Distr.: General
28 March 2017

Original: English

Committee of Experts on International Cooperation in Tax Matters
Fourteenth Session
New York, 3-6 April 2017
Agenda item 3 (b) (iv)
Mutual agreement procedure
— dispute avoidance and resolution

ANNEX II

CHANGES TO THE UN MODEL DERIVING FROM THE REPORT ON BEPS ACTION PLAN 14

Introduction

1. At its February 2017 meeting, the Subcommittee analysed each of the proposed changes related to BEPS Action 14 that are proposed to be made to the OECD Model and that are included in Annex 5 of note E/C.18/2016/CRP.4, which was circulated in advance of the October 2016 meeting of the Committee. The Subcommittee concluded that, at a minimum, it was necessary to examine these changes in order to ensure that quotations included in the UN Model correctly identify the relevant paragraphs of the OECD Model. It also agreed, however, that a number of changes proposed to the OECD Model are relevant for the UN Model and provide useful clarifications or additional explanations.

2. Part 1 of this Annex includes the changes to the Commentary on the UN Model that resulted from that analysis and which the Subcommittee agreed to recommend to the Committee. Part 2 includes a number of changes that could either be made to the Commentary on the UN Model or incorporated into the UN Guide to the Mutual Agreement Procedure, depending on where the Committee considers that these changes should be made. Part 3 includes a number of changes that the Subcommittee recommends to incorporate in the UN Guide to the Mutual Agreement Procedure. Part 4 includes a change that is included in Annex 5 of note E/C.18/2016/CRP.4 but which the Subcommittee does not consider as being relevant for the UN Model or for the UN Guide to the Mutual Agreement Procedure.

3. The following table below shows the recommendations of the Subcommittee with respect to each of the changes to the OECD Model Tax Convention related to BEPS Action 14 that appeared in Annex 5 of document E/C.18/2016/CRP.4. The changes appear in the order in which they were presented in that

document. The first column identify the relevant changes and the page of document E/C.18/2016/CRP.4 in which they appeared; the second column indicates which section of this Annex deals with these changes and the third column summarizes the recommendations of the Subcommittee with respect to the changes.

RELEVANT PART OF ANNEX 5 OF NOTE E/C.18/2016/CRP.4	CORRESPONDING SECTION OF THIS ANNEX	RECOMMENDATION OF THE SUBCOMMITTEE
Changes with respect to minimum standard 1.1 (p. 73 of Annex 5)	Section A (in Part 1)	The new paragraph of the OECD Commentary should be quoted in the UN Commentary but a clarification should be added to that quotation, specifying that the obligation is to start the procedure and not to agree to an outcome (there is no binding obligation with respect to the outcome)~~.~~
Changes with respect to minimum standard 1.2 (p. 74 of Annex 5)	Section B (In Part 1)	The quotation of paragraph 26 of the OECD Model currently found in the Commentary on Article 25 of the UN Model (with adaptations) should be amended to reflect the change made to that paragraph in the OECD Model.
Changes with respect to minimum standard 1.7 (p. 75 of Annex 5)	Section L (in Part 4)	The change proposed to paragraph 5 of Article 25 of the OECD Model (and the consequential changes to the Commentary) is not relevant for the UN Model and no changes to the UN Model are therefore needed.
Changes with respect to minimum standard 2.6 (p. 77 of Annex 5)	Section H (in Part 3)	The recommendation included in the new paragraph that will be added to the OECD Model should be included in the UN Guide to the Mutual Agreement Procedure rather than in the Commentary on the UN Model.
Changes with respect to minimum standard 3.1 (p. 78 of Annex 5)	Section I (in Part 3)	The change proposed to paragraph 1 of Article 25 of the OECD Model (and the consequential changes to the Commentary) should not be made to the UN Model. The interpretation and recommendation included in the new paragraph that will be added to the OECD Model in to clarify the phrase “objection appears to it to be justified” should be included in the UN Guide to the Mutual Agreement Procedure rather than in the Commentary on the UN Model.
Changes with respect to minimum standard 3.3 (p. 85 of Annex 5)	Section C (in Part 1)	The proposed alternative provision to be added to the OECD Commentary on Article 7 should not be included in the UN Model. The proposed alternative provision to be added to OECD Commentary on Article 9 should be added to the Commentary on Article 9 of the UN Model.
Changes with respect to best practice 2 (p. 87 of Annex 5)	Section E (in Part 2)	The Committee should decide whether the new paragraphs of the OECD Model should be quoted in the UN Commentary or should be incorporated in the UN Guide to the Mutual Agreement Procedure.
Changes with respect to best practice 6 (p. 89 of Annex 5)	Section F (in Part 2)	The Committee should decide whether the new paragraphs of the OECD Model should be quoted in the UN Commentary or dealt otherwise.
Changes with respect to best practice 8 (p. 93 of Annex 5)	Section J (in Part 3)	The explanations found in the changes that will be made to the OECD Model should be included in the UN Guide to the Mutual Agreement Procedure rather than in the Commentary on the UN Model.
Changes with respect to best practice 9 (p. 96 of Annex 5)	Section K (in Part 3)	The interpretations reflected in the changes that will be made to the OECD Model should be included in the UN Guide to the Mutual Agreement Procedure rather than in the Commentary on the UN Model.
Changes with respect to best	Section D (in Part 1)	The quotation of paragraph 4 of the OECD Model currently

practice 10 (p. 101 of Annex 5)		found in the Commentary on Article 2 should be amended to reflect the change made to that paragraph in the OECD Model. The quotation of paragraph 49 of the OECD Model currently found in the Commentary on Article 25 should be amended to reflect the change made to that paragraph and the addition of new paragraphs 49.1 to 49.3 in the OECD Model.
Changes with respect to best practice 11 (p. 104 of Annex 5)	Section G (in Part 2)	The Committee should decide whether the proposed changes to the Commentary of the OECD Model should be quoted in the UN Commentary or should be incorporated in the UN Guide to the Mutual Agreement Procedure.

