taxpayers irrespective of the remedies provided by the domestic law of the Contracting States. The MAP is a special procedure that exists in addition to domestic law remedies. For example, a taxpayer who has the right to request MAP assistance may also have the right to challenge the actions taken by a country's tax administration in a domestic court or through a domestic administrative process.

64. It is important that a taxpayer planning to make a request for MAP assistance inform itself as to, and make appropriate use of, the procedures required to protect its rights to domestic administrative or judicial recourses. Such procedures may include, but are not limited to:

- Filing a waiver of domestic time limits on assessment. Under the domestic laws of many States, the tax administration has a limited period of time within which it may assess tax with respect to a given taxable year (sometimes referred to as a statute of limitations on assessment). Taxpayers similarly have a limited period of time in which they may object to or otherwise challenge the actions of the tax administration in a domestic forum. In many of these States, however, the taxpayer and tax administration may agree to extend the relevant periods. This procedure may involve, for example, filing a request or a specific form with the tax administration.
- Submitting a protective claim. In some States, taxpayers may protect their rights to certain domestic recourse procedures by filing a protective claim before any applicable deadlines. A timely claim may have the effect of keeping any applicable periods of limitations open until the claim is resolved or withdrawn. Protective claims may include, for example, a claim for refund submitted to the appropriate administrative or judicial body.

• Lodging an appeal with the appropriate administrative or judicial body. In some States,

taxpayers may protect their rights to certain domestic administrative or judicial procedures by lodging an appeal with the appropriate body before any applicable deadlines. As with a protective claim, a timely appeal may have the effect of keeping any applicable periods of limitations open until the appeal is resolved or withdrawn. Examples of such an appeal may include an application to a tax administration's administrative appeals division or a petition or other challenge filed with a domestic court.

65. Because Article 25, as drafted in most treaties, does not compel the Contracting States to reach agreement in the MAP²⁰, but only to use their best efforts to do so, there will on occasion be situations in which there is no MAP agreement between the Contracting States. In such a situation, a taxpayer that has not taken appropriate measures to protect its rights under domestic law will have no further recourse.

66. A Contracting State should determine the procedure to be followed when a taxpayer has invoked both the MAP and a domestic recourse procedure. As a general matter, most tax administrations will deal with a taxpayer's case in the MAP or in a domestic forum (usually a court), but not both at the same time: one process will be suspended or put on hold pending the outcome of the other.

67. A competent authority should therefore be able to inform taxpayers as to how it will handle cases where a taxpayer seeks to obtain relief through both the MAP and a domestic recourse procedure.

68. In some countries, a taxpayer may only invoke the mutual agreement procedure once the taxpayer has exhausted all domestic law remedies (*e.g.* by waiving its rights of appeal or letting time-limits for appealing lapse). This approach risks putting the taxpayer in a position where no solution will be found to its case if the competent authorities cannot reach an agreement.

69. The practice followed by many countries, however, is to allow the taxpayer to choose whether the MAP or the domestic procedure will proceed first. In this regard, it is important that taxpayers be informed as to the potential consequences of pursuing a recourse through one process rather than the other. The information concerning the procedure to be followed and the consequences of pursuing first either the MAP or domestic recourse will typically be explained in a tax administration's general procedures or instructions for requesting MAP assistance, or in other appropriate public guidance. In particular, as noted below, competent authorities that consider that they cannot deviate from a domestic court decision should ensure that taxpayers are informed of that situation in advance.

70. In many countries, it is preferable to pursue the MAP first and suspend the domestic law recourse procedures. A MAP agreement will generally provide a comprehensive bilateral resolution of the taxpayer's case. A domestic recourse procedure, in contrast, will not provide a resolution in both of the States involved, and may therefore fail to relieve international double taxation. If the competent authorities are able to reach agreement through the MAP and the taxpayer is satisfied with the MAP result, the taxpayer will generally have no further need for domestic recourse procedures and these may then be terminated. If, however, the proposed agreement reached through the MAP is not satisfactory to the taxpayer, the taxpayer may be allowed to reject that proposed agreement and resume the domestic recourse procedure that has been suspended (provided, of course, that the taxpayer has taken appropriate measures to protect its rights to those remedies under the applicable domestic law).

²⁰The situation is, however, different for treaties that follow alternative B of Article 25.

71. The case may arise where a taxpayer who has suspended court proceedings in a domestic court requests to defer its decision whether to accept a proposed MAP agreement until the court delivers its decision.²¹ Contracting States may be concerned about possible divergences or contradictions between the decision of the court and the MAP agreement. As a result, the implementation of a mutual agreement should be conditional on the taxpayer's express acceptance of the terms of the mutual agreement within a reasonable period as well as the taxpayer's withdrawal of any administrative or judicial proceedings regarding the matters settled through the MAP.²²

72. Different issues may arise in the reverse situation in which a taxpayer decides to proceed first with domestic recourses and the MAP is suspended or put on hold (or the competent authorities have not otherwise reached a MAP resolution). The most important of these issues is that the tax authorities of a Contracting State may consider that they do not have the legal authority, through the MAP, to deviate from the decision of a domestic court. If this is the case, the decision rendered by the domestic court will bind the tax administration of the State in which the decision was rendered and prevent it from providing greater relief through the MAP. In such circumstances, the competent authority of that State may be restricted, during the subsequent MAP, to trying to obtain relief from the other Contracting State. For example, suppose that, following litigation initiated by a State A company, a court of State A confirms a transfer pricing adjustment made by the State A tax administration that increases the income derived by that company from a non-arm's length transaction with a related company in State B. Following that court decision, the competent authority of State A will consider that the only thing that it can do through the MAP is to seek to have State B decrease the income of the State B company by the amount of the adjustment and refund its tax as appropriate.

73. The tax administration of the other Contracting State will not, of course, be bound by the decision of a foreign court. Any relief provided by the other Contracting State in these circumstances will necessarily depend primarily on the underlying merits of the taxpayer's case, not on the fact that domestic law constraints prevent the first Contracting State from providing relief.

74. If a tax authority takes the position that it is legally bound to follow a domestic court decision in the MAP, or that it will not deviate from a domestic court decision as a matter of administrative policy or practice, it should inform taxpayers of this general policy so that they can make an informed choice between the MAP and domestic recourse procedures.

75. Audit settlements and unilateral Advance Pricing Arrangements may create similar issues for the MAP.

76. Audit settlements are a method used by many tax administrations to close audit files through an agreement with the taxpayer. Because they represent the result of a negotiation process, audit settlements will typically involve concessions by both the tax administration and the taxpayer. In order to ensure that an audit settlement represents a final resolution, one of the concessions sometimes sought by tax administrations is to include in its terms a limit on further recourses by the taxpayer,

²¹ See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 42 of the Commentary on Article 25 of the OECD Model Tax Convention). Paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention sets out in full paragraphs 7 through 49 of the Commentary on Article 25 of the OECD Model Tax Convention, noting their relevance in light of the circumstance that paragraphs 1 and 2 of Article 25 of the UN Model Tax Convention reproduce the full text of paragraphs 1 and 2 of Article 25 of the OECD Model Tax Convention. A Contracting State's implementation of an agreement reached through the MAP is discussed in section 2.4.8 below.

including recourse to the MAP. As a consequence, the tax administration that entered into the settlement may be precluded from resolving through the MAP any double taxation that may result from the settlement. In these circumstances, the domestic law of the other Contracting State may also prevent its tax administration from providing any double tax relief to the taxpayer with respect to the tax paid to the first Contracting State upon settlement of the audit.

77. Some tax authorities consider that taxpayers and tax administrations should avoid the inclusion of a waiver of the right to access the MAP in audit settlements, especially where the case involves an activity or transaction with potential tax consequences in more than one jurisdiction. In such circumstances, they are of the view that it is inappropriate to have two parties (the taxpayer and one tax administration) not include the other involved party (the other tax administration) in the final resolution of the case. Some other tax authorities consider, however, that an audit settlement may include in its terms a limit on further recourse to MAP by the taxpayer as the audit settlement is opted for by a taxpayer after informed decision factoring potential risk of tax consequences in the other jurisdiction. In such case, for the sake of certainty, the tax authority should make that policy public.

1.1.1.1 *Domestic audit settlements and access to MAP*

An audit settlement is a method used by many tax administrations to close audit files through an agreement with the taxpayer. Because they represent the result of a negotiation process, audit settlements typically involve concessions by both the tax administration and the taxpayer.

In order to ensure that an audit settlement represents a final resolution, one of the **concessions** sometimes sought by tax administrations is to include a **limitation on further recourses by the taxpayer**, especially recourses to domestic remedies, but also recourse to the MAP.

In **some jurisdictions** where the taxpayer has obtained procedural advantages or concessions from a tax administration upon audit settlement that would reduce the competent authority's ability to defend its case in a MAP discussion, those jurisdictions often **impose the policy that the affected issues cannot be reversed or overturned in MAP proceedings**. The reasoning is that the audit settlement is opted for by a taxpayer after informed decision factoring potential risk of tax consequences in the other jurisdiction. **In such case, for the sake of certainty, the tax authority should make that policy public.**²³

Some countries consider that taxpayers and tax administrations should avoid the inclusion of a waiver of the right to access the MAP in audit settlements, especially where the case involves an activity or transaction with potential tax consequences in more than one jurisdiction. In such circumstances, they are of the view that it is inappropriate to have two parties (the taxpayer and one tax administration) not include the other involved party (the other tax administration) in the final resolution of the case. **In other jurisdictions, the taxpayer cannot forfeit its right to access MAP**, regardless of the term of the audit settlement. **Still, even if this right is explicit in these countries,**

²³ Guide to the Mutual Agreement Procedure under Tax Treaties as agreed by the Committee of Experts in their annual meeting in 2012, <http://www.un.org/esa/ffd/tax/gmap/index.htm>; p. 15.

taxpayers may be unwilling to test it if they have already agreed not to seek the assistance of MAP. This may be especially true in cases where the taxpayer will encounter the same tax administration office and auditor in the next audit cycle.²⁴ In addition, sometimes taxpayers offer to settle and not to go to MAP, since they had not planned to go anyway. In these cases, taxpayers often see a larger risk in exposing themselves to the other tax administration, where they have not yet been audited. Cautious taxpayers are often concerned that exposure in the MAP process could potentially lead to an audit referral.²⁵

On the other hand, the tax administration that entered into the settlement may be precluded from resolving any double taxation situation that may result from the settlement via MAP. An audit settlement is generally binding on the tax administration that entered into it. Otherwise it could not be effective. This binding effect also extends to any discussions with the other tax administration during a MAP. As a result, by entering into an audit settlement, the possible outcomes of any ensuing MAP are severely limited. The tax administration entering into the settlement is barred by domestic law from accepting any deviating proposal made by the other tax administration. At the same time, it is extremely unlikely that the other tax administration(s) involved would agree to exactly the same resolution reached as part of the audit settlement. Therefore, the MAP will most likely fail. In addition, the domestic law of the other Contracting State may also prevent its tax administration from providing any double tax relief to the taxpayer with respect to the tax paid to the first Contracting State upon settlement of the audit.

It must be understood that the question of providing access to MAP in a case in which a taxpayer has reached an audit settlement with the tax authorities is distinct from the question of whether MAP arbitration is available (where the relevant treaty contains an arbitration provision).²⁶

In addition, the term “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 guidance.**

According to the OECD Action 14 Report and the Peer Review Documents, **audit settlements between the tax authorities and taxpayers should not preclude access**

²⁴ United Nations Guide to the Mutual Agreement Procedure under Tax Treaties as agreed by the Committee of Experts in their annual meeting in 2012; <http://www.un.org/esa/ffd/tax/gmap/index.htm> (UN MAP Guide), p. 15.

²⁵ OECD (2007), Manual on Effective Mutual Agreement Procedures, p. 35.

²⁶ OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241633-en>; p. 19.

to the mutual agreement procedure (and this should be made clear in countries' MAP programme guidance) **for the following reasons:**²⁷

First of all, taxpayers may not realize the potential implications of double taxation and the fact that an adjustment by the other tax administration may complicate the issue. Secondly, tax administrations should consider the issues of cooperation and reciprocity as well as the fact that one-sided settlements will not serve tax administrations well in the long run.²⁸

The recommendations of Action 14 with regard to audit settlements have not yet been discussed by the UN Tax Committee.

1.1.1.2 Suspension of the collection of taxes

Contracting States should also consider whether and when they will collect taxes that are the object of a MAP request. Some countries consider providing for the suspension or deferral of the requirement to pay a tax liability and/or collection action to be a best practice for tax administrations. This is because such suspension of liability may make the MAP more accessible to taxpayers by avoiding costs related to the time value of money, cash flow burdens etc. Moreover, once States resolve the allocation of taxing rights under a MAP they can collect the tax through the mutual assistance provisions provided in tax treaties. States may also consider the costs involved if interest is required to be paid along with refunds.

Some States prefer to allow either partial collection of taxes pending MAP or to allow suspension of collection following furnishing of a guarantee in order to protect their tax bases. Competent authorities may enter into agreements under Article 25(3) of the UN or OECD Model or may add a specific provision in Article 25 to provide for suspension of collection or for such tailored solutions as well.

Accordingly, BEPS Action Plan 14 recommended the suspension of collection of taxes during MAP procedures. **Such recommendations were added to both the UN Model Commentary (2017) and the OECD Model Commentary (2017).**

In any case, States should make clear to the taxpayer their position on this issue in the interest of transparency.

1.1.1.3 Coverage of interest and penalties

Where interests and penalties charged by States are directly connected to the taxes involved in a MAP, such interests and penalties may be reduced or withdrawn as well during the pendency of a MAP. Such a recommendation was made by BEPS Action 14 and has been incorporated in the UN Model Commentaries (2017) and the OECD Model Commentaries (2017). States should pay special attention to provide relief as regards interest arising during a pending MAP since the taxpayer does not have control over the duration of the MAP.

²⁷ OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. <http://dx.doi.org/10.1787/9789264241633-en>; p. 19.

²⁸ OECD (2007), Manual on Effective Mutual Agreement Procedures; p. 35.

Administrative or criminal penalties that are not related to the taxes involved in a MAP may not be affected by a MAP. However, competent authorities may agree under Article 25(3) UN or OECD Model to reduce or withdraw any administrative penalties where the cause for such penalties is found to not be accurate in a MAP. For example, where there is a penalty for fraud or willful conduct and such conduct was found to not be present in a MAP, the penalties may be withdrawn.

States may choose to deal with the treatment of interest and penalties generally through a competent authority agreement per Article 25(3) UN or OECD Model or to add a specific paragraph as regards its coverage in their tax treaties.

Advance Pricing Arrangements

78. Advance Pricing Arrangements (APAs) are a tool used by tax administrations and taxpayers to agree, in advance, on the tax consequences of a transaction or transactions between the taxpayer and a related party in a different tax jurisdiction. A unilateral APA involves only one of the interested tax administrations and, accordingly, the tax consequences of the relevant transaction(s) in only one jurisdiction. A bilateral APA, in contrast, involves the tax administrations of both jurisdictions and is typically concluded through the MAP article of the relevant bilateral tax treaty. It is therefore able to address the full scope of the transaction with certainty and is more useful in addressing cases of double taxation involving two countries.

