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Dispute avoidance and resolution

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

Note by the Secretariat

Summary

This note is presented FOR DISCUSSION (and not for approval) at the meeting of the Committee to be held in Geneva on 16-19 October 2018.

The note includes a preliminary draft of Chapter 5 (Mutual Agreement Procedure) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution* on which the Subcommittee on Dispute Avoidance and Resolution is currently working.

This draft was prepared by the Secretariat on the basis of written comments by Subcommittee members on a previous draft and of the discussion of that previous draft at the last meeting of the Subcommittee held in Vienna on 9-10 July 2018.

At its meeting of 16-19 October 2018, the Committee is invited to discuss the preliminary draft included in this note and in particular, the issues identified by the Secretariat in paragraph 5 below. Based on the discussion of this note at the Committee's meeting of 16-19 October 2018 and subsequent written comments, the Subcommittee intends to revise and complete the draft Chapter at its meeting scheduled for 13-15 March 2019 and to send it in advance of the Committee's next meeting, when it would be presented for discussion with a view to its subsequent approval as part of the UN Handbook on Dispute Avoidance and Resolution.

The Committee is also invited to discuss the next steps agreed on by the Subcommittee (paragraph 9 below) for finalizing the Handbook before the end of the mandate of the current membership of the Committee.

Background

1. An update on the work of the Subcommittee on Dispute Avoidance and Resolution on the different chapters of the proposed *United Nations Handbook on Dispute Avoidance and Resolution* (the "Handbook") was provided to the Committee at its sixteenth session (New-York 14-17 May 2018). The following draft Chapters of the Handbook were briefly presented and the Committee was invited to comment on the draft contents of the Handbook with a view to prioritizing further work:

- Chapter 1‑Introduction and Overview
- Chapter 2‑Dispute Avoidance Mechanisms
- Chapter 3‑Disputes Resolution: Domestic Procedures
- Chapter 4‑Special Issues faced by Developing Countries
- Chapter 5‑Mutual Agreement Procedure
- Chapter 6‑Non-binding Dispute Resolution
- Chapter 7‑Mandatory Dispute Settlement.
- Other chapters (the Secretariat indicated that an additional chapter could possibly deal with disputes on tax matters arising under the provisions of non-tax instruments, such as investment treaties and GATS).

2. During the subsequent discussion, the Committee discussed how the minimum standards on BEPS Action 14 should be dealt with in the Handbook. The Committee also decided to merge Chapters 4 (Special Issues faced by Developing Countries) and Chapter 5 (Mutual Agreement Procedure) of the Handbook and to include the contents of the *United Nations Guide on Mutual Agreement Procedure* in Chapter 5. It was also decided that the work of the Subcommittee should first focus on bringing these chapters to the Committee for consideration.

3. In light of the Committee's decision to give priority to the work on Chapter 5 (Mutual Agreement Procedure), the subsequent meeting of the Subcommittee, which was held in Vienna on 9-10 July 2018, focused almost exclusively on the contents of that chapter. It was then agreed that the chapter should provide practical guidance on the MAP and should be intended primarily for developing countries that have no or little experience with MAP. It was also agreed that the chapter should present the different steps of the MAP process on the basis of a flowchart and typical timeline. The Subcommittee also decided that since the minimum standards and best practices of BEPS Action 14 have practical importance for the large number of countries that are part of the BEPS Inclusive Framework, they should be mentioned where relevant and should be reproduced in an annex (it was also agreed, however, that there was no need to refer expressly to the provisions of the MLI as these provisions provided only one approach for incorporating changes related to the MAP into bilateral tax treaties that do not satisfy the Action 14 minimum standards). The Subcommittee then proceeded to discuss each section of the draft chapter. A large number of drafting and substantive changes were agreed to and many parts of the chapter were identified as requiring substantial changes. It was agreed that the Secretariat would produce a revised version of the chapter that would seek to reflect the discussions at the meeting.