4. At its meeting of April 2017, the Committee is invited to reach a decision on how to deal with each of the changes included in this Annex (all proposed changes to the UN Model appear in bold italics in the case of additions and ~~strikethrough~~ in the case of deletions).

PART 1 - RECOMMENDATIONS FOR CHANGES TO THE COMMENTARY ON THE UN MODEL

A. Changes related to the treaty obligation to undertake to resolve mutual agreement cases

5. Paragraph 12 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Article 25 of the OECD Model Tax Convention as part of the next update of the OECD Model Tax Convention in order to clarify the treaty obligation to undertake to resolve by mutual agreement cases of taxation not in accordance with the Convention."

6. The Subcommittee considers that the paragraph that will be added to the OECD Commentary for that purpose reflects a principle that is equally relevant for the UN Model. It also considers, however, that it is important to clarify that the obligation to endeavour to resolve a case through the mutual agreement procedure is not an obligation to reach an agreement. It therefore recommends that the new paragraph that will be added to the OECD Model should be included in the paragraphs of the OECD Commentary that are quoted in paragraph 9 of the Commentary on Article 25 of the UN Model. The Committee is therefore invited to adopt the following changes to that paragraph:

Amend the first part of paragraph 9 of the Commentary on Article 25 of the UN Model as follows:

> 9. The Committee considers that the following part of the Commentary on Article 25, paragraphs 1 and 2, of the OECD Model Convention is applicable to the corresponding paragraphs of both alternatives A and B of Article 25 (the additional comments that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to ***provide additional explanations or to*** reflect the differences between the provisions of the OECD Model Convention and those of this Model):
>
> > ***5.1 The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority "shall endeavour" to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a fair and***

objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties. [It must be emphasized, however, that the obligation to "endeavour to resolve" a case is not an obligation to reach a solution: in some rare cases, the competent authorities may be unable to reach an agreement despite their best efforts to resolve the case.]

7. The rules laid down in paragraphs 1 and 2 provide for …

B. Changes related to the circumstances in which access to MAP may be denied

7. Paragraph 17 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Article 25 as part of the next update of the OECD Model Tax Convention in order to clarify the circumstances in which a Contracting State may deny access to the mutual agreement procedure."

8. The Subcommittee considers that the change that will be made to the OECD Commentary for that purpose reflects a principle that is equally relevant for the UN Model. It therefore recommends that the quoted paragraph 26 of the OECD Model that is currently included in paragraph 9 of the Commentary on Article 25 of the UN Model (with adaptations) be amended to reflect the change to paragraph 26 that will be made in the OECD Model. The Committee is therefore invited to adopt the following change to paragraph 9 of the Commentary on Article 25 of the UN Model:

Replace the quotation of paragraph 26 of the OECD Model (with adaptations) that is currently found in paragraph 9 of the Commentary on Article 25 of the UN Model by the following:

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

48. See also paragraph 2 above concerning the access to the mutual agreement procedure where a convention includes paragraph 3 of Article 9 of the United Nations Model Convention [this footnote is not part of the quoted OECD paragraph].

C. Changes related to MAP adjustments and domestic time limits

9. Minimum standard 3.3 of the Report on Action 14 provided that countries that cannot include in their treaties the second sentence of paragraph 2 of Article 25 ("Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States") should be willing to accept alternative treaty provisions that limit the time during which a Contracting State may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

10. The Subcommittee considers that the alternative provision that will be added to the OECD Commentary on Article 9 for that purpose reflects an approach that could usefully be suggested in the Commentary on the UN Model. Since the UN Model does not include a corresponding relief provision equivalent to paragraph 3 of Article 7 of the OECD Model, however, it does not consider that a similar alternative provision should be included in the Commentary on that Article. It therefore recommends that the following changes to paragraph 10 and the addition of a new paragraph 10.1 should be made in the paragraphs of the OECD Commentary that are quoted in paragraph 7 of the Commentary on Article 9 of the UN Model. The Committee is therefore invited to adopt the following changes to that paragraph (as it appears in note E/C.18/2014/4, which was adopted at the 10th session of the Committee):

> 7. In the words of the OECD Commentary, "The re-writing of transactions between associated enterprises in the situation envisaged in paragraph 1 may give rise to economic double taxation (taxation of the same income in the hands of different persons), insofar as an enterprise of State A whose profits are revised upwards will be liable to tax on an amount of profit which has already been taxed in the hands of its associated enterprise in State B." The OECD Commentary observes that "[p]aragraph 2 provides that in these circumstances, State B shall make an appropriate adjustment so as to relieve the double taxation".[1]
>
> However, according to the OECD Commentary,
>
> > 6. […] an adjustment is not automatically to be made in State B simply because the profits in State A have been increased; the adjustment is *[the rest of paragraph 6 and paragraphs 7, 8 and 9 not reproduced here but appear in the UN Model]*
> >
> > 10.[***2***] The paragraph also leaves open the question whether there should be a period of time after the expiration of which State B would not be obliged to make an appropriate adjustment to the profits of enterprise Y following an upward revision of the profits of enterprise X in State A. Some States consider that State B's commitment should be open-ended—in other words, that however many years State A goes back to revise assessments, enterprise Y should in equity be assured of an appropriate adjustment in State B. Other States consider that an open-ended commitment of this sort is unreasonable as a matter of practical administration. In the circumstances, therefore, this problem has not been dealt with in the text of the Article; but Contracting States are left free in bilateral conventions to include, if they wish, provisions