79. Unilateral APAs may prove useful in certain contexts (for example, to avoid the cost and risk of future transfer pricing disputes). The certainty they provide, however, is limited, especially if the tax administration of the other jurisdiction would be expected to examine closely the transaction, or type of transaction, at issue. In addition, taxpayers have sometimes found that previously concluded unilateral APAs have precluded them from obtaining relief under the MAP from the country that has granted the APA when they subsequently found themselves subject to double taxation.

80. Like an audit settlement reached in a potential MAP case, a unilateral APA represents a one-sided resolution of issues with tax consequences in two jurisdictions. In order to provide for a bilateral resolution of these issues, where a foreign adjustment is made with respect to a transaction or issue covered by a unilateral APA, some tax authorities consider that it is helpful for the unilateral APA to be treated as the taxpayer's filing position and eligible for MAP, rather than as an irreversible settlement.

2.5 Other MAP programs: Advance Pricing Arrangements

203. Advance Pricing Arrangements (APAs) are an additional important component of the MAP program in many Contracting States. The implementation and promotion of APA programs is seen by many jurisdictions as a desirable goal given the certainty they provide to both taxpayers and tax administrations and because they offer a cost-effective method to reduce the number of future transfer pricing disputes.

204. An APA is a bilateral agreement through which the tax authorities of two Contracting States determine, upon application by the taxpayer and in advance of the

relevant taxable period, the tax consequences in both States of specific related party transactions and/or activities. In an APA, the competent authorities prospectively agree on a transfer pricing methodology and its application to identified non-arm's length transactions and/or activities, with the objective of avoiding the potential international double taxation that may often arise in transfer pricing cases.

205. Of course, an APA will only be available to a taxpayer if a Contracting State has instituted an APA program. As with many other aspects of the MAP, Article 25 of the UN Model is silent with respect to APAs. A Contracting State that wishes to establish an APA program must accordingly develop its own procedures for the conduct of the APA program.

206. As an initial matter, a Contracting State that institutes an APA program must determine how a taxpayer requests an APA, including, for example, the format of an APA request and related documentation requirements. The Contracting State must also determine how APA requests will be processed, and, more generally, how its APA program will be administered. This information and other guidance should be made readily available to the public to promote transparency and to encourage taxpayer use of the APA program.²⁹

207. Contracting States must also jointly determine how bilateral APA negotiations will be conducted. The generally applicable MAP procedures may provide some guidance in this regard, but certain modifications or adaptations may be appropriate in light of the unique characteristics and complexity of transfer pricing cases. In particular, in developing bilateral procedures for APA negotiations, the Contracting States should take into account the specific requirements of their domestic transfer pricing laws, including, for example, their requirements with respect to documentation.

208. Although APA negotiations are conducted pursuant to the general authority of the MAP article, the Contracting States must also determine the interaction of their domestic laws with an APA. A Contracting State should clarify the legal effect of an APA under its domestic law, preferably in the public guidance promulgated with respect to its APA program. A Contracting State should also examine whether changes to its domestic law are necessary to implement an APA program, which may include an examination of issues such as the scope of the competent authority's legal authority and the ability of a tax administration to enter into an agreement with a taxpayer with respect to prospective tax liabilities.

1.1.1 MAP and bi- or multilateral APAs

Details as regards advance pricing agreements (APAs) and possible merits and issues that countries should consider have been discussed in Chapter 3. However, a couple of points that are relevant to their interaction with MAP are highlighted below

An APA can be concluded unilaterally and bi- or multilaterally, as Questions of transfer prices can occur on different levels. While 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, the legal basis for bi- or multilateral APAs can be found in international treaties, such as Article 25 UN Model or OECD

²⁹ One example of comprehensive taxpayer guidance on the domestic conduct of an APA program is provided in the case of the United States by Revenue Procedure 2006-9, 2006-2 C.B. 278 (January 9, 2006; available at <http://www.irs.gov/pub/irs-drop/rp-06-9.pdf>).

Model serve as basis for APAs. While some countries consider a 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 arrangements.

Bi- and multilateral APAs allow for a higher degree of tax certainty but are more expensive. Every transfer pricing case involves eventually at least two jurisdictions and hence only when all of them are party to an APA tax certainty for the specific case is guaranteed. However, bi- or multilateral approaches usually take more time and result in higher costs for tax administrations³⁰ as well as the taxpayer, caused not only by the increased workload required but also by expenses for traveling that might be necessary. The costs and benefits have to be carefully balanced by a tax administration wishing to introduce an APA program. Generally, bi and multilateral APAs are often preferred in literature³¹ because they avoid the risk of being used by taxpayers as an instrument in tax arbitrage.

C. THE MUTUAL AGREEMENT PROCEDURE

2.1 What is a request for MAP assistance?

81. Under Article 25 of the UN Model, a taxpayer who considers that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty may request the assistance of the competent authority to resolve the case with a view to ensure taxation in accordance with the convention. Such a taxpayer's request is referred to as a request for MAP assistance.

82. A request for MAP assistance is the primary means by which a taxpayer may make a competent authority aware that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty. Requests for MAP assistance are thus at the origin of the large majority of MAP cases.

³⁰ To buffer such (traveling) costs tax administrations could require taxpayers to bear that financial burden, Canada did so in its APA program.

³¹ See also best practices BEPS final report

83. A request for MAP assistance generally³² must be made to the competent authority of a taxpayer's State of residence (see paragraph 1 of Article 25 of the UN Model).

84. In a context in which an adjustment made by one Contracting State may potentially affect taxpayers in both Contracting States, each of the affected taxpayers may want to make a separate request for MAP assistance to the competent authority of its State of residence. For example, where the State A tax administration makes a transfer pricing adjustment with respect to a related party transaction between a resident of State A and a resident of State B, the State A resident and the State B resident may both wish to request MAP assistance from their respective competent authorities. In such cases, the competent authorities may agree to join the cases.

85. A taxpayer may also make a MAP request to the Contracting State of which it is a national in a case that falls under paragraph 1 of Article 24 (Non-Discrimination) of the UN Model. Under Article 24(1), nationals of a Contracting State may not be subjected in the other Contracting State to taxation or any tax-related requirement which is other or more burdensome than the taxation and tax-related requirements to which nationals of that other State in the same circumstances are or may be subjected. Thus, for example, where State A does not allow a deduction to an individual State B national resident of State A in the same manner as that deduction would be allowed to an individual State A national resident of State A, the State B national may typically request MAP assistance from the State B competent authority.

86. Article 25 of the UN Model does not itself set forth rules or other guidelines for the form in which a taxpayer must present a request for MAP assistance. As noted in paragraphs 45 and 46 of the Commentary on the UN Model, each competent authority may prescribe whatever special procedures it feels are appropriate or necessary.

87. In the absence of a special procedure, a taxpayer may present its MAP case to the relevant tax administration in the same manner that it would use to present other tax-related objections to that administration.

88. Countries have found that use of the MAP may be encouraged where the process of making a MAP request is transparent and free of unnecessary formalities. Competent authorities that take appropriate steps to develop guidelines and procedures for a taxpayer's presentation of a MAP case and to publicize this guidance may thereby ensure that taxpayers are able to make full and effective use of the MAP.

89. Competent authorities, in particular in developed countries, may require a great deal of information to consider and resolve appropriately certain of the more common (and fact-intensive) types of MAP cases (for example, transfer pricing, permanent establishment, and residence cases). In developing procedures for the presentation of a MAP request, a competent authority should consider how to balance its need for information with the complexity of the issues in a particular case and the burdens imposed on taxpayers to collect the required information.

90. In a context in which a competent authority has not developed a prescribed format for the presentation of a MAP request, a taxpayer should generally provide the following information (to the extent relevant to the request) (see also paragraphs 22 ff. of the Commentary on Article 25):

I. The name, address, and any taxpayer identification number of the taxpayer;

As noted under paragraph 9 of the Commentary on Article 25 (quoting paragraph 19 of the Commentary on Article 25 of the OECD Model Tax Convention), however, States may give taxpayers the option of presenting their cases to the competent authority of either State.

2. The name, address, and any taxpayer identification number of the related foreign taxpayer(s) involved (for transfer pricing cases);
3. The foreign tax administration involved and, if relevant, the regional or local tax administration office that has made, or is proposing to make, the adjustment(s);
4. The tax treaty article that the taxpayer asserts is not being correctly applied, and the taxpayer's explanation of how it believes the article should be interpreted and/or applied;
5. The taxation years or periods involved;
6. A summary of the facts, including the structure, terms, and timing of all relevant transactions and the relationships between related parties (the taxpayer should advise the competent authority of how the facts may have changed during or after the relevant taxable period, and of any additional facts that come to light after the submission of the MAP request);
7. An analysis of the issues for which competent authority assistance is requested and the relevant legal rules, guidelines or other authorities (including any authorities that may be contrary to the conclusions of the taxpayer's analysis). The analysis should address all specific issues raised by either tax administration as well as the amounts related to the adjustment(s) (in both currencies and supported by calculations, if applicable);
8. For transfer pricing cases, any documentation required to be prepared under the domestic legislation of the taxpayer's State of residence (where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable) and a detailed description of the companies involved, including an analysis of their functions and risks, to the extent relevant;
9. A copy of any other relevant MAP request and the associated documents filed, or to be filed, with the competent authority of the other Contracting State, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the tax administration of the other Contracting State (translations of relevant documents may be helpful, and, where documentation is voluminous, a competent authority may determine that a description or summary of such documentation may be acceptable);
10. A statement indicating whether the taxpayer or a predecessor has made a prior request to the competent authority of either Contracting State with respect to the same or a related issue or issues;
11. A schedule of the relevant time limits and statutes of limitation in each jurisdiction (whether imposed by domestic law or the tax treaty) with respect to the taxable periods for which MAP relief is sought (in cases of multiple taxpayers, a schedule for each taxpayer);
12. A statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or any other comparable document in either of the relevant jurisdictions;
13. A statement indicating whether the taxpayer's request for MAP assistance involves issues that are currently or were previously considered by the tax authorities of either Contracting State as part of an advance pricing arrangement, ruling, or similar proceedings;

14. A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);
15. If the taxpayer has not already provided consent for a person to act as its authorised representative, a signed statement that a representative is authorised to act for the taxpayer in all matters connected with the MAP request.
16. The taxpayer's view on any possible bases on which to resolve the issues;
17. Any other facts that the taxpayer may consider relevant.
91. The taxpayer should attest to the accuracy and completeness of the facts and information presented in a MAP request in a signed statement accompanying the request.
92. A competent authority will typically not charge a fee for a MAP request, although there may be fees associated with certain competent authority functions or activities, such as Advance Pricing Arrangement programs.
93. To the extent feasible, tax administrations may consider it helpful to allow the electronic submission of documents in the context of the MAP. Electronic submission may facilitate the delivery of information to the two competent authorities as well as the connected burdens on taxpayers.
94. A competent authority's ability to understand, analyse, and respond to a taxpayer's MAP request will of course depend upon the quality of the information available. A taxpayer that provides accurate and complete information in a timely manner will facilitate the resolution of its case.
95. In addition, to the extent that a taxpayer provides information to both competent authorities in the MAP process,³³ the taxpayer should ensure that it provides the same information to the two competent authorities. Providing inconsistent or conflicting information may provoke delays if it is difficult for the two competent authorities to come to agreement on a common understanding of the underlying facts.
96. Some competent authorities may delay the acceptance or consideration of a MAP request where a taxpayer has failed to provide required information. In addition, in some Contracting States the misrepresentation of facts or other material information may result in the denial of competent authority assistance, under a Contracting State's domestic law, regulations, or other guidance.
97. Article 26 (Exchange of Information) of the UN Model authorizes the competent authorities of the Contracting States to exchange such information as is necessary for carrying out the provisions of the treaty. Article 26 thus expressly authorizes the exchange of taxpayer information between competent authorities to carry out the MAP provided for by Article 25.
98. Paragraph 1 of Article 26 provides that any information exchanged between the competent authorities is required to be treated as secret in the same manner as if such information were obtained under the domestic laws of the respective Contracting States. Competent authorities should continually keep in mind their obligations under Article 26, which is intended to supplement the generally applicable confidentiality provisions of Contracting States' domestic tax laws.

As noted in the quotation under paragraph 9 of the Commentary on Article 25, however, States may give taxpayers the option of presenting their cases to the competent authority of either State.

2.3.1 When can a taxpayer first make a MAP request?

99. Under paragraph 1 of Article 25 of the UN Model, the triggering event that permits a taxpayer to make a MAP request is the notification to the taxpayer of the action by a Contracting State that results (or will result) in taxation not in accordance with the provisions of the treaty. In contrast, paragraph 3 of Article 25 does not provide a point at which a taxpayer may seek MAP assistance with respect to the interpretation or application of the treaty.³⁴

100. The term “action” in Article 25(1) is intended to be interpreted broadly. “Action” refers to any action or decision, whether of a legislative or regulatory nature, and whether taken with reference to the specific taxpayer or of general application, that has as a consequence that the taxpayer is or will be taxed in a manner contrary to the treaty.³⁵

101. A taxpayer may seek MAP assistance where taxation not in accordance with the treaty is probable, even if it has not materialised. The taxpayer must demonstrate that such taxation is likely to occur, regardless of whether an actual adjustment has already been made. The benefit of the doubt should be given to the taxpayer.

102. In practice, a tax treaty will generally not provide more specific guidance on the point at which the MAP may be invoked. The broad language of Article 25 of the UN Model appropriately provides each Contracting State with a certain latitude to define this point, taking into account the specific characteristics of its domestic tax system and its judgement regarding how the MAP will best function.

103. As the language of the Commentary makes clear, a competent authority’s determination of the point from which the MAP may be invoked must take into account a number of different considerations, including the competent authority’s level of experience, its current and anticipated MAP caseload, and the human and other resources available to the competent authority.

104. Many countries believe that MAP requests should be initiated as soon as it appears likely that an issue will result in taxation contrary to the relevant treaty. Relevant tax administration actions in the early stages of a dispute might include, for example, notification of a proposed adjustment or assessment, or the rejection of a taxpayer protest to a proposed adjustment or assessment. Early consideration of MAP cases may facilitate the identification of pragmatic solutions before the tax administration and the taxpayer have devoted significant resources to prepare the case.

105. Developing countries and countries in transition, especially those with more limited MAP experience and/or competent authority resources, may, however, prefer that MAP requests not be made until there is a more concrete possibility of taxation not in accordance with the treaty. Depending on the characteristics of the particular tax system, a concrete possibility of taxation not in accordance with the treaty might be considered to exist, for example, when a taxpayer receives a final notice of adjustment or assessment, or where an adjustment is sustained in an administrative (non-judicial)

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Given the nature of MAP requests under Article 25(3), taxpayers may reasonably be expected to make such requests before or soon after the taxpayer has taken a filing position with respect to the transaction, activity, or situation affected by the relevant provision of the treaty.

¹⁹ See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 21 of the Commentary on Article 25 of the OECD Model Tax Convention).

appeals procedure.

106. In any case, regardless of the point at which the competent authority determines it is appropriate for a taxpayer to invoke the MAP, a tax administration should provide guidance to taxpayers on this issue, preferably as part of more general public guidance on the MAP process.

2.3.2 *Are there time limits to request access to the MAP?*

107. Under Article 25(1) of the UN Model, a taxpayer must present its request for MAP assistance to the competent authority within three years from the notification of the action resulting in taxation not in accordance with the treaty. Article 25(3) does not provide any time limit for a taxpayer to seek MAP assistance with respect to the interpretation or application of the treaty, but, as noted above, such requests may likely occur before or soon after the taxpayer has taken a filing position based on the relevant treaty provision.