4. The status of the other chapters of the Handbook was briefly discussed during the last part of the Subcommittee's meeting:

- In accordance with the Committee's decision to merge Chapter 4 (Special Issues faced by Developing Countries) with Chapter 5, it was agreed that the parts of Chapter 4 dealing with MAP would be integrated into Chapter 5 while the other parts of Chapter 4 would be incorporated into Chapter 1 (Introduction and overview).
- There was a video-link presentation of the work done on Chapter 3 (Dispute Resolution: Domestic Procedures). A few aspects of the chapter were briefly discussed.
- There was an oral presentation of the work on Chapter 2 (Dispute avoidance mechanisms). Progress on that chapter has been slower than on other chapters. After a brief discussion, it was agreed that the drafting group on that Chapter would seek to organise its work and that an outline of the Chapter would be presented in October, when the Subcommittee will consider whether to modify that group or address the organisation of its work.
- The brief presentation of Chapter 6 (Non-binding Dispute Resolution) was followed by a discussion of whether that chapter should include a sample mutual agreement dealing with the use of alternative dispute mechanisms as part of the MAP. Divergent views were expressed, and it was decided that guidance on that issue could be sought from the Committee at a later stage (probably at the first 2019 meeting of the Committee).
- Although a number of suggestions were made during the meeting concerning items that could be added to Chapter 1 (Introduction and Overview), there was no specific discussion of the ongoing work on that chapter and on Chapter 7 (Mandatory Dispute Settlement).

Preliminary draft of Chapter 5 on MAP

5. The preliminary draft of Chapter 5 on MAP attached to this note was prepared by the Secretariat in accordance with the decision, at the July meeting of the Subcommittee, to produce a revised version of the chapter that would reflect the written comments received before the meeting and the discussions at the meeting. As will be seen, parts of the Chapter need to be completed. Also, due to the amount of re-drafting involved, the members of the Subcommittee did not have time to review this preliminary draft but agreed that it should be presented to the Committee for a first discussion.

6. At its seventeenth session on 16-19 October 2018, the Committee is therefore invited to discuss this preliminary draft and, in particular, to address the following issues:

- *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 in the European Union 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 alternative form of MAP is not dealt with in Chapter 5. Does the Committee agree with that approach?
- *Action 14 minimum standard:* One of the issues that was discussed during the Subcommittee's meeting was the extent to which Chapter 5 should deal with the BEPS Action 14 minimum standards and best practices. As previously mentioned, it was agreed that the Chapter should refer to these wherever relevant and that the minimum standards and best practices should be reproduced in an annex to the Chapter.

Paragraph 5 to 7 of the draft provide a general explanation of the relevance of the report on BEPS Action 14 and of the minimum standards and best practices, which are then referred to where relevant. Does the Committee agree with that approach?

- *Five typical steps of an Article 25(1) MAP*: Paragraph 36 of the draft includes a diagram showing the five typical steps of an Article 25(1) MAP. Since these steps are then used to explain the MAP process, it is important to have agreement on the description of each step. Does the Committee agree with the five steps as described in the diagram?
- *Flowchart of the main actions involved in each of the steps of the MAP process*: The diagram on the five steps of the MAP process is followed by a simple flowchart of the main actions involved in each of these steps. While the diagram could have been expanded to discuss a number of alternative situations, the Secretariat considered that it was important to keep it simple. Does the Committee agree with the approach followed and the description of the actions shown in the flowchart?
- *Tentative timetable for the MAP process*: Paragraph 87 of the draft includes a tentative timetable for the different actions involved in a typical MAP under Art. 25(1). That timetable, which was prepared based on what was previously included in the *Guide on Mutual Agreement Procedure* but was substantially amended to reflect recommendations derived from BEPS Action 14, is also used in the explanations provided on each step of the process. The draft indicates that, except for the deadline for the presentation of a MAP request, the deadlines proposed in the timetable are merely suggestions based on previous MAP cases or on recommendations derived from BEPS Action 14. It also notes that, in practice, some of the actions included in this timetable will be omitted or will be done simultaneously. Does the Committee agree with the suggested timetable?

7. The Subcommittee looks forward to receiving guidance on these issues at the October 2018 meeting of the Committee. It also proposes that the Committee agree that Committee members and country observers wishing to send written comments on other aspects of the attached preliminary draft should do so by email to the Secretariat at taxffdoffice@un.org **before 30 November 2018**.