1. Paragraph 5 of the OECD Commentary on Article 9.

2. The parts that are in square brackets in this quoted paragraph indicate adaptations that have been made to paragraph 10 of the OECD Commentary in order to make its contents more relevant for the UN Model.

dealing with the length of time during which State B is to be under obligation to make an appropriate adjustment […]. ***[One possible approach is] to address this issue through a provision limiting the length of time during which a primary adjustment may be made pursuant to paragraph 1 of Article 9; such a solution avoids the economic double taxation that may otherwise result where there is no corresponding adjustment following the primary adjustment. […] [This could be done through the addition of the following paragraph to Article 9]:***

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

D. Changes related to the treatment of interest and penalties in the MAP

11. Paragraph 57 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Article 25 of the OECD Model Tax Convention as part of the next update of the OECD Model Tax Convention in order to address issues related to the consideration of interest and penalties in the mutual agreement procedure."

12. The Subcommittee considers that the changes that will be made to the OECD Commentary for that purpose reflect legal interpretations and policy considerations that are equally relevant for the UN Model. It therefore recommends that:

- the quoted paragraph 4 of the OECD Model that is currently included in paragraph 4 of the Commentary on Article 2 of the UN Model be replaced by the new paragraph 4 that will be included in the OECD Model.
- the quoted paragraph 49 of the OECD Model that is currently included in paragraph 9 of the Commentary on Article 25 of the UN Model be replaced by the new paragraphs 49 to 49.3 that will be included in the OECD Model.

13. The Committee is therefore invited to adopt the following changes to paragraph 4 of the Commentary on Article 2 of the UN Model and to paragraph 9 of the Commentary on Article 25 of the UN Model:

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

4. This paragraph defines taxes on income and on capital, as taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on capital appreciation and taxes on the total amounts of wages or salaries paid by enterprises. Practices regarding the coverage of taxes on the total amount of wages and salaries paid by enterprises vary from country to country and this matter should be taken into account in bilateral negotiations. According to paragraph 3 of the Commentary on Article 2 of the OECD Model Convention, taxes on the total amount of wages do not include "[s]ocial

security charges, or any other charges paid where there is a direct connection between the levy and the individual benefits to be received”. The OECD Commentary further observes:

> 4. Clearly a State possessing ***the right to tax an item of income or capital under the Convention*** ~~taxing powers – and it alone –~~ may levy the taxes imposed by its legislation together with any duties or charges accessory to them: increases, costs, interest, ***penalties*** etc. It has not been considered necessary to specify this in the Article, as it is obvious that ~~in the levying of the tax~~ ***a Contracting State that has the right to levy a tax may also levy*** the accessory duties or charges ***related to*** ~~depend on the same rule as~~ the principal duty***. Most States, however, do not consider that interest and penalties accessory to taxes covered by Article 2 are themselves included within the scope of Article 2 and, accordingly, would generally not treat such interest and penalties as payments to which all the provisions concerning the rights to tax of the State of source (or situs) or of the State of residence are applicable, including the limitations of the taxation by the State of source and the obligation for the State of residence to eliminate double taxation. Nevertheless, where taxation is withdrawn or reduced in accordance with a mutual agreement under Article 25, interest and administrative penalties accessory to such taxation should be withdrawn or reduced to the extent that they are directly connected to the taxation (i.e. a tax liability) that is relieved under the mutual agreement. This would be the case, for example, where the additional charge is computed with reference to the amount of the underlying tax liability and the competent authorities agree that all or part of the underlying taxation is not in accordance with the provisions of the Convention. This would also be the case, for example, where administrative penalties are imposed by reason of a transfer pricing adjustment and that adjustment is withdrawn because it is considered not in accordance with paragraph 1 of Article 9.***
>
> 5. The Article does not mention “ordinary taxes” or … *[the rest of the paragraph is not reproduced here]*

Replace the quotation of paragraph 49 of the OECD Model that is currently found in paragraph 9 of the Commentary on Article 25 of the UN Model by the following:

> 49. ***Paragraph 4 of the Commentary on Article 2 clarifies that whilst most States do not consider interest and administrative penalties accessory to the taxes covered under Article 2 to themselves be covered by Article 2, where such interest and administrative penalties are directly connected to taxes covered under Article 2, they should be appropriately reduced or withdrawn to the same extent as the underlying covered tax is reduced or withdrawn pursuant to the mutual agreement procedure. Consequently, a Contracting State that has applied interest or an administrative penalty that is computed with reference to an underlying tax liability (or with reference to some other amount relevant to the determination of tax, such as the amount of an adjustment or an amount of taxable income) and that has subsequently agreed pursuant to a mutual agreement procedure under paragraphs 1 and 2 of Article 25 to reduce or withdraw that underlying tax liability should proportionally reduce the amount of or withdraw such interest or administrative penalty.*** ~~States take differing views as to whether administrative interest and penalty charges are treated as taxes covered by Article 2 of the Convention. Some States treat them as taking the character of the underlying amount in dispute, but other States do not. It follows that there~~

~~will be different views as to whether such interest and penalties are subject to a taxpayer initiated mutual agreement procedure.~~

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

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

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

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

PART 2 - CHANGES THAT COULD EITHER BE MADE TO THE COMMENTARY ON THE UN MODEL OR INCORPORATED INTO THE UN GUIDE TO THE MUTUAL AGREEMENT PROCEDURE

E. Changes related to the legal status of a mutual agreement

14. Paragraph 45 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Articles 3 and 25 of the OECD Model Tax Convention as part of the next update of the OECD Model Tax Convention in order to clarify the legal status of a mutual agreement entered into under Article 25(3)."

