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Dispute avoidance and resolution

Chapter on Mutual Agreement Procedure of the Handbook on Dispute Avoidance and Resolution

Note by the Subcommittee on Dispute Avoidance and Resolution

Summary

This note is presented FOR DISCUSSION AND APPROVAL at the meeting of the Committee to be held in New York on 23-26 April 2019.

The note includes the final version of Chapter 5 (Mutual Agreement Procedure) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*, which was finalized by the Subcommittee on Dispute Avoidance and Resolution at its meeting of 13-15 March 2019.

At its eighteenth session on 23-26 April 2019, the Committee is invited to approve the attached final version of Chapter 5 for inclusion in the Handbook.

1. At its seventeenth session (Geneva, 16-20 October 2018), the UN Committee discussed a first draft of Chapter 5 on Mutual Agreement Procedure of the proposed *United Nations Handbook on Dispute Avoidance and Resolution.* The following excerpt from the report of the meeting summarizes the discussion and the decisions taken by the Committee:

> Mr. Krysiak then invited the Committee to discuss the preliminary draft of the MAP Chapter included in note E/C.18/2018/CRP.13 which had been prepared by the Secretariat in accordance with these decisions and, in particular, the specific issues identified in paragraph 6 of the note. The following summarizes these issues and the guidance that was provided by the Committee.
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> *MAP under EU law*: Both the EU Arbitration Convention and the EU Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms envisage a MAP that is parallel or overlaps the MAP under tax treaties. Since the scope of these instruments is limited to disputes between EU states, this form of MAP had not been dealt in the MAP Chapter. The Committee was invited to indicate whether it agreed with that approach. While one member considered that it could be useful to discuss these instruments in the MAP Chapter, most members who spoke on the issue considered that the MAP Chapter should focus exclusively on the MAP under tax treaties, noting that the EU Arbitration Convention and the Directive on tax dispute resolution mechanisms did not apply to MAP involving non-EU countries. It was agreed, however, that a reference to the existence of these instruments should be added in a footnote or a short paragraph.
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> *BEPS Action 14*: The Committee was invited to discuss whether the MAP Chapter correctly reflected the decision taken at the sixteenth session of the Committee concerning the inclusion in the Handbook of references to the Report on BEPS Action 14. The members who intervened on this issue agreed that the MAP Chapter accurately reflected that decision. It was also agreed that although the chapter already indicated that the minimum standards of that Report applied to countries that had joined the BEPS Inclusive Framework, it should be further emphasized that countries that were not part of the BEPS Inclusive Framework were not bound to follow these minimum standards.
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> *Typical steps of an Article 25(1) MAP*: The Committee was invited to discuss whether it agreed with the description of the five typical steps of an Article 25(1) MAP that were presented on the diagram included in paragraph 36 of the chapter. Members intervening on this question generally agreed with the description of the five steps. Some suggestions were made, however, about the visual presentation of these steps. It was suggested, for instance, that the headings of the five steps could be introduced before the diagram but it was then observed that this was already done in paragraph 35 of the chapter.
>
> It was also observed that, in practice, a competent authority may approach the competent authority of another state before reaching a decision as to whether a case was acceptable. The Secretariat indicated that the diagram aimed at providing a step-by-step description of the MAP even though some of the steps may, in practice, be omitted or may occur simultaneously. It also added, however, that the diagram made a clear distinction between the first step of the MAP, which relates to "accepting" a request, and the second and third steps, which deal with the evaluation of the merits of the request. Several members thought that the phrase "accept the request" used in the description of the first step could be misleading as it could be read to suggest a decision on the merits of the request. Various suggestions were made for replacing the reference to "accepting" a request in the first stage of the MAP (e.g. by referring to the "eligibility of the request" or to "access to MAP") and it was agreed to examine the possibility to make such a change.
>
> While one member stressed the importance of the time limits for making a MAP request and for resolving a case, the Secretariat indicated that these were different issues that were discussed separately in the MAP Chapter, there being no time limit for concluding a MAP case (except for the purposes of arbitration, if provided for in a treaty) even though the Report on Action 14 makes reference to an average target time frame for completing MAP cases.

Flowchart of the main actions involved in each of the steps of the MAP process: The Committee was also invited to discuss the simple flowchart, included in paragraph 36 of the MAP Chapter, of the main actions involved in each of the steps of a typical MAP. Most comments on the flowchart were made as part of the comments on the diagram included in the same paragraph (see above). One intervention dealt with the visual presentation of the flowchart, which seemed to suggest that the unilateral phase of the MAP was more important than the bilateral phase. While one member expressed the view that there was no need to change the flowchart, it was agreed to examine possible ways of addressing this concern.

Tentative timetable for the MAP process: The Committee was finally invited to comment on the tentative timetable, in paragraph 87 of the MAP Chapter, for the different actions involved in a typical MAP under Article 25(1). In response to a question, the Secretariat explained that the timetable was not intended to be prescriptive and was prepared based on the MAP practice of some countries, on what was previously included in the Guide on Mutual Agreement Procedure and on recommendations derived from BEPS Action 14. At the request of a few members, it was agreed that the word "suggested" should be added before "timetable" in the heading of the table.

In response to a question about whether different timetables should be used for transfer pricing cases and other cases, the observer from the OECD responded that it would be difficult to do so since each transfer pricing case was different. One member indicated that the Action 14 arbitration subgroup had reached the same conclusion.

Most of the comments focussed on the one-week period suggested in the timetable for one competent authority that wishes to do so to confirm that it has received a notification from the competent authority of the other state that a MAP request has been received. The question was asked whether that suggestion should be made a recommendation and whether the suggested time-period should be expanded to reflect the resource constraints of developing countries. While it was generally agreed that the MAP Chapter should recommend that countries send such a confirmation of the receipt of the notification, members expressed different views on the suggested time- period. Some members thought that the period should not be changed since it was not binding and confirming the receipt of a notification was a simple task. Other members thought that the period should be extended to two weeks, three weeks or one month because the notification may not be received by the persons in charge of MAP cases and the persons who receive the notification may wish to consult before responding. Mr. Krysiak concluded the discussion of that issue by inviting the Subcommittee to consider amending the relevant part of the timetable in the light of the various comments and suggestions that were made so that the Committee can reach a decision on the issue at its next meeting. One member expressed the view that the same issues arose with respect to the one-month period suggested in the timetable for the person who made the MAP request to indicate whether it accepts a proposed agreement.

2. Written comments on the draft discussed at the Committee's meeting were received from a number of members of the Committee and observers.

3. Each of these comments were discussed at the meeting of the Subcommittee on Dispute Avoidance and Resolution held in London on 13-15 March 2019. The attached revised draft reflects the decisions reached by the Subcommittee as a result of that discussion.

4. At its eighteenth session on 23-26 April 2019, the Committee is invited to approve the attached version of Chapter 5 for inclusion in the *Handbook on Dispute Avoidance and Resolution*.

Chapter 5

Mutual Agreement Procedure

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Chapter 5

The Mutual Agreement Procedure

5.1 Introduction

1. This chapter deals with the mutual agreement procedure ("MAP"), which is the dispute resolution procedure provided for in tax treaties.[1] That procedure, which is separate and independent from the administrative and judicial dispute resolution mechanisms provided by domestic law, allows representatives of the states that have concluded a tax treaty (usually through officials from their respective tax administrations) to address taxpayer complaints about an incorrect application of the provisions of the treaty as well as difficulties or doubts arising in relation to the interpretation or application of the treaty.

2. The MAP plays a crucial role in promoting the fulfilment of treaty obligations. It is intended to provide foreign taxpayers with the assurance that a potentially incorrect application of treaty provisions by one treaty state may be brought to the attention of tax officials from the other treaty state. The MAP is therefore a critical component of a tax treaty and a key provision for foreign investors and other taxpayers. This is especially the case in countries where foreigners may be reluctant to rely on domestic administrative and judicial dispute resolution mechanisms, for example because of a perception that the tax administrations, administrative tribunals and courts of these countries lack the necessary resources or tax treaty expertise to deal with treaty issues, which can often be complex.

3. The number of cases involving the use of the MAP has grown steadily over the last two decades: country statistics on the MAP show that the number of MAP cases increased on average by more than 11% each year between 2006 and 2015.[2] The statistics also show, however, that currently the vast majority of MAP cases arise under tax treaties between two developed countries and that relatively few mutual agreement cases involve developing

1 This chapter does not deal with the type of mutual agreement procedure envisaged by either the EU *Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprise* (90/436/EEC), often referred to as the EU Arbitration Convention, or the EU Council Directive 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. More information on these instruments, which are applicable within the European Union, are available at https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/transfer-pricing-arbitration-convention_en and at https://ec.europa.eu/taxation_customs/business/company-tax/resolution-double-taxation-disputes_en_de.

2 Statistics on MAP cases have been collected by the OECD since 2006: see http://www.oecd.org/tax/dispute/map-statistics-2006-2015.htm, In 2016, these statistics were expanded to include more details and to include the MAP cases of all countries that are members of the Inclusive Framework on BEPS: see the statistics for 2017 at http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.

countries other than large emerging economies (such as China and India).[3] As these statistics suggest, the majority of developing countries have no or limited experience with the MAP even though the number of MAP cases involving developing countries is increasing. Regardless of a country's degree of previous experience, all countries that enter into tax treaties must be prepared to meet their obligations with respect to the MAP, and must therefore understand that procedure and implement administrative processes to deal with MAP cases that may arise under their tax treaties.

4. This chapter provides practical guidance on the MAP and is primarily intended for developing countries that have little experience with that procedure, although its contents will also be relevant for a broader range of countries. It replaces the United Nations *Guide to the Mutual Agreement Procedure* which was approved by the United Nations Committee of Experts on International Cooperation in Tax Matters at its 2012 meeting.[4] The guidance included in this chapter complements the guidance on the mutual agreement procedure found in the Commentary on the UN Model, which constitutes the most authoritative source of information on the interpretation of the provisions included in that model; in case of divergences between the guidance of this chapter and that of the Commentary on the UN Model, the latter should prevail. Also, to the extent that the provisions of the UN Model dealing with the MAP are similar to those of the OECD Model, and because the Commentary of the UN Model quotes large parts of the Commentary of the OECD Model, the Commentary of the OECD Model will also be relevant, in particular as regards treaties that follow the wording of the OECD Model rather than that of the UN Model. Obviously, however, the guidance in this chapter is only relevant to the extent that the MAP provisions of the individual treaty under which a MAP case arises are identical or substantially similar to those found in the UN or OECD Models.

5. As explained in Chapter 1, the G20/OECD project on base erosion and profit shifting (BEPS) has had a significant impact on the implementation of the MAP.[5] The BEPS Action Plan recognized that its recommendations to counter base erosion and profit shifting had to be complemented with work aimed at improving the effectiveness of the MAP as a mechanism for resolving treaty-related disputes.[6] Work in this area was carried out under Action 14 (Making dispute resolution mechanisms more effective) of the BEPS Action Plan. The final report on Action 14[7] includes a number of best practices related to the MAP. It also sets forth

3 According to the 2017 MAP statistics of the Inclusive Framework on BEPS, non-OECD countries that joined the Inclusive Framework (other India and China) were involved in only *3%* of the reported MAP cases.

4 Available at http://www.un.org/esa/ffd/wp-content/uploads/2014/09/8STM_CRP_4_clean.pdf, subject to a few drafting amendments made at the meeting (see page 17 of the report on the 2012 meeting at http://www.un.org/ga/search/view_doc.asp?symbol=E/2012/45&Lang=E).

5 See the section on "The new international environment for the resolution of tax disputes" ***[title of the section to be confirmed]*** in Chapter 1.

6 OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, Paris, https://doi.org/10.1787/9789264202719-en, page 23. ***[if not already quoted in previous chapters]***

7 OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, https://doi.org/10.1787/9789264241633-en. ***[if not already quoted in previous chapters]***

a minimum standard with respect to the resolution of treaty-related disputes through the MAP. The Annex reproduces the elements of that minimum standard, which has the following objectives:

- Ensure that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- Ensure that taxpayers can access the MAP when eligible.[8]

6. The large number of countries that have joined the Inclusive Framework on BEPS[9] have committed to implement that minimum standard. For that reason, the elements of that minimum standard and the best practices included in the final report on Action 14 are included in the Annex and are referred to in this chapter where relevant. It is important to remember, however, that countries that have not joined the Inclusive Framework on BEPS are not required to apply that minimum standard.

7. The fact that compliance with the minimum standard is reviewed and monitored by other countries is intended to ensure a greater international scrutiny of how each country that is a member of the Inclusive Framework on BEPS applies the MAP.[10] Two elements of the minimum standard will also contribute to that result. First, the minimum standard requires all countries that are members of the Inclusive Framework on BEPS to provide annual statistics on their MAP cases,[11] including their total MAP caseload, the average time required to complete MAP cases, the general outcomes of the MAP cases that were closed, the other jurisdictions involved in the cases and the proportion of the cases that dealt with issues regarding the allocation of profits between associated enterprises or the attribution of profits to a permanent establishment as opposed to other issues.[12] Second, all these countries must become members of the FTA MAP Forum,[13] a subsidiary body of the Forum on Tax Administration[14] which meets regularly to deliberate on matters affecting the MAP and to monitor the implementation of the minimum standard. ***[Paragraphs 5 to 7 may need to be shortened or revised based on the contents of Chapter 1, once that chapter has been completed]***

8. Since many of the countries that have joined the Inclusive Framework on BEPS are developing countries and these countries will be subject to a peer review of their MAP

8 Page 9 of the report.

9 As of 30 August 2018, 117 countries had joined the Inclusive Framework on BEPS: see http://www.oecd.org/tax/beps/beps-about.htm#monitoring.

10 See http://www.oecd.org/tax/dispute/beps-action-14-peer-review-and-monitoring.htm.

11 Page 15 of the final report on Action 14, note 7.

12 See the second sentence of note 2.

13 Page 16 of the final report on Action 14, note 7.

14 For more information on the Forum on Tax Administration, see http://www.oecd.org/tax/forum-on-tax-administration.

practices, there has been an emphasis by the international community on the provision of assistance to these countries to help them minimize and resolve cross-border tax disputes. This assistance may help these countries overcome challenges that they often experience with respect to the MAP. The following are some of these challenges:

- Many developing countries, especially least-developed countries, currently have a limited capacity to deal with complex international tax treaty issues and few have set up the administrative framework that would allow them to conduct a MAP effectively.
- In some cases, the relationship between MAP and domestic law is unclear and may hinder the application of the MAP.
- Countries with limited experience with international tax law (e.g. transfer pricing audits/studies and treaty application) or with domestic tax laws that lack robust rules to deal with cross-border issues may be tempted to try to avoid resolving international tax disputes through the MAP.
- Not all countries are aware of the fact that the inclusion of MAP provisions in a tax treaty creates legal obligations for the treaty countries. Also, some countries may not have fully considered the procedural aspects of the MAP and may therefore be tempted to discourage its use.
- The protection of taxpayer rights, including the right to confidentiality, may be an issue in some countries, particularly in countries which have limited experience with international tax law; if taxpayers do not trust the MAP because they do not trust the officials involved or the institutional process, they may be reluctant to use it.

9. Despite these challenges, developing countries should be mindful of the need to provide mechanisms to address tax treaty-related disputes. These countries are confronted with international tax cases, and in particular transfer pricing cases: cross-border transactions between different parts of multinational enterprises do not occur only between developed countries but also with developing countries. With those cases comes the need to implement mechanisms in order to prevent obstacles to international trade and investment. Since domestic dispute resolution mechanisms only address the dispute in one treaty country and ignore the tax treatment in the other country, thereby not addressing potential double taxation, a country cannot rely exclusively on domestic recourses to address international double taxation cases. The MAP allows such cases to be resolved in a way that is binding on both countries involved.

5.2 What is the MAP?

5.2.1 Role of the MAP

10. Almost all modern tax treaties include an article that provides a procedure for addressing difficulties that may arise in the interpretation and application of the treaty. This procedure, the MAP, is particularly relevant where such difficulties may result in double taxation, the prevention of double taxation being one of the main purposes for entering into tax treaties;[15]

15 As recognized in the Title and Preamble proposed in the UN and OECD models.

indeed, even cases of double taxation not addressed by the treaty may be dealt with under the MAP.

11. The MAP offers taxpayers an avenue for the resolution of a dispute concerning the application of tax treaty provisions that is distinct and independent from any available domestic dispute resolution mechanisms. While this avenue may not always be successful, it presents some advantages over purely domestic dispute resolution mechanisms:

- The MAP allows a consideration of the issue by tax officials of the two treaty states and any agreement reached in the context of the MAP could impact taxation in both treaty states, whereas the use of a domestic dispute resolution system available in a treaty state would impact only the taxation imposed in that state and thus may not be able to resolve the issue.
- The MAP involves consideration of tax treaty issues by officials who have tax treaty familiarity and expertise, which is not necessarily the case of officials and judges who deal with different types of tax disputes and even non-tax disputes.
- The MAP, being less formal than domestic judicial recourses (especially if such recourses would be required in the two treaty states in order to eliminate double taxation), may be less expensive for taxpayers and tax administrations. It may also provide a quicker resolution of the case in countries where there are lengthy delays in the processing of cases by administrative tribunals and judicial courts.[16]
- The MAP does not preclude recourse to domestic dispute resolution mechanisms in one or both treaty states (although taxpayers may be precluded from pursuing the MAP and such recourses at the same time so as to avoid the risk of conflicting decisions).
- Since the MAP may be initiated as soon as the risk of taxation not in accordance with the provisions of a tax treaty becomes probable, it may involve a quicker access to a dispute resolution mechanism than is possible under domestic law.

5.2.2 Legal basis for the MAP

12. The tax treaty article that provides for the MAP is typically based on Article 25 of the UN or OECD models. Article 25 as found in both models provides three different situations in which the MAP may be used:

- The first situation, by far the most frequent, is where a person that considers that its tax treatment in one or both treaty states is not, or will not be, in accordance with the treaty, requests that this issue be addressed under MAP. This is dealt with in paragraphs 1 and 2 of Article 25.
- The second situation is where tax officials of the two treaty states try to resolve by mutual agreement issues relating to interpretation or application of a treaty provision

16 This is especially true in light of the minimum standard 1.3 of BEPS Action 14, under which countries that have joined the Inclusive Framework on BEPS commit to seek to resolve MAP cases within an average time frame of 24 months (see paragraph 180 below).

(such as the meaning of a term that is not defined in the treaty). These cases are usually related to issues that affect more than one person; they may involve issues of treaty interpretation that concern a category of taxpayers or issues relating to how provisions of the treaty will be applied in practice. This situation is dealt with under the first sentence of paragraph 3 of Article 25.

- The third situation is where the tax officials of the two treaty states consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, where a resident of a third state has a permanent establishment in both Contracting States and double taxation arises because both states tax the profits of the two permanent establishments. This third situation is dealt with under the second sentence of paragraph 3 of Article 25.

13. The guidance included in this chapter deals primarily with cases falling within the first category, which involves requests made to the tax authorities by persons that consider that they have not been taxed in conformity with the treaty.

14. The tax officials of a treaty state who are responsible for applying the MAP are referred to in treaties as the "competent authority" of that state. The term "competent authority" is defined in paragraph 1 (*e*) of Article 3 of the UN Model.[17] While countries are free to choose who is designated for that purpose, it is important that the persons or authorities so designated have sufficient authority to effectively negotiate with their counterparts in the other treaty state and to make binding decisions with respect to the cases brought before them. The competent authority will therefore generally be defined as the relevant minister or head of the tax administration and its authorized representatives, which means that senior officials in the tax administration or the ministry of finance (and not the minister or head of the tax administration personally) will perform the role assigned to the competent authority by the treaty.

15. The UN Model has two versions of Article 25. The only difference between the two alternative versions (alternative A and alternative B) is that alternative B includes an additional paragraph (paragraph 5) which provides for the mandatory arbitration of issues that the competent authorities are unable to resolve within three years. The arbitration process envisaged by that paragraph is discussed in chapter 7. ***[reference to be verified once chapter 7 has been completed]***

16. The following provides a brief description of paragraphs 1 to 4 of both alternative versions of Article 25. Other parts of this chapter provide a detailed analysis of the requirements and obligations of each paragraph and provide guidance on their practical application.

17. Paragraph 1 provides an avenue for taxpayers to ask the competent authority to address potential violations of the provisions of a tax treaty. The requirements of that paragraph are:

17 Paragraph 1 (*f*) of Article 3 of the OECD Model.

- The taxpayer considers that its tax treatment in one or both states is not, or will not be, in accordance with the treaty.
- The case must be presented to the competent authority of the state of residence of the taxpayer or, in cases involving a claim of discriminatory taxation based on nationality to which paragraph 1 of Article 24 could apply, of the state of nationality of the taxpayer.
- The case must be presented within three years from the time the person is notified of the action that allegedly result in taxation not in accordance with the treaty (for instance, a notice of assessment).

18. The only difference between paragraph 1 of the UN Model and paragraph 1 of the OECD Model relates to the second requirement. Paragraph 1 of the OECD Model was modified in 2017 to allow a person to present a case to the competent authority of either state. This difference is discussed below.[18]

19. Paragraph 2, which is identical in the UN and OECD models, sets out the obligations of the competent authority to whom a case is presented under paragraph 1.

20. Paragraph 3, which is also the same in the UN and OECD models, deals with the second and third situations referred to in paragraph 12 above in which the MAP may be used. Under the first sentence of the paragraph, the competent authorities must try to resolve by mutual agreement issues relating to interpretation or application of the treaty. The second sentence of the paragraph also authorizes them to consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, in the case referred to in paragraph 12.

21. The first sentence of paragraph 4, which is the same in the UN and OECD models, authorizes the competent authorities to communicate with each other directly for purposes of the mutual agreement procedure. The second sentence of the paragraph, which has no equivalent in the OECD Model, allows the competent authorities to develop, through consultation, bilateral procedures for the implementation of the mutual agreement procedure.[19]

22. The BEPS Action 14 minimum standard requires that the countries that have joined the Inclusive Framework on BEPS include paragraphs 1, 2 and 3 of Article 25 of the OECD Model in their tax treaties. It does, however, allow these countries to use alternative mechanisms instead of strictly following the wording of the first sentence of paragraph 1 and the second sentence of paragraph 2.[20] As discussed below, this allows these countries to adopt the different formulation of paragraph 1 found in the UN Model.

18 Paragraphs 48 and 112.

19 While paragraph 4 of the OECD Model does not expressly provide that the competent authority may develop such procedures, there is no substantive difference between the two versions because the authorization to develop these administrative provisions can likewise be found in paragraph 3 of Article 25.

20 Element 1.1 of the minimum standard (see Annex).

5.3 Typical treaty issues dealt with through the MAP

5.3.1 List of typical MAP issues

23. As previously mentioned, the vast majority of MAP cases result from requests made by taxpayers under paragraph 1 of Article 25. Issues that give rise to such requests typically result from disagreements related to the facts of a case or to the interpretation of the applicable treaty provisions. They sometimes involve the interpretation of contracts or of provisions of domestic law, such as those related to labor law or copyright law.