108. A taxpayer may thus be denied access to the MAP in an Article 25(1) case if the taxpayer does not meet the timeliness requirement. Although the specific time limit(s) for making a MAP request may vary from tax treaty to tax treaty, some general observations on the timeliness of MAP requests under treaties based on the UN Model are nonetheless appropriate.

109. The three-year time limit for presenting a MAP request is intended to establish a minimum time period within which taxpayers must present their MAP requests. Contracting States may, of course, agree to longer periods, or to forgo time limits, in the interest of taxpayers.

110. Determining whether a MAP request is timely requires a competent authority to decide what constitutes the first notification of the action resulting in taxation not in accordance with the treaty. The term “notification” should typically be interpreted in the manner most favourable to the taxpayer.

111. In general, the time for presentation of a MAP request should begin to run only when the taxpayer is notified of the tax administration action that gives rise to the taxation at issue - that is, when the taxpayer receives a notice of assessment or adjustment, an official tax bill, or any other official demand for the collection or levy of tax.

112. If the relevant tax is levied by the deduction of a withholding tax at source, the time for presentation of a MAP request should generally begin to run upon the payment of the income. If, however, the taxpayer can demonstrate that it first became aware of the deduction at a later date, the time limit for the taxpayer’s presentation of a MAP request should be determined with reference to that later date.

113. In contrast, where the relevant tax is levied through a self-assessment system, there will typically be some form of notification effecting the assessment, such as a notice of liability or of denial or adjustment of a claim for refund. In such cases, the time for presentation of a MAP request should begin to run upon such notification, rather than beginning at the time when the taxpayer lodges its self-assessed return. Where there is no such notification, the time of “notification” should generally be considered to be the time when the taxpayer would be reasonably be regarded as having been made aware of the taxation that is not in accordance with the treaty.

114. Finally, in the case where the taxation not in accordance with the treaty is the

result of a combination of actions or decisions taken in both Contracting States, the time limit for presenting a request for MAP assistance should generally be determined with reference to the notification to the taxpayer of the last of the relevant actions or decisions taken by either Contracting State.

2.4 How does the MAP work?

2.4.1 Basics: A typical MAP case

115. The first stage of a typical MAP case begins when a taxpayer contacts the competent authority of its State of residence to request assistance where the action of one or both of the Contracting States results in taxation not in accordance with the applicable tax treaty.³⁶ In a transfer pricing case, the taxpayer (or the related party in the other Contracting State) is also encouraged to contact the competent authority of the other Contracting State and to provide it with the relevant details of the MAP request.

116. The taxpayer's request must be prepared and presented in accordance with the instructions and other guidance provided for this purpose by the relevant competent authority. In the absence of any such guidance, the taxpayer should generally present its request to the competent authority of its State of residence in the same manner as it would present any other objection or protest to the tax administration.

117. The taxpayer's MAP request should in all cases describe in detail the relevant facts and circumstances, the procedural situation of the case, and the issue(s) in connection with which competent authority assistance is requested.

118. Following the submission of the MAP request, the residence State competent authority should confirm to the taxpayer that the request has been received and advise the other competent authority of the request.

119. The competent authority must also examine the request to assure that it is acceptable before any consideration of the substantive issue(s) raised by the taxpayer. This initial review will involve the following determinations:

- Was the MAP request submitted in accordance with applicable guidance?

Although competent authorities should ideally seek to avoid undue formality in the MAP process (especially in the case of an unsophisticated taxpayer), a taxpayer should prepare and submit its MAP request according to the procedures established by a Contracting State's domestic law, regulations, and/or any other applicable guidance. Such procedures may include, for example, guidelines for the format of a MAP request or the requirement of a signed taxpayer statement that the MAP request was prepared under penalties of law.

- Does the MAP request contain sufficient facts and other information to understand and evaluate the taxpayer's claim?

The MAP request should, at a minimum, present a full description of the relevant facts and circumstances and the basis for the taxpayer's claim of taxation not in accordance with the treaty. Although a competent authority may frequently ask a taxpayer to provide additional information, the MAP

³⁶ As noted in section 1.2.1 above, most disputes that arise under tax treaties are Article 25(1) cases.

process is most efficient if a taxpayer submits a complete initial request. To this end, it is useful for competent authority guidance regarding the MAP to include a description of the information required to be submitted in a MAP request (for example, in the form of a checklist).³⁷

- Is the taxpayer's claim timely?

As discussed above, a competent authority should define (within the framework of Article 25 of the relevant tax treaty) the specific point from which a taxpayer may invoke the MAP - that is, when a taxpayer's case may be brought to the MAP. A competent authority may determine that the taxpayer's MAP request is premature - and thus unacceptable - if, for example, international double taxation will arise only upon the occurrence of uncertain or remote future events. Also, Article 25(1) of the UN Model requires that a taxpayer file a MAP request within three years of the notification to the taxpayer of the action that results in taxation not in accordance with the treaty. The MAP request should accordingly set forth facts to demonstrate that the request was made within the applicable time limit(s), if any, provided by the treaty and/or by a Contracting State's domestic law and regulations.

120. The competent authority should promptly notify the taxpayer whether its MAP request will be accepted. In the event that the MAP request is not accepted, the competent authority should ideally inform the taxpayer of the reason(s) for the rejection.

121. In a scenario in which a rejected MAP request is not barred altogether (for example, by a time limit), the competent authority should indicate to the taxpayer how it might perfect its MAP request and/or invite the taxpayer to re-submit its MAP request at a later time (for example, when the taxpayer's claim is timely).

1.1.1.2 *Improving deficient requests*

Neither the UN Model, nor the OECD Model or their respective Commentaries explicitly mention the possibility of re-submitting requests after improving them. However, the CA is allowed under both Commentaries to request additional information. Moreover, under BEPS Action 14, the minimum standard requires that access to MAP not be denied merely because not all information required by the domestic guidance has been submitted. In addition, most countries' domestic procedures allow for a correction of petitions under certain circumstances. Thus, it could be inferred that the improvement and re-submission of requests is allowed. However, absent any explicit provisions in the Models to this effect, the handling of such cases is entirely up to the CA.

One important aspect that must be taken into account in this regard is the timing issue. If the taxpayers submit the original, flawed request too close to the 3-year deadline for submission of MAP requests pursuant to Article 25 (1), they may be in danger of missing the deadline in the case of the re-submission. It is up to the competent authorities whether they would accept an improved request that was not submitted on time. While generally

³⁷ See section 2.2 above.

an over-formalistic approach is not recommended, especially given the fact that the request had already been reviewed with respect to its content, it is not obligatory for competent authorities to be lenient in this regard.

122. The competent authority must then answer some additional questions to determine how it will approach the taxpayer's case:

- Has the taxpayer pursued domestic law remedies in addition to the MAP?

As discussed above, how domestic law remedies and the MAP interact is generally determined in each Contracting State by that State's domestic law and administrative procedures. The tax treaty itself is typically silent on this point. A MAP request should accordingly indicate whether the taxpayer has pursued other administrative or judicial remedies, in either Contracting State, in addition to the MAP.

The competent authority uses this information to determine how the taxpayer's case will move forward from a procedural perspective. Thus, for example, where a Contracting State does not allow the simultaneous consideration of a taxpayer's case in both the MAP and a domestic forum, the competent authority can determine whether one process should be suspended or put on hold pending the outcome of the other process.

- Has there been a decision, a settlement, or any other resolution with respect to the taxpayer's case in any domestic forum utilized by the taxpayer?

The information recommended to be provided with a MAP request includes an indication whether domestic law remedies pursued by the taxpayer have resulted in a decision, a settlement, or any other resolution. As discussed above, a tax administration may consider that it does not have the legal authority to deviate from the decision of a domestic court in the MAP.

Accordingly, depending on a Contracting State's domestic law and procedure, a court decision (or other similar resolution of a taxpayer's case in a domestic forum) may limit the scope of the relief a competent authority is able to provide in a particular case.

123. After answering these questions regarding the procedural situation of the taxpayer's case and the limits (if any) on the scope of possible MAP relief, the competent authority of the taxpayer's State of residence will proceed to consider the substantive issue(s) presented in the MAP request.

124. Where the competent authority determines that the taxpayer has a valid claim and that the taxation not in accordance with the treaty is (in whole or in part) the result of the action of the State of residence, the competent authority may be able to provide relief unilaterally - that is, without involving the other competent authority. In this scenario, the competent authority should provide the appropriate relief with all possible speed.

125. Where the taxation not in accordance with the treaty is the result of the action of the other Contracting State (or the competent authority of the taxpayer's State of residence is otherwise unable itself to provide satisfactory relief), the second stage of the MAP process begins. The competent authority of the taxpayer's State of residence initiates contact with the other competent authority to endeavour to resolve the matter by

mutual agreement.

126. This contact with the other competent authority should take place as soon as practically possible. It may typically occur using an opening letter or other similar document containing basic information about the MAP case. The other competent authority should confirm its receipt of the opening letter and, after a preliminary review, indicate whether it agrees to initiate MAP discussions.

127. Where the competent authority of the other Contracting State agrees to discuss the case in the MAP, both competent authorities will proceed to an in-depth analysis of the merits of the case and the issues presented, in preparation for the bilateral discussion of the case.

128. The framework for this analysis and discussion is generally provided by a position paper prepared by one of the competent authorities. The position paper is typically prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that is alleged to be contrary to the treaty.

The position paper

The position paper is the written document reflecting a jurisdiction's position in a MAP. It is prepared by one competent authority and submitted to the other jurisdiction's competent authority. Taxpayers are not directly involved in the writing of this letter, however, some competent authorities will allow them to assist in the preparation, a practice that is certainly not in contradiction to the concept of MAP as a state-to-state procedure and neither to the wording of Article 25 OECD and UN MC. However, whenever documents are shared between the competent authority and the taxpayer, potential infringements of data protection rules have to be observed. Preparing a position paper is an essential step in MAP for a jurisdiction because it reflects the core of its position in the procedure and once a position was taken in this document it will hardly be possible to deviate from such a stance.

The position paper is usually written by the tax administration that caused the action considered to be resulting in the taxation not in accordance with the Convention³⁸. The matter is independent of which competent authority has first received a request by a taxpayer. This is not a legally binding rule on the burden of proof³⁹ but the principle is deduced by logical reasoning since the tax administration who took the action will likely be able to justify it more easily.

In most cases, a tax administration receiving a position paper will reply in the same format formulating its own position in a rebuttal or response paper. However, there

³⁸ GMAP para 169

³⁹ OECD. 2017. TPG para 4.17

will be cases in which such a formal response will not be necessary, e.g. if face-to-face meetings are imminent or the receiving competent authority agrees to the view taken in the position paper. In case a competent authority needs further clarification on specific points of the other competent authority's position it is certainly allowed to request such.

The position paper does not have a clearly defined legal format. Hence it is up to the respective competent authority to structure it. As with the request for MAP, principles of structuring in legal writing, such as the IRAC (Issue, Rule, Application, and Conclusion) could be used as guidance. A clearly structured position paper that describes a country's standpoint simply but comprehensively will support a timely and satisfactory solution of the case at hand. Time invested in the diligent preparation of the position paper may help to shorten the overall duration of MAP. A list of typical elements of a position paper is depicted in the box below.

Box x:

- 1) The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;
- 2) Contact information for the competent authority official in charge of the MAP case;
- 3) A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;
- 4) The taxation years or periods involved;
- 5) The amount of income and the relevant tax for each taxable year, if applicable;
- 6) A complete description of the issue(s) presented, the relevant tax administration actions and adjustments, and the relevant domestic laws and treaty articles;
- 7) To the extent relevant and appropriate, calculations and supporting data (which may include financial and economic data and reports relied upon by the tax administration,

Source: UN GMAP paragraph x

129. In a more complex MAP case, the other competent authority should prepare and present a reasoned rebuttal to the initial position paper.

130. When the competent authorities are ready to discuss a MAP case, their discussions may take place using a great variety of methods - for example, by correspondence, by

telephone or video conference, or in face-to-face meetings. Depending on the complexity of the issues involved, the competent authority negotiations may occur in a series of meetings or other consultations. The MAP discussions may also lead to requests for additional information or other clarification from the taxpayer.

131. As with other aspects of the MAP, Article 25 of the UN Model is silent with respect to how Contracting States will conduct their MAP negotiations. Under Article 25(4), the Contracting States are directed to develop appropriate bilateral procedures to implement the MAP. Such procedures include procedures for the notification and discussion of MAP cases.

132. As explained in paragraphs 20 to 46 of the Commentary on Article 25 of the UN Model, the procedures developed for the conduct of the MAP should take into account, among other considerations, the experience of the respective competent authorities, their current and anticipated MAP caseload, and the resources available to the competent authorities. The MAP process should avoid unnecessary formality and promote forthright discussion and a collaborative approach to issue resolution. Competent authorities should also inform taxpayers of the procedural details of the MAP, ideally as part of more general public guidance on the MAP.

133. Following a thorough discussion, the competent authorities will generally come to an agreement on a mutually acceptable resolution. Upon reaching an agreement, the competent authorities usually memorialise its details in an initialled summary record that describes the method of relief (for example, an adjustment to income or credit), the extent to which each Contracting State will provide relief, the timing of relief, and any other important details (such as the treatment of amounts repatriated in connection with an adjustment to income).

134. The residence State competent authority then notifies the taxpayer that a MAP agreement has been reached and provides the taxpayer with an explanation of its details. Depending on the effect of invoking the MAP in the relevant Contracting State,⁴⁰ the taxpayer may have the option to accept or reject the MAP resolution. In the typical case in which the taxpayer accepts the MAP resolution, the summary record is generally followed by an exchange of letters that formalises the agreement between the competent authorities.

135. Following the formal exchange of letters, the competent authorities take steps as appropriate to implement the relief provided for in their agreement.

136. In a simple case in which the competent authority of one Contracting State agrees to provide correlative relief with respect to an adjustment initiated by the other Contracting State, such relief will generally be provided in the first Contracting State through a corresponding adjustment - that is, an adjustment by the first Contracting State that offsets, in whole or in part, the other Contracting State's initial adjustment.

2.4.2 Other barriers to access to the MAP: fraud, gross negligence, wilful default and tax avoidance

137. Paragraph 3 of Article 9 is relevant in discussing barriers to MAP. That paragraph provides:

See the discussion in section 2.4.3., below.

The provisions of paragraph 2 [of Article 9] shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.

138. Under specific conditions, paragraph 2 of Article 9 obliges one Contracting State (State A) to make a correlative adjustment with respect to a State A enterprise where the other Contracting State (State B) has made a transfer pricing adjustment with respect to a related State B enterprise. Where paragraph 3 of Article 9 applies, however, State A no longer has an obligation to make such an adjustment with respect to the State A enterprise and the taxpayer may not initiate the mutual agreement procedure under Article 25, paragraph 1 in order to request such corresponding adjustment. However, the taxpayer may initiate the mutual agreement procedure where the taxpayer considers that all the conditions provided for in paragraph 3 are not met or that the adjustment of profits is not in accordance with paragraph 1.

139. State A may determine in particular circumstances that it is appropriate to consider providing MAP relief even in a case where paragraph 3 applies. Consistent with the Commentary on Article 25 noted above, many countries would consider the provision of such relief to be within the scope of, and authorized generally by, Article 25. Paragraph 8 of the Commentary on Article 9 states that Member countries may consider the double penalties that apply in Article 9(3) cases to be too harsh, a factor that could make them consider MAP access potentially appropriate. In any case, this paragraph of the Commentary on Article 9 also notes that these cases “are likely to be exceptional and there would be no application of [Article 9(3)] in a routine manner”.