15. The Subcommittee considers that the new paragraphs 6.1 to 6.3 that will be added to the OECD Commentary for that purpose reflects a valid legal interpretation of the legal status of a mutual agreement reached under Article 25. The Subcommittee did not reach agreement, however, as to whether that legal interpretation should be included in the Commentary on Article 25 of the UN Model or should simply be incorporated in the UN Guide to the Mutual Agreement Procedure; it therefore decided to leave it to the Committee to decide where that interpretation should be included.

16. The Committee is therefore invited to adopt one of the following two options:

Option 1 - Changes to the Commentary on the UN Model:

Amend paragraph 9 of the Commentary on Article 25 of the UN Model by adding the following new quoted paragraphs immediately before quoted paragraph 7:

6.1 Through Article 25, the Contracting States have delegated to the competent authorities broad powers concerning the application and interpretation of the provisions of the Convention. Paragraph 2 authorises the competent authorities to resolve by mutual agreement cases presented-by taxpayers in order to avoid taxation which could otherwise result from domestic laws but would not be in accordance with the Convention. Paragraph 3 similarly authorises the competent authorities to resolve by mutual agreement difficulties or doubts concerning the interpretation or application of the Convention, both in individual cases (e.g. with respect to a single taxpayer's case) and more generally (e.g. through the joint interpretation of a provision of the treaty applicable to a large number of taxpayers). Under paragraph 3, the competent authorities can, in particular, enter into a mutual agreement to define a term not defined in the Convention, or to complete or clarify the definition of a defined term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention. Such circumstances could arise, for example, where a conflict in meaning under the domestic laws of the two States creates difficulties or leads to an unintended or absurd result. In order to ensure a proper resolution of such cases, an agreement reached under paragraph 3 concerning the meaning of a term used in the Convention should prevail over each State's domestic law meaning of that term.

6.2 Whilst the status under domestic law of a mutual agreement reached pursuant to Article 25 may vary between States, it is clear that the principles of international law for the interpretation of treaties, as embodied in Articles 31 and 32 of the Vienna Convention on

the Law of Treaties, allow domestic courts to take account of such an agreement. The object of Article 25 is to promote, through consultation and mutual agreement between the competent authorities, the consistent treatment of individual cases and the same interpretation and/or application of the provisions of the Convention in both States. Article 25 also authorises the competent authorities to resolve, by mutual agreement, difficulties or doubts as to the interpretation or application of the Convention; such a mutual agreement, reached pursuant to the express mandate contained in paragraph 3 of the Article, represents objective evidence of the competent authorities' mutual understanding of the meaning of the Convention and its terms. For these reasons, an agreement reached by the competent authorities under Article 25 is a relevant consideration to take into account for purposes of the interpretation of the Convention.

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

7. The rules laid down in paragraphs 1 and 2 provide for …

Option 2 - Incorporation into the UN Guide on Mutual Agreement Procedure:

The Committee recommends that when the UN Guide to the Mutual Agreement Procedure is revised, it should reflect what is included in the above paragraphs 6.1 to 6.3 of the OECD Commentary.

F. Changes related to the suspension of collection during a MAP

17. Paragraph 50 of the Report on Action 14 indicated that "[w]hen the OECD Model Tax Convention is next updated, it is expected that amendments related to this best practice *[Best practice 6]* will be made to the Commentary on Article 25, in particular to expand on existing Commentary describing the policy considerations that support a suspension of collection procedures during the period a MAP case is pending."

18. The Subcommittee examined the changes to paragraphs 47-48 of the OECD Model that are proposed in order to deal with the policy considerations related to the suspension of collection. The Subcommittee did not reach agreement, however, as to whether these changes should be included in the Commentary on Article 25 of the UN Model; it therefore decided to leave it to the Committee to decide whether these or other changes should be included in the Commentary in order to deal with the policy considerations related to the suspension of collection during a MAP.

19. The Committee is therefore invited to adopt one of the following three options:

Option 1 - Keep the UN Commentary as it currently reads:

Keep the following paragraphs 47-48 of the OECD Model as currently quoted in paragraph 9 of the Commentary on Article 25 of the UN Model but, in order to clarify that the paragraphs currently quoted do not include the relevant amendments that will be made to the OECD Commentary, add a footnote to each paragraph as follows:

47.[1] Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. States therefore should as far as possible take into account the cash flow and possible double taxation issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. It also appears, as a minimum, that if the mutual agreement procedure is initiated prior to the taxpayer's being charged to tax (such as by an assessment), a payment should only be required once that charge to tax has occurred.

48.[2] There are several reasons why suspension of the collection of tax pending resolution of a mutual agreement procedure can be a desirable policy, although many States may require legislative changes for the purpose of its implementation. Any requirement to pay a tax assessment specifically as a condition of obtaining access to the mutual agreement procedure in order to get relief from that very tax would generally be inconsistent with the policy of making the mutual agreement procedure broadly available to resolve such disputes. Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic

1 ***This paragraph corresponds to paragraph 47 of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the changes to this paragraph that were made by the OECD in July 2017.***

2 ***This paragraph corresponds to paragraph 48 of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the changes to this paragraph that were made by the OECD in July 2017.***

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

Option 2 - Replaced quoted paragraphs 47-48 by the paragraphs as modified in the OECD Model

Replace the quotation of paragraphs 47 and 48 of the OECD Model that is currently found in paragraph 9 of the Commentary on Article 25 of the UN Model by the following:

47. Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. [*the rest of the paragraph has been moved to new paragraph 47.1*]

47.1 Unlike disputes that involve solely the application of a Contracting State's domestic law, the disputes that are addressed through the mutual agreement procedure will in most cases involve double taxation. States therefore should as far as possible take into account ~~the~~ cash flow ~~and possible double taxation~~ issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant

Convention. [*the following three sentences are currently in paragraph 48 of the Commentary on Article 25*] ***Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement that the taxpayer pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment.*** As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. ***States may wish to provide so expressly in the Convention by adding the following text to the end of paragraph 2:***

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

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

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

procedure discussions when a probable result could be the refunding of taxes already collected. [*the rest of the paragraph has been moved to new paragraph 48.1*] ***In many States, the suspension of the assessment and/or collection of tax pending the resolution of a mutual agreement procedure may require legislative changes for the purpose of its implementation. States may also wish to provide expressly in the Convention for the suspension of assessment and collection procedures by adding the following text to the end of paragraph 2:***

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

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

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

Option 3 - Adopt different paragraphs for the UN Commentary

This option adopts the OECD commentary (as per option 2), without giving Contracting States the option to include a clause at the end of paragraph 2, to suspend the collection of taxes during the

period that the mutual administrative assistance is pending. This option aims to incorporate the additional guidance provided in the OECD commentaries following the BEPS Action Plan, concerning the options available to the tax authorities concerning the suspension in collection of taxes, without binding more vulnerable countries, such as developing countries, to take a stand through the negotiation of bilateral tax treaties. At the same time, this option addresses the potential consequences in the suspension of collection of taxes, when attached to a mutual agreement procedure – the most important of which is the increase in requests for mutual agreement procedure with the intent to stall the payment of taxes. New language has been inserted in the end of paragraph 47.1 to address this issue and propose some of the normative actions available to developing countries facing constriction in human and monetary resources.

47. Article 25 gives no absolutely clear answer as to whether a taxpayer initiated mutual agreement procedure may be denied on the basis that there has not been the necessary payment of all or part of the tax in dispute. However, whatever view is taken on this point, in the implementation of the Article it should be recognised that the mutual agreement procedure supports the substantive provisions of the Convention and that the text of Article 25 should therefore be understood in its context and in the light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. [the rest of the paragraph has been moved to new paragraph 47.1]

47.1 Unlike disputes that involve solely the application of a Contracting State's domestic law, the disputes that are addressed through the mutual agreement procedure will in most cases involve double taxation. States therefore should as far as possible take into account the cash flow and possible double taxation issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. [the following three sentences are currently in paragraph 48 of the Commentary on Article 25] Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement that the taxpayer pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review. **States should strive to address this issue domestically, by issuing clear regulations, with respect to the standard practice. Should States chose to suspend the assessment and collection procedures during the period that a mutual agreement proceeding is pending, additional measures (such as penalties, fines, administrative procedures) should be considered in order to avoid procrastination in making tax payments through a request for mutual agreement procedure. The practice of delaying the payment of taxes without a justified reason may be avoided by having domestic legislation authorising penalties**

and charges over the period in which the payment of taxes was suspended, should the competent authority of one or both Contracting States find the request for mutual agreement procedure to be unjustified, or based on false pretences. ~~***States may wish to provide so expressly in the Convention by adding the following text to the end of paragraph 2:***~~

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

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

48. ~~***For the***~~ There are several reasons described in the preceding paragraph,why suspension of the collection of tax pending resolution of a mutual agreement procedure can be a desirable policy, **although States should weigh the benefits of applying a consistent "suspension of taxes approach" against the pressure such a policy might impose on the human, financial and technical resources available to the tax administration to handle a potential increase in requests for mutual agreement procedure.** ~~although many States may require legislative changes for the purpose of its implementation.~~ ~~*Moreover,*~~ ~~A~~~~*a*~~*A*ny requirement to pay a tax assessment specifically as a condition of obtaining access to the mutual agreement procedure in order to get relief from that very tax would generally be inconsistent with the policy of making the mutual agreement procedure broadly available to resolve such disputes. [the following three sentences have been moved to paragraph 47.1] ~~Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment.~~ Finally, a~~*A*~~nother unfortunate complication *of such a requirement* may be delays in the resolution of cases if a country is less willing to enter into good faith mutual agreement procedure discussions when a probable result could be the refunding of taxes already collected. [the rest of the paragraph has been moved to new paragraph 48.1] In many States, the suspension of the assessment and/or collection of tax pending the resolution of a mutual agreement procedure may require legislative changes for the purpose of its implementation. ~~***States may also wish to provide expressly in the Convention for the suspension of assessment and collection procedures by adding the following text to the end of paragraph 2:***~~

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

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

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

G. Changes related to multilateral MAPs and APAs

20. Paragraph 59 of the Report on Action 14 indicated that "[i]t is intended to make amendments to the Commentary on Article 25 as part of the next update of the OECD Model Tax Convention in order to address the issue of multilateral MAPs and APAs."

21. The Subcommittee considers that the changes that will be made to the OECD Commentary for that purpose reflect useful explanations on the application of the provisions of Article 25 with respect to multilateral MAPs and APAs. The Subcommittee did not reach agreement, however, as to whether these explanations should be included in the Commentary on Article 25 of the UN Model or should simply be incorporated in the UN Guide to the Mutual Agreement Procedure; it therefore decided to leave it to the Committee to decide where these explanations should be included.