24. The Commentary on Article 25 of the UN Model[21] identifies a few common issues that are dealt with through the MAP. The following are examples of such issues:

- *Transfer pricing issues and issues related to the attribution of profits to a permanent establishment.* The MAP statistics of the Inclusive Framework on BEPS[22] include a breakdown of MAP cases based on whether they relate to attribution of profit issues[23] or other cases. According to the statistics prepared for 2017, such cases, which are discussed below in sections 5.3.2 and 5.3.3, represented 54% of reported MAP cases for that year.
- *Whether a permanent establishment exists in a treaty state*. Where, for example, an enterprise of State A does business in State B and State B considers that the business activities exercised on its territory constitute a permanent establishment under the definition of that term in the relevant treaty, State B may tax the enterprise's profits that it considers as being attributable to that permanent establishment as well as other profits referred to in treaty provisions similar to those of paragraphs 1 (*b*) and (*c*) of Article 7 of the UN Model. State A, however, may take the view that there is no permanent establishment and that the treaty gives it the exclusive right to tax the profits of the enterprise. As a result, the profits taxed by State B would also be taxed by State A which may refuse to provide relief from double taxation.
- *Dual treaty residence of a person (individual or legal person)*. For example, an individual who is a resident of both States A and B under the respective domestic laws of these states and who has a permanent home available in both states will, under the provisions of the treaty between States A and B that correspond to paragraph 2 (*a*) of Article 4 of the UN Model, be deemed to be a resident only of the state with which his or her personal and economic relations are closer (centre of vital interests). Based on this test, the individual considers that he or she is a resident of State A for treaty purposes. State B, however, applies the test differently and taxes the worldwide income of the individual on the basis that the individual is a resident of State B for the purposes of the treaty.

21 Paragraph 9, quoting paragraphs 9-10 of the Commentary on Article 25 of the OECD Model.

22 Paragraph 7 and note 2 above.

23 Defined as issues related to the attribution of profits to a permanent establishment or the allocation of profits between associated enterprises and arising under treaty provisions corresponding to Articles 7 and 9 of the UN and OECD models).

- *Alleged application of withholding taxes in contravention to the treaty provisions*. An example would be where a company resident of State A pays a dividend to a company resident of State B and the company withholds tax from the dividend at the rate of 25% provided by State A's domestic law. After the State B company has requested a refund of the tax withheld in excess of the applicable rate provided in paragraph 2 of Article 10 of the treaty between States A and B, the tax authorities of State A reject that request because they consider that the State B company is not the beneficial owner of the dividend. The company disagrees with that view.
- *Issues related to the characterization of income*. An example would be where a company resident of one treaty state considers that a software payment that it received from a resident of the other treaty state constitutes business profits (which, under Article 7 of the relevant treaty, the other state may not tax in the absence of a permanent establishment on its territory) but the other state requests the payment of a withholding tax on the amount paid because it considers that the payment constitutes royalties covered by Article 12 of the treaty.
- *Alleged application of domestic anti-abuse provisions in contravention to the treaty provisions.* For example, under a dividend-stripping rule found in the domestic law of State A, that state taxes as dividends the gain realized by a resident of State B upon an alienation of shares that would otherwise fall within a provision of the treaty between the two states that is similar to paragraph 6 of Article 13 of the UN Model. The taxpayer disagrees with State A's view that the application of the dividend-stripping rule is justified notwithstanding the definition of the term "dividends" in the treaty because the alienation is part of an arrangement that constitutes an abuse of the relevant treaty provision.
- *Alleged taxation by one treaty state in contravention to the treaty rules on non-discrimination.* An example would be where a company resident of a treaty state considers that the denial, under the domestic law of that state, of the deduction of certain payments made to residents of the other treaty state constitutes a violation of a treaty non-discrimination rule similar to that of paragraph 4 of Article 24 of the UN Model.
- *Issues related to cross-border employment*. An example would be where a treaty state taxes the income derived from employment services performed on its territory by a resident of the other treaty state because it considers that the employee spent more than 183 days on its territory during a 12-month period, but the taxpayer disagrees and considers that the exception of paragraph 2 of Article 15 applies to the income.

25. The above list is not an exhaustive list of treaty issues that are raised in MAP cases initiated under paragraph 1 of Article 25. That paragraph allows a person to raise any issue that may have resulted, or may result, in that person being taxed not in accordance with the provisions of a tax treaty.

26. In many cases, taxation not in accordance with the provisions of a tax treaty will result in double taxation: for example, if the amount of withholding tax that is levied in the source state exceeds what is authorized by the treaty, the treaty does not require the residence state to provide a credit for the excess tax and double taxation of the relevant income may result. Double taxation is not a required condition, however, for a MAP case to be initiated; all that is required is that person making a request under paragraph 1 of Article 25 considers that there is, or will be, taxation not in accordance with the treaty provisions.

5.3.2 Transfer pricing issues

27. Given that a large proportion of MAP cases arising under paragraph 1 of Article 25 involve issues related to the allocation of profits between associated enterprises or the attribution of profits to permanent establishments and that, on average, such cases require significantly more time to be processed,[24] it is important to understand the treaty context in which these cases typically arise.

28. Issues related to the allocation of profits between associated enterprises involve the application of treaty rules corresponding to those of Article 9 (Associated enterprises) of the UN and OECD models. These rules deal with transfer pricing adjustments based on the arm's length standard.[25] Paragraph 1 of Article 9 acknowledges that a treaty state may adjust the profits of an enterprise of a treaty state that is an associated with respect to an enterprise of the other treaty state in order to reflect the profits that would have been realized if the enterprises had been dealing at arm's length. In order to avoid that the same profits are taxed by both treaty states, paragraph 2 imposes an obligation on the other treaty state to provide a corresponding adjustment to the profits of the other associated enterprise but only to the extent that the adjustment made by the first state conforms with paragraph 1 of Article 9 and is therefore in accordance with the arm's length standard.[26]

29. The following example illustrates the application of paragraphs 1 and 2 of Article 9. Company A, a resident of State A, is a wholly-owned subsidiary of Company B, a resident of State B. The companies are therefore associated enterprises for the purposes of Article 9 of treaty between States A and B. Following a tax audit of company A, the tax administration of State A takes the position that the company paid an excessive amount for management services

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24 See the OECD MAP statistics, note 2, which show that for 2016 and 2017, MAP cases involving transfer pricing issues were completed on average in 30 months whereas other cases were completed on average in 17 months.

25 Detailed guidance on the practical application of the arm's length principle in the context of Article 9 may be found in the United Nations, *Practical Manual on Transfer Pricing for Developing Countries* (2017), available at http://www.un.org/esa/ffd/publications/united-nations-practical-manual-on-transfer-pricing-for-developing-countries-2017.html as well as in the OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris, https://doi.org/10.1787/tpg-2017-en.

26 Paragraph 3 of the UN Model, which has no equivalent in the OECD Model, indicates that the obligation to provide a corresponding adjustment under paragraph 2 does not arise if, as a result of legal proceedings, there has a been a final ruling that one of the enterprises is liable to penalty with respect to fraud, gross negligence or wilful default in relation to the actions that resulted in the initial transfer pricing adjustment under paragraph 1.

that were provided to it by company B. Based on its analysis of what an independent enterprise would have paid for similar service, State A reduces the amount of the deduction claimed by company A with respect to the payment for these services, which has the effect of increasing the taxable profits of company A and, therefore, the tax payable by the company. This is referred to as the "initial" or "primary" adjustment.

30. The profits on which company B has been taxed by State B, however, include the amount initially charged by that company to company A for the management services. Thus, the additional profits allocated to company A in the initial adjustment made by State A have already been taxed in State B. In order to eliminate such double taxation,[27] paragraph 2 requires State B to reduce the amount of the tax that it charged on those profits (the "corresponding adjustment"). That obligation, however, is dependent on whether or not the initial adjustment made by state A is in conformity with the arm's length standard.

31. Given tax authorities' increased focus on transfer pricing and the element of uncertainty involved in the application of the arm's length principle,[28] transfer pricing adjustments and the obligation to provide corresponding adjustments under paragraph 2 of Article 9 create an important potential for disputes between taxpayers and tax authorities and between tax authorities themselves. As recognized by the last sentence of paragraph 2, which provides that the "competent authorities of the Contracting States shall if necessary consult each other" for the purposes of determining a corresponding adjustment, the MAP plays a critical role in allowing for the resolution of such disputes in a way that ensures that the same profits are not subject to tax in the two treaty states. The BEPS Action 14 minimum standard, which requires countries that have joined the Inclusive Framework on BEPS to "provide access to MAP in transfer pricing cases and implement the resulting mutual agreements (e.g. by making appropriate adjustments to the tax assessed)",[29] acknowledges the importance of allowing such disputes to be dealt with through the MAP:

> … the failure to grant MAP access with respect to a treaty partner's transfer pricing adjustments, with a view to eliminating the economic double taxation that may follow from such an adjustment, will likely frustrate a primary objective of tax treaties. Countries should thus provide access to MAP in transfer pricing cases. Where, in particular, treaty provisions such as paragraph 2 of Article 9 or, in the absence of paragraph 2 of Article 9, provisions of domestic law enable Contracting States to provide for a corresponding adjustment and it is necessary for the competent authorities of the Contracting States to consult to determine the appropriate amount of that corresponding

27 Since this form of double taxation involves two states taxing different taxpayers on the same income, it is often referred to as "economic double taxation" as opposed to "juridical double taxation", which involves two states taxing the same taxpayer on the same income.

28 "As transfer pricing is often referred to as 'an art, not a science', the resulting uncertainty creates the potential for transfer pricing disputes with tax authorities, even if the multinational enterprise is seeking to comply with domestic transfer pricing rules" (United Nations *Practical Manual on Transfer Pricing for Developing Countries*, note 25, paragraph A4.4.14).

29 Element 1.2 of the minimum standard (see Annex).

adjustment with the aim of avoiding double taxation, countries should provide access to MAP.[30]

32. As noted above, access to MAP in transfer pricing cases can thus be allowed even under treaties that do not include the corresponding adjustment provisions of paragraph 2 of Article 9. This is expressly recognized in the Commentary on Article 25 of the UN Model, which provides that "…the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to the text of paragraph 1 – which usually only confirms broadly similar rules existing in domestic laws – indicates that the intention was to have economic double taxation covered by the Convention."[31] In order to avoid any doubt regarding the issue, the final report on Action 14 recommends that, as a best practice,[32] countries should include paragraph 2 of Article 9 in their tax treaties. Similarly, access to MAP should also be allowed where a corresponding adjustment is denied on the basis of paragraph 3 of Article 9 of the UN Model (according to which there is no obligation to make a corresponding adjustment in certain cases involving fraud, gross negligence or willful default) because a taxpayer may reasonably consider that the conditions for the application of that paragraph have not been met. Another issue that may be addressed through the mutual agreement procedure is the application of "secondary adjustments", a question related to the consequences of a primary transfer pricing adjustment which is discussed in the Commentary on Article 9 of the UN and OECD models.[33]

33. Many countries offer taxpayers the possibility of minimizing the risk of transfer pricing disputes through the conclusion of advance pricing arrangements (APAs). The use of APAs, their advantages and the issues that they may raise are discussed in Chapter 2. As explained in Chapter 2, bilateral and multilateral APAs are typically concluded through the use of the mutual agreement procedure.[34]

34. In some cases, the tax administrations of developing countries will have little or no expertise in the area of transfer pricing. The competent authorities of these countries may nevertheless become party to a MAP involving transfer pricing issues. In such cases, they may need to seek assistance and should rely on guidance such as that of the *Practical Manual on Transfer Pricing for Developing Countries.*[35]

5.3.3 Issues related to the attribution of profits to a permanent establishment

35. Issues related to the attribution of profits to permanent establishments involve the application of treaty rules corresponding to those of Article 7 (Business profits) of the UN and

30 Final report on Action 14, note 7, page 14.

31 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 11 of the Commentary on Article 25 of the OECD Model.

32 Best practice 1 (see Annex).

33 Paragraph 7 of the Commentary on Article 9 of the UN Model, quoting paragraphs 8 and 9 of the Commentary on Article 9 of the OECD Model.

34 Annex II of Chapter IV of the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (note 25) provides guidance on the use of the MAP for the conclusion of APAs.

35 Note 25.

OECD models and, in particular, of the provisions of paragraph 2 of that Article.[36] That paragraph contains the basic rule for determining the profits attributable to a permanent establishment and provides that these profits are the profits that the permanent establishment "would have made if, instead of dealing with the rest of the enterprise, it had been dealing with an entirely separate enterprise under conditions and at prices prevailing in the ordinary market".[37] This means that the profits attributable to a permanent establishment should be determined on the basis of the separate entity and arm's length principles.

36. The application of the arm's length principle to the determination of profits attributable to a permanent establishment raises issues that are very similar to those arising in the application of that principle in the context of Article 9, which deals with associated enterprises. The application of the separate entity principle, however, raises a number of additional difficulties[38] since it requires that some transfers of capital, goods and services between a permanent establishment and its head office and between a permanent establishment and other permanent establishments of the same enterprise be treated as if they were transactions between separate enterprises for purposes of determining the profits of the permanent establishment.

37. Another difference between the MAP issues that may arise under Article 7 and Article 9 is that the basic rule of paragraph 2 of Article 7 concerning the attribution of profits to a permanent establishment applies to both treaty states. That rule is therefore relevant not only for determining what may be taxed by the treaty state where the permanent establishment is situated but also what is the part of the profits of the enterprise with respect to which the other treaty state, being the state of residence, must eliminate double taxation in accordance with the rules of Articles 23A and 23B (Methods for the elimination of double taxation). While this means that risks of double taxation should in theory be avoided in many cases since both countries are obliged to apply the same principles for the determination of profits attributable to a permanent establishment, this may not prevent disputes from arising since the practical application of the separate entity and arm's length principles underlying paragraph 2 of Article 7 raises a number of difficult issues. The MAP has therefore an important role to play in order

36 Paragraph 1 of Article 7 of the UN Model, unlike the corresponding provision of the OECD Model, specifies three categories of profits that may be taxed in the state where there is a permanent establishment: (a) profits attributable to the permanent establishment; (b) profits from sales in that state of goods or merchandise that are of the same or a similar kind as those sold through the permanent establishment; (c) profits from other business activities carried on in that state that are the same or of a similar kind as those carried on through the permanent establishment. Most MAP cases related to Article 7 deal with the first category, i.e. the determination of profits that are attributable to the permanent establishment.

37 Paragraph 14 of the Commentary on Article 7 of the UN Model, quoting paragraph 14 of the Commentary on Article 7 of the 2008 OECD Model. While the new version of Article 7 that was included in the OECD Model in 2010 differs significantly from Article 7 of the UN Model, paragraph 2 of this new version also uses the separate entity and arm's length principles as the basis for determining the profits attributable to a permanent establishment (even though it provides a somewhat different interpretation of these principles).

38 Some of these difficulties are addressed in paragraph 15 of the Commentary on Article 7 of the UN Model, quoting paragraphs 12-15.4 of the Commentary on Article 7 of the 2005 OECD Model, as well as in the Commentary on paragraph 3 of Article 7 of the UN Model.

to ensure that the profits attributable to a permanent establishment are determined in a consistent way by both treaty states.

5.4 How does the MAP work?

5.4.1 Overview of the Art. 25(1) MAP process

38. A typical MAP initiated by a person in accordance with paragraph 1 of Article 25 involves different actions that may be regrouped under the following five steps:

1. The MAP request
2. The unilateral stage of the consideration of the MAP case
3. The bilateral stage of the consideration of the MAP case
4. The conclusion of the MAP
5. The implementation of the mutual agreement reached through the MAP

39. The following diagram summarizes each of these five typical steps. The diagram is followed by a flowchart that indicates the main actions involved in each of these steps. Both the diagram and flowchart refer to actions that are typically carried out during the MAP whether or not they are expressly required by the provisions of the relevant treaty. Sections 5.4.2 to 5.4.6 provide additional details on each of the steps. A more detailed table summarizing the different actions involved in a typical MAP with an indicative timetable is included in section 5.4.7. Section 5.4.8 explains the main differences between the process for a MAP under paragraph 1 of Article 25 and a MAP under the first and second sentences of paragraph 3 of Article 25. Section 5.4.9 deals with the communication between competent authorities in the context of a MAP.

THE FIVE STEPS OF A TYPICAL ART. 25(1) MAP

1. The MAP request (section 5.4.2 below)

The MAP begins with a request made to a competent authority in accordance with paragraph 1 of Article 25. The competent authority that receives the request should first notify the person who made the request, and the competent authority of the other treaty state, that it has received the request. It should then assess whether the request meets the conditions for a valid presentation of a case and, if it does, it must determine that it is admissible (such determination that the request is admissible merely means that the request was validly presented and does not involve a decision on the merits of the objection raised in the request).

2. Unilateral stage of the consideration of the MAP case (section 5.4.3 below)

After the request has been determined to be admissible, the competent authority that received it should proceed to examine the merits of the request. At that stage, the competent authority needs to a make a preliminary assessment as to whether the objection raised by the taxpayer is justified. If it concludes that the objection appears to be justified, it should request that its tax administration make the necessary tax adjustment if that can solve the case without the need to consult the competent authority of the other State. Otherwise, it should initiate the next step of the MAP.

3. Bilateral stage of the consideration of the MAP case (section 5.4.4 below)

If the competent authority that received the request considers it to be justified but is unable to resolve the case unilaterally, it must contact the competent authority of the other treaty state and both states must use their best efforts to seek to resolve the case through written communication and, if necessary, oral discussions.

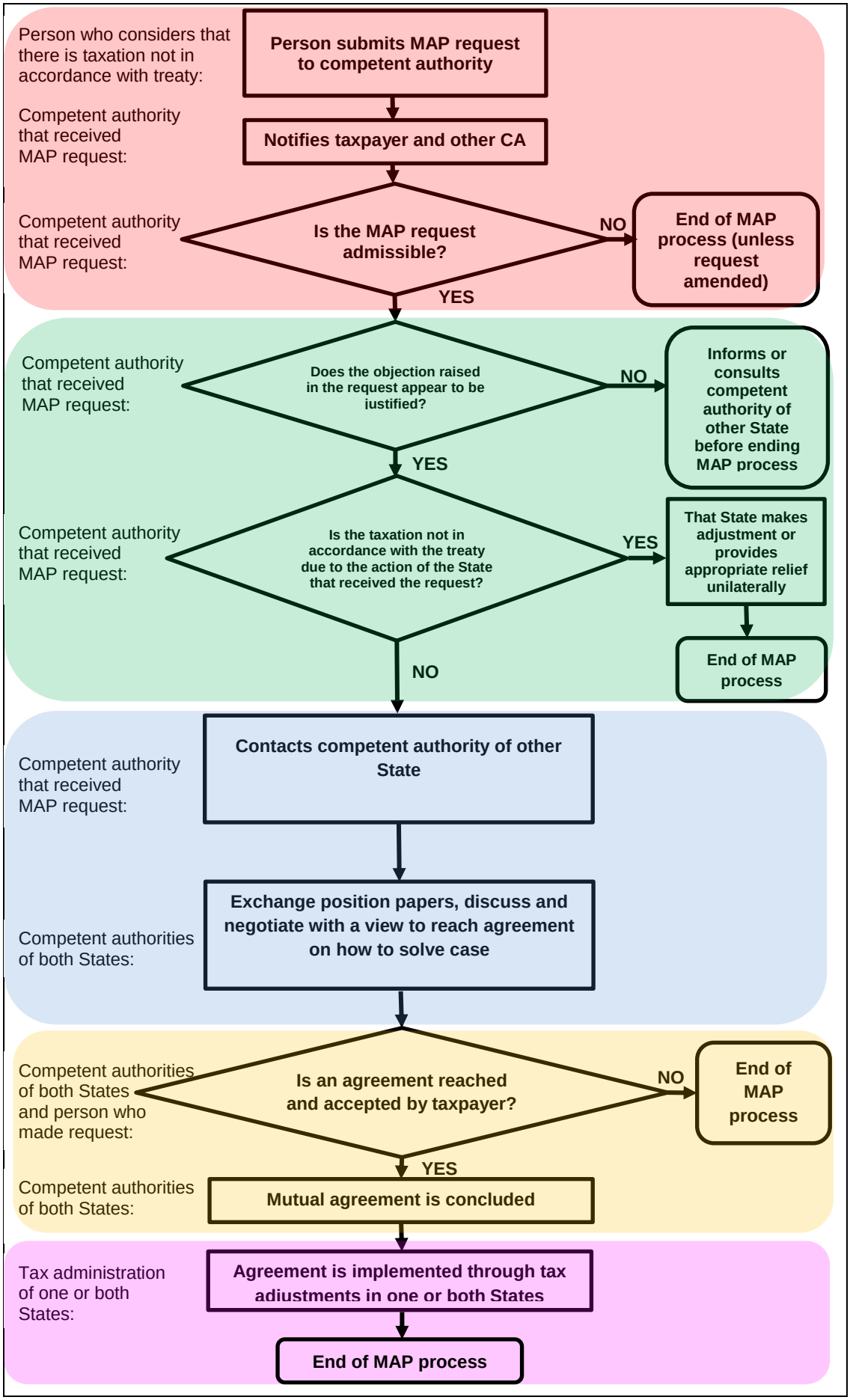
4. Conclusion of the MAP (section 5.4.5 below)

If the competent authorities are able to reach agreement, the contents of a tentative agreement are communicated to the taxpayer. If the taxpayer accepts the agreement, a mutual agreement is concluded by the competent authorities.

In the rare cases where, despite their best efforts, the competent authorities are unable to resolve the case, they should notify the taxpayer that the case has been closed without agreement.

5. Implementation of the mutual agreement (section 5.4.6 below)

Where a mutual agreement has been concluded by the competent authorities, it must be implemented by the tax administration of the State that agreed to eliminate the taxation that was not in accordance with the treaty (or by both tax administrations if the agreement requires tax adjustments in both States).


Person who considers that there is taxation not in accordance with treaty:
Person submits MAP request to competent authority
Competent authority that received MAP request:
Notifies taxpayer and other CA
Competent authority that received MAP request:
Is the MAP request admissible?
NO
End of MAP process (unless request amended)
YES
Competent authority that received MAP request:
Does the objection raised in the request appear to be iustified?
NO
Informs or consults competent authority of other State before ending MAP process
YES
Competent authority that received MAP request:
Is the taxation not in accordance with the treaty due to the action of the State that received the request?
YES
That State makes adjustment or provides appropriate relief unilaterally
End of MAP process
NO
Competent authority that received MAP request:
Contacts competent authority of other State
Competent authorities of both States:
Exchange position papers, discuss and negotiate with a view to reach agreement on how to solve case
Competent authorities of both States and person who made request:
Is an agreement reached and accepted by taxpayer?
NO
End of MAP process
YES
Competent authorities of both States:
Mutual agreement is concluded
Tax administration of one or both States:
Agreement is implemented through tax adjustments in one or both States
End of MAP process

5.4.2 The MAP request

40. The requirements for a MAP request to be validly made under paragraph 1 of Article 25, which are described in paragraph 17 above, relate to which person may make the request, to which competent authority it should be presented and when the request should be made. Each of these requirements, as well as what a MAP request should include, is discussed below.

41. As will be seen in the following paragraphs, countries sometimes apply these requirements differently and may have different views concerning what a MAP request should include. Given these differences and because most taxpayers are unfamiliar with the MAP, the tax administration of each country that has entered into a tax treaty should provide general guidance to taxpayers on the use of the MAP. The importance of doing so is recognized in paragraph 42 of the Commentary on Article 25 of the UN Model as well as in the BEPS Action 14 minimum standard, which requires countries that have joined the Inclusive Framework on BEPS to "publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers".[39] The web site that includes the MAP profiles of these countries[40] allows easy access to the MAP information already published by some of these countries and developing countries may wish to refer to these examples in developing their own MAP guidance.