140. In practice, some competent authorities have refused to provide relief where the adjustment underlying a taxpayer’s MAP request is based upon an anti-avoidance provision in their countries’ domestic laws (for example, a thin capitalisation provision) even where a tax convention does not provide expressly that MAP assistance will not be provided in such circumstances. If such cases are accepted for MAP consideration, these competent authorities may do no more than forward the cases to the other competent authority, which may then provide correlative relief at its discretion.

141. This approach may likely not lead to a satisfactory resolution. Moreover, even where a tax treaty specifically provides for the application of a Contracting State’s anti-avoidance provisions, Contracting States should carefully examine whether their application in a particular case is in conflict with other provisions of the relevant tax treaty.

142. Competent authorities may also decide not to accept a taxpayer’s MAP request (or not to provide relief) for other policy reasons, or because a tax administration would like a judicial precedent with respect to a specific issue.

143. Some of these barriers to the MAP may be inconsistent with a Contracting State’s obligation under Article 25 of the UN Model to endeavour to resolve through the MAP all “justified” taxpayer objections to taxation not in accordance with the treaty. These barriers may also likely conflict with a Contracting State’s more general obligations under the international law of treaties.⁴¹ They are certainly inconsistent

See Articles 26 (“*Pacta sunt servanda*”) and 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol.

with the general spirit and purpose of the MAP. Contracting States should accordingly not raise such barriers to access to the MAP without careful consideration.

2.4.3 What is the effect of invoking the MAP?

144. An aspect of the MAP that is closely linked to the relationship between the MAP and domestic law⁴² - and with respect to which Article 25 of the UN Model is silent - is the legal effect of the taxpayer's invocation of the MAP.

145. In general, a mutual agreement is conditioned on the acceptance by the taxpayer of the mutual agreement. If the taxpayer does not accept it, the mutual agreement does not come into effect and each Contracting State will tax according to its understanding of the relevant facts and how it understands the treaty to apply with respect to those facts.

2.4.4 What is the taxpayer's role in the MAP?

146. Article 25 of the UN Model provides that a taxpayer may present a MAP request, but does not otherwise provide for taxpayer participation in the MAP. Contracting States may, however, provide for a taxpayer role in the MAP pursuant to the directive contained in paragraph 4 of Article 25 to develop, through competent authority consultations, "appropriate bilateral procedures, conditions, methods, and techniques" for the implementation of the MAP.

147. In practice, the taxpayer's role in the MAP is typically determined by domestic law (or other guidance) in the taxpayer's State of residence, on how to seek MAP assistance.⁴³ Although domestic procedures for MAP access will necessarily vary to a greater or lesser degree, the following general comments may be made with respect to the taxpayer's role in the MAP.

148. The taxpayer's primary role in the MAP is to provide the competent authority of its State of residence with complete and accurate information and documentation in a timely manner. The taxpayer should promptly advise its competent authority of any material changes in the facts and circumstances relevant to its case, as well as any new facts and information that emerge subsequent to the taxpayer's prior submissions. The taxpayer should similarly provide complete and timely responses to any competent authority requests for additional information. The competent authority

1155, p. 331). Article 26 of the Vienna Convention provides that every treaty is binding on the parties thereto and must be performed by them in good faith. Article 27 of the Vienna Convention provides that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform under a treaty. See section 1.4 above.

A Contracting State may generally prefer to apply the same procedures to all resident taxpayers seeking MAP assistance, regardless of the applicable tax treaty, rather than to develop specific procedures for MAP access under each individual tax treaty. This policy may facilitate the administration of a competent authority's MAP function and assure the uniform treatment of taxpayers (with respect to access to the MAP).

may also ask the taxpayer for assistance in interpreting the information provided including: economic models and legal memoranda justifying the taxpayer's application of the arm's length standard.

149. The taxpayer should additionally make certain that the information provided to both competent authorities is consistent and free of conflicts. A taxpayer will generally not itself provide information connected with a MAP request directly to the competent authority of the other Contracting State. Rather, the competent authority of the State of residence will typically provide such information to the competent authority of the other Contracting State, under the authority of Article 26 (Exchange of Information) and as part of the bilateral procedures developed for the conduct of the MAP.

150. Circumstances may arise, however, where a taxpayer is involved in the preparation of information that is provided separately to both competent authorities. For example, where a MAP request regards a transaction with a related party in the other Contracting State, and the related foreign party itself makes a MAP request to the other competent authority, the taxpayer may often be involved in the preparation of information or documents that are presented to the other competent authority.

151. Competent authorities may permit taxpayers to present briefs or make presentations to both competent authorities as part of the MAP process. The material presented may in some cases also include taxpayer proposals for the resolution of a MAP case. Providing taxpayers with appropriate opportunities to present relevant information may help both competent authorities to reach a common understanding of the facts and issues, especially in particularly complex MAP cases, and thereby improve the functioning of the MAP.

152. In general, taxpayers have no further direct involvement in the consultation between the two competent authorities. Many Contracting States regard MAP consultations as a confidential, government-to-government process in which taxpayer participation would be barred or otherwise inappropriate.

153. In addition, the MAP is a bilateral process in which both parties share common interests: the resolution of international double taxation and the correct interpretation and application of the tax treaty. A taxpayer's main interest, in contrast, will generally be to minimize, over time, its worldwide tax liability. Direct taxpayer involvement in competent authority negotiations could thus reasonably be expected to extend or distort the MAP process.

154. Even though a taxpayer will usually not be directly involved in MAP discussions, the competent authority to which its MAP request was submitted should regularly communicate with the taxpayer regarding the status of its case and the relevant consultations. Such communications may encourage taxpayer cooperation with the MAP (for example, the prompt submission of additional information or documentation, when necessary) and should also improve the overall transparency of the MAP process.

2.4.5 How does the competent authority analyse and evaluate a MAP case?

155. A competent authority's evaluation of a MAP case will usually begin when the competent authority receives the taxpayer's MAP request and the supporting documentation. As discussed above, the competent authority must first make a threshold determination whether it will accept the case for MAP consideration. The competent authority then evaluates the procedural situation of the case and the scope of the relief potentially available to the taxpayer. Following these first steps, the competent authority proceeds to a substantive analysis of the facts and issues presented in the MAP request.

156. Where the competent authority is able to resolve the MAP case unilaterally, there is, of course, no need to involve the competent authority of the other Contracting State.

157. Where, on the other hand, it is necessary to initiate bilateral consideration of the case in the MAP, the competent authorities of both Contracting States must necessarily conduct their own substantive analyses. For this purpose, it is of fundamental importance that both competent authorities are working with the same set of facts.

158. The competent authority that initiates the MAP consultation process should provide the other competent authority with all of the relevant facts and information submitted by the taxpayer with the MAP request. Taxpayer involvement (for example, in the form of a presentation to both competent authorities) may also assist the competent authorities in arriving at a common understanding of the facts. Once the competent authorities agree on the facts of a MAP case, their analysis will turn to the proper interpretation of the tax treaty and its application to the taxpayer's facts.

159. The end result of each competent authority's analysis is a reasoned and principled position on how the MAP case should be resolved. Each competent authority should be prepared to articulate in a clear manner the domestic law basis for any relevant tax administration's action taken with respect to the taxpayer and, more importantly, how such action is consistent with the terms of the tax treaty.

160. The key point of reference for purposes of the competent authorities' analysis is the body of law that the two Contracting States have in common: the tax treaty itself; any agreed-upon memorandum of understanding or joint technical explanation of the treaty; and any relevant model tax treaties (such as the UN Model), together with their commentaries.

161. Although the specific manner in which each competent authority presents its respective position will be determined by the bilateral procedures developed by the Contracting States for the implementation of the MAP, at least one of the competent authorities will typically prepare a position paper setting forth its analysis and conclusions.

2.4.6 How do the competent authorities interact in a MAP case?

162. How the competent authorities interact in a MAP case is for the most part determined by the specific bilateral procedures they develop to carry out their MAP function. Article 25 of the UN Model does not provide guidance on how MAP consultations should be conducted although, as noted above, paragraph 4 of Article 25 directs the competent authorities of the Contracting States jointly to develop appropriate bilateral procedures to implement the MAP.

163. Article 25 provides considerable latitude to the Contracting States to create a procedural framework for the MAP that takes into account their specific circumstances and preferences. The Commentary on Article 25 of the UN Model contains the following useful discussion in this regard:

36. The competent authorities will have to decide how their consultation should proceed once that part of the procedure comes into operation. Presumably, the nature of the consultation will depend on the number and character of the cases involved. The competent authorities should keep the consultation procedure flexible and leave every method of communication open, so that the method appropriate to the matter at hand can be used.

37. Various alternatives are available, such as informal consultation by telecommunication or in person; meetings between technical personnel or auditors of each country, whose conclusions are to be accepted or ratified by the competent authorities; appointment of a joint commission for a complicated case or series of cases; formal meetings of the competent authorities in person etc. It does not seem desirable to place a time limit on when the competent authorities must conclude a matter, since the complexities of particular cases may differ. Nevertheless, competent authorities should develop working habits that are conducive to prompt disposition of cases and should endeavour not to allow undue delay.

1.2 Procedural issues in MAP

1.2.1 Who can request MAP

A MAP request can be submitted under Article 25 (1) UN Model and OECD Model if the following criteria are fulfilled:

- there is an applicable tax treaty covering the issue or transaction;
- the treaty is applicable to the person making the request, i.e. the person is either a resident of one of the Contracting States under the articles corresponding to Articles 1, 3 and 4 of the UN Model and OECD Model or it is a national of one of the Contracting States and the case concerns discrimination under Article 24 (1) of the Models;
- the treaty applies to the taxes levied in the case, i.e. the taxes are covered by the article corresponding to Article 2 of the UN Model and OECD Model;
- the person considers that the actions of one or both countries resulted or will result in taxation not in accordance with the provisions of the tax convention;
- the competent authority is notified within the time limits specified in the applicable tax treaty; and
- the issue or objection seems to be justified.

There is generally no minimum requirement on the amount of taxes in dispute for accessing MAP.

In addition to the criteria set down in Article 25 (1) of the Model Conventions, most competent authorities require specific information to be included in the request in order for it to be eligible. According to the BEPS Action 14 minimum standard, this information must be published in the MAP guidelines of the competent authorities. Moreover, under the minimum standard, States are not allowed to limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information.

Both **individuals and multinational corporations** can access MAP in the country in which they are resident under Article 25 (1) UN Model and in either Contracting State

under Article 25 (1) OECD Model. The taxpayers must, however, be **residents or nationals of either Contracting State** in order to be eligible.

Taxation not in accordance with the treaty must have occurred. The broad phrasing implies that not only cases of double taxation, but also cases where the single taxation was not in accordance with the treaty are covered, as well as cases of double non-taxation (though it is unlikely that a taxpayer would submit a request in the latter situation). Whether this requirement is fulfilled will be determined by the CA receiving the request in the first stage of the process. If the taxation is not in accordance with the treaty, the case will be considered justified and either resolved unilaterally or accepted into the second stage of the process. However, if the CA finds the objection to be unjustified, then the case is denied entry to the second MAP stage. No recourse is foreseen against this assessment, either in the UN and OECD Models or, generally, the domestic laws of the Contracting States involved. BEPS Action 14 merely requires that the request be permissible in either Contracting State or a notification / consultation of the other State in the case of a finding of “objection not justified” by the receiving state. However, Article 5 (3) of the EU Arbitration Directive grants the taxpayer a remedy in cases where the request is rejected by the CAs, involving either the domestic courts or the Advisory Commission.

An important aspect to take into account is the **timing aspect**. There are two time-related aspects to take into account. Firstly, the question arises how soon a taxpayer can initiate a MAP request. It is important to note that **taxpayers are entitled to initiate a competent authority request even before an audit is completed or they have received formal notification of an assessment**. The probability that taxation not in accordance with the applicable convention will result is sufficient (as opposed to merely the possibility).

Nevertheless, when a request is submitted very early, this may lead to difficulties in the demonstration that taxation not in accordance with the convention has, in fact, occurred. For this reason, competent authorities may require that the adjustment potentially leading to taxation not in accordance with the convention be confirmed by the conclusion of the audit before committing resources to the analysis or evaluation of a MAP process. This is also due to the fact that the competent authority may feel unable to evaluate the case before the audit function has completed the factual development and related analysis. Ideally, if a competent authority cannot adequately evaluate the case at such an early stage, this should only lead to a delay in the processing of the case and should not prevent the presentation of the case itself or bar access to MAP.

Secondly, there is the question of how late a MAP request can be submitted. Both the UN Model and the OECD Model foresee a **three-year time frame for the submission of the request, starting from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention**. In most cases this would mean three years from the date of the notice of adjustment. The aim of the time limit is to prevent tax

administrations from having to make or react to adjustments many years after the taxable period at issue, since the information may very well no longer be available. While this may seem like a clear and easy-to-verify requirement, in practice there are significant difficulties in correctly determining and applying this deadline both for the taxpayer and for the competent authorities. Therefore, despite the fact that the onus for making a timely request rests with the taxpayer, it is suggested that tax administrations should not apply an overly strict interpretation of a convention's time limitation for requesting MAP.

One type of situation which causes difficulties in determining when the deadline expires are self-assessment cases. 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 as stipulated in Article 25(1) of the OECD Model Convention.

Where a taxpayer pays additional tax in connection with the filing of an amended return reflecting a bona fide taxpayer-initiated adjustment, 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 materializes. Since the BEPS Action 14 minimum standard requires that a minimum of 3 years must pass before a case is denied access to MAP, the three-year period is implemented in Article 16 (1) of the MLI. However, in practice, many treaties include a shorter time period or lack any time periods. If the treaty lacks a specific deadline, it is possible that the Contracting States could accept cases indefinitely. Nevertheless, the more likely situation is that the deadline for the submission of the request would depend on the deadlines under domestic law.

1.2.2 The role of the taxpayer in MAP

1.2.2.1 *The MAP initiation*

The taxpayer initiates the specific case MAP under Article 25 (1) UN Model by filing a MAP request with the competent authority of his state of residence or the state it is a national of. But afterwards the taxpayer does not have an active role in the procedure between the competent authorities.

The taxpayer's primary role in the MAP, and especially in the initiation phase, is to provide the competent authority of its state of residence with complete and accurate information and documentation in a timely manner. The taxpayer should promptly advise its competent authority of any material changes in the facts and circumstances relevant to its case, as well as any new facts and information that emerge subsequent to the taxpayer's prior submissions. The taxpayer should similarly provide complete and timely responses to any competent authority requests for additional information.⁴⁴ This is essential because the taxpayer is the only party who has a direct access to all relevant facts that may be determinative of the outcome of the procedure.

Beyond this, neither the UN Model Convention nor the OECD Model Convention explicitly mandate any minimum level of taxpayer involvement in the procedure. In practice, domestic law (or guidelines) in the taxpayer's country of residence usually outline his role in the MAP. Taxpayer participation may be useful, but it is not a given. Taxpayer involvement can theoretically take several different forms:

- (i) the competent authorities' efforts to keep the taxpayer posted on the status of the MAP,
- (ii) the taxpayer's input to the procedure by supplying factual information,
- (iii) the taxpayer's right to give a joint, verbal presentation to both competent authorities and
- (iv) the taxpayer's active participation in the MAP negotiations, this last form being very uncommon in practice.