22. The Committee is therefore invited to adopt one of the following two options:

Option 1 - Changes to the Commentary on the UN Model:

Amend paragraph 9 of the Commentary on Article 25 of the UN Model by adding the following new quoted paragraphs 37.1 to 37.6 immediately after quoted paragraph 37:

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

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

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

37.4 As recognised in paragraph 55 below, in the multilateral case described in paragraph 37.2, paragraph 3 of Article 25 of the tax convention between the States in which

the permanent establishments are situated enables those two States to consult together to ensure that the convention operates effectively and that the double taxation that can occur in such a situation is appropriately eliminated.

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

Amend paragraph 9 of the Commentary on Article 25 of the UN Model by replacing quoted paragraph 52 by the following new paragraph 52:

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

- where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty;
- where the laws of a State have been changed without impairing the balance or affecting the substance of the Convention, settle any difficulties that may emerge from the new system of taxation arising out of such changes;
- determine whether, and if so under what conditions, interest may be treated as dividends under thin capitalisation rules in the country of the borrower and give rise to relief for double taxation in the country of residence of the lender in the same way as for dividends (for example relief under a parent/subsidiary regime when provision for such relief is made in the relevant bilateral convention)**;**
- ***conclude bilateral advance pricing arrangements (APAs) as well as conclude multilateral APAs with competent authorities of third States with which each of the Contracting States has concluded a bilateral tax convention in cases where difficulties or doubts exist as to the interpretation or application of the conventions (especially in cases where no actions of the Contracting States are likely to result in taxation not in accordance with the provisions of a convention). A multilateral APA may be concluded either through the negotiation of a single agreement between all the competent authorities of the concerned States or through the negotiation of separate, but consistent, bilateral mutual agreements;***
- ***determine appropriate procedures, conditions and modalities for the application of paragraphs 1 and 2 as well as the second sentence of this paragraph to multilateral cases (see paragraphs 37.1 to 37.6 above and paragraphs 55 to 55.2 below) and for the involvement of third States in the mutual agreement procedure***

where the resolution of the case may affect or be affected by taxation in third States.

Amend paragraph 9 of the Commentary on Article 25 of the UN Model by replacing quoted paragraph 55 by the following new paragraphs 55 to 55.2:

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

55.1 ~~It is not merely desirable, but in most cases also will particularly reflect the role of Article 25 and the mutual agreement procedure in providing that the competent authorities may consult together as a way of ensuring the Convention as a whole operates effectively, that the mutual agreement procedure should result in the effective elimination of the double taxation which can occur in such a situation. The opportunity for such matters to be dealt with under the mutual agreement procedure becomes increasingly important as Contracting States seek more coherent frameworks for issues of profit allocation involving branches, and this is an issue that could usefully be discussed at the time of negotiating conventions or protocols to them.~~ There will be Contracting States whose domestic law prevents the Convention from being complemented on points which are not explicitly or at least implicitly dealt with in the Convention. ~~however, and i~~***I***n these situations the Convention could be complemented by a protocol dealing with this issue. ~~In most cases, however, the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles, will sufficiently support issues involving two branches of a third state entity being subject to the paragraph 3 procedures.~~ ***The second sentence of paragraph 3 does not, however, allow the Contracting States to eliminate double taxation where the provision of such relief would contravene their respective domestic laws or is not authorised by the provisions of other applicable tax treaties. That sentence only allows the Contracting States, in cases not provided for in the Convention, to consult each other in order to eliminate double taxation in accordance with their respective domestic laws or in accordance with a tax treaty one of the Contracting States has concluded with a third State. Thus, for instance, in the case of a resident of a third State having permanent establishments in both Contracting States, the second sentence of paragraph 3 allows the competent authorities of the Contracting States to agree on the facts and circumstances of a case in order to apply their respective domestic tax laws in a coherent manner, in particular with respect to any dealings between those permanent establishments; the Contracting States could provide relief from any double taxation of the***

profits of such permanent establishments, however, only to the extent allowed by their respective domestic laws or by the provisions of a tax treaty concluded between a Contracting State and that third State (i.e. applying the provisions of Article 7 and Article 23 of a tax treaty between a Contracting State and the third State). As shown by these examples, paragraph 3 therefore plays a crucial role to allow competent authority consultation to ensure that tax treaties operate in a co-ordinated and effective manner.

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

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

Option 2 - Incorporation into the UN Guide on Mutual Agreement Procedure:

The Committee recommends that when the UN Guide to the Mutual Agreement Procedure is revised, it should reflect what is included in the above paragraphs 37.1 to 37.5, 52, 55 to 55.2 of the OECD Commentary. Also, in order to clarify that the paragraphs currently quoted in paragraph 9 of the Commentary on Article 25 of the UN Model do not include the relevant amendments that will be made to the OECD Commentary, the following footnote will be added at the end of the quoted paragraphs 52 and 55 of the OECD Model:

> [*Footnote*] This paragraph corresponds to paragraph *[52 or 55, as the case may be]* of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the change to these paragraphs that were made by the OECD in July 2017.

PART 3 - CHANGES THAT THE SUBCOMMITTEE RECOMMENDS TO INCORPORATE IN THE UN GUIDE TO THE MUTUAL AGREEMENT PROCEDURE.