5.4.2.1 Who is allowed to make a MAP request?

42. Any person, as defined in Article 3 of the UN and OECD Model, may make a request for MAP under paragraph 1 of Article 25 as long as that person considers that the action of either or both treaty states have resulted, or will result, in that person being taxed in a way that would not be in accordance with the provisions of the treaty. There is no requirement of a minimum amount of taxes in dispute for making a MAP request.

43. The person making a MAP request could be a natural person (i.e. an individual) or a legal person such as a company. In most cases, the person will also need to be a resident of one of the treaty states since, under Article 1 (Persons covered), the application of most treaty provisions is restricted to residents of a treaty state. Paragraph 1 of Article 25 of the UN Model, however, recognizes that a person that is a national of one of the treaty states, without necessarily being a resident of either state, may also make a MAP request based on the provisions of paragraph 1 of Article 24, which prevents discriminatory taxation based on nationality and which, under the wording of the UN and OECD models, applies even to persons who are not residents of the treaty states.

44. The requirement that the person consider that it has been, or will be, taxed not in accordance with the provisions of the treaty must be determined from the perspective of the taxpayer.[41] Clearly, when making a MAP request, a person does not have to provide definitive

39 Minimum standard 2.1 (see Annex).

40 See paragraph 203 below.

41 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 14 of the Commentary on Article 25 of the OECD Model

proof that taxation not in accordance with the provisions of the treaty has occurred or will occur. For the purpose of making a valid request, all that is required is that the taxpayer have a reasonable belief that this is the case based on facts that can be established.[42] Whether that belief appears to be founded or not will be determined by the competent authority that receives the request once that request has been found admissible (see section 5.4.3 below).

45. Although MAP requests frequently involve cases of double taxation, a MAP request may be made even if there is no double taxation as long as the request deals with taxation that allegedly contravenes one or more treaty provisions. For instance, cases related to the application of the non-discrimination provisions of Article 24 will often relate to situations where there is no double taxation.

46. MAP requests related to future taxation that may not be in accordance with the treaty provisions are less frequent in practice than requests dealing with taxation that has already occurred. There is no requirement that the anticipated taxation have been assessed or that tax have be paid before a MAP request is made. However, a MAP request dealing with future taxation should only be made when taxation not in accordance with the treaty provisions appears as a risk that is not merely possible but probable. The Commentary[43] includes a few examples of such situations. One of these examples is where a state's domestic transfer pricing rules require a taxpayer to report a higher taxable income from transactions with associated enterprises than what would be required on the basis of the arm's length prices actually used in these transactions, and it is therefore doubtful that a corresponding adjustment will be provided in a treaty state once the taxpayer is assessed by the first state.

5.4.2.2 To which competent authority should a MAP request be made?

47. Paragraph 1 of Article 25 of the UN Model requires that the MAP request be presented to the competent authority of the state of residence of the person making the request or, if the request is based on paragraph 1 of Article 24, which prevents discrimination based on nationality, to the state of which the person is a national.

48. Paragraph 1 of the OECD Model was modified in 2017 to allow a person to present a case to the competent authority of either state. As explained by the Commentary, this change was made in order "to ensure that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure (i.e. be discussed by the competent authorities of both Contracting States) is open to consideration by both competent authorities."[44]

42 Id.

43 Id.

44 Paragraph 17 of the Commentary on Article 25 of the OECD Model. Presenting a case to the competent authority of the treaty state that is not the state of residence may be particularly beneficial in cases when the taxation that is the subject of the MAP request involves a transaction between unrelated parties who may not be able or willing to coordinate to ensure that a request for MAP assistance is made in the state of residence.

49. While the BEPS Action 14 minimum standard requires countries that are members of the Inclusive Framework on BEPS to include paragraph 1 of the OECD Model in their treaties,[45] it allows the use of the version found in the UN Model as long as the country implements "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".[46] Countries that are members of the Inclusive Framework and thus need to comply with the minimum standard should implement such a notification or consultation process if they are not willing to allow their residents to present a MAP case (other than a case related to paragraph 1 of Article 24) to the competent authority of the other state.

50. A taxpayer who files a MAP request with a competent authority of a treaty state may send a copy of that request to the competent authority of the other treaty state[47] (in fact, the practice of some competent authorities is to instruct the taxpayer to provide the request to the other competent authority directly). In these cases, the request should mention that fact in order to facilitate coordination between the competent authorities.[48] A taxpayer may also rely on the competent authority that received the request to provide the request to the other competent authority (see section 5.4.2.11 below).

5.4.2.3 When should a MAP request be made?

51. Paragraph 1 of Article 25 provides that a MAP request must be presented within three years from the first notification to the taxpayer of the action by a treaty state that results (or will result) in taxation not in accordance with the provisions of the treaty. The purpose of that time limit is to prevent tax administrations from having to address objections presented many years after the relevant tax event, since the necessary information may very well no longer be available.

52. Although some bilateral tax treaties provide that a MAP request must be presented within a shorter period of time (typically two years), the Commentary indicates that the three-year period should be considered as a minimum and that countries may agree on a longer period or may even omit the reference to a time limit as long as they agree that their domestic time limits are more favorable to the taxpayer, either because their domestic laws provide a longer limit or do not impose any time limit for such requests.[49] Countries that are members of the Inclusive Framework on BEPS, however, have committed to allow the presentation of MAP requests within a period of no less than three years[50] and could not, therefore, apply a lower time limit.

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45 Minimum standards 1.1 and 3.1 (see Annex).

46 Note 7, page 22.

47 The wording of paragraph 1 in the OECD model permits the request to be presented to both competent authorities at the same time: see paragraph 17 of the Commentary on Article 25 of the OECD Model.

48 See item (*v*) of the suggested contents of a MAP request, paragraph 59 below.

49 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 20 of the Commentary on Article 25 of the OECD Model.

50 Minimum standard 1.1 (see Annex), as interpreted in *BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer review documents*, available at http://www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf, page 11.

53. In order not to unduly prevent access to the MAP, "the first notification of the action resulting in taxation not in accordance with the provisions of the Convention" should be interpreted in the manner most favorable to the taxpayer.[51] The "first notification of the action resulting in taxation" should therefore be interpreted as referring to the notification of the individual action concerning the taxation of a specific person, as evidenced, for instance, by a notice of assessment or an official demand for the payment of tax, as opposed to when an administrative decision that concerns a large number of taxpayers, such as a change of administrative practice concerning how to apply a certain treaty provisions, has been taken. Since the practical application of this principle may raise difficulties, the Commentary illustrates its application in a number of cases,[52] including:

- *Where tax is levied by the deduction of a withholding tax at source*: the three-year period should generally begin to run upon the payment of the relevant income from which tax is withheld allegedly in contravention with the treaty. If, however, the taxpayer can demonstrate that it first became aware of the deduction of the tax at a later date, the beginning of the period should be determined with reference to that later date.

- *Self-assessment cases*: in such cases, there will usually be some notification of the tax payable (such as a notice of tax liability or of the denial, or reduction, of a claim for refund). The time of that notification, rather than the time when the taxpayer files its tax return, would be the starting point for the three-year period. There may be cases, however, where there is no notice of tax liability or similar notification. In such cases, the starting time of the period would be when the taxpayer would, in the normal course of events, be regarded as having been made aware of the taxation allegedly not in accordance with the Convention (e.g. when the taxpayer becomes aware of a transfer of funds representing the tax paid, such as when a bank balance or statement is made available to the taxpayer).

- *Where the taxpayer does not initially consider an action as resulting in taxation not in accordance with the treaty provisions*: the notification of the action is the starting point of the three year period regardless of when the taxpayer becomes aware that such action may be contrary to the treaty as long as "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". The Commentary qualifies that statement, however, as regards self-assessment cases.[53]

- *Where the taxation not in accordance with the treaty is the result of a combination of actions or decisions taken in both Contracting States:* in that case, the starting point of the time limit for presenting a request for MAP assistance should generally be

51 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 21 of the Commentary on Article 25 of the OECD Model.

52 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraphs 22 to 24 of the Commentary on Article 25 of the OECD Model.

53 Where, for example, a taxpayer who filed a tax return and was assessed accordingly is subsequently informed 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 Commentary suggests that the judicial decision would be the starting point of the three-year period.

determined with reference to the notification to the taxpayer of the last of the relevant actions or decisions taken by either treaty state. The example provided by the Commentary is where the state of source levies tax not in accordance with the treaty but the state of residence initially provides relief of double taxation through the exemption or credit method. If the state of residence subsequently notifies the taxpayer that the relief is denied with the result that the taxpayer suffers double taxation, the time period should be considered to begin with the notification of the denial of relief.

54. Many countries consider that MAP requests should be initiated as soon as it appears likely that an issue will result in taxation contrary to the relevant treaty. Since paragraph 1 of Article 25 authorizes the making of a MAP request even before taxation has actually materialized (provided that such taxation is probable), taxpayers are entitled to make such early requests.[54] The early consideration of a MAP case may facilitate the identification of a pragmatic solution before the tax administration and the taxpayer have devoted significant resources to the case.

55. On the other hand, some countries may be concerned about devoting resources to a MAP case until the alleged taxation not in accordance with the treaty has materialized. Their competent authorities may also have difficulties evaluating a case before the audit function has completed its review of the facts and its analysis. While the fact that a competent authority cannot adequately evaluate a MAP case presented at an early stage may lead to a delay in the processing of the case, it would not constitute a valid reason for rejecting a MAP request that otherwise meets the requirements of paragraph 1 of Article 25.

56. Also, some countries allow taxpayers to make so-called "protective" MAP requests. These requests are typically made in order to ensure that the request is made within the required three-year period. The taxpayer who makes such a request agrees that the request should not be examined until further notification, which means that while the competent authority may determine whether the request is admissible, it does not have to examine its merits until such notification is received.[55]

5.4.2.4 Format and contents of a MAP request

57. Article 25 does not include rules or other guidelines concerning the format and contents of a MAP request. While each competent authority may adopt the rules that it feels are appropriate or necessary for that purpose, it is important to maintain a balance between the competent authority's wish to obtain the information necessary to process the case and the need

54 The Commentary recognizes that a request can be made even before the action: see the last sentence of paragraph 21 of the Commentary on Article 25 of the OECD Model, as quoted in paragraph 9 of the Commentary on Article 25 of the UN Model.

55 While countries that are members of the Inclusive Framework on BEPS have committed to seek to resolve MAP cases within an average timeframe of 24 months (minimum standard 1.3; see paragraph 180 below), "protective" MAP requests are not taken into account for that purpose until notification is received to examine the case: *BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer review documents*, note 50, page 52.

not to impose unreasonable compliance requirements on the taxpayer, which could discourage the use of the MAP.

58. In order to facilitate access to the MAP, the MAP guidance that a country should publish[56] should include information on how a MAP request should be presented, to whom it should be presented and what information it should include. The importance of doing so was recognized in the BEPS Action 14 minimum standard,[57] which requires countries that are members of the Inclusive Framework on BEPS to publish guidance on the information and documentation that should be submitted with a MAP request. The specific guidance on the contents and format of a MAP request that has been produced in many countries[58] should obviously be followed in those countries.

59. The documents that were prepared for the purposes of the peer review of the compliance with the BEPS Action 14 minimum standard[59] include the following suggestions as to the information and documentation that could be included in a MAP request.[60] While states will often have different requirements for the contents of a MAP request, the information listed below is typical of what countries would want to find in a MAP request.

56 See paragraph 41 above.

57 Minimum standard 3.2 (see Annex).

58 See paragraph 41 above.

59 Note 10.

60 "Guidance on Specific Information and Documentation Required to be Submitted with a Request for MAP Assistance*",* in *BEPS Action 14 on More Effective Dispute Resolution Mechanisms −Peer Review Documents,* note 50, page 57. Item 6 of the list below, which refers to the situation where "the MAP request was also submitted to another authority under another Instrument that provides for a mechanism to resolve treaty-related disputes" deals with situations where a similar procedure may have been initiated under the EU Arbitration Convention or the EU Council Directive on tax dispute resolution mechanisms in the European Union (see note 1).

SUGGESTED CONTENTS OF A MAP REQUEST

(i) ***Identity of the taxpayer(s) covered in the MAP*** request – the identity of the taxpayer(s) covered in a MAP request must be sufficiently specific to allow the competent authority to identify and contact the taxpayer(s) involved. The information provided should include the name, address, taxpayer identification number or birth date, contact details and the relationship between the taxpayers covered in the MAP request (where applicable).

(ii) ***The basis for the request*** – the MAP request should state the specific tax treaty including the provision(s) of the specific article(s) which the taxpayer considers is not being correctly applied by either one or both Contracting Party (and to indicate which Party and the contact details of the relevant person(s) in that Party).

(iii) ***Facts of the case*** – the MAP request should contain all the relevant facts of the case including any documentation to support these facts, the taxation years or period involved and the amounts involved (in both the local currency and foreign currency).

(iv) ***Analysis of the issue(s) requested to be resolved via MAP*** – the taxpayer should provide an analysis of the issue(s) involved, including its interpretation of the application of the specific treaty provision(s), to support its basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both Contracting Party. The taxpayer should support its analysis with relevant documentation (for example, documentation required under transfer pricing legislative or published guidance, copies of tax assessments, audits conducted by the tax authorities leading to the incorrectly application of the tax treaty provision).

(v) ***Whether the MAP request was also submitted to the competent authority of the other Contracting Party*** – If so, the MAP request should make this clear, together with the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted. A copy of that submission (including all documentations filed with that submission) should also be provided unless the contents of both MAP submissions are exactly the same.

(vi) ***Whether the MAP request was also submitted to another authority under another Instrument that provides for a mechanism to resolve treaty-related disputes*** – If yes, the MAP request should clearly state so and the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted, should be provided. A copy of that submission (including all documentations filed with that submission) should also be provided unless the contents of both MAP submissions are exactly the same.

(vii) ***Whether the issue(s) involved were previously dealt with*** – the request should state whether the issue(s) presented in the MAP request has been previously dealt with, for example, in an advance ruling, advance pricing arrangement, settlement agreement or by any tax tribunal or court. If yes, a copy of these rulings, agreements or decisions should be provided.

(viii) ***A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner*** – the request for any other information or documentation should be well-targeted and responses to the request should be complete and be submitted within the time stipulated in the request for such information or documentation.

60. The following is an example of a fictitious MAP request that would follow these suggestions and would satisfy the requirements of most countries that have published guidance on what a MAP request should include.

EXAMPLE OF A MAP REQUEST

1 November 06

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

Subject: **Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion***

Company XCO Inc., Tax Identification number: STA-123.456.789C

For State A taxation year ending 31 December 01

Dear Ms Doe,

XCO respectfully requests the assistance of the competent authority of State A for the purposes of eliminating taxation not in accordance with the provisions of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* (the "Treaty").

This request follows a notice of tax assessment, dated 1 September 04, that was issued to XCO by the tax administration of State B. That notice required XCO to pay SBP 835,000 (representing SBP 200,000 of corporate tax, SBP 400,00 for taxes that should have been withheld on wages and interest expenses attributable to the PE, SBP 100,000 of penalties and SBP 135,000 of interest) by 1 December 04. It related to XCO's activities in State B during State B's taxable year that ended 31 December 01. A copy of the tax assessment issued by State B is enclosed as Annex [X].

The tax assessment was based on the view that XCO had a permanent establishment in State B in B's tax year 01. The assessment required the payment of State B's corporate tax at the rate of 25% on profits of SBP 840,000 which, according to the tax administration of State B, were attributable to the alleged permanent establishment. Tax of SBP 10,000 previously withheld on a rental payment made to XCO was deducted from the amount of that tax. The assessment also required the payment of SBP 400,000 on account of the tax that allegedly should have been withheld on the salaries of the employees of XCO that were attributable to the alleged permanent establishment and on the interest paid by XCO on borrowed money used for the alleged permanent establishment.

In accordance with Art. 25(1) of the treaty, XCO hereby requests that the competent authority of State A ensures that State A provides relief for the tax assessed by State B for the tax year 01. If State A is not itself able to arrive at a satisfactory solution, XCO requests that the competent authority of State A endeavor to resolve the case by mutual agreement with the competent authority of State B, with a view to the avoidance of taxation which is not in accordance with the Treaty.

IDENTIFICATION

1. *Taxpayer's name and address*: Company XCO Inc., 456 Anystreet, Capital City, State A.

2. *Assessing / adjusting tax administration*: The tax administration that issued the assessment / adjustment that triggered this request is the tax administration of State B. The office that issued the assessment is District 9 Tax Office, 444 Alienstreet, Largetown, State B.

3. *Relevant treaty article(s)*: The relevant articles of the Treaty are Articles 5 (Permanent Establishment), 7 (Business Profits), 12 (Royalties), 23B (Credit Method), and 25 (Mutual Agreement Procedure). The provisions of these articles are identical in all respects to those of the UN Model.

4. *Taxation year(s) involved*: This request relates to the taxation 01 (same taxation year in State A and B).

5. *Prior MAP requests*: XCO has not made a prior MAP request on this issue or any other relevant issue.

6. *Whether the MAP request was also submitted to State B:* Yes. An identical copy of this request has been sent by fax on 1 November 06 to Ms Dame Ma, Assistant-Commissioner and Competent Authority, Ministry of Finance, room 777, 8th Floor, 111 Alienstreet, Largetown, State B, fax +99 8765 4321.

7. *Relevant time limits*: As a general rule, the domestic tax law of State B does not permit a new tax assessment to be made more than 4 years after a prior assessment or the filing of a tax return for the relevant tax year: the domestic law of State B would therefore allow a new assessment if made before 1 September 08.

   As a general rule, the domestic tax law of State A does not permit any adjustment to the amount of tax payable by a person for a given taxable period more than 6 years after the end of that taxable period: the domestic law of State A would therefore allow a new assessment if made before 1 January 08.

   Art. 25(2) of the Treaty provides that a mutual agreement must be implemented notwithstanding any time limits in the domestic law of States A and B.

   Art. 25(1) of the Treaty provides that a MAP request must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention; in this case, the deadline for making the request is 31 August 07, which is three years after the assessment issued by State B on 1 September 04.

8. *Domestic dispute mechanisms*: On 15 October 04, XCO made a formal complaint against the tax assessment issued by the tax administration of State B. The Tax Court of State B, which is the judicial instance to which the complaint was made, will be informed of this MAP request.

9. *Applicable APAs, rulings or similar proceedings:* Not applicable.

10. *Applicable settlement or agreement with the other jurisdiction*: No agreement has been reached with the tax administration of State B concerning the issue raised in this request.

FACTS

1. XCO is a resident of State A.

2. In year 00, XCO concluded a contract with company YCO, a resident of State B, for the dredging of a canal situated in State B that is owned and operated by company YCO. The contract provided that the work would take place over a 4-month period starting on 15 January 01 and finishing on 15 May 01. XCO is not related to company YCO.

3. Employees of XCO arrived in State B on 10 January 01 and carried out the dredging operations in State B from 15 January 01 to 15 May 01 using various dredgers owned by

XCO. Employees of XCO were therefore present in State B during a total period of 125 days during the taxation year 01.

4. After the completion of the contract and before the dredgers were shipped back to State A, XCO leased one of the dredgers to company XCOB, a subsidiary of XCO which is a resident of State B, for a period of two months (1 June 01 to 31 July 01).

5. Company XCOB was incorporated on 15 April 01. On 15 May 01, it concluded separate dredging contracts with company ZCO, the owner and operator of other canals situated in State B, for the dredging of some of these canals. Company XCOB began the performance of these contracts on 1 June 01 and it decided to rent one of XCO's dredgers that were already in State B while waiting for the delivery of a new dredger.

6. XCO's dredger was used in State B by company XCOB's own employees between 1 June and 31 July 01. On 10 August it was shipped back to State A. A withholding tax of 10% (SBP 10,000) was withheld by company XCOB's on the rental payment of SBP 40,000 made to XCO, that rental payment being based on market rates for the rental of comparable dredgers between unrelated parties. The amount withheld was remitted to the tax administration of State B. A copy of the remittance receipt is enclosed as Annex X.

7. XCO took the position that it was not liable to any additional tax in State B for the tax year 01 and, in accordance with State B's domestic law, did not file a return in State B for that year. It also took the position that since it did not have a permanent establishment in State B, it did not have any withholding tax obligations in State B as regards the employment income of its employees who worked in State B in tax year 01 (see Art. 15(2) of the Treaty) and the interest payments that it made in tax year 01 on money borrowed to acquire equipment used in State B (see the second sentence of Art. 11(4) of the Treaty).

8. XCO's tax return filed in State A for the tax year 01 included the profits from its dredging contract with Company Y (SBP 800,000) and from its rental contract with Company XCOB (SBP 30,000). XCO applied against its tax liability in State A a tax credit equivalent to the lower of the tax withheld in State B and the State A tax applicable to net taxable income related to the rental payment received from Company XCOB. As shown below, the amount of that credit was SAD 3,000.

9. The definition of a permanent establishment found in the domestic law of State B provides that a foreign enterprise that carries on business activities in State B during one or more periods aggregating more than 120 days in any 12-month period is deemed to have a permanent establishment in State B in respect of these activities.

10. State B domestic tax law provides for a withholding tax of 10% on payment for royalties and rental charges for the use of tangible property. Until year 05, payment for services were not subject to any withholding tax.

11. In May 04, following an audit of company XCOB, the tax administration of State B wrote to XCO asking why it had not filed a tax return for year 01 even though one of its dredgers was used in State B during a period of seven months (10 January to 10 August) in year 01. After exchanging letters with representatives of company XCO, the tax administration took the position that company XCO had a permanent establishment in State B in year 01 and that the profits from its contracts with companies YCO and XCOB were subject to State B's corporate tax of 25%. In addition, the tax administration of State B took the position that company XCO had improperly failed to withhold tax on salaries and interest payments that were borne by the alleged permanent establishment. Copies of the relevant correspondence are enclosed in Annex [X].

12. On 1 September 04, the tax administration of State B assessed XCO for SBP 835,000 (representing SBP 200,000 of corporate tax, SBP 400,00 for taxes that should have been withheld on wages and interest expenses attributable to the PE, SBP 100,000 of penalties and SBP 135,000 of interest).

COMPETENT AUTHORITY ISSUES

The Taxpayer considers the following are issues to be considered for relief by the competent authority of State A, or to be resolved by mutual agreement with the competent authority of State B:

1. Whether XCO has a permanent establishment in State B in tax year 01 arising from its activities therein, and in particular, whether the mere rental of a dredger to company XCOB should be taken into account in determining the existence of a potential permanent establishment for XCO.

2. If XCO is determined to have a permanent establishment in State B, the amount of profits attributable to such a permanent establishment and the amounts of taxes that should have been withheld at source by XCO on wages and interest borne by the alleged permanent establishment.

3. If XCO is determined to have a permanent establishment in State B in tax year 01, the amount of foreign tax credit available in State A for the tax paid to State B to which XCO is entitled under Article 23B of the Treaty.

4. Whether the amount of penalties and interest included in the tax assessment issued by the tax administration of State B was justified.

ANALYSIS

Issue 1: Determination of existence of a permanent establishment in State B

1. The explanations provided by the tax administration of State B suggest that the position that XCO had a permanent establishment in State B in tax year 01 was based primarily on three arguments.

2. The first argument (the "domestic PE" argument) was based on the presence of employees of XCO in State B for more than 120 days, which is the period of time required for a permanent establishment to exist under the domestic tax law of State B.