Under many domestic laws, the taxpayer has a right to be kept apprised of the status of the MAP. As the bilateral phase of the MAP can often take a very long time and the taxpayer has a high stake in the proceedings, it is advisable to briefly inform the taxpayer of important steps in the procedures, without, of course, providing substantive details.

Such an information policy can also help prevent delays. If, for instance, the slow response of one competent authority is due to the fact that a related party of the taxpayer has not provided the necessary information, the taxpayer can exert influence on this party

⁴⁴ Subcommittee on Dispute Resolution: Background Note on "Resolving issues that prevent a mutual agreement: Supplementary mechanisms for dispute resolution" - Addendum A Guide to the Mutual Agreement Procedure under the United Nations Model Double Taxation Convention between Developed and Developing Countries (2008); p. 29. http://www.un.org/esa/ffd/tax/documents/bgrd_model_dr.htm

and thus speed up the proceedings if it is informed of the reasons for the delay. This scenario can commonly occur in transfer pricing cases.

1.2.2.2 The right to withdraw a request

A taxpayer has the right to end a MAP initiated at his request at any time before agreement was reached by withdrawing said request. This is not explicitly stated in the Models, but takes place quite often in practice.

Most often, such a withdrawal is due to the fact that the **double taxation challenged by the taxpayer has already been resolved by one or both competent authorities through domestic means.** While competent authorities are required to examine the possibility of granting relief domestically in the unilateral phase of the MAP, sometimes bilateral discussions between the competent authorities can result in an agreement that this is the best way to resolve the case.

Alternatively, it is possible that the taxpayer had initiated court proceedings in parallel with the MAP and that these proceedings result in a judgment leading to the elimination of double taxation.

Neither the Models and their Commentaries, nor the MAP Guides of the OECD and UN contain any formal requirements for such a withdrawal. Domestic MAP guidance may contain indications. Commonly, the withdrawal should be issued in the same form as the initial request. It need not contain any additional information or explanation of the reasons for the withdrawal.

1.2.2.3 The right to refuse an agreement

Taxpayers have the right to request MAP assistance, but they are generally not bound by the mutual agreement between the two competent authorities if, and when, this is reached. Although neither the OECD Model Convention nor the UN Model Convention states this explicitly, it can probably be inferred from Article 25(1), which says that the MAP and the domestic remedies are not tied to each other. Moreover, both the OECD Commentary and the UN Commentary⁴⁵ point to this conclusion.

The OECD Commentary addresses the issue in examining the scenario of a mutual agreement that is concluded with regard to a taxpayer who is still litigating the same case in the courts of either Contracting State. The OECD Commentary states that there is no ground for rejecting a MAP request made by a taxpayer on the basis that he is allowed to disregard the solution agreed upon as a result of the MAP until the court had delivered its judgment in that suit. This makes it clear that the OECD Commentary does not consider the mutual agreement to be binding on the taxpayer.

The UN Commentary also recognizes that the general practice is that taxpayers are not bound by the mutual agreement.

⁴⁵ Commentaries on the United Nations Model Double Taxation Convention between Developed and Developing Countries, http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf

Embarking on a MAP without the certainty that the taxpayer will accept its outcome may represent a serious waste of resources that many developing countries may barely afford. In addition, the competent authorities will want to avoid any inconsistency between the mutually agreed solution and the outcome of a court proceeding. There are different possible approaches to address this issue.

One possibility is to make the implementation of the mutual agreement contingent on (i) the taxpayer's acceptance of the mutual agreement and (ii) the taxpayer's renunciation of domestic remedies with respect to those points settled in the mutual agreement. This method ensures that the agreement will not subsequently be challenged. It cannot, however, prevent the taxpayer from rejecting the agreement outright. Nevertheless, if such a rejection should occur, it frees the competent authorities of the burden of implementing the agreement.

Another possible approach is for the competent authorities to make the access to MAP itself conditional upon the taxpayer's waiver of domestic legal remedies. However, this would not be in line with the intent of the MAP itself and even less with the objective of Action 14 to guarantee access to MAP, which has (broadly) been endorsed by the UN Tax Committee. Therefore, such an approach is not recommended. Moreover, should this approach be considered, then it should be implemented in the treaty itself to guarantee legal certainty.⁴⁶ A MAP provision in a bilateral treaty which is fully in line with Article 25 (1) of the UN Model Convention could not be interpreted as being subject to this restriction.

1.2.2.4 Other ways to involve the taxpayer in the MAP

Taxpayers can support administrations in the conduct of MAP. MAP is a state to state procedure, hence taxpayers have only limited rights in this procedure. However, the taxpayer is a stakeholder in the procedure and he will often have strong opinions on preferable outcomes of it. Indeed, **taxpayers will frequently be willing to voluntarily contribute significantly to the procedure** in order to support their own standpoints. While the taxpayer might not have a right to contribute directly to the procedure such contributions could, nevertheless, be highly appreciated by competent authorities. For example, the presentation of the facts and circumstances of a case to both competent authorities may be for the benefit of the better understanding of economic circumstances for both tax authorities and could be considered in particular in fact intensive cases such as transfer pricing cases.⁴⁷ Indeed, Article 25 UN Model does not restrict voluntary cooperation of the taxpayer with one or both involved competent authorities beyond legal requirements. **Taxpayers can also explain their views on the legal thinking involved.**

⁴⁶ Cesare Silvani, Dispute Resolution Procedures in International Tax Matters, IFA Research Paper #5 (2014); pp. 41-42.

⁴⁷ Best Practice #13 MEMAP

On the other hand, some States may prefer to ask taxpayers to contribute to the costs involved in MAP as well and then, try and involve the taxpayer in a facilitative process. The form of involvement of taxpayers can vary within the limits permissible by domestic law and allowed by the competent authorities. In general, taxpayers will decide to support the positions of one or another competent authority. However, this does certainly not relieve them from any obligation to cooperate with the competent authority not supporting their views. In particular, **both authorities should have access to the same information on the facts and circumstances of the case** and should not receive conflicting information from the taxpayer.⁴⁸

Tax administration who rely heavily on the support of taxpayers in MAP need to be cautious about losing control of the procedure. This risk is particularly relevant for jurisdictions with limited own capacities in conducting MAP since they will be the ones who are more tempted to use taxpayer resources and, additionally, controlling a case is, due to their lack of resources, more difficult in the first place.

An active participation of the taxpayer may also carry other risks. For example, if the taxpayer were present at the discussion table together with the competent authorities, they would need to refrain from referring to previous MAP cases that they have examined and take additional precautions to ensure **confidentiality and tax secrecy**.⁴⁹ Hence, the benefits and risks of close cooperation have to be carefully balanced.

Taxpayers may also avail themselves of alternative dispute resolution mechanisms, like mediation, conciliation or an expert witness – provided there is agreement from the competent authorities to take part in such mechanisms. When MAP cases are deadlocked, are at risk to fail, and binding arbitration is not foreseen, alternative dispute resolution mechanisms, like mediation, conciliation or expert witnesses, have been suggested by multiple authors⁵⁰ as one way to overcome such situation. However, those mechanisms can be costly and hence, their use can be restricted for purely financial reasons. In such cases, taxpayers might consider contributing to MAP by financing those mechanisms and it will be up to the competent authorities to accept such contribution or not.

Whenever enhanced taxpayer involvement is considered matters of data protection have to be considered. As mentioned above, information exchanged between competent authorities in MAP is covered by the same confidentiality requirements as all other forms of exchange of information under Article 26 OECD and UN MC, therefore, sharing confidential information with taxpayers will need the consent of the other tax administration.

⁴⁸ MEMAP 3.3.1.

⁴⁹ Cesare Silvani, Dispute Resolution Procedures in International Tax Matters, IFA Research Paper #5 (2014) IFA; p. 39.

⁵⁰ [References to be added]

Any jurisdiction fostering enhanced taxpayer involvement in MAP should consider framing this into specific guidelines.

Cooperation among all stakeholders involved in the MAP process is crucial to a responsive and well-functioning MAP program. The provision of information and assistance when requested will promote transparency and consistency. Thus, cooperation amongst these stakeholders or parties (taxpayers and competent authorities) to the MAP process is paramount. In particular, the duration of MAP depends on such good cooperation.⁵¹

The strategic plan developed by the OECD FTA MAP Forum also suggests focusing on *“(1) the potential use of bilateral or multilateral meetings in which taxpayers can present factual information to governments at the same time and (2) sharing best practices with respect to liaising with taxpayers and their advisors and informing them of case developments, as may be consistent with the provisions of the applicable convention.”*

1.2.3 Time-limits for MAP

There is no overall time limit for the MAP, either in the UN or in the OECD Model Conventions, unless the MAP article includes an arbitration clause. In case an arbitration clause is included, then the time-limit for concluding a successful mutual agreement is determined by the wording of the arbitration clause. Under the OECD Model Convention, the arbitration can be requested after two years, while under the UN Model Convention, the time-frame for the MAP is 3 years.

While there is no overall time limit, the UN Guide to MAP provides an ideal timeline for carrying out the MAP (see section 3) and the BEPS Action 14 Minimum Standard requires that cases be concluded in an average time frame of 24 months.

1.2.4 The completion of MAP

1.2.4.1 *General*

A MAP can be completed only where there is either an agreement or where there is an agreement that no agreement has been found or reached. However, in practice, cases have not been completed without any formal notification, simply because competent authorities have ceased to act.

1.2.4.2 *Agreement between the competent authorities*

In case of an agreement, there is consensual closure of a case through a formal act. An agreement does not necessarily have to eliminate double taxation completely. In fact, the new OECD Reporting Framework on MAP details the percentage of cases that have fully resolved double taxation and many States have several MAP cases that have been completed without a full resolution.

An agreement can be found both regarding legal and factual questions. Further, an agreement can also cover only some of the disputed questions and could be thus, a partial

⁵¹ MEMAP 3.3.3.

agreement. An agreement is usually done in written form, although this is not a legal prerequisite it may be useful for reasons of recording the content.

1.2.4.3 *No agreement between the competent authorities*

A situation where there is an understanding between competent authorities that there can be no formal agreement may be termed a 'non-agreement'. A non-agreement means the closure of a case through a formal act without finding a consensual solution.

As with the agreement, the non-agreement can only cover specific aspects of the case (partial non-agreement). Especially in such cases, written format is recommended. In particular, the taxpayer should be informed about such closure, since it may lead to the need of further action such as pursuing domestic remedies.

However, it is acknowledged that competent authorities may implicitly reach a 'non-agreement' without formally closing the case. States are dissuaded from following this practice since this would go against the objective of MAP and would lead to increased uncertainty for taxpayers.

1.2.4.4 *Implementation of the agreement*

After arriving at an agreement in a MAP, the solution has to be implemented by one or both of the States involved. This is of great practical significance since the competent authority may be in a position to require the mandatory implementation of an agreement by the tax office of a State, even where such authority may not be superior in terms of hierarchy in a tax office.

It should also be stressed that the implementation of MAP should not be deterred by domestic statutes of limitation. Even though this is provided for in Article 25 (2) of the UN and OECD Models specifically, States are urged to implement this without exception to ensure that the MAP process remains effective and efficient. The importance of the implementation of the MAP is highlighted by the fact that the Minimum Standard of BEPS Action 14 requires that MAPs be implemented once reached. This can be achieved either by implementing the above-mentioned provision of Article 25 (2) or by being willing to include provisions limiting the time frame for making an adjustment pursuant to Articles 7 and 9 of the OECD Model.

1.3 Practical aspects of MAP

Before going into practical considerations on the MAP process, it is important to have a clear picture of the different steps of the procedure. The following table provides an overview of the entire MAP procedure and its ideal timeline under Art 25 (1) of the UN Model.

Action			Target Time Frame or Deadline
Taxpayer	State A Competent Authority (Taxpayer's State of Residence)	State B Competent Authority	
Initiation of the MAP			
<ul style="list-style-type: none"> • Submit MAP request to State A Competent Authority (CA). • If a transfer pricing case, Taxpayer (or associated enterprise in State B) is encouraged to contact State B CA and provide it with the relevant details of MAP request. 			Under Article 25(1) of the UN Model: "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention"
	<ul style="list-style-type: none"> • Confirm receipt of MAP request. 		Within one month of Taxpayer's submission of MAP request to State A CA.

	<ul style="list-style-type: none"> • In transfer pricing cases, Advise State B CA of MAP request. 		<p>Within three months of Taxpayer's submission of the MAP request to State A CA.</p>
	<ul style="list-style-type: none"> • Preliminary review of MAP request. • Where necessary, request additional information from Taxpayer. • Determine whether MAP request will be accepted. • If case accepted, the unilateral phase of the MAP begins. 		<p>Within four months of Taxpayer's submission of the MAP request to State A CA.</p>
Unilateral stage			
	<ul style="list-style-type: none"> • Determine whether unilateral relief is possible and appropriate. • Notify Taxpayer whether MAP request will be accepted and whether unilateral relief is possible and appropriate. • In transfer pricing cases, inform State B 		<p>Within three months of Taxpayer's submission of all information required by State A CA to determine whether the MAP request will be accepted and whether unilateral relief is possible and appropriate.</p>

	<p>CA that MAP request is accepted and whether unilateral relief is possible and appropriate.</p>		
Bilateral stage			
	<ul style="list-style-type: none"> If no unilateral relief possible, propose to State B CA to initiate MAP discussions - issue opening letter to State B CA and communicate all relevant information in order to allow State B CA to examine the case. 		<p>Within three months of the notification to the taxpayer that MAP request is accepted and unilateral relief is not possible and appropriate.</p>

		<ul style="list-style-type: none"> • Confirm receipt of State A CA request to initiate MAP discussions. • Preliminary review of MAP request. • Where necessary, request that State A CA obtain additional information from Taxpayer. 	Within one months of State B CA's receipt of State A CA's opening letter.
		<ul style="list-style-type: none"> • Notify State A CA whether request to initiate MAP discussions is accepted. 	Within three months of State B CA's confirmation
	<p>If State B CA agrees to MAP discussions, the CA of the Contracting State that initiated the adjustment or, in the absence of an adjustment, of the Contracting State the taxation of which is considered not in accordance with the Convention (whether State A CA or State B CA) analyses and evaluates the MAP case and prepares a position paper for the other CA.</p>		Within six months of State B CA's agreement to enter into MAP discussions.

	<ul style="list-style-type: none"> • Review of MAP case by the other CA. • Where necessary, the other CA may request that the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention, provide additional information or explanation. • Determination by the other CA whether unilateral relief is possible and appropriate. • Where appropriate, preparation of rebuttal paper or other response to the position paper by the other CA. 	<p>Within six months of the other CA's receipt of the position paper prepared by the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention.</p>
	<p>Negotiation between State A CA and State B CA.</p>	
<p>Conclusion of the MAP</p>		
	<ul style="list-style-type: none"> • MAP agreement between State A CA and State B CA. • Memorialize MAP agreement in summary record. 	<p>Within 36 months of the acceptance date of Taxpayer's MAP request by State A CA.</p>
	<ul style="list-style-type: none"> • Notify Taxpayer that MAP agreement has been reached and explain its terms. • Where relevant, request that Taxpayer indicate whether it 	<p>Within one month after MAP agreement has been memorialized.</p>

	accepts MAP agreement.		
Notify State A CA whether it accepts the MAP agreement.			Within one month of notification of the MAP agreement.
	If Taxpayer accepts the MAP agreement, State A CA and State B CA confirm and formalize MAP agreement through exchange of letters.		Within one month of the Taxpayer's acceptance of the MAP agreement.
	Implementation of the MAP agreement.		No later than three months after the exchange of letters formalizing the MAP agreement.