Next steps

8. Based on the discussion of this note at the Committee's meeting of 16-19 October 2018 and the subsequent written comments, the Subcommittee intends to revise and complete the draft Chapter 5 of the Handbook at its next meeting. The draft Chapter will then be sent to the Committee's members in advance of the Committee's next meeting, when it will be presented for discussion with a view to its subsequent approval as part of the Handbook.

9. At its July 2018 meeting in Vienna, the Subcommittee also discussed the longer-time planning for the completion of the Handbook. It was agreed that the Subcommittee should aim to present the full Handbook for final adoption at the second 2020 meeting of the Committee of Experts so that only final editorial changes (if any) would be considered at the first 2021 meeting, which will be the last meeting of the current membership of the Committee. Based on that objective, the Subcommittee agreed that:

- The next meeting of the Subcommittee would take place on 13-15 March 2019. The United Kingdom has kindly offered to host that meeting. That meeting of the Subcommittee will focus on Chapter 5 (MAP) so as to be able to present a complete

version of that chapter at the first 2019 meeting of the Committee (subject to subsequent editorial changes that could result from the contents of the other parts of the Handbook). If time permits, other chapters could also be discussed during the March 2019 meeting of the Subcommittee.

- The four next Committee meetings (two meetings in 2019 and two meetings in 2020) would be used to discuss and get approval of the various chapters of the Handbook, recognizing that Chapter 5 may well constitute more than half of the Handbook.
- After the first 2019 meeting of the Committee, the Subcommittee would meet in July 2019 [dates and location to be confirmed]. It is expected that since Chapter 5 would have been substantially completed before the first 2019 meeting of the Committee, that subsequent meeting of the Subcommittee would focus on the other chapters of the Handbook.
- Given the fact that the different chapters will have been authored by different groups, it was suggested that an editor would need to review the whole Handbook before publication.

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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. 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 taxpayers 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 investors with the assurance that cases where treaty provisions may not have been applied correctly by one treaty state may be brought to the attention of tax officials from the two treaty states. It may therefore contribute to helping developing countries implement a tax system that is conducive to attracting foreign investment. This is especially the case in countries where foreign investors 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 and tax treaty expertise to deal with complex treaty issues.

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.[1] They also showed, however, that the vast majority of MAP cases arise under tax treaties between two developed countries and that relatively few mutual agreement cases involve developing countries other than large emerging economies (such as China and India). Nevertheless, all countries that enter into tax treaties must be prepared to meet their obligations with respect to the mutual agreement procedure 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. It replaces the United Nations *Guide to the Mutual Agreement Procedure* which was approved by the United Nations

1 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 2016 at http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.

Committee of Experts on International Cooperation in Tax Matters at its 2012 meeting.[2] 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 mutual agreement procedure 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.[3] 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 mutual agreement procedure as a mechanism for resolving treaty-related disputes.[4] 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[5] includes a number of best practices related to the MAP. It also sets forth 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 mutual agreement procedure 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.[6]

2 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).

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

4 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]***

5 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]***

6 Page 9 of the report.

6. The large number of countries that have joined the Inclusive Framework on BEPS[7] 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.

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.[8] 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,[9] 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 attribution/allocation of profit issues as opposed to other issues.[10] Second, all these countries must become members of the FTA MAP Forum,[11] a subsidiary body of the Forum on Tax Administration[12] 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]***

5.2 What is the MAP?

5.2.1 Role of the MAP

8. Almost all modern tax treaties include an article that provides a procedure allowing tax officials from the countries that have entered into such a treaty to consult together and address 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.[13]

9. 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

7 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.

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

9 Page 15 of the final report on Action 14, note 5.

10 See the second sentence of note 1.

11 Page 16 of the final report on Action 14, note 5.

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

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

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.

- The MAP involves consideration of tax treaty issues by officials who have tax treaty familiarity and expertise, which is not necessary 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 substantially less expensive to pursue. 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.
- The MAP does not preclude recourse to domestic dispute resolution mechanisms in one or both treaty states (although taxpayers will usually be precluded from pursuing the MAP and such recourses at the same time so as to avoid the risk if 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 what is possible under domestic law.