3. The second argument (the "183-day presence" argument) was based on the view that XCO was allegedly "present" in State A for more than 183 days in tax year 01, taking into account both the presence of XCO's employees and of XCO's equipment (i.e. the dredger).

4. The third argument (the "similar activity" argument) was based on the view that the renting of the dredger during the period of June-July 01 was arguably related to the dredging operations carried out by XCO between January and May 01.

5. As explained below, we believe that these three arguments are contrary to the proper interpretation of the relevant provisions of the Treaty.

6. Since the term "permanent establishment" is defined in the Treaty, the definition of that term in the domestic tax law of State B is irrelevant for the purposes of the application of the Treaty (although the State B domestic tax law requirement must, of course, also be satisfied to permit an assessment). For that reason, the "domestic PE" argument should be rejected.

7. While the dredging of a canal could constitute a permanent establishment under Art. 5(3)a) of the Treaty if it constituted a construction site or installation project (see paragraph 15 of the Commentary on Article 5 of the 2017 UN Model, quoting paragraph 17 of the Commentary on Article 5 of the 2010 OECD), this would only be the case if that site or project lasted more than 6 months. Since XCO was only involved in dredging activities between 15 January and 10 May 01, that condition was not met.

8. The "183-day presence" argument must equally be rejected. While Art. 5(3)b) of the Treaty deems a permanent establishment to exist where services are furnished in a State during a

period or periods aggregating more than 183 days in any 12-month period, this only applies if the services are furnished "through employees or other personnel engaged by the enterprise for such purpose". XCO's employees were only present in State B between 10 January and 10 May 01, a period that falls short of the required 183 days. Even if one assumes that the rental of the dredger during the June-July period could constitute a service (a view with which we disagree), such "service" could not be considered to have been furnished in State B through employees or other personnel.

9. The "similar activity" argument is equally flawed. The rental of the dredger was not connected in any way with the activities performed in State B by XCO's employees. During our discussion with the tax administration of State B, reference was made to Art. 7(1)c) of the Treaty, which refers to profits attributable to "other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment". That rule, however, is not part of the definition of permanent establishment and is only relevant to determine what may be taxed by a State once a permanent establishment has been found to exist in that State under the definition in Art. 5. In addition, the leasing of equipment cannot reasonably be considered to constitute activities that are of the same or similar kind as the dredging of a canal.

Issue 2: Profit attributable to the alleged permanent establishment and taxes that should have been withheld on payments borne by the alleged permanent establishment

10. The tax administration of State B has determined that the taxable income related to the profits attributable to the alleged PE was SBP 840,000 calculated as follows:

Revenues		
Revenues from contract with YCO	2,000,000	
Revenues from rental of the dredger	40,000	
Total revenues attributable to PE	2,040,000	**2,040,000**
Expenses		
Salaries for employees	600,000	
Travel and accommodation expenses	290,000	
Fuel and maintenance	220,000	
Insurance	10,000	
Interest	15,000	
General administrative expenses	20,000	
Depreciation of dredgers	45,000	
Total expenses attributable to PE	1,200,000	**1,200,000**
Taxable income attributable to the PE		**840,000**

11. The profits attributable to the alleged permanent establishment would obviously depend on what constitutes the alleged permanent establishment. In any event, we do not agree with the tax administration of State B that the income that XCO derived from the short-term rental of the dredger to XCOB should be attributed to the alleged permanent establishment or are profits attributable to "other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment" within the meaning of Art. 7(1)c) of the Treaty.

12. For the purposes of computing the foreign tax credit for the tax withheld on the rental payment for the dredger, the tax return for tax year 01 that was filed by XCO shows the following computation of the taxable income derived from State B (the average exchange rate for year 01 was 2 State A dollar (SAD) for 1 State B Peso (SBP)):

		SBP	SAD
Revenues from rental of the dredger to XCOB		40,000	20,000
Expenses			
Insurance	1,000		
Interest	1,500		
General administrative expenses	2,000		
Depreciation of the dredger for 2 months	5,500		
	10,000	(10,000)	(5,000)
Taxable income derived from State B		**30,000**	**15,000**

13. If it is considered that XCO had a permanent establishment in State B and that the income from the rental of the dredger should be attributed to that PE, the computation of the taxable income derived from State B that needs to be made for the purposes of computing State A's foreign credit would be as follows (the difference with the amount calculated by State B is attributable to the different depreciation rate required by the tax laws of each State for the dredgers used in State B and to the fact that State B restricts the amount of accommodation expenses that are deductible):

Revenues (in SBP)		
Revenues from contract with YCO	2,000,000	
Revenues from rental of the dredger	40,000	
Total revenues attributable to PE	2,040,000	2,040,000
Expenses (in SBP)		
Salaries for employees	600,000	
Travel and accommodation expenses	300,000	
Fuel and maintenance	220,000	
Insurance	10,000	
Interest	15,000	
General administrative expenses	20,000	
Depreciation of dredgers	75,000	
Total expenses attributable to PE	1,240,000	1,240,000
Taxable income attributable to the PE (in SBP)		**800,000**
Taxable income attributable to the PE (in SAD)		**400,000**

14. Finally, if, contrary to the above analysis of Issue 1, it is concluded that, under Article 5 of the Treaty, XCO had a permanent establishment in State B in taxation year 01, it would be unfair to retroactively require XCO to have collected withholding tax on the wages and interest borne by the permanent establishment. The employees of XCO all took the position that no part of their salary for tax year 01 was taxable in State B and the tax administration of State B has not yet assessed these employees for income tax.

Issue 3: Entitlement to credit in State A for tax paid by in State B

15. If, contrary to the above analysis of Issue 1, it is concluded that, under Article 5 of the Treaty, XCO had a permanent establishment in State B in taxation year 01, XCO would be entitled to a tax credit in State A for the amount of tax paid to State B tax calculated under State B tax rules on the profits attributable to that permanent establishment as determined under Issue 2. The credit would be limited to the amount of State A tax attributable to these profits as computed under State A tax rules.

16. The calculation of the foreign tax credit made in the tax return that XCO filed in State A for tax year 01 would be affected by the tax adjustment made by State B. The foreign tax credit for 01 would be SAD 80,000 instead of SAD 3,000, resulting in an overpayment of SAD

77,000 which would need to be reimbursed by State A to XCO together with interest calculated from the date on which XCO filed its tax return for 01.

Issue 4: Payment of penalties and interest

17. The tax administration of State B has imposed penalties of SBP 60,000 for failure to file a tax return for 01 and SBP 40 000 for failure to withhold tax It has also assessed SBP 135,000 of interest on the amount of unpaid corporate tax and withholding tax. If our position that XCO did not have a permanent establishment in State B in tax year 01 should prevail, it seems clear that both the penalties and the interest should be eliminated together with the tax.

REQUEST FOR RELIEF

In light of the above, XCO requests that the competent authority of State A determine whether it considers that the tax assessment dated 1 September 04 issued by the tax administration of State B resulted in taxation in accordance with the provisions of the Treaty.

If the competent authority of State A considers that the assessment resulted in taxation in accordance with the provisions of the Treaty, XCO requests that, in accordance with Article 23B of the Treaty, State A provide a credit to XCO against its tax liability for the tax year 01 for the additional tax imposed by State B through the assessment and that it refund to XCO the overpaid tax together with interest.

If the competent authority of State A considers that the assessment is not in accordance with the provisions of the Treaty, XCO requests that the competent authority of State A contact the competent Authority of State B under Art. 25(2) of the Treaty to negotiate and reach a mutual agreement that eliminates taxation not in accordance with the provisions of the Treaty together with the interest and penalties that were added to the alleged unpaid tax.

On behalf of Company XCO, I certify that all the information and documentation included in this MAP request and annexes is accurate to the best of my knowledge. XCO Inc. will assist you in the resolution of this MAP case by providing in a timely manner any relevant additional information or documentation that you may require.

For further correspondence and additional information concerning this request, please contact

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A
(email at john.smith@network.com; tel: 01 23 45 67 89)

ABC LLP has been mandated by Company XCO Inc. (“XCO”) to present this MAP request on its behalf. The letter authorizing ABC LLP to do so is included in Annex [X].

We appreciate your assistance in this matter.

Sincerely,

[Signed]

Ms Am Elia, director and Chief Financial Officer of XCO Inc
Company XCO Inc.
456 Anystreet,
Capital City
STATE A

[The relevant annexes would be attached to this request]

61. The above example is merely illustrative of what a MAP request could include. In practice, the requests may be less elaborate. As long as a taxpayer provides the information that a country requested in its published guidance on MAP, the competent authority should not seek to deny access to the MAP on the basis that the request that was submitted did not include enough information.[61] It should rather determine that the MAP request is admissible and, if needed, request additional information from the taxpayer as part of its consideration of the case.

62. The taxpayer should make every effort to distill substantive and decisive elements of the case in its MAP request. The MAP request may follow a long and extensive audit process at the end of which an adjustment has been made. During that process, large amounts of documentation will typically have been produced, which may include evidence that is irrelevant to the MAP. Hence, it is essential for the taxpayer to select the substantive and decisive elements of the case when deciding what to discuss in the request. This is particularly important in complex transfer pricing cases.

5.4.2.5 Filing the MAP request

63. In the absence of specific rules, a taxpayer should be able to present its MAP case to the competent authority of a country in the same manner that it would use to present other tax-related objections to the tax administration of that country. To the extent feasible and provided that confidentiality is safeguarded, tax administrations may consider it helpful to allow the electronic submission of a MAP request and other documents to be provided during the MAP.[62] This will facilitate the communication of information from the taxpayer to the competent authorities as well as between the competent authorities.

64. A competent authority will typically not charge a fee for receiving or handling a MAP request, although in some countries there may be fees associated with Advance Pricing Arrangement programs.

65. A requirement for immediate payment of taxes that are contested through a MAP request, or of interest and penalties on such tax, may, if a similar requirement does not apply in the case of a domestic recourse, discourage a taxpayer from making a MAP request. This issue is discussed in section 5.4.2.9.

66. The various requirements as to how a MAP request should be made should not prevent a taxpayer from approaching a tax administration before actually filing a MAP request in order to obtain guidance on the use of the MAP. Such pre-filing contacts may allow taxpayers to learn more about the procedural aspects of the MAP. The tax administration may also learn from the taxpayer's experience with the other treaty state. Taxpayers should be mindful, however, that such pre-filing contacts do not stop the three-year time limit for filing a formal request.

61 As recognized in the BEPS Action 14 minimum standard 3.2 (see Annex).

62 See section 5.4.9.

5.4.2.6 Can access to MAP be denied in certain cases?

67. While competent authorities may provide rules and procedures concerning the format and contents of a MAP request and the manner in which the request should be filed, a taxpayer cannot be prevented from making a MAP request if its case meets the requirements of paragraph 1 of Article 25. The following paragraphs illustrate this principle in relation to three situations in which access to MAP may have been questioned in the past.

Cases involving the application of anti-abuse provisions

68. The issue has sometimes arisen whether a MAP request could be made concerning the application of anti-abuse provisions, whether found in a country's domestic law (e.g. a legislative general anti-abuse rule) or in the treaty itself (e.g. the so-called "principal purposes test" rule of paragraph 9 of Article 29 of the UN and OECD models).

69. There is nothing in the wording of Article 25 of the UN and OECD Models that authorizes a competent authority to deny MAP access merely because the case concerns the application of anti-abuse rules. The incorrect interpretation or application of a treaty anti-abuse rule or the application of a domestic anti-abuse rule in contravention with treaty provisions could clearly result in taxation not in accordance with treaty provisions and thus be the object of a MAP request.

70. This is confirmed in the Commentary,[63] which provides that "[i]n the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure". While the Commentary also notes that some countries may wish to deny access to the MAP in case of serious violations of domestic laws resulting in significant penalties, it makes it clear that this exception must be expressly provided in the treaty itself.[64]

71. As part of the BEPS Action 14 minimum standard,[65] countries that are part of the Inclusive Framework on BEPS have committed to "provide MAP access in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty".[66]

72. Thus, the application of the principal purpose test of paragraph 9 of Article 29 of the UN and OECD Model, which deny treaty benefits in cases of improper use of the treaty provisions,

63 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 26 of the Commentary on Article 25 of the OECD Model.

64 Id., last sentence.

65 Minimum standard 1.2 (see Annex).

66 The explanations of the minimum standard 1.2 also provide that "[i]f a country would seek to limit or deny MAP access in all or certain of these cases, it should specifically and expressly agree on such limitations with its treaty partners, which should include a requirement to notify treaty partner competent authorities about such cases and the facts and circumstances involved." OECD (2015), *Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report*, note 7, paragraph 15.

does not prevent in any way a taxpayer from making a MAP request because it considers that the conditions of the paragraph were not met and treaty benefits should therefore have been granted. Another example is that of paragraph 3 of Article 9 of the UN Model, which applies where there has been a final ruling that one of the associated enterprises is "liable to penalty with respect to fraud, gross negligence or willful default": the effect of the paragraph is to deny the benefits of the corresponding adjustment provisions of paragraph 2 of Article 9 and not to prevent access to the MAP, for instance where the taxpayer considers that the provisions of paragraph 3 have been incorrectly applied.

Domestic audit settlements

73. In many countries, the tax administration is allowed to negotiate with a taxpayer for the purposes of reaching an agreement that will close an audit. Since such an "audit settlement" represents the result of a negotiation process, some tax administrations may wish to restrict access to further recourses, including the mutual agreement procedure, concerning issues that are addressed in that settlement.

74. Since an audit settlement reached in one treaty country does not bind the other treaty country, denying access to the MAP in the case of an audit settlement could result in unrelieved double taxation. For that reason, when concluding audit settlements under their domestic law, tax administrations should not require taxpayers to renounce the right to make a MAP request.[67] This is expressly provided for in the minimum standard on BEPS Action 14, which requires countries that have joined the Inclusive Framework on BEPS to "clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP".[68]

75. For that purpose, however, it is important to distinguish an audit settlement, which is an agreement reached between the taxpayer and the part of the tax administration in charge of audits, from a negotiated settlement reached under a dispute resolution mechanism that is separate from the audit function and that can only be initiated at the request of the taxpayer. Thus, it is acceptable to restrict access to MAP in the case of the settlement of proceedings before an independent party, such as a taxpayer ombudsman, who may only address disputes initiated by the taxpayer. In that case, however, the BEPS Action 14 minimum standard would require a country that has joined the Inclusive Framework on BEPS and that has put in place such a mechanism to notify its treaty partners of that mechanism and to address the impact of that mechanism on access to MAP in its published MAP guidance.

Self-initiated adjustments

76. Some countries allow taxpayers to make changes to a previously-filed tax return in certain circumstances. For instance, it may be possible for a taxpayer to amend a tax return filed a few years before in order to reflect the arm's length price of a transaction entered into

67 Paragraph 45.1 of the Commentary on Article 25 of the OECD Model.

68 Minimum standard 2.6 (see Annex).

with an associated enterprise or of a transfer between a permanent establishment and another part of the same enterprise.

77. Such a change made in good faith in order to reflect the arm's length principle could obviously result in double taxation to the extent that it would increase the profits taxable in one treaty country without a corresponding adjustment to the profits of the associated enterprise or the other part of the enterprise that have been taxed in the other treaty country.

78. In order to ensure that competent authorities are allowed to resolve the double taxation that could arise in such a case of good-faith taxpayer-initiated adjustment, taxpayers should be allowed to access the MAP so that the primary adjustment and a possible corresponding adjustment may be discussed with the competent authority of the other treaty country. This is one of the best practices included in the final report on Action 14.[69] Although this issue is not addressed in the Commentary on the UN Model, a MAP request should not be rejected by a competent authority merely because it results from a good-faith taxpayer-initiated adjustment as long as the request reflects the taxpayer's legitimate concern about the correct application of Article 7 or 9 in its case.

5.4.2.7 What happens if the taxpayer who requests a MAP is also pursuing domestic recourses such as a court challenge?

79. Paragraph 1 of Article 25 provides that access to MAP is available "irrespective of the remedies provided by domestic law". The MAP is a treaty-based dispute resolution mechanism that exists in addition to any recourse allowed by domestic law remedies. For that reason, nothing should prevent a taxpayer from initiating both the MAP and available domestic recourses, such as a court challenge to the action of a tax administration that the taxpayer considers to be in violation of the treaty provisions.

80. Indeed, since Article 25, as drafted in most tax treaties, does not compel the competent authorities to reach agreement under the MAP but only to use their best efforts to do so, a taxpayer will often be well-advised to initiate domestic law recourses, such as judicial or administrative proceedings, in parallel to making a MAP request. While the MAP will generally provide a comprehensive resolution of the taxpayer's case that will be binding on both treaty states, thereby ensuring that double taxation is avoided, the taxpayer should not have to take the risk that if the MAP is ultimately unsuccessful, it will be too late to initiate domestic recourses. Despite the fact that such domestic recourses will only provide a solution in the state in which they are initiated, in some cases they may be sufficient to address the alleged violation of the treaty provisions.

81. While most countries will allow the MAP and domestic recourses to be initiated in parallel, they will also often want to ensure that both processes are not actively pursued simultaneously with the risk of conflicting decisions. In other words, they may require that either the MAP or the domestic recourses be pursued first. In most countries, this will be

69 Best practice 9 (see Annex). The same guidance appears in paragraph 14 of the Commentary on Article 25 of the OECD Model.

achieved by allowing the taxpayer to decide which of the MAP or the domestic recourse is pursued first and by putting the other process on hold (through the mechanisms and to the extent allowed by domestic law[70]) pending the conclusion of the process that the taxpayer chose to pursue first. This is an area, however, where country practice varies and competent authorities are encouraged to follow the best practice, identified in the final report on BEPS Action 14,[71] of providing in their published MAP guidance[72] information on how taxpayers can coordinate the MAP process with any available domestic law remedies.

82. If a country were to allow MAP access only after a taxpayer is precluded from initiating domestic law recourses (e.g. by requiring that the taxpayer waive its right to initiate such remedies or by insisting that the MAP request be made only after the end of the period of time for initiating these remedies), the taxpayer would run the risk of losing the right to initiate domestic recourses while being unable to get a MAP solution to its case because the competent authorities cannot reach an agreement. Allowing a taxpayer to initiate both proceedings in parallel subject to choosing which process will first be actively pursued avoids this issue. In practice, taxpayers will typically prefer to pursue the MAP first and suspend domestic litigation.[73] As explained below, this is due to the fact that the vast majority of countries consider that, once a judicial decision has been rendered in a case by a domestic court, the competent authority of the country is precluded from reaching a different solution through the MAP.

83. Allowing the MAP and domestic recourses to be initiated in parallel while requiring one of the two processes to be actively pursued before the other may, however, give rise to the following issues.

84. Where the MAP is pursued first, most competent authorities would not want to reach a mutual agreement that the two countries would be required to implement while the taxpayer would resume its domestic recourses with the hope of getting a better outcome in one of the two countries. As explained in paragraph 157 below and as recommended in the Commentary,[74] most countries avoid this situation by requiring that the formal conclusion of a mutual agreement be conditional on the taxpayer's express acceptance of the terms of the mutual agreement within a reasonable period of time as well as on the taxpayer's withdrawal of any administrative or judicial proceedings regarding the matters dealt with in the proposed agreement.

70 See paragraph 25 of the Commentary on Article 25 of the UN Model, which discusses how this could be done.

71 Best practice 8 (see Annex).

72 See paragraph 41 above.

73 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraphs 25 and 44 of the Commentary on Article 25 of the UN Model.

74 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 45 of the Commentary on Article 25 of the OECD Model.

85. In some cases, however, the taxpayer who is asked to accept a proposed mutual agreement and to terminate domestic judicial recourses may wish to defer its decision until the court delivers its decision. This issue is discussed in paragraph 161 below.

86. Where domestic law recourses are actively pursued before the MAP, the main issue that may arise is that once a final court decision is rendered, the competent authorities may consider that they do not have the legal authority, through the MAP, to deviate from the final decision of a domestic court (a question that is ultimately a matter of domestic law).[75] If this is the case, the competent authority of the state in which the decision was rendered will consider itself bound by the final decision rendered by the domestic court and will be unable to reach a different conclusion through the MAP. In such circumstances, the only additional relief that the competent authority of that state could pursue for the taxpayer would be to seek relief from the competent authority of the other state. Assume, for example, that following litigation initiated by a State A company, a court of State A confirms a transfer pricing adjustment made by the State A tax administration which had the effect of increasing the profits derived by that company from a non-arm's length transaction with an associated enterprise of State B. Following that court decision, the competent authority of State A will consider that the only thing that it can do through the MAP is to seek to have State B agree to make a corresponding adjustment that would reflect a corresponding reduction of the profits of the enterprise of State B with an eventual refund of the tax paid in State B. The tax administration of State B will not, of course, be bound by the court decision rendered in State A. Any relief provided through the MAP in these circumstances will necessarily depend on whether the competent authority of State B agrees with the adjustment that was made by State A and which was validated by the court.

87. In order to allow taxpayers to make an informed choice as to which of the MAP or the domestic recourses should first be actively pursued, competent authorities should therefore clarify, in their published MAP guidance,[76] whether they consider themselves legally bound to follow a final domestic court decision in the MAP or will not deviate from such a decision as a matter of administrative policy or practice.

5.4.2.8 MAP request related to recurring issues

88. The taxation measure that gave rise to a MAP request for a particular taxation year or event will sometimes have relevance for other taxation years or similar events. For instance, a series of payments made over a number of years pursuant to a transaction that is the subject of a transfer pricing adjustment may give rise to issues affecting the withholding tax on each payment and to issues related to the relief of double taxation that will affect each taxation year during which these payments are made. In these situations, provided that the relevant facts and

75 As noted in the Commentary (see, in particular, the last part of paragraph 42 of the Commentary on Article 25 of the OECD Model), in some countries a competent authority would not be legally bound to follow a court decision and would not be required to do so by administrative policy or practice. In that case, nothing would prevent such a competent authority from reaching a mutual agreement that would depart from the decision of a domestic court.

76 As suggested in the last part of best practice 8 of the final report on BEPS Action 14.

circumstances are substantially the same across the events and years concerned and that this can be verified, it will be efficient to address the recurring issue through a single MAP case covering all the relevant taxation years or similar events. This will avoid substantially similar MAP requests based on the same facts as well as the resulting waste of resources and risk of inconsistent solutions.

89. This is recognized in the final report on BEPS Action 14. According to one of the best practices included in that report,[77] countries should put in place procedures to allow MAP requests for the resolution of recurring issues where the relevant facts and circumstances are the same (subject to verification though audit). As noted in the report, however, this would only be possible with respect to each event or taxation year for which a MAP request may still be made within the three-year time period provided by paragraph 1 of Article 25.

5.4.2.9 Can taxes be collected once a MAP request has been filed?

90. Country practice varies as regards the collection of the taxes that are the object of a MAP request. Some countries seek explicit provisions in their tax treaties that oblige both competent authorities to suspend the collection of such taxes.[78] Other countries allow for suspension or deferral of the collection of such taxes either as a general administrative practice or as a negotiated arrangement with their treaty partners. Yet other countries do not provide for the suspension of the collection of taxes pending the MAP.