Source: G-MAP pp. 34-37. The names of the different stages and their starting points have been altered for clarity.

1.3.1 The MAP request

1.3.1.1 *Minimum content*

The presentation of a case to the tax administration by a taxpayer is the starting point of MAP.⁵² According to Article 25 para 1 and 2, a case is presented by a taxpayer to the tax administration of his residence,⁵³ or, in cases of Article 24 OECD and UN MC,

⁵² This is not meant in a formal way, formally the starting point of MAP is the acceptance of the competent authority.

⁵³ In the case of economic double taxation two separate requests can be submitted to the competent authorities of each affected taxpayer. In such case, this will certainly lead to only one MAP case (see GMAP para 88). As noted earlier, requests may be made to the other State as well in treaty provisions modified as per the MLI.

his nationality. Although DTCs do not define the circumstances of this presentation in detail, there is a broad understanding of how this MAP request should look like, as will be described below. Nevertheless, as noted in paragraphs 45 and 46 of the Commentary on the UN Model, each competent authority may prescribe whatever special procedures it feels are appropriate or necessary⁵⁴.

The request usually needs to be submitted in writing, which will include the electronic transmission. Countries have found that the use of MAP may be encouraged where the process of making a MAP request is transparent and free of unnecessary formalities.⁵⁵ However, the written form is required, which will include the electronic transmission.⁵⁶ This does not prevent the taxpayer from approaching the respective tax administration before actually filing the written request to discuss his specific situation. In such pre-filing situations, taxpayers may learn from tax administrations about procedural aspects of MAP and international dispute resolution in more general. Indeed, at this stage, the tax administration might learn as well from previous experiences of the taxpayer (in other countries). Nevertheless, taxpayers have to be cautious during the pre-filing phase to not overlook time limits, as defined in the respective DTC, for formal requests.

The application of general principles of legal reasoning is typically needed in making a conclusive request. In the absence of clear rules on the format of the request, general principles of legal writing should be adhered to. Often, a legal letter is structured following the IRAC (Issue, Rule, Application, and Conclusion)⁵⁷ rule, which helps to clearly structure the request. However, IRAC is not the only way to properly structure, and other models could be used as well. In fact, it is only important that the request follows a logical structure that is comprehensible to its addressee, the competent authority. The exact form is insofar only of secondary importance. In transfer pricing cases it is also useful to consider the structure of a common set of substantive rules or guidelines, such as the UN manual on transfer pricing or the OECD transfer pricing guidelines,⁵⁸ in the request, and to conceive the request reflecting the structure of those documents.

The need to distill substantive and decisive elements of the case and include them in the request is essential. The formal request of MAP is often the result of long lasting and extensive audit process and a subsequent adjustment. During such a process typically large amounts of documentation will have been produced, which may include evidence that is irrelevant to the MAP. Hence, it is essential for taxpayers to distill substantive and decisive elements of the case and include them in the request. In doing so taxpayers should

⁵⁴ GMAP para 90

⁵⁵ GMAP para 92

⁵⁶ MEMAP BB#6 and GMAP para 97

⁵⁷ The principle is also sometimes referred to as ICRA (Jensen, Legal Writing Coach). However, the most important purpose of this principle is to help clearly structuring a document, which can be certainly achieved in both ways.

⁵⁸ In particular the description of a typical comparability analysis, as done in the OECD. 2010. TPG para 3.4. could be useful in this regard

also be aware that employees of the competent authority are often not as familiar with complex business structures, as for example tax auditors are, and therefore try to keep the request as simple as possible. This will particularly apply to complex transfer pricing cases. Taxpayers who succeed in focusing on decisive elements of the facts and reproducing them in a simple manner will likely be able to benefit from a shorter duration of the MAP.

However, it should be stressed that above all taxpayers are obliged to only provide accurate and consistent information to the involved competent authorities. The misrepresentation of facts and other material information may even result in the denial of competent authority assistance under a jurisdiction's domestic law⁵⁹.

A List of typical contents of a MAP request is depicted in the box below. In the context in which a competent authority has not developed a prescribed format for the presentation of a MAP request in detail, a taxpayer should check whether the request contains the following items (see also paragraphs 22ff of the Commentary on Article 25).⁶⁰ Some of the items listed below, such as for example the detailed transfer pricing documentation, should only be added to the request in an appendix to allow for a clear structuring:

⁵⁹ GMAP para 100

⁶⁰ GMAP para 94 also MEMAP in subchapter 2.2.1. includes a list of 17 elements that should be included in a request which slightly deviates from the list quoted above

BOX x:

- 1) The name, address and any taxpayer identification number of the taxpayer;
- 2) The name, address and any taxpayer identification number of the related foreign taxpayer(s) involved (for transfer pricing cases):
- 3) The foreign tax administration involved and, if relevant, the regional or local tax administration office that has made, or is proposing to make, the adjustment(s);
- 4) The tax treaty article that the taxpayer asserts is not being correctly applied, and the taxpayer's explanation of how it believes the article should be interpreted and/or applied;
- 5) The taxation years or periods involved;
- 6) A summary of the facts, including the structure, terms, and timing of all relevant transactions and the relationships between related parties (the taxpayer should advise the competent authority of how the facts may have changed during or after the relevant taxable period, and of any additional facts that come to light after the submission of the MAP request);
- 7) An analysis of the issues for which competent authority assistance is requested and the relevant legal rules, guidelines or other authorities (including any authorities that may be contrary to the conclusions of the taxpayer's analysis). The analysis should address all specific issues raised by either tax administration as well as the amounts related to the adjustment(s) (in both currencies and supported by calculations, if applicable);
- 8) For transfer pricing cases, any documentation required to be prepared under the domestic legislation of the taxpayer's State of residence (where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable) and a detailed description of the companies involved, including an analysis of their functions and risks, to the extent relevant;
- 9) A copy of any other relevant MAP request and the associated documents filed, or to be filed, with the competent authority of the other Contracting State, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the tax administration of the other Contracting State (translations of relevant documents may be helpful, and, where documentation is voluminous, a competent authority may determine that a description or summary of such documentation may be acceptable);

Source: GMAP paragraph 94.

In some countries, specific guidelines on the format of a MAP exist and should certainly be followed diligently. Taxpayers who are not clear about the existence of such rules could either directly seek for guidance from the respective competent authority or consult the MAP country profiles published by OECD,⁶¹ as the publication of the information required in the MAP request is one of the minimum standards of BEPS Action 14. For tax administrations, it is important in developing such rules to carefully balance their need for information with the taxpayer's administrative burden.⁶²

A MAP request may include confidential information, e.g. business secrets. Hence it is important that the secrecy of such information is sufficiently protected. The communication between tax administrations, which is usually based on the respective provision on exchange of information in the applicable DTC, guarantees treatment of exchanged information as secret.⁶³ The principle of secrecy including the final agreement is one of the most substantive deviations from domestic judicial procedures which usually lead to a published decision, albeit often with the taxpayer's name redacted.

1.3.1.2 *Improving insufficient requests*

Neither the UN Model, nor the OECD Model or their respective Commentaries explicitly mention the possibility of re-submitting requests after improving them. However, the CA is allowed under both Commentaries to request additional information. Moreover, under BEPS Action 14, the minimum standard requires that access to MAP not be denied merely because not all information required by the domestic guidance has been submitted. In addition, most countries' domestic procedures allow for a correction of petitions under certain circumstances. Thus, it could be inferred that the improvement and re-submission of requests is allowed. However, absent any explicit provisions in the Models to this effect, the handling of such cases is entirely up to the CA.

One important aspect that must be taken into account in this regard is the timing issue. If the taxpayers submit the original, flawed request too close to the 3-year deadline for submission of MAP requests pursuant to Article 25 (1), they may be in danger of missing the deadline in the case of the re-submission. It is up to the competent authorities whether they would accept an improved request that was not submitted on time. While generally an over-formalistic approach is not recommended, especially given the fact that the request had already been reviewed with respect to its content, it is not obligatory for competent authorities to be lenient in this regard.

⁶¹ Is this for all IF or FTA countries?

⁶² GMAP para 93

⁶³ GMAP para 101 a 102

1.3.2 The position paper

The position paper is the written document reflecting a jurisdiction's position in a MAP. It is prepared by one competent authority and submitted to the other jurisdiction's competent authority. Taxpayers are not directly involved in the writing of this letter, however, some competent authorities will allow them to assist in the preparation, a practice that is certainly not in contradiction to the concept of MAP as a state-to-state procedure and neither to the wording of Article 25 OECD and UN MC. However, whenever documents are shared between the competent authority and the taxpayer, potential infringements of data protection rules have to be observed. Preparing a position paper is an essential step in MAP for a jurisdiction because it reflects the core of its position in the procedure and once a position was taken in this document it will hardly be possible to deviate from such a stance.

The position paper is usually written by the tax administration that caused the action considered to be resulting in the taxation not in accordance with the Convention⁶⁴. The matter is independent of which competent authority has first received a request by a taxpayer. This is not a legally binding rule on the burden of proof⁶⁵ but the principle is deduced by logical reasoning since the tax administration who took the action will likely be able to justify it more easily.

In most cases, a tax administration receiving a position paper will reply in the same format formulating its own position in a rebuttal or response paper. However, there will be cases in which such a formal response will not be necessary, e.g. if face-to-face meetings are imminent or the receiving competent authority agrees to the view taken in the position paper. In case a competent authority needs further clarification on specific points of the other competent authority's position it is certainly allowed to request such.

The position paper does not have a clearly defined legal format. Hence it is up to the respective competent authority to structure it. As with the request for MAP, principles of structuring in legal writing, such as the IRAC (Issue, Rule, Application, and Conclusion) could be used as guidance. A clearly structured position paper that describes a country's standpoint simply but comprehensively will support a timely and satisfactory solution of the case at hand. Time invested in the diligent preparation of the position paper may help to shorten the overall duration of MAP. A list of typical elements of a position paper is depicted in the box below.

⁶⁴ GMAP para 169

⁶⁵ OECD. 2017. TPG para 4.17

Box x:

- 9) The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;
- 10) Contact information for the competent authority official in charge of the MAP case;
- 11) A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;
- 12) The taxation years or periods involved;
- 13) The amount of income and the relevant tax for each taxable year, if applicable;
- 14) A complete description of the issue(s) presented, the relevant tax administration actions and adjustments, and the relevant domestic laws and treaty articles;
- 15) To the extent relevant and appropriate, calculations and supporting data (which may include financial and economic data and reports relied upon by the tax administration,

Source: UN GMAP paragraph x

1.3.3 Means of communication during MAP

Communication between CAs can use various channels. It can take the form of personal face to face meetings, of written correspondence and of all types of digital communication, such as email, telephone or video conferences. Article 25 UN Model does not define the means of communication between competent authorities, but merely states that they can communicate directly without using diplomatic channels. Hence a limitation to specific ways of communications cannot be read into this provision⁶⁶. Accordingly, absent legal limitations, the most efficient ways of communication should be selected, certainly also considering the specific costs. Practice shows that often personal meetings are most effective.⁶⁷ However, they are also most expensive and therefore usually only used reluctantly. Nevertheless, at least one face to face meeting usually takes place, where both CAs can present and defend their positions and they engage in the negotiation of a solution. Often face to face meetings are prepared by other forms of communication, allowing for a focused discussion, and thus reducing unnecessary costs.

When using different types of communication, the documentation of that correspondence should not be overlooked. While this is easy for written

⁶⁶ Insofar also all major international materials are unanimous.

⁶⁷ Several countries have found it efficient to meet for MAP discussions during international organization meetings such as during UN, EU and OECD obligations, where applicable.

correspondence it necessitates special effort in the case of telephone or video conferences. Without diligent documentation of all forms of correspondence the risk of duplicative and repetitive discussions is high, in particular when considering personnel fluctuations in the competent authorities. The cost-saving effects of formless communication could thus be undermined.

Asymmetries can occur in the communication where one competent authority is more experienced than another one. This will often be the case if developing countries conduct MAPs with developed countries, considering the asymmetries in past case-loads as described above. In such a case more experienced competent authorities should not use such advantages inappropriately to leverage their own position but support the less experienced competent authority in a cooperative manner.

164. As noted in paragraph 42 of the Commentary on Article 25 of the UN Model, the competent authorities should make public, in as complete a manner as possible, the procedures they have adopted for the conduct of the mutual agreement procedure.

165. The framework for the MAP consultation in a specific case is typically provided by a position paper prepared by one of the Contracting States. As already explained, a position paper is a document that sets out a detailed description of the relevant facts and issues, frames the questions to be resolved, and presents reasoned proposals for their resolution.

166. The position paper will generally be prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that the taxpayer alleges to be contrary to the treaty, regardless of the competent authority to which the taxpayer made its MAP request. The preparation and transmission of position papers is generally regarded as a matter of priority because of their important role in facilitating meaningful MAP discussions - and thus the timely resolution of a MAP case.

167. A position paper should generally contain the following relevant information:

1. The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;
2. Contact information for the competent authority official in charge of the MAP case;
3. A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;
4. The taxation years or periods involved;
5. The amount of income and the relevant tax for each taxable year, if applicable;
6. A complete description of the issue(s) presented, the relevant tax administration actions and adjustments, and the relevant domestic laws and treaty articles;
7. To the extent relevant and appropriate, calculations and supporting data (which may include financial and economic data and reports relied upon by the tax administration, as well as relevant taxpayer documents and records); and

8. For transfer pricing cases,⁶⁸

- (i) An analysis of characteristics of property or services, of functions and risks, of contractual terms, of economic circumstances and of business strategies;
- (ii) An outline of comparable transactions and methods of adjusting for differences, if relevant;
- (iii) A description of the methodology used to make the adjustment(s); and
- (iv) An explanation of the choice of the methodology used to make the adjustment(s), including why the tax administration believes the methodology chosen is best-suited to achieve an arm's length result; identification of the tested party, if applicable; and an industry and functional analysis (to the extent that the relevant studies are not included in taxpayer documentation required to be prepared under the domestic legislation of the taxpayer's State of residence).

168. Following its review of the position paper, the other competent authority may request additional information and/or clarification with respect to the information presented.

169. In addition, depending on the complexity of the issue(s), the other competent authority may itself prepare a rebuttal or response paper. The written exchange of positions may help to focus the competent authorities on the precise area(s) of disagreement and thereby make their MAP consultations more productive.

170. Where the other competent authority prepares a rebuttal or response paper, the paper may be most useful if it contains the following information:

1. An indication whether a view, resolution, or proposed relief presented in the initial position paper can be accepted;
2. An indication of the areas or issues where the competent authorities are in agreement or disagreement;
3. Requests for any required additional information or clarification;
4. Other or additional information considered relevant to the case but not presented in the initial position paper; and
5. Alternative reasoned proposals for resolution.

171. In practice, competent authorities may conduct their discussions and consultations using many different means, including letters, facsimiles, electronic mail, telephone and video conferences, and face-to-face meetings.

172. Face-to-face meetings may in many circumstances be the most effective manner to reach a resolution in a MAP case because they oblige each competent authority to develop and present a reasoned position by a set deadline. They may also foster a more candid and collegial discussion. The effectiveness of face-to-face meetings is further enhanced when such meetings involve competent authority officials who are themselves

Where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable.

authorized to resolve MAP cases.