H. Changes related to audit settlements

23. Paragraph 32 of the Report on Action 14 indicated that:

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

24. The Subcommittee examined the new paragraph 45.1 (reproduced below) that will be added to the OECD Model in order to address that issue. ~~While it generally agreed with the recommendation included in the paragraph, T~~T~~t~~he Subcommittee considered that it was more related to a commitment by the jurisdictions that had adopted the Report on Action 14 than to an interpretation of Article 25. For that reason, the Subcommittee considered that it seemed more appropriate to include that recommendation in the UN Guide to the Mutual Agreement Procedure. The Subcommittee therefore invites the Committee to recommend that when the UN Guide to the Mutual Agreement Procedure is revised, it should [reflect what is] [discuss the issues] included in the following paragraph of the OECD Commentary:

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

I. Changes related to the need to ensure that both competent authorities are made aware of MAP requests being submitted

25. Minimum standard 3.1 of the Report on Action 14 provided that in order to ensure that both competent authorities are made aware of MAP requests being submitted and are able to give their views on whether the request is accepted or rejected, 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 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.

26. The Subcommittee examined the new paragraph 31.1 (reproduced below) that will be added to the OECD Model in order to clarify the meaning of the phrase "appears to be justified" in paragraph 2 of Article 25.~~ While it generally agreed with the view expressed in that paragraph, i~~It concluded that it seemed more appropriate to include that view in the UN Guide to the Mutual Agreement Procedure together with a sentence that would indicate that it is a good practice for the competent authority of a Contracting State that receives a request under paragraph 1 of Article 25 but that considers that the objection reflected in that request is not justified to notify the competent authority of the other State accordingly. The Subcommittee therefore invites the Committee to recommend that when the UN Guide to the Mutual Agreement Procedure is revised, it should [reflect] [discuss] what is included in the following paragraph of the OECD Commentary together with the additional sentence that appears between brackets:

> 31.1 The determination whether the objection "appears … to be justified" requires the competent authority to which the case was presented to make a preliminary assessment of the taxpayer's objection in order to determine whether the taxation in both Contracting States is consistent with the terms of the Convention. It is appropriate to consider that the objection is justified where there is, or it is reasonable to believe that there will be, in either of the Contracting States, taxation not in accordance with the Convention. [Where that is not the case and the competent authority to which the case was presented concludes that the objection is not justified, it should notify the competent authority of the other Contracting State of its conclusion in order to ensure that both competent authorities are made aware of MAP requests that have been submitted in relation to the convention between the two States.]

27. As regards the change proposed to paragraph 1 of Article 25 of the OECD Model in order to allow a MAP request to be presented to either competent authority, however, the Subcommittee did not consider that a similar change should be made to the UN Model. For that reason, it did not consider that the consequential changes made to the Commentary of the OECD Model should be quoted in the UN Model. In order to clarify that the paragraphs currently quoted in paragraph 9 of the Commentary on Article 25 of the UN Model do not include the relevant amendments that will be made to the OECD Commentary, the Subcommittee recommends that the following footnote be added to these quoted paragraphs of the OECD Model:

Add the following footnote at the end of paragraphs 7, 16, 17, 18, 19, 31, 32, 33, 34 and 35 of the OECD Model which are quoted in paragraph 9 of the Commentary on Article 25 of the UN Model:

> [*Footnote*] This paragraph corresponds to paragraph [*7, 16, 17, 18, 19, 31, 32, 33, 34 or 35, as the case may be]* of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the change to paragraph 1 of Article 25, and the consequential changes to the Commentary, that were made by the OECD in July 2017.

J. Changes related to the relationship between MAP and domestic law administrative and judicial remedies

28. Best Practice 8 included in the Report on Action 14 indicated that countries should provide guidance on the relationship between the MAP and their domestic law administrative and judicial remedies and that such guidance should address, in particular, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice. Paragraph 53 of the Report included changes to be made to the Commentary on Article 25 of the OECD Model in order to clarify that issue.

29. The Subcommittee examined these changes (reproduced below). While it generally agreed with the explanations on the relationship between MAP and administrative / judicial remedies provided through these changes, it concluded that it seemed more appropriate to include these explanations in the UN Guide to the Mutual Agreement Procedure. The Subcommittee therefore invites the Committee to recommend that when the UN Guide to the Mutual Agreement Procedure is revised, it should [reflect what is] [discuss the issues] included in the following paragraphs of the OECD Commentary:

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

taxation notwithstanding a court decision that such taxation was in accordance with the provisions of a tax treaty. In such a case, nothing (e.g. administrative policy or practice) should prevent the competent authorities from reaching a mutual agreement pursuant to which a Contracting State will relieve taxation considered by the competent authorities as not in accordance with the provisions of the tax treaty, and thus depart from a decision rendered by a court of that State.

30. Since paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the existing version of paragraphs 35 and 42 (with adaptations) of the Commentary on Article 25 of the OECD Model, the Subcommittee also recommends that, in order to clarify that the paragraphs currently quoted do not include the amendments that will be made to the OECD Commentary, the following footnote be added to these quoted paragraphs:

Add the following footnote at the end of paragraphs 35 and 42 of the OECD Model which are quoted in paragraph 9 of the Commentary on Article 25 of the UN Model:

[*Footnote*] This paragraph corresponds to paragraph *[35 or 42, as the case may be]* of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the change to these paragraphs that were made by the OECD in July 2017.