91. The Commentary indicates that while Article 25 does not address the question of whether MAP may be denied if the tax in dispute has not been paid, there are various reasons that support the practice of suspending the collection of tax during the MAP.[79] First, suspending or deferring collection furthers the general goal of making MAP more accessible to taxpayers. Even where the competent authorities eliminate double taxation through the MAP, unless collection is also suspended during the negotiation process, the taxpayer may lose the time value of any amounts that are ultimately refunded to it. In addition, even where the taxpayer's pre-MAP tax payment is ultimately reimbursed as a result of a mutual agreement, the taxpayer may face a significant temporary cash flow burden because of the obligation to make that initial payment.

92. Second, countries favoring the suspension or deferral of the taxes that are the object of a MAP believe that doing so incentivizes the competent authorities to negotiate and reach agreements in MAP without delay. That is, if a competent authority has secured the collection of the tax, it may be hesitant to make reasonable efforts to conclude a MAP with the other competent authority.

77 Best practice 5 (see Annex).

78 Paragraph 9 of the Commentary on Article 25 of the UN Model quotes paragraph 48 of the Commentary on Article 25 of the OECD Model which suggests the following additional sentence that countries may add to paragraph 2 of Article 25 for that purpose: "Assessment and collection procedures shall be suspended during the period that any mutual agreement proceeding is pending."

79 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraphs 46 to 48 of the Commentary on Article 25 of the OECD Model.

93. On the other hand, some countries prefer to nevertheless collect or allow for only partial deferral of the taxes that are the object of a MAP in order to avoid any tax collection risks.

94. One of the best practices included in the final report on Action 14 is that countries should take appropriate measures to provide for a suspension of collection procedures during the period a MAP case is pending and that, at a minimum, such a suspension of collection should be available under the same conditions applicable to a person pursuing a domestic administrative or judicial remedy.[80] As recognized in the Commentary, however, the suspension of collection of tax may require legislative changes in a number of countries.[81]

95. Given the economic importance of this issue for taxpayers, countries should make public to both taxpayers and their treaty partners their position with regard to the suspension or deferral of collection of taxes that are the object of a MAP.

96. A similar issue arises with respect to the payment of interest and penalties associated with the tax that is subject to a MAP. This issue is discussed in the Commentary, which recommends that, as is the case for the payment of the tax itself, the requirements concerning the payment of interest and penalties should not be more onerous in the case of request for MAP than they are in the case of a domestic recourse.[82]

5.4.2.10 Withdrawal of a MAP request

97. While Article 25 does not expressly deal with the withdrawal of a MAP request, a taxpayer who made such a request certainly has the right to withdraw the request at any time before the procedure is completed. In fact, the MAP statistics of the Inclusive Framework on BEPS[83] show that in 2017, around 5% of the MAP cases completed in that year were closed as a result of the request being withdrawn by the taxpayer. There are different reasons for which a taxpayer may want to withdraw a request previously made. In some cases, the withdrawal will simply result from the fact that the issue that was the subject of the request was resolved through domestic administrative or judicial remedies.

98. A taxpayer's withdrawal of a MAP request should not preclude a later presentation of another request dealing with the same issue if it is still unresolved, provided that the presentation of the new request is made before the applicable time limit and that the competent authorities, either at the unilateral or bilateral phase of the procedure, have not already reached a proposed conclusion that would have effectively closed the case.

80 Best practice 6 (see Annex).

81 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 48 of the Commentary on Article 25 of the OECD Model. That paragraph also includes a suggested additional sentence that countries may add to paragraph 2 of Article 25 to expressly provide for the suspension of assessment and collection procedures.

82 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 49.4 of the Commentary on Article 25 of the OECD Model.

83 Note 2.

5.4.2.11 Role of the competent authority that receives the request

99. The competent authority which receives a request made pursuant to paragraph 1 of Article 25 will normally perform two initial tasks:

- Determine whether the request is valid and should therefore be considered admissible. While a competent authority may reject a request that does not meet the requirements of the paragraph as interpreted in its own published rules, guidelines and procedures, it does not have the discretion to reject a request that was validly made.[84] Although a valid MAP request must be considered admissible by the competent authority to which it is presented, this simply means that the competent authority will examine the request on its merits and does not imply, at that initial stage, that the competent authority agrees with the taxpayer's position.
- Notify the taxpayer and the competent authority of the other treaty state involved that it has received the request.

Is the request valid?

100. The determination of whether the request is valid is limited to determining that the request meets the requirements of paragraph 1 of Article 25 as interpreted in the country's own published rules, guidelines and procedures on MAP. This initial review of the request will usually require the competent authority to address the following questions:

- *Was the request made in time?* As explained in section 5.4.2.3 5.4.2.3above, paragraph 1 of Article 25 provides that a MAP request must be made within three years from the first notification of the action(s) that allegedly resulted in taxation not in accordance with the Convention. A request that is clearly made after that period would not be admissible as such. The determination of whether a request was made within the required time period will initially be based on the information included in the request and on information readily available to the competent authority. Where, however, the information provided in the request is subsequently found to be incorrect or not to meet the requirements for a valid request, the competent authority that initially considered the request to have been made within the required time limit will certainly be able to reject that request even if it has started to examine its merits.
- *Was the request submitted in accordance with applicable guidance?* Section 5.4.2.4 and 5.4.2.5 above indicate that a country's published MAP guidance[85] will normally determine what should be included in a MAP request and how it should be filed.
- *Does the request contain sufficient information to understand and evaluate the taxpayer's objection?* As mentioned in paragraph 59, a country's published MAP guidance should describe the information and documentation that must be included in a MAP request. The minimum standard on BEPS Action 14, which requires countries

84 In many countries, the decision to reject a MAP request is an administrative decision that could be subject to judicial review by a court under administrative law.

85 Paragraph 41 above.

that have joined the Inclusive Framework on BEPS to publish such guidance, recognizes that a competent authority should not prevent access to MAP "based on the argument that insufficient information was provided if the taxpayer has provided the required information."[86] At a minimum, a MAP request should include the information requested in a country's own published rules, guidelines and procedures on MAP and only the absence of such information should constitute a reason for considering that a request is invalid and should not be considered admissible.

101. When determining whether a request is valid, formalism should be avoided. A competent authority should not, for instance, determine that a MAP request is invalid merely because the request does not satisfy some minor procedural requirement.

102. Given the time limit involved for making a valid MAP request, it is crucial that a taxpayer be quickly informed of whether or not its request has been found admissible. In the event that the MAP request is not found admissible, the competent authority should inform the taxpayer of the reason(s) for the rejection. For instance, the competent authority that receives a request that lacks critical information should quickly indicate to the taxpayer what information is missing so that the taxpayer may submit a valid request before the applicable time limit.[87] Also, instead of rejecting a MAP request that does not include the necessary information, a competent authority may prefer to delay its decision until the missing information is received. When determining whether a MAP request that lacks the necessary information should be rejected, a competent authority should also keep in mind that it will always be able to require additional relevant information when examining the merits of a MAP request.

Notification that a request has been received

103. Following the submission of a MAP request, the competent authority should promptly confirm to the taxpayer that the request has been received. This should be done as soon as possible and not later than four weeks after the receipt of the request.

104. The following is an example of the notification that could be sent to the taxpayer following the receipt of the fictitious MAP request included in paragraph 60 above.

86 Minimum standard 3.2 (see Annex).

87 If a request is found to be invalid, it is reasonable to consider that the taxpayer has not yet presented its case in accordance with paragraph 1 of Article 25 and is therefore still entitled to do so as long as the period of time for presenting a MAP request has not expired.

EXAMPLE OF NOTIFICATION TO THE TAXPAYER OF THE RECEIPT OF A MAP REQUEST

10 November 06

John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* made on behalf of Company XCO Inc.

Tax Identification number: STA-123.456.789C

Mr. Smith,

I hereby acknowledge receipt of the request for mutual agreement procedure that you made on behalf of company Company XCO Inc. for the taxation year ending 31 December 01.

As a first step, we will determine whether that request appears to have been made in accordance with our published guidance on MAP and with Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion*. As soon as a preliminary decision on this matter has been reached, we will inform you and will begin the consideration of the merits of the case.

Please note that any correspondence or additional information concerning this case should be sent directly to me at the address below.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

105. In many cases, a competent authority will be able to inform the taxpayer that the request has been found admissible at the same time that it will confirm the receipt of the request. Where this is not the case, the notification of the receipt should be quickly followed by a notification of the decision as to whether the request is admissible. The following is an example of such a subsequent notification of the admissibility of the fictitious MAP request included in paragraph 60 above.

EXAMPLE OF NOTIFICATION OF THE ADMISSIBILITY OF A MAP REQUEST

20 December 06

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: **Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* made on behalf of Company XCO Inc.**

Tax Identification number: STA-123.456.789C

Mr. Smith,

As a follow-up to my letter of 10 November 06 in which I acknowledged receipt of the request for mutual agreement procedure made on behalf of company XCO Inc. for the taxation year ending 31 December 01, I wish to inform you that, based on an initial review of the information included in the request and in light of Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* and of our published guidance on MAP, the request has been found admissible under our MAP program. We will now undertake to review the merits of that request.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

106. The competent authority that receives a MAP request should also notify the other competent authority of that receipt. The guidelines prepared for the preparation of the MAP statistics of the Inclusive Framework on BEPS[88] recommend that this notification be given within four weeks from the receipt of the MAP request.

107. The following is an example of the notification that could be sent to the other competent authority following the receipt of the fictitious MAP request included in paragraph 60 above.

88 BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer review documents, note 50, paragraph 9 (page 33).

EXAMPLE OF NOTIFICATION TO THE OTHER COMPETENT AUTHORITY OF THE RECEIPT OF A MAP REQUEST

15 November 06

Ms Dame Ma
Assistant-Commissioner and Competent Authority
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject: Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* (the "Treaty") made on behalf of Company XCO Inc. (State A Tax Identification number: STA-123.456.789C)

Dear Ms Ma,

Please be advised that we have received a MAP request from Company XCO Inc., a resident of State A, in accordance with paragraph 1 of Article 25 of the Treaty. The request alleges that a tax assessment issued to XCO Inc. by the tax administration of your country for the taxation year 01 was not in accordance with the provisions of Articles 5 and 7 of the Treaty.

I understand that a copy of the request has already been sent to you by the taxpayer (please let me know if that is not the case).

We will now proceed to determine whether the request is admissible and, if that is the case, we will examine its merits and determine whether we can provide unilateral relief. We will inform you once we have reached a decision in these matters

Please note that any correspondence concerning this case should be sent directly to me at the address below.

I would appreciate it if you could confirm receipt of this notification as soon as possible.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

108. In some cases, a competent authority will be able to determine within a very short period of time that a MAP request is admissible, that the objection included in the request appears to be justified and that it is not itself able to arrive at a satisfactory solution so as to be in a position

to initiate the second stage of the MAP. In such a case, the notification of the request that the competent authority would send to the competent authority of the other state could also serve to indicate that the unilateral stage of the MAP has been completed and to initiate the bilateral stage of the MAP.

5.4.3 The unilateral stage of the consideration of the MAP case

109. The unilateral stage of the MAP begins once the competent authority that received the MAP request has determined that it is admissible. While the competent authority of the other treaty state will have been notified of the request, it will not be directly involved in this stage of the process during which the competent authority that received the request will, according to paragraph 2 of Article 25 of the UN and OECD models,

- examine the merits of the request in order to determine whether it appears to be justified and, if that is the case,
- determine whether it can unilaterally eliminate the taxation not in accordance with the treaty provisions.

5.4.3.1 Consideration of the merits of a MAP case

110. During its examination of the merits of the request, the competent authority will review the facts and analysis presented in the MAP request. If the request relates to an action taken by its own tax administration, it will typically consult the relevant auditors or officials who took that action.

111. If, as a result of its examination of the merits of the request, the competent authority reaches the final conclusion that the taxpayer's objection is not justified, the MAP comes to an end regardless of the position that could eventually be taken by the other competent authority. Given this result, it is important that before reaching that conclusion, the competent authority be convinced that the taxpayer's objection is without merits.

112. Recognizing the risk that a competent authority might wrongly conclude that a MAP request is without merits, in particular where the request alleges that it was the action of the state that received the request that was not in accordance with the treaty provisions, the final report on BEPS Action 14 requires countries that have joined the Inclusive Framework on BEPS[89] to implement the following alternative solutions:

- Amend the wording of their tax treaties in order to allow the taxpayer to present its request to the competent authority of either state,[90] or

89 Minimum standard 3.1 (see paragraph 49 above).

90 As explained in section 5.4.2.2 above, that change was made to paragraph 1 of Article 25 of the OECD Model but was not made in the UN Model, which simply presents it as an option (see paragraph 9 of the Commentary on Article 25).

– Implement a process through which a competent authority that considers that a MAP request that it has received is without merits must notify or consult with the competent authority of the other treaty state involved.

113. According to the final report on BEPS Action 14, this requirement seeks to ensure that the competent authorities of both treaty states "have the opportunity to provide their views on whether the MAP request should be accepted or rejected and on whether the taxpayer's objection is considered to be justified". The report makes clear, however, that the notification or consultation process that it proposes "should not be interpreted as consultation as to how to resolve the case".[91]

114. Where, notwithstanding the possible consultation referred to above, the competent authority that received the request reaches a final conclusion that the objection included in the request is without merits, it should notify the taxpayer that it considers that the taxation that was the object of the request did not violate the treaty provisions and close the MAP case. Such notification should include an explanation of the competent authority's conclusion.

115. The MAP statistics produced for 2017[92] indicate that this happened in only 3% of the MAP cases that were closed during that year. In the vast majority of the cases that reach the unilateral stage of the MAP, therefore, the competent authority that received the request will conclude that there are sufficient reasons to continue the process.

116. When considering the merits of a MAP request, a competent authority will sometimes need to obtain additional information from the taxpayer, especially where the action that led to the MAP request was taken in the other treaty state. The competent authority may also ask the taxpayer for assistance in interpreting the information provided, such as economic models and legal analyses justifying the taxpayer's application of the arm's length standard or its position on other treaty issues concerned.

117. The following illustrates a request for additional information, as well as the response from the taxpayer, in the case of the fictitious MAP request included in paragraph 60 above.

91 Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, note 7, paragraph 35 (page 22).

92 Paragraph 7 and note 2 above.

EXAMPLE OF A REQUEST FOR ADDITIONAL INFORMATION

23 January 07

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: Request for additional information
Company XCO Inc., Tax Identification number: STA-123.456.789C
Taxation year ending 31 December 01

Mr. Smith,

We need to obtain the following additional information in order to determine our position concerning the MAP request referenced above:

1. The changes that would need to be made to the computation of the foreign tax credit claimed by XCO Inc. in its tax return for the taxation year 01 if the tax assessment issued by the tax administration of State B on 1 September 04 were found to be in accordance with the provisions of the Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion.

Please send the requested information within 30 days of the date of this letter.

Please note that If we do not receive the requested information within the requested time, the processing of your MAP request will be delayed and that failure to provide the information could lead to the case being closed without further action.

Yours sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

EXAMPLE OF A RESPONSE TO A REQUEST FOR ADDITIONAL INFORMATION

15 February 07

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

Subject: Request for additional information
Company XCO Inc., Tax Identification number: STA-123.456.789C

Dear Ms Doe,

This letter is in response to your letter dated 23 January 07 in which you informed us that the MAP request referenced above had been determined to be admissible but asking us to provide additional information on the computation of the foreign tax credit to be granted by State A if the tax assessment issued by the tax administration of State B on 1 September 04 were found to be in accordance with the provisions of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion*.

If it were considered, contrary to our position, that XCO had a permanent establishment in State B and that the income from the rental of the dredger should be attributed to that PE, the computation of State A's foreign credit and of the tax payable made in our year 01 tax return would need to be modified as follows:

		Paid to State B (in SBP)	**Declared in 01 (in SAD)**	**After 04 adjustment (in SAD)**
1.	Taxable income for 01		8,000,000	8,000,000
2.	Taxable income attributable to State B (as filed in 01) SBP 30 000 = SAD 15 000		15,000	--
3.	Taxable income attributable to State B (after 04 adjustment) SBP 800 000 = SAD 400 000		--	400,000
4.	Tax payable in State A at 20% (before foreign tax credit)		1,600,000	1,600,000
5.	Tax paid in State B in 01	10,000	5,000	5,000
6.	Additional tax claimed by State B in 04	200,000	--	100,000
7.	State A tax related to State B income (as filed in 01): 20% x 15 000		3,000	
8.	State A tax related to State B income (after 04 adjustment): 20% x 400 000			80,000

9.	Foreign credit: lower of State B tax (lines 5 + 6) or State A tax on State B income (line 7 or 8)		3,000	80,000
10.	Tax payable in State A (line 4 – line 9)		**1,597,000**	**1,520,000**
11.	Overpayment for 01		**77,000**	

If you need any additional information concerning the above or concerning our MAP request, please do not hesitate to contact me.

Sincerely,

[Signed]

John Smith
ABC LLP

On behalf of Company XCO Inc.

118. Circumstances may arise where a taxpayer is involved in the preparation of information that is provided separately to both competent authorities. For example, where a MAP request relates to a transaction between a taxpayer and a related company resident of the other treaty state and that related company has itself presented a MAP request to the competent authority of that other state in relation to the same transaction, the taxpayer may be involved in the preparation of information that is presented to the competent authority of that other state as part of that other MAP request. In such cases where information regarding the same transaction (or set of transactions) is being provided separately to the two competent authorities, the tax authorities should urge the taxpayers involved to ensure that both sets of information are complete and fully consistent.

5.4.3.2 Can unilateral relief be provided?

119. The second part of the unilateral stage of the MAP is for the competent authority that received a request that it considers to be justified to determine whether its own tax administration can provide relief (commonly referred to as "unilateral relief") without the need to consult the competent authority of the other state involved.

120. A typical example of unilateral relief would be where a taxpayer resident of State A makes a MAP request to the competent authority of that state because it has just been asked to pay tax in State B which, according to the treaty between States A and B, should have been paid a few years before. The request seeks to have State A grant a foreign tax credit to the taxpayer for the tax paid to State B with respect to that previous year. Assuming that the information provided to the competent authority of State A is sufficient to establish that the relevant income was taxed by State B in accordance with the treaty provisions and that tax was indeed paid to State B, the competent authority will be able to conclude that the tax

administration of State A is required to provide a foreign tax credit in accordance with treaty provisions corresponding to those of Article 23B of the UN Model.

121. Once a competent authority has determined that it should provide unilateral relief, it should promptly notify the taxpayer of its decision and inform the competent authority of the other state that the MAP case is closed as a result of its decision. The decision then should be implemented promptly. The mechanism that will be used to implement the decision with depend on the nature of the relief, on domestic law and on procedures that might have been developed by the competent authority for that purpose. That implementation will typically require coordination with other parts of the tax administration, such as the service responsible for issuing refunds.

122. The MAP statistics produced for 2017[93] indicate that unilateral relief was provided in 19% of the MAP cases closed during that year. The fact that around 1 out of 5 MAP cases results in unilateral relief shows that competent authorities are often able to resolve MAP cases without the need to initiate the bilateral stage of the MAP.

123. In many cases, however, a competent authority will want to discuss the case with the competent authority of the other state either because it considers that the other state's tax was not levied in accordance with the treaty provisions or because it simply wants to obtain additional information or confirmation concerning the facts or analysis included in the MAP request. In these cases, the competent authority will initiate the bilateral stage of the MAP.

5.4.4 The bilateral stage of the consideration of the MAP case

5.4.4.1 Initiation of substantive discussions with the other competent authority

124. If the competent authority that received the MAP request concludes that the objection included in the request appears to be justified but that it is not able to solve the case unilaterally, it must initiate the bilateral stage of the MAP by engaging with the competent authority of the other treaty state with the objective of jointly arriving at a satisfactory solution of the case. This will typically be done by inviting the other competent authority to provide a position paper or by offering to do so (see the example below).

125. As noted in the Commentary,[94] once the bilateral stage of the MAP process is under way, the competent authorities need to agree on how they will communicate for the purpose of resolving the case. This will naturally depend on the nature of the case but will also depend on whether there is only one or a number of MAP cases between the two countries involved. Different methods of communication may be used for that purpose,[95] including written correspondence, informal consultations through telecommunication, meetings between officials of each country's competent authority service and, more exceptionally, appointment

93 Paragraph 7 and note 2 above.

94 Paragraph 36 of the Commentary on Article 25 of the UN Model.

95 Paragraph 37 of the Commentary on Article 25 of the UN Model.

of a joint commission for a complicated case or a series of cases.[96] Competent authorities should remain flexible and consider every method of communication.

126. In some circumstances, competent authorities of countries that have to deal with a large number of MAP cases will want to record in the form of a memorandum of understanding or similar document the bilateral procedures they have developed for the conduct of the bilateral stage of the MAP. This guidance may be broadly applicable (for example, establishing general objectives or timelines for all MAP cases) or concern a specific sub-set of MAP cases (for example, clarifying documentation requirements for transfer pricing cases). Such arrangements could help promote a consistent approach to MAP cases and advance the MAP process, especially where they free the competent authorities to focus on substantive (rather than procedural) issues.

127. An important initial step in the bilateral discussions of a MAP case is ensuring that both competent authorities are working from the same set of facts and have a common understanding of those facts. The competent authority that initiates the bilateral stage should ensure that the other competent authority has received all the information submitted by the taxpayer with the MAP request or afterwards even if that information will have been submitted by the taxpayer directly to both competent authorities (see paragraphs 50 and 118 above).

128. The following illustrates how the competent authority that received the MAP request could initiate the bilateral stage of the MAP by writing to the competent authority of the other state in the case of the fictitious MAP request included in paragraph 60 above.

EXAMPLE OF A REQUEST FOR BILATERAL DISCUSSION OF A MAP CASE

19 April 07

Ms Dame Ma
Assistant-Commissioner and Competent Authority
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject: MAP request from Company XCO Inc.
State A Tax Identification number: STA-123.456.789C
Taxation year ending 31 December 01

Dear Ms Ma,

This follows up my letter dated 15 November 06 in which I informed you that we had received a MAP request on behalf of Company XCO Inc.

96 See paragraph 4 of Article 25 of the UN and OECD models.

We have found that request admissible and our preliminary assessment of the case suggests that Company XCO's claim that it did not have a permanent establishment in State B in the taxation year 01 would seem to be justified.

I would therefore appreciate receiving your position paper explaining the basis on which your tax administration considered that Company XCO's had a permanent establishment in State A during taxation year 01 and explaining how the profits attributable to the alleged permanent establishment were determined.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

5.4.4.2 Position paper and response

129. A key part of the bilateral stage of the MAP is for the competent authorities to exchange views as to how the treaty provisions should be interpreted and applied to the facts of the case. Each competent authority should seek to provide a reasoned and principled position on how the MAP case should be resolved and should therefore be able to present in a clear manner the treaty and domestic law basis for any relevant tax administration's action taken with respect to the taxpayer.

130. The usual practice for doing so is for one of the competent authorities to present to the other competent authority its own analysis of the MAP case in a document commonly referred to as the "position paper" and to invite the other competent authority to respond to that position paper.

131. In transfer pricing cases, the state that made the initial adjustment will typically be expected to produce the initial position paper because it will have more information about the basis on which it was determined that the relevant transaction was not at arm's length. There is no settled practice, however, in non-transfer pricing cases: in some cases, the competent authority that received the MAP request will offer to present its position paper first while in others it will invite the competent authority of the treaty state that took the action(s) that triggered the MAP request to do so. Country practice varies, however, and it is also possible that each competent authority will want to present its own position paper on the case before commenting on the position paper prepared by the other competent authority.