173. Of course, Contracting States must determine how best to conduct their MAP consultations in the context of their bilateral relationship, taking into account factors such as the specific characteristics and experience of each competent authority, available resources, and the expected MAP caseload. Regardless of the means of consultation chosen, competent authorities should be encouraged to maintain open lines of communication throughout the MAP process, with a view to clarifying issues and facts and thereby moving MAP cases to resolution with all possible speed.

174. In some circumstances, the competent authorities may wish to memorialize the bilateral procedures they develop for the conduct of the MAP in the form of a memorandum of understanding (MOU) or other published guidance. This guidance may be broadly applicable (for example, establishing general objectives or timelines for all MAP cases) or concern a specific subset of MAP cases (for example, clarifying documentation requirements for transfer pricing cases).

175. MOUs promote a consistent approach to MAP cases and advance the MAP process, especially where they free the competent authorities to focus on substantive (rather than procedural) issues or provide guidelines for further process improvements. In addition, the publication of MOUs or other similar guidance enhances transparency and improves taxpayer understanding of the MAP process.

The use of formal Framework Agreements

The functionality of MAP can be improved by framework agreements between CAs as they are mentioned in the UN MC but feasible under the OECD MC as well. Framework agreements could instruct two CAs on how MAP cases are to be resolved either generally, or in specific types of cases. Where several cases of a single type are pending between the CAs, framework agreements may allow for quick resolution. This was found to be particularly useful in the case of the India-US Framework agreement on resolving transfer pricing cases under which hundreds of unresolved MAP cases between the two States have been reported to be resolved.

The usefulness of such agreements will depend on the specific situation of two or a group of countries. Typically, a high case load speaks for finding such general agreement. However, even in situations where no MAPs have been conducted before, framework agreements can be useful if tax certainty is at particularly low levels in order to foster trust in a newly implemented procedure.

Framework agreements will ideally include administrative provisions, as on the conduct of regular meeting etc., as well as procedural rules as for example on specific time limits.

2.4.7 What happens when the competent authorities reach an agreement?

176. As noted above, when the competent authorities reach agreement in a MAP case, they will typically memorialise its details in a written summary describing the method of

relief, the extent to which each Contracting State will provide relief, the timing of relief, and any other details.

177. The relevant competent authority - that is, the competent authority to which the taxpayer presented its MAP request - then notifies the taxpayer that a MAP agreement has been reached and explains the details of the MAP resolution.

178. A competent authority must determine for itself the manner in which it informs a taxpayer that a MAP agreement has been reached, as well as the level of detail provided in its explanation of the proposed resolution. The summary of the MAP agreement provided to the taxpayer may typically take the form of a closing letter and/or an oral presentation in the context of a closing meeting. Regardless of the method chosen, the competent authority should ideally explain to the taxpayer the rationale for the MAP resolution.

179. Once presented with the terms of the agreement reached in the MAP, the taxpayer may have the option to accept or reject the MAP resolution.⁶⁹

180. Although taxpayers may often be permitted to reject a MAP agreement, they are generally not permitted to accept the MAP agreement only in part - that is, only with respect to certain issues or certain taxable periods - unless both competent authorities agree to such a partial acceptance. Particularly in more complex cases, it may be unacceptable to the competent authorities to separate a MAP resolution into its component parts, given that the resolution, as a whole, represents a series of compromises and concessions by both competent authorities based on the totality of the facts and circumstances.

181. Where the taxpayer accepts the MAP resolution, such acceptance must typically be communicated to the competent authority in writing. The relevant competent authority may also ask the taxpayer to withdraw formally any domestic objections that were suspended or put on hold pending the outcome of the MAP process and/or to agree not to pursue any other forms of relief with respect to the same issue(s) and taxable period(s).

182. The competent authorities' initial summary record is then generally followed by an exchange of letters formalising the MAP agreement. Depending on the specific procedure developed between the two competent authorities, this exchange of letters may occur before, or following, the taxpayer's acceptance of the terms of the MAP resolution.

183. In all cases, the exchange of letters should ideally occur shortly following the conclusion of the MAP discussions. This will assure that the letters accurately reflect the competent authorities' agreement. Then, as discussed below, the competent authorities will arrange as appropriate to give effect to the MAP agreement in their respective jurisdictions.

Where the taxpayer rejects the MAP resolution, the competent authorities may consider the case closed. At this point of the MAP, the competent authorities may also determine that it is appropriate to consider any alternative proposal(s) for resolution presented by the taxpayer before the MAP case is definitively closed.

184. The competent authority to which the MAP request was submitted should formally advise a taxpayer that has rejected a MAP resolution when its MAP case has been closed. To the extent that the taxpayer has taken steps to protect its rights to seek relief in a domestic court or administrative appeals process, the taxpayer may then

See the discussion of the effect of invoking the MAP in section 2.4.3 above.

proceed to avail itself of those procedures. There is, of course, no guarantee that any domestic law recourse procedure will relieve international double taxation or otherwise resolve the issue(s) that prompted the MAP request in a taxpayer-favourable manner.

185. In some circumstances, a competent authority agreement in an important area may reasonably be considered to provide a more general indication of the Contracting States' views on a particular issue. Paragraph 43 of the Commentary on Article 25 of the UN Model advises that competent authorities should develop appropriate procedures to publish such determinations (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

186. The MAP is most likely to produce an agreement that is susceptible to providing public guidance when the matter resolved is a general question of interpretation or application (that is, a case described in the first sentence of Article 25(3)). Such a MAP agreement might concern, for example, the definition of a term used in the treaty, or a process used to apply the treaty (for example, a certification process used to determine whether a person is a resident of a Contracting State or otherwise entitled to the benefits of the treaty).

187. In the majority of MAP cases, however, the agreement reached by the competent authorities is based on a taxpayer's specific facts and circumstances and is generally not intended to establish a precedent, whether with respect to other taxpayers or even with respect to the same taxpayer in different taxable years. In practice, the letters exchanged by the competent authorities to formalise a MAP agreement may often contain an express Statement that the agreement has no precedential value.

2.4.8 How is relief implemented?

188. Following the competent authorities' exchange of letters and the taxpayer's acceptance of the MAP agreement, each competent authority must take the appropriate steps to implement the relief provided for in the MAP agreement, pursuant to the authority granted by Article 25 and any applicable provisions of a Contracting State's domestic law. The implementation of the MAP agreement should take place with all possible speed.

189. The specific steps taken to implement a MAP agreement will, of course, depend upon the nature of the relief to be provided to the taxpayer.

190. In certain MAP cases, implementation of relief may require no more than a refund of tax by one of the Contracting States.

191. For example, a MAP case may concern the proper rate of withholding tax on a dividend, interest, or royalty payment made by a resident of State A to a resident of State B. The competent authorities may agree in the MAP that State A should not have levied withholding tax at the rate provided by State A domestic law, but rather at the lower rate provided in the applicable article of the State A-State B tax treaty. Relief would be provided to the State B resident through a refund by State A of the tax withheld in excess of the rate provided in the treaty.

192. A second example is provided by a permanent establishment case. The competent authorities may agree in the MAP that a State A enterprise did not have a permanent establishment in State B and, accordingly, that the State A enterprise should not have been subject to State B tax with respect to certain business income, under the business profits article of the State A-State B tax treaty. Relief would be provided to the State A enterprise through a refund of the State B tax on the relevant business income.

193. In other MAP cases, the competent authority of one Contracting State agrees to provide correlative relief with respect to an adjustment initiated by the other Contracting State. Such relief will generally be provided in the first Contracting State through a corresponding adjustment - that is, an adjustment by the first Contracting State that offsets, in whole or in part, the other Contracting State's initial adjustment.

194. For example, assume a State A transfer pricing adjustment that increases the income derived by a State A company from a non-arm's length transaction with a related company in State B. If the State B competent authority agrees through the MAP to provide correlative relief with respect to the State A adjustment, it will typically provide such relief through a corresponding adjustment that decreases the income of the State B company, for the relevant taxable period, in the amount of the State A adjustment. In this context, the State B corresponding adjustment may result in a refund of State B tax.

195. Paragraph 44 of the Commentary on Article 25 of the UN Model provides additional examples of the procedures required to implement different types of MAP relief in connection with a transfer pricing adjustment. If we again assume a State A transfer pricing adjustment that increases the income derived by a State A company from a non-arm's length transaction with a related company in State B, these examples may be illustrated as follows:

(i) State A may consider deferring the tax payment due as a result of its adjustment or even

waiving the payment if, for example, payment or reimbursement of an expense charge by the State B company is prohibited at the time because of currency or other restrictions imposed by State B.

(ii) State A may consider steps to facilitate carrying out the adjustment and payment of a

reallocated amount. For example, the State B company may be allowed, for State A tax purposes, to establish in its books an account payable in favour of the State A company in the amount of the State A adjustment, and the State A company will not be subject to a second State A tax on the establishment or payment of the amount receivable. The payment of the account receivable by the State B company should also not be considered a dividend by State B.

(iii) State B may also consider steps to facilitate carrying out the adjustment and payment of a

reallocated amount. This may, for example, involve recognition of the payment made as a deductible item for State B tax purposes. Such steps are generally a part of the State B correlative adjustment.

196. From a practical standpoint, the implementation of MAP relief will generally require the competent authority to direct the appropriate component of the tax administration to take one or more specific actions with respect to the taxpayer, such the payment of a refund or the adjustment of the amount of tax due from the taxpayer or a related party. How this will occur will depend upon the specific unilateral procedures developed by the competent authority for this purpose, as well as the division of responsibilities and functions within the tax administration.

197. Paragraph 2 of Article 25 of the UN Model provides that any agreement reached through the MAP shall be implemented notwithstanding any time limits in the domestic law of the Contracting States, such as time limits relating to adjustments of assessments

and tax refunds.

198. In practice, however, the domestic laws of certain Contracting States may limit the ability of the competent authority to implement MAP relief in disregard of domestic law time limits. As a result, some tax treaties do not contain a provision similar to the second sentence of Article 25(2).

209. Some tax treaties may, for example, provide that MAP relief will only be implemented to the extent consistent with domestic law time limits. Certain other tax treaties provide that a Contracting State will be obliged to implement a MAP agreement after a domestic law time limit has passed only if the Contracting State has been notified of the MAP case within a specified time period (for example, within a specific number of years from the end of the relevant taxable period).

210. In light of these potential differences from the UN Model, taxpayers should pay close attention to the relevant language of the applicable tax treaty and timely take all protective measures required to preserve the possibility of MAP relief in both Contracting States.

211. Because treaty-based or domestic law time limits may limit the effectiveness of the MAP, it is also helpful for a competent authority to remind the taxpayer when its MAP request is accepted of any time limits for the implementation of MAP relief that are applicable in the taxpayer's specific case. In any case, the overly strict interpretation of such time limits is seen by many countries as contrary to the spirit of the MAP.

2.4.9 What is the recommended timeline for the MAP?

212. The time required to complete a MAP case will depend on a number of factors, including the complexity of the case, the resources available to the competent authorities, and their overall caseloads. In general, however, most competent authorities will endeavour to complete a MAP case within three years of the date of its acceptance. It should also be noted that the time required to complete a case may be longer between countries using different languages because of the necessity of translation. In order to alleviate such difficulty, the CAs are encouraged to use a common language in all communication that do not legally require the formal use of an official language by one or both States. The following table illustrates an ideal timeline for a typical Article 25(1) MAP case:

[NB – this table is already included above – the best place will be found for it.]

Action			
Taxpayer	State A Competent Authority (Taxpayer's State of Residence)	State B Competent Authority	Target Time Frame or Deadline
STAGE ONE			
<ul style="list-style-type: none"> • Submit MAP request to State A Competent Authority (CA). • If a transfer pricing case, Taxpayer (or the associated enterprise in State B) is encouraged to contact State B CA and to provide it with the relevant details of the MAP request. 			Under Article 25(1) of the UN Model: "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention"
	<ul style="list-style-type: none"> • Confirm receipt of MAP request. 		Within one month of Taxpayer's submission of the MAP request to State A CA.
	<ul style="list-style-type: none"> • In transfer pricing cases, Advise State B CA of MAP request²³. 		Within three months of Taxpayer's submission of the MAP request to State A CA.
	<ul style="list-style-type: none"> • Preliminary review of MAP request. • Where necessary, request additional information from Taxpayer. 		Within four months of Taxpayer's submission of the MAP request to State A CA.

² Early consideration of transfer pricing cases by State B CA may facilitate the progress of stage two of
³ MAP.

	<ul style="list-style-type: none"> • Determine whether MAP request will be accepted. • If case accepted, determine whether unilateral relief is possible and appropriate. • Notify Taxpayer whether MAP request will be accepted and whether unilateral relief is possible and appropriate. • In transfer pricing cases, inform State B CA that MAP request is not accepted or that unilateral relief is possible and appropriate. 		<p>Within three months of Taxpayer's submission of all information required by State A CA to determine whether the MAP request will be accepted and whether unilateral relief is possible and appropriate.</p>
STAGE TWO			
	<ul style="list-style-type: none"> • If no unilateral relief possible, propose to State B CA to initiate MAP discussions - issue opening letter to State B CA and communicate all relevant information in order to allow 		<p>Within three month of the notification to the taxpayer that MAP request is accepted and unilateral relief is not possible and appropriate.</p>
		<ul style="list-style-type: none"> • Confirm receipt of State A CA request to initiate MAP discussions. • Preliminary review of MAP request. • Where necessary, request that State A CA obtain additional information from 	<p>Within one months of State B CA's receipt of State A CA's opening letter.</p>

		<ul style="list-style-type: none"> Notify State A CA whether request to initiate MAP discussions is accepted 	<p>Within three months of State B CA's confirmation</p>
	<p>If State B CA agrees to MAP discussions, the CA of the Contracting State that initiated the adjustment or, in the absence of an adjustment, of the Contracting State the taxation of which is considered not in accordance with the Convention (whether State A CA or</p>		<p>Within six months of State B CA's agreement to enter into MAP discussions.</p>
	<ul style="list-style-type: none"> Review of MAP case by the other CA. Where necessary, the other CA may request that the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention, provide additional information or explanation. Determination by the other CA whether unilateral relief is possible and appropriate. Where appropriate, preparation of rebuttal paper or other response to the position paper by the other CA. 		<p>Within six months of the other CA's receipt of the position paper prepared by the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the</p>
	<p>Negotiation between State A CA and State B CA.</p>		
<p>STAGE THREE</p>			
	<ul style="list-style-type: none"> MAP agreement between State A CA and State B CA. Memorialise MAP agreement in summary record. 		<p>Within 36 months of the acceptance date of Taxpayer's MAP request by State A CA.</p>
	<ul style="list-style-type: none"> Notify Taxpayer that MAP agreement has been reached and explain its terms. Where relevant, request that Taxpayer indicate 		<p>Within one month after MAP agreement has been memorialised.</p>

Notify State A CA whether it accepts the MAP			Within one month of notification of the MAP
	If Taxpayer accepts the MAP agreement, State A CA and State B CA confirm and formalise MAP agreement through		Within one month of the Taxpayer's acceptance of the
	Implementation of the MAP agreement.		No later than three months after the exchange of letters formalising the MAP agreement.