K. Changes related to bona fide taxpayer-initiated foreign adjustments

31. Best practice 9 of the Action 14 Report indicated that countries' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments – i.e. taxpayer-initiated adjustments permitted under the domestic laws of a treaty partner which allow a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust (i) the price for a transaction between associated enterprises or (ii) the profits attributable to a permanent establishment, with a view to reporting a result that is, in the view of the taxpayer, in accordance with the arm's length principle. Paragraph 55 of the Report indicated that changes would be made to the Commentaries on Articles 7, 9 and 25 of the OECD Model in order to reflect this best practice:

32. The Subcommittee examined these changes (reproduced below). While it generally agreed with the principles expressed in these changes, it concluded that the changes were not relevant for Article 7 of the UN Model (which does not include the corresponding relief provision found in paragraph 3 of Article 7 of the OECD Model) but, also, that it seemed more appropriate to [include] [discuss] the principle underlying these changes in the UN Guide to the Mutual Agreement Procedure. The Subcommittee therefore invites the Committee to recommend that when the UN Guide to the Mutual Agreement Procedure is revised, it should [reflect what is] [discuss the issues] included in the following paragraphs of the OECD Commentary:

New paragraph 6.1 to be added to the Commentary on Article 9 of the OECD Model:

6.1 Under the domestic laws of some countries, a taxpayer may be permitted under appropriate circumstances to amend a previously-filed tax return to adjust the price for a transaction between associated enterprises in order to report a price that is, in the taxpayer's opinion, an arm's length price. Where they are made in good faith, such adjustments may facilitate the reporting of taxable income by taxpayers in accordance with the arm's length

principle. However, economic double taxation may occur, for example, if such a taxpayer-initiated adjustment increases the profits of an enterprise of one Contracting State but there is no appropriate corresponding adjustment to the profits of the associated enterprise in the other Contracting State. The elimination of such double taxation is within the scope of paragraph 2. Indeed, to the extent that taxes have been levied on the increased profits in the first-mentioned State, that State may be considered to have included in the profits of an enterprise of that State, and to have taxed, profits on which an enterprise of the other State has been charged to tax. In these circumstances, Article 25 enables the competent authorities of the Contracting States to consult together to eliminate the double taxation; the competent authorities may accordingly, if necessary, use the mutual agreement procedure to determine whether the initial adjustment met the conditions of paragraph 1 and, if that is the case, to determine the amount of the appropriate adjustment to the amount of the tax charged in the other State on those profits so as to relieve the double taxation.

Changes to paragraph 23 of the Commentary on Article 25 of the OECD Model:

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

Changes to paragraph 14 of the Commentary on Article 25 of the OECD Model:

14. It should be noted that the mutual agreement procedure, unlike the disputed claims procedure under domestic law, can be set in motion by a taxpayer without waiting until the taxation considered by him to be “not in accordance with the Convention” has been charged against or notified to him. To be able to set the procedure in motion, he must, and it is sufficient if he does, establish that the “actions of one or both of the Contracting States” will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual

application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention. Thus, for example, if a change to a Contracting State's tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income. Other examples include filing a return in a self assessment system or the active examination of a specific taxpayer reporting position in the course of an audit, to the extent that either event creates the probability of taxation not in accordance with the Convention (*e.g.* where the self assessment reporting position the taxpayer is required to take under a Contracting State's domestic law would, if proposed by that State as an assessment in a non-self assessment regime, give rise to the probability of taxation not in accordance with the Convention, or where circumstances such as a Contracting State's published positions or its audit practice create a significant likelihood that the active examination of a specific reporting position such as the taxpayer's will lead to proposed assessments that would give rise to the probability of taxation not in accordance with the Convention). Another example might be a case where a Contracting State's transfer pricing law requires a taxpayer to report taxable income in an amount greater than would result from the actual prices used by the taxpayer in its transactions with a related party, in order to comply with the arm's length principle, and where there is substantial doubt whether the taxpayer's related party will be able to obtain a corresponding adjustment in the other Contracting State in the absence of a mutual agreement procedure. ***Such actions may also be understood to include the bona fide taxpayer-initiated adjustments which are authorised under the domestic laws of some countries and which permit a taxpayer, under appropriate circumstances, to amend a previously-filed tax return in order to report a price in a controlled transaction, or an attribution of profits to a permanent establishment, that is, in the taxpayer's opinion, in accordance with the arm's length principle (see paragraph 6.1 of the Commentary on Article 9 and paragraph 59.1 of the Commentary on Article 7).*** As indicated by the opening words of paragraph 1, whether or not the actions of one or both of the Contracting States will result in taxation not in accordance with the Convention must be determined from the perspective of the taxpayer. Whilst the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established, the tax authorities should not refuse to consider a request under paragraph 1 merely because they consider that it has not been proven (for example to domestic law standards of proof on the "balance of probabilities") that such taxation will occur.

33. Since paragraph 9 of the Commentary on Article 25 of the UN Model currently includes the existing version of paragraphs 14 and 23 of the Commentary on Article 25 of the OECD Model, the Subcommittee also recommends that, in order to clarify that the paragraphs currently quoted do not include the amendments that will be made to the OECD Commentary, the following footnote be added to these quoted paragraphs:

Add the following footnote at the end of paragraphs 14 and 23 of the OECD Model which are quoted in paragraph 9 of the Commentary on Article 25 of the UN Model:

[*Footnote*] This paragraph corresponds to paragraph *[14 or 23, as the case may be]* of the OECD Model as it read immediately before July 2017. This reflects the fact that the Committee did not endorse the change to these paragraphs that were made by the OECD in July 2017.

PART 4 - CHANGES THAT ARE INCLUDED IN ANNEX 5 OF NOTE E/C.18/2016/CRP.4 BUT WHICH THE SUBCOMMITTEE DOES NOT CONSIDER AS BEING RELEVANT

FOR THE UN MODEL OR FOR THE UN GUIDE TO THE MUTUAL AGREEMENT PROCEDURE

L. Changes related to the footnote to Art. 25(5) of the OECD Model

34. Paragraph 23 of the Report on Action 14 indicated that:

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

35. The Subcommittee concluded that since Alternatives A and B of Article 25 of the UN Model recognize that MAP arbitration provisions are purely optional, the footnote to Article 25 of the OECD Model and the related Commentary were not relevant for the UN Model.