132. The position paper does not need to follow any specific format; the competent authority is free to structure it as it wishes. A clearly structured position paper that describes a country's standpoint succinctly but comprehensively will support a timely and satisfactory solution of the case. Time invested in the diligent preparation of the position paper may help shorten the overall duration of the MAP.

133. The key point of reference for purposes of the preparation of a position paper should be the provisions of the tax treaty itself. The competent authority should also take account of any guidance promulgated under the treaty, such as a memorandum of understanding, exchange of notes or previous mutual agreement dealing with the meaning of a treaty term or the application of the treaty in specific circumstances. Where a MAP case relates to treaty provisions that are based on those of the UN or OECD models, the Commentary of these models will also constitute relevant guidance. Similarly, the guidance found in the United Nations *Practical Manual on Transfer Pricing for Developing Countries 2017* and in the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*[97] will be relevant when dealing with transfer pricing issues.

134. When the MAP request deals with a tax measure, such as an adjustment or assessment, that originated from auditors or officials of the country of the competent authority that prepares the position paper, these auditors or officials may be consulted during the preparation of that paper.

135. The following is an example of a position paper based on the fictitious MAP request in paragraph 60 above.

EXAMPLE OF A POSITION PAPER

19 April 07

Subject: **Position paper**
MAP request to State A by Company XCO Inc.
State A Tax Identification number: STA-123.456.789C

Our MAP case reference: STBMAP06-12345LT

Dear Ms Doe,

This is in response to your letter of 20 February 07 in which you invited us to provide a position paper explaining the basis on which our tax administration considered that Company XCO's had a permanent establishment in State A during taxation year 01 and explaining how the profits attributable to the alleged permanent establishment were determined.

Please note that this case has been assigned to me and that you may contact me at the address below or by email at rob.inson@fin.gov.sta or by phone at +007 12 2333 4444.

You will find attached the position paper requested.

We hope that you can agree with the conclusions in paragraph 15 of the attached position paper. If not, we would be grateful if you could set out fully the reasons why you disagree with these conclusions.

Unless you consider that a meeting is necessary to resolve this case, I look forward to receiving your response and to closing this case in the near future.

97 Note 25.

The information given in this letter is provided under the terms of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* and its use and disclosure is governed accordingly.

Sincerely,

[Signed]

Mr. Rob Inson, Senior Analyst
State B MAP Program Unit
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

****

17 April 07

MAP request to State A by Company XCO Inc.
State A Tax Identification number: STA-123.456.789C

Our MAP case reference: STBMAP06-12345LT

Position Paper by State B Competent Authority

Facts

The relevant facts of the case may be summarized as follows:

1. In year 00, XCO, a resident of State A, concluded a contract with company YCO, a resident of State B, for the dredging of a canal situated in State B that is owned and operated by company YCO. The contract provided that the work would take place over a 4 month period starting on 15 January 01 and finishing on 15 May 01.

2. Employees of XCO arrived in State B on 10 January 01 and carried out the dredging operations in State B from 15 January 01 to 15 May 01 using different dredgers owned by XCO. Employees of XCO were in State B during a total period of 125 days during the taxation year 01.

3. After the completion of the contract and before the dredger was shipped back to State A, XCO leased one of the dredgers to company XCOB, a subsidiary of XCO which is a resident of State B, for a period of two months (1 June 01 to 31 July 01). On 10 August 01, the dredger was shipped back to State A. A withholding tax of 10% (SBP 10,000) was withheld by company XCOB's on the rental payment of SBP 40,000 made to XCO and was remitted to the tax administration of State B.

4. XCO did not file a return in State B for the taxation year ending 31 December 01. It also took the position that it did not have any withholding tax obligations in State B as regards the employment income of his employees who worked in State B in tax year 01 and the interest payments that it made in tax year 01 on money borrowed to acquire equipment used in State B.

5. On 1 September 04, the tax administration of State B assessed for SBP 835,000 (representing SBP 200,000 of corporate tax, SBP 400,00 for taxes that should have been withheld on wages and interest expenses attributable to the PE, SBP 100,000 of penalties and SBP 135,000 of interest).

Relevant provisions of the State A-State B treaty

6. The most relevant provisions of the Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion (the "Treaty") are Article 12 (Royalties) and Article 12A (Fees for Technical Services). These Articles are similar to Article 12 and 12A of the *United Nations Model Double Taxation Convention between Developed and Developing Countries, 2017 version* (the UN Model).

7. Paragraph 2 of Article 12 allows taxation of royalties that arise in a Contracting State but if the beneficial owner of the royalties is a resident of the other Contracting State the tax cannot exceed more than 10% of the gross amount of the royalties.

8. Paragraph 2 of Article 12A allows taxation of fees for technical services that arise in a Contracting State but if the beneficial owner of the royalties is a resident of the other Contracting State the tax cannot exceed more than 10% of the gross amount of the royalties.

Relevant provisions of the domestic law of State B

9. Sec. 45 of the *Income Tax Law* of State B, as it read throughout year 01, provided for a withholding tax of 10% on all payments made by residents to non-residents for royalties and rental charges for the use of tangible property.

10. While Sec. 47A of the *Income Tax Law* of State B now provides for a withholding tax of 15% on all payments for services made by a resident of State B to a non-resident, that Section was only enacted in year 05 and did not apply to payments made to Company XCO in taxation year 01.

11. Throughout year 01, however, Section 4 of the *Income Tax Law* of State B provided than a non-resident company that had a permanent establishment in State B was liable to tax in State B on the profits of that permanent establishment in the same manner as a company resident of State B. The definition of "permanent establishment" in Section 2 provided that "any foreign enterprise that carries on business activities in State B during one or more periods aggregating more than 120 days in any 12-month period is deemed to have a permanent establishment in State B in respect of these activities." This clearly applies to company XCO Inc. which, in its own MAP request, indicated that its employees were present in State B for more than 120 days in year 01.

Position of State B

12. During taxation year 01, company XCO received two different types of payments from State B residents which may be taxed by State B in accordance with the treaty:

    a. The payment of SBP 2,000,000 made by YCO for dredging services, which constitutes fees for technical services provided by XCO to YCO and as such was taxable under Article 12A of the Treaty but on which no tax was paid by XCO.

    b. The payment of SBP 40,000 made by XCOB for the rental of a dredger, which in accordance with both Article 12 of the Treaty and Section 45 of the Income Tax Law, was subject to a withholding tax of 10%.

13. While it is true that during the relevant taxation year, the domestic tax law of State B did not provide for a withholding tax on fees for technical services, there is nothing in Article 12A that requires that the tax provided by that Article be levied by withholding. Article 12A simply provides that State B is allowed to tax the payment of SBP 2,000,000 but that the tax shall not exceed 10% of that payment (i.e. SBP 200,000). How this taxing right is exercised by State B is purely a matter of domestic law.

14. Once a tax treaty allocates taxing rights to a country, it is a matter of domestic law how these taxing rights are exercised (see, for instance, paragraph 1 of the Commentary on Article 15 of the UN Model, quoting paragraph 12.4 of the Commentary on the same Article of the OECD

Model). Having the right to tax the payment of SBP 2,000,000 (subject of its tax not exceeding SBP 200,000), State B exercised that right with respect to taxation year 01 by taxing XCO under the provisions of its domestic tax law related to permanent establishments. In doing so, it did not apply Articles 5 or 7 of the Treaty, contrary to what the MAP request alleges. It simply used the permanent establishment rules of its domestic law, rather than a more typical withholding tax mechanism, when exercising the taxing rights granted by Article 12A.

15. On the basis of the preceding analysis, we would therefore respond as follows to each of the issues raised in the MAP request:

a. *Whether XCO had a permanent establishment in State B in tax year 01*: our answer to that question is no under the definition of permanent establishment found in the Treaty but yes under the definition of permanent establishment found in State B domestic law, which is only applicable for purposes of the domestic law application of the taxing right granted by Article 12A of the Treaty.

b. *If XCO is determined to have a permanent establishment in State B, the amount of profits attributable to such a permanent establishment*: this question does not arise under the Treaty since there is no permanent establishment for the purposes of the Treaty. Under the domestic law of State B, the profits attributable to the permanent establishment are SBP 1,445,000 (no deduction may be claimed for the wages, insurance, interest and administrative expenses shown in the calculation of profits included in the MAP request since Section 82 of the *Income Tax Law* does not allow the deduction of any payment made to a non-resident on which withholding tax was not applied). That amount is taxable at the corporate rate of 25%, which means a domestic tax of SBP 361,250 but the maximum tax allowed by Article 12A of the Treaty is SBP 200,000.

c. *If XCO is determined to have a permanent establishment in State B, the amount that should have been withheld at source by XCO on wages and interest borne by the alleged permanent establishment*: we agree with the analysis included in the MAP request concerning the absence of a permanent establishment under the Treaty definition of permanent establishment. For that reason, we also agree that the Treaty did not allow State B to tax the wages and interest (note, however, that, as indicated above, no deduction may be claimed for such amounts in computing the State B domestic law profits related to the contract with YCO). For that reason, we agree to reduce the tax owed by XCO by the amount of SBP 400,000 representing withholding taxes on wages and interest.

d. *If XCO is determined to have a permanent establishment in State B in tax year 01, the amount of foreign tax credit available in State A for the tax paid to State B to which XCO is entitled under Article 23B of the Treaty*: based on the above analysis, XCO would be entitled to a foreign tax credit for the amount of SBP 200,000 of tax on its profits from the contract with YCO in addition to an amount of SBP 10,000 of tax on its profits from the rental payment received from XCOB).

e. *Whether the amount of penalties and interest included in the tax assessment issued by the tax administration of State B was justified:* we do not consider that penalties and interest are covered by the provisions of tax treaties, and for that reason, do not consider that these should be discussed in the context of a MAP.

136. The competent authority that receives the position paper should send a reasoned reply to the initial position paper. Ideally, this reply would include the following:

– An indication of whether a view, resolution, or proposed relief presented in the initial position paper can be accepted.

- An indication of the areas or issues where the competent authorities are in agreement or disagreement.
- If relevant, a request for any required additional information or clarification.
- If relevant, other or additional information considered relevant to the case but not presented in the initial position paper.
- In case of disagreement with the solution proposed in the initial position paper, any alternative reasoned proposals for resolution of the case.

137. The following is an example of a response to the preceding position paper based on the fictitious MAP request in paragraph 60 above.

EXAMPLE OF RESPONSE TO THE POSITION PAPER

7 June 07

Mr. Rob Inson, Senior Analyst
State B MAP Program Unit
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject: Response to your position paper
MAP request to State A by Company XCO Inc.
Tax Identification number: STA-123.456.789C

(Your MAP case reference: STBMAP06-12345LT)

Dear Mr. Inson,

Thank you for the position paper included in your letter of 19 April 07.

We have discussed the analysis and positions put forward in your position paper with the representative of Company XCO Inc. You will find below our response concerning your views on each of the issues raised in the MAP request.

1. *Your view that the contract with YCO generated fees for technical services taxable in State B, which State B could tax under its domestic law definition of permanent establishment even though there was no permanent establishment under the Treaty*

I Based on your analysis, I accept the part of the assessment according which an amount of SBP 200,000 of tax is owed by XCO to State B for the taxation year 01.

2. *If XCO is determined to have a permanent establishment in State B, the amount of profits attributable to such a permanent establishment*

Given my response to your views on the preceding issue, I am prepared to accept that tax payable to State B by XCO for year 01 should be limited to 200,000. I therefore do not think that we need to discuss the domestic law computation of that tax, even though I must express reservations on the

part of your position paper that suggests that the wages, insurance, interest and administrative expenses shown in the calculation of profits included in the MAP request would not be deductible.

3. *If XCO is determined to have a permanent establishment in State B, the amount that should have been withheld at source by XCO on wages and interest borne by the alleged permanent establishment*

I am pleased to note your conclusion that in the absence of a permanent establishment under the Treaty, Company XCO did not have withholding tax obligations in State B with respect to the wages and interest paid in 01. We take note of your agreement to reduce the tax owed by XCO by the amount of SBP 400,000 representing withholding taxes on wages and interest.

4. *If XCO is determined to have a permanent establishment in State B in tax year 01, the amount of foreign tax credit available in State A for the tax paid to State B to which XCO is entitled under Article 23B of the Treaty*

As indicated above, I am prepared to recognize that XCO has a corporate tax liability of SBP 200,000 in State B for taxation year 01. Upon payment of that amount, Company XCO will be entitled to a foreign tax credit for its taxation year 01 with respect to the amount of that foreign tax. The amount of the credit will, however, be limited to the amount of tax paid in State A by XCO on the profits associated to the 2,000,000 of revenues received from YCO. The computation of the additional foreign tax credit that will be granted will therefore be made based on the domestic tax law rules of State B.

5. Whether the amount of penalties and interest included in the tax assessment issued by the tax administration of State B was justified.

*O*n the basis of your own analysis, it seems clear to us that whereas there may be an argument for maintaining the penalty of SBP 60,000 for failure to file a tax return for 01, the penalty for failure to withhold tax should be eliminated. As regards the interest, we consider that only the interest on 200,000 of unpaid tax should be payable; there should be no interest charged on the amount of withholding tax since, by your own admission, no withholding tax was payable.

While it is true that tax treaty provisions do not address the issue of interest and penalties, this is an issue that should be addressed when you will implement the mutual agreement that will result from this case. As indicated in paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 49 of the Commentary on Article 25 of the OECD Model. “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.”

Based on the preceding, I would suggest that we discuss the remaining issues of this case by phone. I would propose to schedule that call for 10.00am (Capital City time) on Tuesday 25 June. Please let me know whether this suggestion and the proposed time are acceptable to you.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

138. There may be cases in which such a detailed response to the initial position paper will not be necessary, e.g. if face-to-face meetings are imminent or the receiving competent authority simply informs the competent authority that produced the position paper that it completely agrees with the views and solution put forward in the position paper.

139. Either competent authority may request additional information or clarification as the MAP discussions develop, either from each other or from the taxpayer. Such requests should be made, and responded to, as soon as practicable, given that delays in receiving additional information or clarification may delay the substantive consideration (and thus the resolution) of a MAP case. More generally, the competent authorities should endeavor to exchange all relevant information well in advance of any meetings that may be agreed to. Where both competent authorities have adequate time prior to a meeting to review the materials and to consider fully the case and issues, the competent authorities can make the most effective use of their meeting time and the MAP consultations will be more productive.

140. While there is no time limit for the conclusion of the bilateral phase of the MAP,[98] competent authorities should strive to resolve cases in a timely manner and keep the taxpayer informed of the status of their request on an on-going basis. Time will be saved, for instance, if competent authorities use a common language in all communications that do not legally require the use of an official language. It will also be helpful for the competent authorities to advise each other on a regular basis (for example, every three months) of their progress on a MAP case; such regular updates should keep both competent authorities focused on the details of the case and its overall progress, and should thereby facilitate its timely resolution. Also, where a competent authority encounters delays in the preparation or review of a position paper, it should inform its counterpart of the reasons for the delay and provide a projected timeframe for completion.

5.4.4.3 Treatment of interest and penalties associated with the taxes at issue in a MAP case

141. Article 25 does not directly address the treatment of any interest and penalties that are associated with the taxes at issue in a MAP. As indicated in the Commentary on Article 2 (Taxes covered), most countries do not consider that Article 2 of the UN and OECD models, which determines which are the taxes covered by the treaty, applies to interest and administrative penalties associated to taxes that are themselves covered by that Article. The Commentary goes on, however, to indicate that "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."[99]

98 Some treaties, however, provide for the mandatory arbitration of unresolved issues after a certain period of time: see paragraph 5 of Article 25 Alternative B of the UN Model and the corresponding provisions of the OECD Model, which are discussed in Chapter 7. It should also be noted that the countries that have joined the Inclusive Framework on BEPS have committed "to seek to resolve MAP cases within an average timeframe of 24 months" (minimum standard 1.3; see Annex).

99 Paragraph 4 of the Commentary on Article 2 of the UN Model, quoting paragraph 4 of the Commentary on Article 2 of the OECD Model. A similar statement is included in paragraph 9 of the Commentary on

This only applies, however, where the interest/penalties are computed with reference to the amount of the underlying tax liability or some other amount relevant to the determination of tax.

142. An example provided by the Commentary is where interest and administrative penalties based on the amount of a transfer pricing adjustment are imposed by a country at the time of making that transfer pricing adjustment and that adjustment is subsequently reduced or withdrawn as a result of a mutual agreement. In that case, the interest and penalties should be proportionally reduced.

143. The Commentary adds that some countries may prefer to amend paragraph 2 of Article 25 to expressly provide that the competent authorities shall endeavor to agree on the application of domestic law provisions related to interest and administrative penalties related to a MAP case.[100] In any event, as recognized by the final report on Action 14, it is a good practice for countries to make sure that their positions regarding the treatment of interest and penalties are publicly known.[101]

144. Since interest is typically calculated on the basis of the amount of tax charged, it should be relatively straightforward to determine when it is directly connected to the underlying tax liability and should therefore be withdrawn or reduced as a result of a mutual agreement. A different issue may arise where a treaty country has required the immediate payment of an amount of tax that is subject to a MAP and that amount is subsequently reduced or eliminated as a result of a mutual agreement. In that case, that country should pay a reasonable amount of interest on the amount of tax that will be reimbursed to the taxpayer.[102] This will be particularly important if there are differences between the domestic law of the two treaty states on the accrual of interest on tax liabilities and refunds. Assume, for instance, that a MAP results in the confirmation of a tax liability in one country and a corresponding refund of tax in the other country. If the first country has collected the relevant tax prior to the MAP or charges interest on the late payment of that tax but the other country does not pay interest on the corresponding amount of tax refunded to the taxpayer, this will result in a substantial economic burden on the taxpayer.

145. As noted in the Commentary, countries should try to adopt flexible approaches with respect to the provision of relief for interest in the MAP. Such relief from interest is especially appropriate for the period during which the MAP is ongoing process, given that the amount of time it takes to resolve a case through the MAP is, for the most part, outside the taxpayer's

Article 25 of the UN Model, quoting paragraph 49 of the Commentary on Article 25 of the OECD Model.

100 Last sentence of paragraph 49.1 of the Commentary on Article 25 of the OECD Model, as quoted in paragraph 9 of the Commentary on Article 25 of the UN Model.

101 Best practice 10 (see Annex).

102 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting the last part of paragraph 48 of the Commentary on Article 25 of the OECD Model.

control. It is recognized, however, that in some cases, changes to the domestic law of a country may be required to permit the competent authority of that country to provide interest relief.[103]

146. The decision of whether to allow relief in MAP for penalties associated with taxes that are reduced or eliminated through a mutual agreement will depend on the nature of the specific penalty. Certain penalties - for example, a penalty for failure to maintain proper transfer pricing documentation - may concern domestic law compliance issues that are not connected to the tax liability that is the subject of a MAP. In these cases, as well as in the case of criminal penalties, the competent authorities may be unable or unwilling to discuss them in the MAP.[104] Competent authorities may, however, agree under paragraph 3 of Article 25 to reduce or withdraw any administrative penalties that are not based on the amount of the underlying tax liability where the MAP reveals that there was no cause for such penalties. For example, where there is a penalty for fraud or willful conduct and such conduct was found to not be present in a MAP, the penalties may be withdrawn.[105] Some countries may also be willing to provide relief from penalties through the MAP even where the adjustment that gave rise to the MAP is fully or partially sustained in the MAP. A country may feel that such relief is appropriate, for example, if it appears after MAP review that the application of the penalty is no longer justified.

5.4.4.4 Taxpayer's involvement in the MAP

147. The MAP is a government-to-government process through which issues related to the interpretation and application of tax treaties may be discussed and resolved between the competent authorities, which are the two parties involved. The taxpayer is therefore involved only in certain parts of the process, typically:[106]

- Submitting the MAP request and ensuring that both competent authorities have all of the information required to consider the case (see sections above);
- Offering, or responding to requests for, engagement with each competent authority as they analyze the issues at hand and prepare position papers and replies (see below), and
- Accepting or rejecting the proposed mutual agreement (see section 5.4.5.2 below).

148. While this reflects the general practice of most competent authorities, tax treaties do not preclude a more active participation by the taxpayer in the MAP process if competent authorities consider it appropriate. For instance, competent authorities may permit taxpayers to present briefs or make presentations to both competent authorities as part of the MAP process. The material presented may in some cases also include the taxpayer's proposals for

103 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting the last part of paragraph 49.3 of the Commentary on Article 25 of the OECD Model.

104 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraphs 49.1 and 49.2 of the Commentary on Article 25 of the OECD Model.

105 Id.

106 In some countries, domestic law may impact the extent to which a taxpayer is involved in the MAP process.

the resolution of a MAP case. Both competent authorities should be encouraged to communicate with the taxpayer.

149. Providing taxpayers with appropriate opportunities to present relevant information may help both competent authorities to reach a common understanding of the facts and issues, especially in particularly complex MAP cases, and thereby improve the functioning of the MAP. Competent authorities may wish to use their published MAP guidance to make their positions regarding taxpayer involvement in the MAP process known to both taxpayers and other competent authorities.

150. Even though a taxpayer will usually not be directly involved in MAP discussions, the competent authority to which a MAP request was submitted should regularly communicate with the taxpayer regarding the status of its case and the relevant consultations. Such regular communication will encourage the taxpayer to cooperate when requested (for example, by promptly submitting additional information when requested) and will also contribute to the overall transparency of the MAP process.

5.4.5 The conclusion of the MAP

151. A MAP case typically reaches its conclusion when one of the following occurs:

a) The competent authority to which the MAP request was presented considers that the actions taken by both treaty states resulted in taxation that was in accordance with the provisions of the treaty and that the request is therefore without merit.

b) The competent authority to which the MAP request was presented provides unilateral relief that eliminates the taxation that was not in accordance with the provisions of the treaty.

c) The MAP request is withdrawn by the taxpayer or becomes irrelevant because the taxation not in accordance with the provisions of the treaty has been eliminated through other mechanisms (such as a domestic court decision).

d) The competent authorities of both treaty states reach a mutual agreement after a proposed agreement was presented and accepted by the taxpayer.

e) A proposed agreement was presented to the taxpayer by the competent authorities but the taxpayer rejected that proposed agreement.

f) The competent authorities conclude that they cannot reach agreement or the case is no longer actively pursued (e.g. as a result of inaction by the taxpayer).

152. Situations where a MAP case does not proceed to the bilateral stage of the MAP, where the request is withdrawn or where taxation not in accordance with the treaty is eliminated as a result of domestic remedies have already been dealt with. The following paragraphs address the cases where the competent authorities reach a proposed agreement and the rare cases where there is no agreement.

5.4.5.1 Proposed mutual agreement

153. When the competent authorities reach a tentative agreement in a MAP case, they should document the details of that proposed agreement in writing. Their correspondence should describe the extent to which each state will provide relief, the method of relief, when and for which period the relief will be provided as well as any other relevant details.

154. In order to avoid possible disagreement as to what was agreed to during the MAP discussions, facilitate the presentation of the proposed agreement to the taxpayer and expedite the implementation of the agreed solution once accepted by the taxpayer, this correspondence should take place as soon as possible after the conclusion of these discussions.

155. When the solution is tentatively agreed to during a meeting which could involve the discussion of a number of MAP cases, the proposed solution of each case completed during the meeting could be documented through the agreed minutes of the meeting.