213. Throughout the consideration of a MAP case, the competent authority that received the MAP request may consider it a useful practice to provide periodic, informal status updates to the taxpayer.

214. It may also be valuable for the competent authorities to advise each other on a regular basis (for example, every three months) of their progress on a MAP case. Such updates should keep both competent authorities focused on the details of the case and its overall progress, and should thereby facilitate its timely resolution.

215. Requests for additional information or clarification (whether competent authority-to-taxpayer or competent authority-to-competent authority) should not, however, be deferred until these periodic MAP case status updates. Such requests should be made as soon as practically possible, given that delays in receiving additional information or clarification may delay the substantive consideration (and thus the resolution) of a MAP case.

216. As discussed above, the framework for analysis and discussion in a MAP case is generally provided by a position paper. In most contexts, it is considered realistic and appropriate for the position paper to be prepared by the responsible competent authority within four to six months of the latter of (i) receipt of a complete submission of all relevant information, or (ii) notification by the other competent authority that it agrees to discuss the case in the MAP.

217. It is similarly reasonable to expect the other competent authority to complete its evaluation and response (if any) to the position paper within six months of its receipt of the position paper.

218. If it is not possible for a competent authority to respect this timetable for the preparation or review of the position paper, the relevant competent authority should timely advise its counterpart of the reasons for the delay and provide a projected timeframe for completion. Of course, the competent authorities should endeavour promptly to raise, and respond to, supplementary questions that arise during the review of the position paper, in order to clarify any issues before their formal MAP negotiations.

219. More generally, the competent authorities should endeavour to exchange all relevant information well in advance of their meetings. Where both competent authorities have adequate time prior to a meeting to review the materials and to consider fully the case and issues, the competent authorities can make the most effective use of their meeting time and the MAP consultations will be more productive.

220. Certain MAP cases will not be resolved within three years of the date of their acceptance

(or any other similar deadline determined or recommended by the Contracting States).

Delays may arise where a taxpayer does not timely provide necessary information or where a MAP case is particularly complex.

221. In circumstances in which a MAP case is not resolved by a generally applicable deadline, the competent authorities may agree to continue their discussions, to extend the time frame for discussion and resolution, or take other appropriate action, which may include invoking alternative dispute resolution procedures such as arbitration or mediation.

222. It may also be advisable for senior competent authority officials to review such MAP cases to determine the causes of the delay and to agree on any necessary steps to move these cases forward to resolution. Such review may also permit the competent authorities to identify more general issues with the handling of MAP cases and areas where broader improvements may be made to their MAP programs. In addition, the competent authorities should maintain a list of their MAP caseload in which each case is included and each action taken in relation to the case is indicated with the date on which the action occurred. Such a list provides competent authorities, especially those that handle a large number of cases, a general view of the progress made and the delays incurred with respect to all the cases.

2.4.10 What is the relationship between the MAP and domestic law penalties, interest, and collections?

223. Contracting States may have different views on whether a tax treaty applies with respect to interest and penalties on a tax adjustment that is the object of a MAP request. Contracting States may similarly take different positions with respect to whether their domestic collection procedures should apply to tax adjustments that are the object of MAP discussions.

224. As with many other areas of the MAP, Article 25 of the UN Model is silent on these issues. Contracting States must accordingly reach their own conclusions regarding the interaction of the MAP and the relevant domestic law provisions. The Contracting States should also ideally discuss these issues in the context of their tax treaty negotiations and/or during their development of bilateral procedures for the conduct of the MAP.

225. In certain circumstances, a Contracting State may take the position that interest and penalties are outside the scope of a tax treaty because they are not expressly referred to in the treaty. In such a case, the Contracting State may conclude that its competent authority cannot or should not waive or otherwise consider interest and penalties as part of the MAP.

226. A Contracting State's views on the relationship between the MAP and domestic law penalty provisions may also depend on the nature of a specific penalty. Certain penalties - for example, a penalty for failure to maintain proper transfer pricing documentation - may concern domestic law compliance issues that are outside the scope of the MAP and the tax treaty. The competent authority may as a result be unable or unwilling to discuss them in the MAP.

227. In contrast, other penalties (such as certain transfer pricing penalties) may be linked to the amount of an adjustment that is itself the object of a MAP request. In a case in which a Contracting State that has applied such a penalty agrees in the MAP to reduce the amount of the underlying adjustment, that State should appropriately reduce the amount of the penalty, regardless of its view as to whether the treaty covers penalties.

228. Some Contracting States may also be willing to provide relief from penalties through the MAP even where the adjustment that gave rise to the MAP is fully or partially

sustained in the MAP. A Contracting State may feel that such relief is appropriate, for example, if it appears after MAP review that the application of the penalty is no longer justified.

229. Differences between domestic law provisions on the accrual of interest on tax liabilities and refunds may create other issues for the MAP. Even if the MAP eliminates the international double tax that was the object of the MAP request, the taxpayer may still suffer a significant and equivalent economic burden if there are asymmetries with respect to how interest accrues on tax liabilities and refunds in the two Contracting States.

230. For example, a MAP agreement may often result in an additional tax liability in one Contracting State and a corresponding refund of tax in the other Contracting State. In a scenario in which the first Contracting State charges interest on the tax deficiency (or collects tax prior to the MAP resolution) and the second Contracting State does not pay interest on the amount refunded to the taxpayer, this may result in a substantial economic burden on the taxpayer.

231. In light of this burden, it is desirable for Contracting States to adopt flexible approaches to provide for relief of interest in the MAP, where they consider that their competent authorities are permitted to do so and where such relief is appropriate. Some Contracting States may feel that relief from interest is especially appropriate for the period in which the taxpayer is in the MAP process, given that the amount of time it takes to resolve a case through the MAP is, for the most part, outside the taxpayer's control. In many cases, however, changes to the domestic law of a Contracting State may be required to permit the competent authority to provide interest relief.

232. Contracting States should also consider how their collection procedures will apply with respect to a tax adjustment that is the object of a MAP request. Some countries consider providing for the suspension or deferral of the requirement to pay a tax liability and/or collection action to be a best practice for tax administrations.

233. There are a number of reasons why a suspension or deferral of collection procedures may be considered a desirable and appropriate policy. As a threshold matter, requiring a taxpayer to pay a tax assessment as a condition to request MAP assistance with respect to the tax that is being assessed is viewed by some countries as inconsistent with the goal of making the MAP broadly accessible.

234. A requirement to pay tax prior to a MAP resolution may also impose significant costs on a taxpayer. Even where the competent authorities eliminate double taxation through the MAP, the taxpayer will still lose the time value of any amounts that are ultimately refunded to it in the common case in which there are asymmetries between the interest policies of the two Contracting States involved. In addition, even where the economic burden of the taxpayer's pre-MAP tax payment is removed, the taxpayer may face significant cash flow burdens connected with the payment that are inconsistent with the tax treaty goal of promoting cross-border trade and investment.

235. As in the case of interest relief, changes to the domestic law of a Contracting State may be required to permit the competent authority to suspend or defer the payment of tax and/or collection action.

2.6 Resolving issues that may prevent a mutual agreement

236. Given the scope and complexity of the issues that a tax treaty must address, Contracting States will inevitably have occasional differences of view on how the treaty should be applied in specific cases. Alternative B of Article 25 seeks to address situations where such differences would otherwise prevent an agreement. The Commentary on paragraph 5 of that alternative as well as the Annex on that Commentary contain useful guidance to implement the arbitration process provided for in the alternative.

1.3.4 Use of technology

Today's communication technology allows for cheap cooperation between geographically widely separated jurisdictions. States are encouraged to use technology in MAP as much as possible to avoid unnecessary costs.

In the context of constantly evolving technology, the question arises of whether some of these new technologies could be used to facilitate a quicker resolution of disputes or to cut the costs of the process. For developing and least developed countries, resource constraints still pose the greatest challenge. They lack capacities, databases and funds. If dispute settlement mechanisms are to become more widespread, there is a need to find tailored solutions for them.

There are several possible uses for such technical tools:

- 1. Facilitating the contacts and sharing of information between the parties to a dispute**
- 2. Fulfilling documentation and filing requirements**
- 3. Setting up databases containing information concerning the disputes**

These possibilities shall be discussed in more detail in the following.

Technology now offers a range of tools that can be used to facilitate the contacts between the parties in a way which makes such exchanges more secure, structured and low cost by creating a common platform. The common platform may be via use of private clouds (i.e. shared platforms that are secure and with controlled access) or shared software (the same software deployed in multiple locations that are able to securely communicate with each other). Either would make it possible to deliver this sort of capability at much lower costs than in the past. As a shared resource, the financial burden on individual countries will be much reduced. However, when using these tools, careful consideration should be placed on the topic of securing the information shared in the tools (e.g. in the private clouds or in the shared software). Without a secure system, users would be hesitant or, even, prevented by laws or regulations in their jurisdiction from sharing sensitive information. In the context of dispute resolution, information from multiple sources (the competent authorities, taxpayers, experts and others) needs to be shared with multiple parties (the competent authorities, the panel members and, if appropriate, also the taxpayer). Moreover, this information can be extremely sensitive (e.g. the taxpayer's trade secrets). As a result, the use of such platforms could help ease the administrative burden of the dispute resolution process, but adequate security measures are essential. An access control system must be in place to provide adequate permissions to all of these parties. Namely, not only a simple yes or no to access various pieces of information, but also what actions are allowed to be performed upon the information (read, edit, archive, delete).

One possible approach would be to set up a cloud server for the relevant dispute, to which the taxpayer and the competent authorities could upload all relevant documents.

The access to the documents would be restricted depending on the folder they were in. For instance, the taxpayer could have access to, and edit and update its documents, as could the competent authorities, for their documentation, but the taxpayer would not have access to the competent authority documents. The panel members would have access to all relevant documents, but could only read, not edit and delete them, with the exception of the panel reports.

Such a system would have multiple benefits. Firstly, it would be more secure than sending the sensitive information by email. Secondly, the panel members or mediator (if the dispute reaches those stages) would have instant access to them at all times and from any location. Therefore, the costs of the dispute could be reduced (no postal charges, for instance). Thirdly, there would be less need for all the parties involved to meet face to face and the resolution of the dispute would be quicker, since the panel could start working on the documents immediately as they are uploaded and continue working on them from abroad.

The security of such a system and its proper functioning would depend on a pre-determined number of persons receiving individual log-in data and the corresponding authorizations for access. Different access levels could be attributed to the username and password combinations for each of the parties involved: panel members would have the broadest access, followed by competent authorities and then finally taxpayers. The security of the passwords could be ensured by the issuance of perpetually changing access codes, which would be updated every minute. These would be combined with a secret password set by the authorized persons to form a secure password. Such a multi-point authentication process is complex and costly. However, the security benefits should outweigh the costs.

Technology might also help in setting feasible time schedules and deadlines as well as organizing the workflow of steps and approvals required, which can enable timely resolutions of the MAPs.

Meeting deadlines is especially important in dispute resolution procedures, as failure to do so can result in an automatic escalation of the dispute or other unwanted consequences. The strict deadlines imposed on the parties to the dispute serve an important role in increasing the efficiency of the resolution and minimizing costs. The deadlines are also relevant for panel members, who have to present their determination on time, and taxpayers wishing to stay informed on, and perhaps participate in, the proceedings. Additionally, the dispute resolution process may require a high number of face-to-face meetings of a number of people from different institutions and countries. Therefore, it becomes all the more important for all parties involved to have good scheduling capabilities. While a simple scheduling tool such as an email program would be appropriate for most other occasions, **a scheduling tool specifically designed for dispute resolution processes would offer many advantages.** Firstly, default deadlines, e.g. the two-year MAP deadline, could be pre-programmed and displayed. Secondly, pre-programmed ideal time-frames could be set, which could help the competent authorities deal with very heavy caseloads by suggesting deadlines for a series of predetermined steps such as: reading the documentation in the case, demanding additional documentation from the taxpayer, confirming the information with the

other competent authority and asking for its opinion etc. The same would be true for the members of the arbitration panel.

In addition, a scheduling tool, perhaps patterned after doodle, with the contact information of the relevant counterparties already programmed in, could help the parties involved to schedule their meetings more efficiently, by synchronizing with their other schedules, sending timely reminders of meetings etc. Finally, specially designed software could make the review process more efficient. Most of the activities of the competent authority representatives will normally be reviewed by their superiors. A built-in electronic approval system would allow the reviewer to release the relevant documents after review with the click of a mouse button. This review system would be integrated with the file sharing tool in the cloud, so that only approved and reviewed documents would be visible to other parties.

Technology could provide simpler access to MAP for all taxpayers as well as provide transparency to them concerning the stage their procedure is at. Of course, the taxpayer that is a party to a specific dispute will not have access to the confidential documents prepared by the tax authorities involved in that dispute, however, they will be entitled to review the written position papers and responses. The competent authorities may of course agree to provide the taxpayer with access to additional information.

However, the question of access does not only concern the availability of existing information, but also the submission of new information and even the requests for the commencement of the procedure itself. For example, the requests for MAPs can be dealt with electronically and without a high cost for the requesting parties and notifications as key stages are reached could be provided back to the taxpayer. The approval or denial of the request could take place at the click of a button and the electronic system could be pre-programmed to set in motion a series of actions pursuant to this decision, for instance automatic notification of the taxpayer and/or the other competent authority, depending on the decision. The introduction of an automated process for launching a MAP would not only help cut costs, but also significantly reduce the workload of already understaffed and overloaded administrations, thus enabling them to devote more resources to the subsequent conduct and timely conclusion of the MAPs already under way.

A common platform may help ensure that relevant data is structured and presented in a consistent way, facilitating the analysis. This could, for instance, be achieved by standardizing the fields to be completed when entering disputes into the database, thus ensuring the standardization in the reported disputes of every country.

In transfer pricing disputes, the lack of data about comparables is a common problem in less developed countries. It would help if there was more data to draw on and technology can be of help⁷⁰. The suggestions of shared access to existing comparables data services or

⁷⁰ See the suggestion of a virtual companies house in Chapter 8 of the FTA report Dealing Effectively with the Challenges of Transfer Pricing: <http://www.oecd.org/tax/forum-on-tax-administration/49428070.pdf>

the creation of a regional set of comparables database are both feasible with a shared platform in place.

A common shared platform might help, on the one hand, taxpayers to comply with the transfer pricing documentation requirements (including CbCR) and, on the other hand, tax administrations to share the information in a consistent, secure and easy to use manner among themselves.

Similarly, the documentation required to file a request for MAP would also be provided online, by upload to the cloud. This way, it could easily be updated and reviewed by the competent authority. Ideally, the electronic uploading tool would include pre-programmed information concerning the type of document necessary and a separate upload of each document type would be possible. The taxpayer would simply tick a box selecting from the pre-programmed types of documents to match each file to the correct document type. The uploading tool would then automatically assess whether additional information is necessary to file the request by comparing the types of documents selected and uploaded by the taxpayer against its pre-programmed list of necessary documents. If it found the documentation incomplete, the taxpayer would receive an automatic request indicating the missing documentation, coupled with a deadline for providing it. Once the documentation is complete, the program would issue a notification of the submission of the request to the relevant competent authority and would automatically start the countdown to the two-year MAP deadline.

The UN Committee of Experts has created a specific subcommittee to deal with the digitization of the economy including how technology can assist tax administrations. The subcommittee is expected to discuss how technology can improve MAP as well. The work and decisions of the subcommittee will be factored into this work as it goes forward as well.

[MAP Flowchart and any other annexes to go here]