5.4.5.2 Taxpayer's notification and acceptance of a proposed agreement

156. The taxpayer should be promptly notified of the proposed agreement. If two taxpayers are involved (which is often the case in transfer pricing MAP cases), each competent authority will typically notify the taxpayer that is its own resident. In other cases, the notification will be provided by the competent authority that received the MAP request unless agreed otherwise. The manner in which a competent authority will provide this notification may be governed by domestic law or administrative practices. The notification may, for example, take the form of a letter providing a short description of what was tentatively agreed to and/or an oral presentation. The following provides an example of a letter notifying the taxpayer of the proposed agreement reached as regards the fictitious MAP request referred to in paragraph 60 above:

EXAMPLE OF A NOTIFICATION TO TAXPAYER OF THE PROPOSED AGREEMENT REACHED

28 June 07

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: Proposed mutual agreement under Art. 25(2) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* made on behalf of Company XCO Inc.

Tax Identification number: STA-123.456.789C

Mr. Smith,

As you are aware from our previous conversations, I have exchanged correspondence and had phone conversations with my counterpart in State B concerning the mutual agreement request referred to above.

My discussions with the competent authority of State B have allowed us to reach the following conclusions and we now consider the case to be settled, subject to your agreement:

– *Amount of 200,000 of unpaid corporate tax included in the tax assessment issued by the tax administration of State B*: Both competent authorities agree that Company XCO did not have a permanent establishment (within the meaning of the Convention) in State B during the relevant period. Based on our earlier conversation and for the sole purpose of reaching an agreement that would eliminate double taxation, we have conceded, however, that the payment of SBP 2,000,000 made by Company YCO to Company XCO for dredging services performed in State B is taxable by State B pursuant to Article 12A of the treaty. An amount of SBP 200,000, which is the maximum amount of tax allowed by the treaty, is therefore owed by XCO to State B for the taxation year 01.

– *Amount of unpaid withholding taxes included in the tax assessment issued by the tax administration of State B:* In the absence of a permanent establishment within the meaning of the Convention, Company XCO did not have withholding tax obligations in State B with respect to the wages and interest that it paid for work performed in State B in 01. The amount of SBP 400,000 of unpaid withholding taxes related to wages and interest paid by Company XCO that was included in the tax assessment of 4 September 04 will be withdrawn by the tax administration of State B.

– *Foreign tax credit in State A:* Upon proof of the payment of 200,000 of tax to State B for the taxation year 01, we will recognize that company XCO is entitled to claim a foreign tax credit in State A for the same taxation year. That credit will correspond to the lower of the amount of SBP 200,000 (expressed in SAD at the rate applicable at the date of the payment to State B) and the amount of tax paid in State A by XCO on the profits associated to the 2,000,000 of revenues received from YCO.

– *Amount of penalties and interest included in the tax assessment issued by the tax administration of State B:* The penalty of SBP 60,000 imposed on Company XCO for failure to file a tax return in State B for taxation year 01 will be maintained but the penalty of SBP 40,000 for failure to withhold tax will be withdrawn by the tax administration of State B. The interest of SBP 135,000 included in the assessment of 4 September 04 will be reduced so that interest is only charged on 200,000 of unpaid tax to be calculated by the tax administration of State B from the day when the tax return for year 01 was due to be filed in State B.

I look forward to receiving written confirmation, before 6 July 07, that you agree with the terms of the agreement and agree to terminate or renounce to any domestic law recourse that might still be available concerning the issues raised by your request.

Sincerely,

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

157. The Commentary on Article 25 of the UN Model indicates that "in most countries, a mutual agreement cannot be finalized before the taxpayer has given agreement and renounced domestic legal remedies."[107] In order to avoid a situation where the competent authorities

107 Commentary on Article 25 of the UN Model, footnote 51.

would conclude a mutual agreement that would be binding on the tax administrations of the treaty states but where the taxpayer would resume or initiate judicial proceedings in order to obtain a different result in one of these states, the Commentary goes on to recommend that the conclusion of a mutual agreement be subject to the taxpayer acceptance and to the termination and relinquishment of any available domestic law recourse, such as continuing previously-suspended court proceedings on the same matters as those dealt with through the MAP,[108] even though Article 25 does not expressly require such acceptance.

158. As a general rule, a taxpayer will not be permitted to accept only parts of the proposed agreement (such as the decisions tentatively reached with respect to certain issues or certain taxable periods) unless both competent authorities agree to such a partial acceptance. Since the proposed agreement may represent a series of compromises and concessions, the competent authorities may find it unacceptable, especially in complex cases, to separate the proposed agreement into different parts and to accept only some parts of the overall negotiated solution.

159. The competent authorities may, however, wish to consider any alternative proposed solution that the taxpayer could formulate at this stage. This could be particularly helpful where the taxpayer identifies unforeseen consequences that the proposed agreement could have. In such cases, the competent authorities will be able to modify the proposed agreement before it is finalized.

160. A taxpayer presented with the terms of a proposed agreement could obviously decide to reject it. The experience of countries that have substantial experience with the MAP suggests, however, that in practice it is very rare for a taxpayer to do so.

161. A taxpayer may also wish to defer acceptance of the proposed mutual agreement until the conclusion of ongoing judicial proceedings in one of the treaty states dealing with the same issues. While the Commentary on the UN and OECD models[109] indicates that there would no grounds for rejecting a request for such a deferred acceptance, as an efficiency and administrative matter, the practice of some competent authorities is to require that the taxpayer express his acceptance or rejection of the MAP resolution within a specified number of days.[110]

162. Where the taxpayer definitively rejects the proposed agreement, the competent authorities may consider that the MAP has reached its conclusion. In that case, the competent authority to which the MAP request was presented should formally notify the taxpayer that the MAP case has been closed. In that case, it is open to the taxpayer to resume or initiate any

108 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 45 of the Commentary on Article 25 of the OECD Model.

109 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 42 of the Commentary on Article 25 of the OECD Model. The Commentary on the UN Model adds, however, that one member of the UN Committee of Experts disagreed with that view and considered that a taxpayer should decide within a reasonable period of time whether to accept the proposed agreement and should not be allowed to defer acceptance until a court has delivered its decision.

110 The Commentary also notes that the competent authorities may take the view that where a taxpayer has undertaken both a MAP and judicial proceedings on the same issues, they will defer discussing the MAP case in depth until a court decision has been rendered.

domestic tax remedies that may still be available concerning the issues that were the subject of the MAP case.

163. Where the proposed agreement has been accepted by the taxpayer and, as part of that acceptance, domestic legal remedies have been terminated or relinquished, the next step is the formal conclusion of the mutual agreement by the competent authorities. This may involve an exchange of letters between the competent authorities confirming the proposed agreement. Alternatively, the proposed agreement reached between the competent authorities may have been drafted in the form of a conditional agreement subject to the acceptance of the taxpayer, which means that once this condition is met, the mutual agreement is automatically concluded.

164. The following provides an example of an exchange of letters by the competent authorities (sometimes referred to as "closing letters") concerning the agreement reached as regards the fictitious MAP request referred to in paragraph 60 above:

EXAMPLE OF CLOSING LETTER FROM STATE A TO STATE B

4 July 07

Mr. Rob Inson, Senior Analyst
State B MAP Program Unit
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject: Closing of MAP request made by Company XCO Inc.
Tax Identification number: STA-123.456.789C
Taxation year ending 31 December 0101

(Your MAP case reference: STBMAP06-12345LT)

Dear Mr. Inson,

As a follow-up to our successful conversation on 25 June 07 and to my exchange of emails with Mr. John Smith on 28 June 07, when I was informed that Company XCO accepted the proposed agreement that we reached, I would like to confirm the agreement that we have reached in the MAP case referred to above:

- *Amount of 200,000 of unpaid corporate tax included in the tax assessment issued by the tax administration of State B:* The amount of SBP 200,000 of unpaid corporate taxes that was included in the tax assessment of 4 September 04 will be maintained and a new assessment replacing the one issued on 4 September 04 will be issued by the tax administration of State B for that amount as well as for the revised amount of penalties and interest referred to below.

- *Amount of unpaid withholding taxes included in the tax assessment issued by the tax administration of State B:* The amount of SBP 400,000 of unpaid withholding taxes related to wages and interest paid by Company XCO that was included in the tax assessment of 4 September 04 will be withdrawn by the tax administration of State B.

– *Foreign tax credit in State A:* Upon proof of the payment of 200,000 of tax to State B for the taxation year 01, the tax administration of State A will recognize that company XCO is entitled to claim a foreign tax credit in State A for the same taxation year. That credit will correspond to the lower of the amount of SBP 200,000 (expressed in SAD at the rate applicable at the date of the payment to State B) and the amount of tax paid in State A by XCO on the profits associated to the 2,000,000 of revenues received from YCO. The computation of that additional foreign tax credit will be made by the tax administration of State A on the basis of the domestic tax rules of State A.

I propose that this letter and your reply thereto constitute a mutual agreement between the competent authorities of our two States within paragraph 2 of Article 25 of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* and be implemented by both States as soon as possible.

I also understand that, in implementing that mutual agreement, the penalty of SBP 60,000 imposed on Company XCO for failure to file a tax return in State B for taxation year 01 will be maintained but the penalty of SBP 40,000 for failure to withhold tax will be withdrawn by the tax administration of State B. The interest of SBP 135,000 included in the assessment of 4 September 04 will be reduced so that interest is only charged on 200,000 of unpaid tax to be calculated by the tax administration of State B from the day when the tax return for year 01 was due to be filed in State B.

The only issue left is for us is to determine the relevant dates for the purposes of our respective MAP statistics. I would propose the dates below and would be grateful to receive your agreement or your alternative proposals.

a. Date MAP request was received from taxpayer: 1 November 06
b. Start Date: 22 November 06
c. Milestone 1: 19 April 07
d. End date: 28 June 07
e. Outcome of MAP: Fully resolving taxation not in accordance with tax treaty

Sincerely,

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

EXAMPLE OF RESPONSE TO CLOSING LETTER FROM STATE A

7 July 07

Ms Jane Doe, Delegated Competent Authority
MAP Program Unit
State A Taxation Office
123 Mainstreet
Capital City
STATE A

Subject: Closing of MAP case
MAP request to State A by Company XCO Inc.
Tax Identification number: STA-123.456.789C

MAP case reference: STBMAP06-12345LT

Dear Ms Doe,

This is in response to your letter of 4 July 07 informing us that the MAP case referred to above has been closed with the following agreement, duly accepted by Company XCO, which was reached between the competent authorities of our two countries and which fully eliminates any double taxation that the taxpayer might otherwise have suffered:

– *Amount of 200,000 of unpaid corporate tax included in the tax assessment issued by the tax administration of State B:* The amount of SBP 200,000 of unpaid corporate taxes that was included in the tax assessment of 4 September 04 will be maintained and a new assessment replacing the one issued on 4 September 04 will be issued by the tax administration of State B for that amount as well as for the revised amount of penalties and interest referred to below.

– *Amount of unpaid withholding taxes included in the tax assessment issued by the tax administration of State B:* The amount of SBP 400,000 of unpaid withholding taxes related to wages and interest paid by Company XCO that was included in the tax assessment of 4 September 04 will be withdrawn by the tax administration of State B.

– *Foreign tax credit in State A:* Upon proof of the payment of 200,000 of tax to State B for the taxation year 01, the tax administration of State A will recognize that company XCO is entitled to claim a foreign tax credit in State A for the same taxation year. That credit will correspond to the lower of the amount of SBP 200,000 (expressed in SAD at the rate applicable at the date of the payment to State B) and the amount of tax paid in State A by XCO on the profits associated to the 2,000,000 of revenues received from YCO. The computation of that additional foreign tax credit will be made by the tax administration of State A on the basis of the domestic tax rules of State A.

I confirm these outcomes. Our exchange of letters constitutes a mutual agreement within paragraph 2 of Article 25 of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* and shall accordingly be implemented by both States as soon as possible.

I also confirm that, when implementing this agreement, the penalty of SBP 60,000 imposed on Company XCO for failure to file a tax return for taxation year 01 will be maintained but the penalty of SBP 40,000 for failure to withhold tax will be withdrawn. The interest of SBP 135,000 included in the assessment of 4 September 04 will be reduced so that interest is only charged on 200,000 of unpaid tax to be calculated from the day when the tax return for year 01 was due to be filed.

I finally confirm the following statistical information:

a. Date MAP request was received from taxpayer: 1 November 06

b. Start Date: 22 November 06
c. Milestone 1: 19 April 07
d. End date: 28 June 07 (the date when you informed company XCo Inc. of the outcome of the case
e. Outcome of MAP: Fully resolving taxation not in accordance with tax treaty

Sincerely,

Mr. Rob Inson, Senior Analyst
State B MAP Program Unit
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

5.4.5.3 No agreement

165. It is relatively rare for a MAP case to result in a situation where the competent authorities are unable to reach a mutually acceptable solution either because they disagree on substantive issues or because of inaction on the part of one or both competent authorities: the MAP statistics produced for 2017[111] indicate that this happens in only 1% of MAP cases.

166. The competent authorities may be able to reach a partial agreement concerning some issues raised by a MAP case even though they are unable to resolve other issues arising from that case. In such a case, a proposed partial agreement could be proposed to the taxpayer.

167. The competent authorities should formalize the closure of a MAP case that is the result of a failure to reach agreement. It is important that the taxpayer be informed that its MAP case is no longer being actively pursued since other recourses, such as domestic legal proceedings, may then be resumed or undertaken. While it is acknowledged that competent authorities may implicitly cease to pursue a MAP case without having formally decided to close the case (in particular, where the lack of progress results from the inaction of one of the competent authorities), the better course of action is that the competent authorities should then take the initiative of formally ending the MAP in these situations, so as to avoid undermining the reliability of the MAP and creating uncertainty for taxpayers.

5.4.6 The implementation of a mutual agreement reached through the MAP

168. As indicated in the last sentence of paragraph 2 of Article 25, there is an obligation to implement the mutual agreement reached under that paragraph regardless of any time limits that may exist under the domestic law of the treaty states.

169. The implementation of a mutual agreement should be done promptly. It will typically require that a competent authority coordinate with other parts of the tax administration, such as the service responsible for issuing refunds. The implementation of a mutual agreement will

111 Paragraph 7 and note 2 above.

often depend on specific unilateral procedures that were developed by the competent authority for this purpose taking into account the division of responsibilities and functions within the tax administration.

170. The actions needed to implement a mutual agreement will, of course, depend on the nature of the relief to be provided to the taxpayer. In certain cases, the implementation of the agreement may require nothing more than a refund of tax by one of the treaty states. Where, for example, a MAP case concerns the proper rate of withholding tax applied to a dividend payment made by a company resident of State A to a resident of State B, the mutual agreement may provide that State A should not have levied withholding tax at the rate provided by State A domestic law, but rather at the lower rate provided in the State A-State B tax treaty. Relief would therefore be provided to the State B resident through a refund by State A of the tax withheld in excess of the rate provided in the treaty.

171. A second example is where the competent authorities mutually agree that an enterprise of State A did not have a permanent establishment in State B and, accordingly, that the enterprise's business profits should not have been taxed by State B, as provided in the first sentence of paragraph 1 of Article 7 of the relevant tax treaty. In such a case, relief would typically be provided through a refund of the tax levied by State B on the relevant business profits. Since the existence of a permanent establishment may trigger other tax obligations, such as a liability for withholding taxes on interest borne by the permanent establishment,[112] the implementation of the mutual agreement may require relief beyond the refund of the tax levied on the business profits, such as the refund of the source tax on interest that would have been previously collected by State B from the enterprise because the enterprise did not withhold that tax when it made the interest payment.

172. In cases dealing with transfer pricing issues, the competent authority of a state may agree to provide relief under paragraph 2 of Article 9 following a primary transfer pricing adjustment made by the other treaty state. Such relief will often be provided through a reduction of the taxable profits of an associated enterprise of the state that must provide the corresponding adjustment, with a consequential reduction of the tax previously paid on these profits.[113]

173. For example, assume that the tax administration of State A makes a transfer pricing adjustment that increases the taxable profits of a company resident of State A with respect to a non-arm's length transaction with an associated enterprise of State B. If the competent authority of State B concludes a mutual agreement requiring State B to provide a corresponding adjustment to the associated enterprise of State B, the tax administration of State B will typically do so by reducing the taxable profits of the associated enterprise for the relevant taxable period. That corresponding adjustment may result in a refund of the tax previously levied by State B.

112 Under the second sentence of paragraph 5 of Article 11 of the UN Model.

113 Paragraph 7 of the Commentary on Article 9 of the UN Model, quoting paragraph 7 of the Commentary on Article 9 of the OECD Model.

174. Paragraph 44 of the Commentary on Article 25 of the UN Model provides the following additional examples of the procedures that may be used to provide different types of reliefs that may be needed to implement a mutual agreement dealing with transfer pricing issues:

i) The first country may consider deferring a tax payment under the adjustment or even waiving the payment if, for example, payment or reimbursement of an expense charge by the associated enterprise is prohibited at the time because of currency or other restrictions imposed by the second country.

ii) The first country may consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. Thus, if income is imputed and taxed to a parent corporation because of service to a related foreign subsidiary, the related subsidiary may be allowed, as far as the parent country is concerned, to establish on its books an account payable in favor of the parent, and the parent will not be subject to a second tax in its country on the establishment or payment of the amount receivable. Similarly, such payment should not be considered a dividend by the country of the subsidiary.

iii) The second country may consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. This may, for example, involve recognition of the payment made as a deductible item, even though prior to the adjustment there was no legal obligation to pay such amount. This is really an aspect of the correlative adjustment.

175. Since the last sentence of paragraph 2 of Article 25 of both the UN and OECD models provides that the implementation of a mutual agreement is not subject to any time limits in the domestic law of the treaty states (for instance a time limit beyond which the tax administration could not make any tax adjustment with respect to a given tax year), the competent authority may need to coordinate with those officials of the tax administration in charge of applying domestic time limits, such as statutes of limitation, that would otherwise prevent the adjustment of tax liabilities for previous tax years.

176. While some countries consider that the time limit for implementation of mutual agreements should be linked to domestic law time limits and have therefore, in their treaties, omitted the second sentence of paragraph 2 or expressly provided a time limit for the implementation of a mutual agreement,[114] it should be noted that the application of domestic law time limits may effectively remove the taxpayer's ability to obtain relief under the MAP, for example, if a late adjustment is made in one country and domestic law time limits prevent a corresponding adjustment in the other country. In any event, countries that are members of the Inclusive Framework on BEPS are, in principle, required to include the second sentence of paragraph 2 in their treaties. The BEPS Action 14 minimum standard[115] allows them, however, to depart from this requirement provided that they are willing to accept alternative treaty provisions that limit the time during which a state may make an adjustment to the profits of an

114 See for example, paragraph 2 of Article 26 of the Norway-Philippines tax treaty signed in 1987.

115 Minimum standard 3.3 (see Annex).

enterprise or a permanent establishment under paragraph 2 of Article 7 or paragraph 1 of Article 9.

5.4.7 Summary and timetable of the different actions involved in a MAP

177. The table included at the end of this section summarizes the different actions involved in a MAP process that were discussed in the preceding sections. It also provides a tentative timetable showing reasonable deadlines for each of these different actions.

178. While the deadline for the presentation of a valid MAP request is mandatory (pursuant to paragraph 1 of Article 25), the other deadlines are merely suggestions based on previous MAP cases or on recommendations derived from BEPS Action 14.

179. Unless the relevant treaty provides for the mandatory arbitration of issues that have not been resolved within a certain period of time,[116] there is no time limit by which a MAP case must be completed. The time required for doing so will obviously depend on a number of factors, including the complexity of the case, the resources available to the competent authorities and their overall caseloads. The MAP statistics produced for 2017[117] show that the MAP cases completed during that year took approximately 30 months for transfer pricing cases and 17 months for other cases.

180. Countries that have joined the Inclusive Framework on BEPS have committed to seek to resolve MAP cases within an average time frame of 24 months.[118] As already indicated, that commitment will be monitored through the Action 14 peer review process.[119]

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

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116 In the case of the arbitration provisions of paragraph 5 of Article 25(alternative B) of the UN model, that period of time is three years from the presentation of the case to the competent authority of the state to which the request was not initially made (see Chapter 7).

117 Paragraph 7 and note 2 above.

118 Minimum standard 1.3 (see Annex). The start date of that 24-month period will generally be the earlier of one week from the date when the competent authority that received the MAP request notified the other competent authority or 5 weeks from the receipt of the MAP request. An exception is made, however, where the MAP request does not include all the required information: see *BEPS Action 14 on More Effective Dispute Resolution Mechanisms - Peer review documents*, note 50, paragraph 10, page 36.

119 Paragraph 7 above.

182. In practice, some of the actions included in the following table will be omitted or will be done simultaneously. For instance, a competent authority that receives a MAP request may be able to notify the taxpayer that is has received the request at the same time that it will indicate that the request is valid and that it needs additional information to pursue its examination of the case. A competent authority may also be able to notify the other competent authority of the request at the same time that it will provide a position paper to initiate the bilateral stage of the MAP.

SUMMARY AND SUGGESTEDTIMETABLE FOR THE ACTIONS INVOLVED IN A MAP

BY WHOM?	WHAT?	WHEN?
Person who considers that there is (or will) be taxation not in accordance with the treaty	Submits MAP request to relevant competent authority	**Mandatory deadline under Art. 25(1):** within **3 years** after first notification of the actions resulting in taxation not in accordance with the treaty
Competent authority that received the request	Notify receipt of the request to taxpayer and competent authority of the other state	Within **4 weeks** of the receipt of the request
Competent authority of the other state	The competent authority of the other state confirms that it has received the notification that the MAP request was presented	Within **1 week** from being notified of the presentation of the MAP request
Competent authority that received the request	• Determination of whether a valid request was made: – Examine the request in light of the conditions for a valid request – Where necessary request additional information from person who made the request • Determination of the admissibility of a valid request or rejection of an invalid request	Within **2 months** of the receipt of the request or after all necessary information for a valid request has been submitted
Competent authority that received the request	• Examination of the merits of the objection raised in the MAP request • Determination of whether that objection appears to be justified • Determination of whether the case may be solved through unilateral relief to be provided by the state that received the request	Within 4 **months** of the *"**start date**" of the MAP ["start date is the **earlier of**:* • ***1 week** after notification of MAP case to other competent authority by the competent authority that received the request* • ***5 weeks** after the receipt of the MAP request (unless additional information is requested within **2 months** from such receipt)*]
Tax administration of the state that received the Request	**If the competent authority determined that the case may be solved through unilateral relief**, tax administration makes the necessary tax adjustment	Within **3 months** after the competent authority's determination
Competent authority that received the request	**If the competent authority determined that the case cannot be solved unilaterally** • Contacts the competent authority of the other state to initiate bilateral MAP discussion • Send to the competent authority of the other state all the information necessary to process the case	Within **2 months** of the determination that the objection seems justified and that the case may not be solved unilaterally

BY WHOM?	WHAT?	WHEN?
Competent authority of the other state	• May confirm that is willing to undertake discussion of the case • If necessary, request additional information from the competent authority that received the request (which may have to be requested from the person that made the request) • If there is a legitimate objection to discussing the case, may use the opportunity to inform the competent authority that received the request	Within **1 month** of being contacted
One of the competent authorities (in allocation of profit cases, typically the one that made the initial adjustment)	Send to the competent authority of the other state position paper stating its view of the case	Within **4 months** from *the "**start date**" of the MAP case*
Competent authority of the state that received the position paper	Send response to the position paper received from the competent authority that received the request	Within **6 months** of the receipt of the position paper
Competent authorities of both states	Competent authorities negotiate, with face-to-face meetings where appropriate, in order to reach an agreement on the case	Negotiation should start within **6 months** after the response to the position paper, with a view to completing the case within **24 months** from the **"start date"** of the MAP case
Competent authority that received the request	• Notifies the person who made the MAP request of the proposed mutual agreement • Request that the person indicate whether it accepts the proposed mutual agreement	Within **1 month** from the competent authorities reaching a tentative agreement
Person who made the MAP request	Person who made the MAP request indicates whether it accepts the proposed mutual agreement	Within **1 month** of the presentation of the proposed agreement
Competent authorities of both states	Competent authorities exchange letters formalizing the mutual agreement (the closing letters)	Within **1 month** of the acceptance of the tentative agreement by the person who made the request
Tax administration of the state(s) that agreed to make MAP adjustment	Implement the mutual agreement through domestic tax adjustment	Within **3 months** of the exchange of closing letters

5.4.8 The process for a MAP under paragraph 3 of Article 25

183. As already mentioned,[120] paragraph 3 of Article 25 provides for two types of MAP that are different from the taxpayer-initiated MAP under paragraph 1:

- Under the first sentence of the paragraph, the competent authorities seek to resolve by mutual agreement issues relating to interpretation or application of the treaty provisions. Typically, this type of MAP relates to matters of a general nature that concern a category of taxpayers and may be initiated by the competent authorities without a request from a taxpayer. For example, competent authorities may reach such a mutual agreement in order to complete or clarify the definition of a term in the tax treaty or to determine appropriate procedures for the application of specific treaty provisions (e.g. the procedures for confirming a taxpayer's status as a resident of a Contracting State, or the procedures and criteria used to grant treaty benefits to fiscally transparent entities).
- Under the second sentence of the paragraph, the competent authorities consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, where a resident of a third state has a permanent establishment in both treaty states and the double taxation involves the profits of these two permanent establishments.

184. Where mutual agreements reached under paragraph 3 deal with issues of interpretation or application of a tax treaty that are relevant for all taxpayers or a category of taxpayers, the publication of such agreements, which are not specific to particular cases and should not, therefore, include any taxpayer-specific information, will serve to provide guidance and may prevent potential future disputes. As recognized by the final report on Action 14, it is therefore a good practice for countries to publish such agreements[121] (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

185. Paragraph 2 of Article 3 provides that a term that is not defined in the treaty "shall, unless the context requires otherwise" have the meaning that it has under the domestic law of the state that applies the treaty. Since paragraph 3 of Article 25 forms part of the context in which paragraph 2 of Article 3 must be read, it would be logical to consider that a mutual agreement concluded under paragraph 3 of Article 25 that would provide a common definition of a term not defined, or not defined exhaustively, in the treaty, would prevail over an inconsistent domestic law meaning of that term. Paragraph 2 of Article 3 of the OECD model was amended in 2017 to remove any doubt in this respect.[122]

120 Paragraph 12 above.

121 Best practice 2 (see Annex). Publication may actually be required under the domestic law of some countries.

122 The relevant part of paragraph 2 of Article 3 of the OECD Model now reads: "…any term not defined therein shall, unless the context otherwise requires ***or the competent authorities agree to a different meaning pursuant to the provisions of Article 25***, have the meaning that it has at that time under the law of that State…" [emphasis added].

186. The case of an enterprise of a third state that has permanent establishments in both of the treaty states is the most-often cited example of double taxation not addressed by the provisions of a treaty that may be dealt with under the second sentence of paragraph 3. The following example illustrates such a case:

> ***Example X***
>
> Company T, a resident of State T, has a permanent establishment situated in State A where it manufactures spare parts for appliances. Company T also has a permanent establishment situated in State B from which it sells these spare parts to consumers.
>
> Spare parts are regularly shipped from the permanent establishment situated in State A to the permanent establishment situated in State B. For the purposes of determining the profits attributable to both permanent establishments, Company T treats such transfers as sales.
>
> Following a tax audit of the activities carried on through the permanent establishment situated in State A, the tax administration of State A has increased by 30 000 the profits attributable to that permanent establishment after concluding that the arm's length price that an independent manufacturer would have charged for the sale of specific spare parts that were transferred to the other permanent establishment would have been 100 000 rather than 70 000, which is the amount shown as sales in the accounts prepared for the permanent establishment.
>
> Since the profits attributable to the permanent establishment in State B were computed on the basis that the cost of the spare parts transferred to that permanent establishment was 70 000, the adjustment made by the tax administration of State A results in double taxation of 30 000 of profits.
>
> Company T being a resident of neither State A nor State B, the provisions of the treaty between these two states (and, in particular, of Article 7 thereof) do not apply to address that form of double taxation. Despite that fact, the second sentence of paragraph 3 allows the competent authorities of States A and B to consult for the elimination of that double taxation. This will be particularly important if there is no tax treaty between one (or both) of these states and State T.

187. The second sentence of paragraph 3 allows the treaty states to consult each other in order to eliminate double taxation in accordance with their respective domestic laws or in accordance with a tax treaty that one of the states has concluded with a third state (such as a treaty with State T, in the preceding example). While the second sentence plays a crucial role as it allows competent authority consultation to ensure that tax treaties operate in a coordinated and effective manner, in some states, the domestic law would not allow the tax administration to provide a solution under that sentence in a case that is not explicitly or at least implicitly dealt with in the treaty.[123]

188. Paragraph 3 does not include any condition or indication as to how and when a MAP case under that paragraph should be initiated. Competent authorities may of course approach each other when and how they wish to in order to address general issues of interpretation or application of the treaty. They may also do so if they want to discuss cases concerning specific taxpayers, such as the one described in the example above.

123 Paragraph 10 of the Commentary on Article 25 of the UN Model, quoting paragraph 55.1 of the Commentary on Article 25 of the OECD Model.

189. As is the case for a taxpayer-initiated MAP under paragraph 1, however, any agreement reached under paragraph 3 is binding on the tax administrations and must be implemented by them (unless rescinded or replaced, in the case of an agreement of a general nature reached under the first sentence of the paragraph).

5.4.9 Communication with the other competent authority

190. The competent authorities have a lot of flexibility as regards the ways in which they may communicate in the context of a MAP under either paragraph 1 or paragraph 3. Paragraph 4 of Article 25 of the UN and OECD models allows them to communicate with each other directly and they can do so by letter, telephone, email, physical meeting or other means of communication; there is therefore no need to use diplomatic channels.

191. Although the paragraph also indicates that they may communicate "through a joint commission consisting of themselves or representatives", competent authorities that deal with few MAP cases rarely find it necessary to set up such a commission. The Commentary explanations of how such a commission would work and, in particular, the suggestion that each delegation should be chaired by "a high official or judge chosen primarily on account of his special experience" and that the taxpayer would have "the right to make representations in writing or orally, either in person or through a representative"[124] suggests the setting up of a body that is more formal than what is typically found necessary to deal with MAP cases.

192. Despite the flexibility available as regards the manner in which the competent authorities communicate with each other, it is important to remember that to the extent that a MAP case deals with information that is confidential under domestic law, such information may only be exchanged as authorized by provisions similar to those of Article 26 (Exchange of Information) of the UN and OECD models. Since paragraph 1 of Article 26 authorizes the exchange of information that is "foreseeably relevant for carrying out the provisions" of a tax treaty that includes the MAP article, the competent authorities acting in the context of a MAP can directly exchange confidential information.

193. It is important to remember, however, that paragraph 2 of Article 26 provides that any information exchanged between the competent authorities is required to be treated as secret in the same manner as if such information were obtained under the domestic laws of the respective states. Thus, information obtained in the context of a MAP must remain confidential. Officials performing competent authority functions should continually keep in mind this confidentiality requirement, which extends the scope of the confidentiality obligations to which they are subject under their domestic law.

124 Paragraph 11 of the Commentary on Article 25 of the UN Model, quoting paragraphs 60 and 62 of the Commentary on Article 25 of the OECD Model.

5.5 How should the competent authority perform its MAP functions?

5.5.1 Organization of the MAP function

194. Tax treaties typically assign different roles to the competent authority of a state: the provisions of the UN Model provide that, apart from dealing with MAP, the competent authority is responsible for notifying the other state of significant changes made to the domestic tax law (paragraph 4 of Article 2), for the exchange of information (Article 26), for the assistance in the collection of taxes (Article 27) and for granting discretionary treaty benefits in certain circumstances (paragraphs 6 and 8 (*c*) of Article 29). Some tax treaties add other responsibilities to that list. With crucial developments in the area of exchange of tax information,[125] the addition to many treaties of provisions on assistance in collection of taxes[126] and the increased number of MAP cases,[127] the importance of these different roles has increased significantly over the last decades.

195. As already noted,[128] countries are free to choose who is formally designated as competent authority and to whom the competent authority powers are delegated. For practical and administrative reasons, the power and authority to perform the competent authority function will typically be delegated to subordinate officials (the "authorized representatives") who will carry out the day-to-day functions of the competent authority.[129]

196. The administrative organization of the various competent authority functions will clearly depend on the number of tax treaties concluded and the resources needed to effectively meet the obligations assigned to the competent authority under these treaties. States that have a large MAP caseload will frequently separate the performance of the MAP responsibility from that of the other roles of the competent authority. In some states, different MAP cases will even be assigned to different offices based on the nature of the case,[130] the region, the industry or the type of taxpayer (individual, company, large taxpayer etc.). On the other hand, a state that has rarely or never been involved in MAP cases might prefer to delegate the MAP functions to the officials in charge of the negotiation of tax treaties given the tax treaty knowledge of these officials.

197. In most countries, the administrative organization of the MAP function and of the MAP process is a purely administrative issue that does not require changes to domestic law: the

125 In particular, the work done under the umbrella of the *Global Forum on Transparency and Exchange of Information*: see http://www.oecd.org/tax/transparency/about-the-global-forum/.

126 The provisions on assistance in the collection of taxes were added to the UN Model in 2011, based on provisions that were added to the OECD Model in 2003.

127 See paragraph 7 above.

128 Paragraph 14 above.

129 Since treaties are silent on the way this delegation should be made, it should be done in accordance with the domestic law or administrative practices of each state. This may involve an order or directive issued by the Minister designated as competent authority under the treaty, regulations or any other administrative procedure for the allocation of responsibilities to officials.

130 For instance, it is not unusual to have different offices deal with bilateral or multilateral advance pricing arrangements and other MAP cases.

provisions of tax treaties will provide all the necessary legal basis for dealing with MAP cases and reaching and implementing mutual agreements. As already explained,[131] however, it is important for the competent authority to provide taxpayers with information on the availability of the MAP and on the process to be followed when making a MAP request and dealing with MAP cases. These rules should indicate who can request and initiate the MAP and explain the legal basis for conducting the MAP, the form of the MAP request, the standard of assessment by the competent authority, the relationship with domestic dispute resolution mechanisms, the process involved in the MAP discussions, and the rights of the taxpayer in a MAP case.

198. Regardless of the administrative organization of the MAP function, it is important that the persons that will actually perform the MAP functions of the competent authority have sufficient authority (with sufficient safeguards to ensure accountability) to effectively negotiate with their counterparts in other treaty states and to make binding decisions with respect to the cases brought before them. Practical experience with the MAP process has shown that the efficiency and effectiveness of the MAP is enhanced if the competent authority function is delegated to senior tax officials who are actively and directly engaged in the MAP process.[132]

199. Countries with extensive practical experience with the MAP have also found that it is of fundamental importance to provide the competent authority with adequate resources. The BEPS Action 14 minimum standard requires that countries that have joined the Inclusive Framework on BEPS ensure that adequate resources are provided to the MAP function.[133]

200. Human resources, in the form of skilled personnel, will often be the most crucial factor in operating an efficient and effective MAP program. Maintaining and developing the skills of the competent authority staff also require that a tax administration devote appropriate resources to their training.

201. Also, measures used to evaluate the work performance of officials involved in MAP cases should relate to factors such as the number of cases resolved, the time taken to resolve cases (taking into account the complexity of the cases and matters not under the control of the officials), consistency and principled and objective outcomes. The use of such criteria reinforces the goals and objectivity of the competent authority function and thereby improves the overall effectiveness of the MAP program. By contrast, the evaluation of the performance of these officials should not be based on factors such as the magnitude of proposed or sustained audit adjustments or the amount of tax revenues resulting from the decisions taken through the MAP. The BEPS Action 14 minimum standard prevents countries that have joined the Inclusive Framework on BEPS from using such performance indicators[134] which could deter a competent authority from compromising and reaching agreements.

131 Paragraph 41 above.

132 Which means that officials with decision-making authority with respect to MAP cases remain informed of the details of MAP cases and are closely involved in detailed bilateral MAP discussions.

133 Minimum standard 2.5 (see Annex).

134 Minimum standard 2.4 (see Annex).

202. In addition to skilled personnel, the competent authority should be provided with adequate financial resources to meet its obligations under that country's tax treaties. In some cases, expenses related to face-to-face meetings with other competent authorities (such as travel and accommodation expenses) may need to be incurred, although developing countries with few MAP cases may prefer to use telecommunication or, if a face-to-face meeting is necessary, may prefer to host it in order to avoid such costs. Also, while the competent authorities of developing countries may not have financial resources to pay for the translation of documents (for example, translations of contracts or foreign tax law), the taxpayer will often provide such translations.

203. It is crucial that information on how to contact the competent authority of a state be readily available. The availability of such information is needed in order to ensure that taxpayers are able to make a request under paragraph 1 of Article 25. These details should be included in the information that a country makes available on its MAP process.[135] Also, the BEPS Action 14 minimum standard requires countries that have joined the Inclusive Framework on BEPS to "publish their country MAP profiles on a shared public platform."[136] This means that the contact details of the competent authorities of a large number of countries may be accessed from a single web site.[137]

204. It is also crucial that the officials in charge of dealing with MAP cases implement a reliable system of internal recordkeeping that facilitates access to information concerning MAP requests received, MAP cases currently under discussion and previously completed MAP cases while ensuring the confidentiality of the relevant information. Such recordkeeping should, among other things, allow the monitoring of the progress of MAP cases, thereby facilitating compliance with the target deadlines for the various actions involved in a MAP case. They should also facilitate the preparation of the MAP statistics that the BEPS Action 14 minimum standard requires from the countries that have joined the Inclusive Framework on BEPS.[138] Internal records of previous MAP cases facilitate the processing of similar cases and contribute to the consistent interpretation of a treaty where the issues and material facts are the same.

205. Competent authorities, while often part of the tax administration, need a high degree of independence from the audit and review functions to be effective. Competent authorities have to make decisions on both factual and legal questions in the cases they are dealing with and have to focus primarily on the resolution of cases that involve taxation not in accordance with the tax treaty provisions. Typically, they will have to rely on the cooperation of other parts of the tax administration, such as the audit department that examined the facts of the case in the first place. A good internal communication is therefore crucial for the effectiveness of the competent authority function.

206. While the relationship between the competent authority and the audit and tax adjustment functions will generally not be hierarchical, it should be clear that the competent authority is

135 Paragraph 41 above.

136 Minimum standard 2.2 (see Annex).

137 These MAP profiles are available at http://www.oecd.org/tax/dispute/country-map-profiles.htm.

138 Minimum standard 1.5 (see Annex).

not constrained by the positions adopted by officials performing these functions (e.g. auditors, assessors or inspectors).

207. The specific circumstances of developing countries will obviously need to be taken into account in the organization of the MAP function:

- Given their limited resources, tax administrations of developing countries may be reluctant to divert resources to the competent authority functions, especially since these functions require skilled personnel and may also require financial resources (e.g. travel expenses). The fact that these countries are typically involved in very few MAP cases,[139] however, suggests that an efficient approach would be to allocate the competent authority function to the officials in charge of treaty negotiations, who are familiar with treaty provisions and with dealing with foreign tax officials. Officials involved in MAP cases will learn and develop specific skills most significantly through actual work on such cases. Having no experience in dispute resolution should not result in rejecting the cases for the lack of such experience.
- In order for competent authorities of developing countries to have the ability and power to negotiate with other competent authorities and implement mutual agreements domestically, responsible politicians and high-ranking officials may need to back the MAP, recognizing that positive effects on the revenues will mostly materialize indirectly through a better investment climate, even though it will be difficult to measure these effects.
- The proper application of transfer pricing rules and tax treaties by the tax administration is important to a successful MAP. The application of domestic law and tax treaties in a manner consistent with global standards will not only reduce disputes but will also facilitate the work of the competent authority. A MAP case involving a transfer pricing dispute is only as strong as the inputs from the domestic transfer pricing team during the transfer pricing audit or study.

5.5.2 How should a competent authority approach a MAP case?

208. The competent authority of a treaty state that is involved in a MAP represents that state in matters related to the interpretation or application of the relevant tax treaty.

209. In broad terms, the role of the competent authority in the MAP is to ensure that a tax treaty is properly applied and to endeavor in good faith to resolve any issues that may arise in the application and interpretation of the treaty provisions.

210. When addressing a MAP case, the competent authority is to be guided first by the terms of the treaty itself and the relevant provisions of domestic law; it should not be influenced by opinions on whether or not the treaty or the law reflects an appropriate tax policy and whether or not these should be amended.

139 Paragraph 3 above.

211. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue considerations or an overall balance of results. Moreover, competent authorities should strive to be consistent in their approach to an issue, regardless of the state that benefits from that approach in a particular case and regardless of the position taken by colleagues who have produced the disputed tax adjustment. Notwithstanding disagreements on facts or principles, competent authorities should seek and be able to compromise in order to reach a mutual agreement.

5.6 Possible improvements to the MAP

5.6.1 Framework agreements

212. The functioning of the MAP may be improved through the conclusion, under paragraph 3 of Article 25, of "framework agreements" between the competent authorities. Such framework agreements may address procedural or administrative issues related to the MAP (as is envisaged by the second sentence of paragraph 4 of the UN Model) or may deal with specific substantive treaty issues. For instance, where several MAP cases raising similar issues are pending, such framework agreements may allow for a quicker resolution of these cases by addressing the underlying substantive treaty issues. This approach was found to be particularly useful in the case of the India-United States tax treaty: within one year of its conclusion, a framework agreement signed in January 2015 facilitated the resolution of more than 100 cases in the information technology (software development and information technology enabled services) sector.[140]

213. The usefulness of such agreements will depend on the specific situation of the countries involved. They may be particularly helpful where there are a large number of pending MAP cases between two countries. They may also be helpful, however, in order to facilitate future discussions between countries that have not previously discussed MAP cases or that had difficulties in addressing a few cases. The agreements would then address administrative issues and procedural issues such as the conduct of regular meetings and the implementation of specific deadlines for the processing of the cases.

5.6.2 Use of technology

214. Since technology is ever evolving, the question arises of whether new technologies could be used to improve how competent authorities deal with the MAP and, in particular, how technology can complement and make more effective the way competent authorities interact during the MAP process. For developing and least developed countries, resource constraints still pose a great challenge in meeting the requirements for a successful implementation of the MAP. This section briefly describes some technologies that may be particularly relevant to the performance of competent authority functions, especially for procedural matters. New technology can facilitate the contacts and sharing of information between the taxpayers and

140 Press release dated 16 January 2016 issued by India's Central Board of Direct Taxes, available at https://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/439/PressRelease_28-1-16.pdf

competent authorities involved in a MAP case, facilitate documentation and filing requirements and help in setting up databases containing information relevant to the work of the competent authorities.

215. Technology now offers a range of tools that could be used to facilitate the contacts between the parties in a way which would make such exchanges more secure, structured and low cost by creating a common platform. The common platform may involve the use of secure clouds (i.e. shared platforms that are secure and with controlled access) or shared software (the same software programs deployed in multiple locations that are able to securely communicate with each other). Either would make it possible to deliver this sort of capability at much lower costs than in the past. When using these tools, a key consideration is the securing of information shared. Without a secure system, users would be hesitant or, even, prevented by laws or regulations in their jurisdiction from sharing sensitive information.

216. In the context of a MAP, information needs to be shared between the taxpayers and competent authorities and between the competent authorities themselves. In the case of tax treaties with respect to which MAP arbitration is allowed, information also needs to be exchanged between the competent authorities and the members of the arbitration panel (and their staffs, in some cases). This information must be kept confidential and can be extremely sensitive (e.g. the taxpayer's trade secrets). An access control system must be in place to provide adequate permissions to all of these parties.

217. A number of competent authorities in developed countries have already been using technical platforms for many years and the question arises whether these experiences can be shared and how new, innovative technologies may be used by developing countries.

218. One possible approach would be to set up a secure cloud server for the relevant dispute, to which the taxpayer and the competent authorities could upload the documents that they wish to share. The access to the documents would be restricted depending on the folder in which they are stored.

219. Technology might also help in setting feasible time schedules and deadlines as well as organizing the workflow of steps and approvals required by a MAP, thereby contributing to the timely resolutions of MAP cases. Such a scheduling tool could help the parties involved to schedule their meetings more efficiently by synchronizing with their other schedules, sending timely reminders of meetings etc.

220. Technology could provide simpler access to MAP for all taxpayers as well as providing them information concerning developments in their cases. The question of access to MAP does not only concern the availability of existing information, but also the submission of new information and even the filing of a MAP request. A common platform may help ensure that relevant data is structured and presented in a consistent way, facilitating its treatment. The documentation required to file a request for MAP could also be provided online, where it could easily be updated and accessed by the competent authorities. Ideally, the tool would include

pre-programmed information concerning the type of documents necessary and a separate upload of each document type would be possible.

ANNEX

Action 14: The Minimum Standard on the Resolution of Treaty-Related Disputes through the MAP and the Best Practices[141]

Minimum Standard

1. Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner

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

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

1.3 Countries should commit to a timely resolution of MAP cases: countries commit to seek to resolve MAP cases within an average timeframe of 24 months. Countries' progress toward meeting that target will be periodically reviewed on the basis of the statistics prepared in accordance with the agreed reporting framework referred to in element 1.5.

1.4 Countries should enhance their competent authority relationships and work collectively to improve the effectiveness of the MAP by becoming members of the Forum on Tax Administration MAP Forum (FTA MAP Forum).

1.5 Countries should provide timely and complete reporting of MAP statistics, pursuant to an agreed reporting framework to be developed in co-ordination with the FTA MAP Forum.

1.6 Countries should commit to have their compliance with the minimum standard reviewed by their peers in the context of the FTA MAP Forum.

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

141 Final Report on Action 14, note 7.

2. Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes

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

2.2 Countries should publish their country MAP profiles on a shared public platform (pursuant to an agreed template to be developed in co-ordination with the FTA MAP Forum).

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

2.4 Countries should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

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

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

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

3. Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure

3.1 Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected. In order to achieve this, countries should either: amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the competent authority of either Contracting State, or where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented

does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case).

3.2 Countries' published MAP guidance should identify the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance. Countries should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information.

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

Best practices

1. Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner

1. Countries should include paragraph 2 of Article 9 in their tax treaties.

2. Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes

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

3. Countries should develop the "global awareness" of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration's "Global Awareness Training Module" to appropriate personnel.

4. Countries should implement bilateral APA programmes.

5. Countries should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit. Such procedures would remain subject to the requirements of paragraph 1 of Article 25: a request to resolve an issue with respect to a particular taxable year would only be allowed where the case has been presented within three years of the first notification of the action resulting in taxation not in accordance with the Convention with respect to that taxable year.

3. Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure

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

7. Countries should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.

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

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

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

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