5.2.2 Legal basis for the MAP

10. 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 by tax officials of the two states. 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 (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 the double taxation involves the profits of these two permanent establishments. This third situation is dealt with under the second sentence of paragraph 3 of Article 25.

11. 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.

12. 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.[14] 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 will perform the role assigned to the competent authority by the treaty.

13. 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. That paragraph, which is similar to paragraph 5 of Article 25 of the OECD Model, is rarely found in treaties concluded by developing countries. The arbitration process envisaged by that paragraph is discussed in chapter 7. ***[reference to be verified once chapter 7 has been completed]***

14. 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 paragraphs and provide guidance on their practical application.

15. 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:

- The person 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 discrimination 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).

16. 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

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

2017 to allow a person to present a case to the competent authority of either state. This difference is discussed below.[15]

17. 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.

18. Paragraph 3, which is also the same in the UN and OECD models, deals with the second and third situations referred to in paragraph 10 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 10.

19. 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.[16]

20. The BEPS Action 14 minimum standard that the large number of countries that have joined the Inclusive Framework on BEPS have committed to implement requires that these countries include paragraphs 1, 2 and 3 of Article 25 of the OECD Model in their 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.[17] As discussed below, this allows these countries to adopt the different formulation of paragraph 1 found in the UN Model.

5.3 Typical treaty issues dealt with through the MAP

5.3.1 List of typical MAP issues

21. 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.

15 Paragraph ???.

16 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.

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

22. The Commentary on Article 25 of the UN Model[18] identifies a few common issues that are dealt with through the MAP. In addition, the MAP statistics produced for 2016[19] include a breakdown of MAP cases for that year based on whether they relate to attribution of profit issues[20] or other cases. The following are examples of issues that are frequently raised in MAP cases:

- *Transfer pricing issues and issues related to the attribution of profits to a permanent establishment. S*uch cases, which represent more than 55% of reported MAP cases for 2016, are discussed below.

- *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 of 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). The application of this test may require the examination of many factors such as the individual's family and social relations, occupations, place of business and political, cultural or other activities. Based on these factors, the individual considers that he or she is a resident of State A for treaty purposes. State B, however, taxes the worldwide income of the individual on the basis that that the individual is a resident of State B for the purposes of the treaty.

- *Alleged application of withholding taxes in contravention to the treaty provisions*. An example would 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

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

19 Paragraph 7 and note 1 above.

20 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).

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 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 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.

23. The above list is not an exhaustive list of treaty issues that are raised in MAP cases initiated under paragraph 1 of Article 25, which 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.

24. 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 required, 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

25. 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 significant more time to be processed,[21] it is important to understand the treaty context in which these cases typically arise.

26. 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.[22] Paragraph 1 of Article 9 acknowledges that a treaty state may adjust the profits of an enterprise of a treaty state that is associated 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 the two 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 and is therefore in accordance with the arm's length standard.[23]

27. 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. Both 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 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.

28. 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 with the result that the increase in the profits of company A that resulted from the initial adjustment made by

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21 See the OECD MAP statistics for 2016, note 1.

22 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.

23 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.

State A represents profits that have already been taxed in State B. In order to eliminate such double taxation,[24] 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.

29. Given the tax authorities' increased focus on transfer pricing and the element of uncertainty involved in the application of the arm's length principle,[25] 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)",[26] 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 adjustment with the aim of avoiding double taxation, countries should provide access to MAP.[27]

30. As noted above, access to MAP in transfer pricing cases can thus be allowed even in 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, according to which "…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

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24 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.

25 "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 MNE is seeking to comply with domestic transfer pricing rules" (United Nations *Practical Manual on Transfer Pricing for Developing Countries*, note 22, paragraph A4.4.14).

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

27 Final report on Action 14, note 5, page 14.

existing in domestic laws—indicates that the intention was to have economic double taxation covered by the Convention."[28]

31. 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.[29]

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

32. 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 OECD models and, in particular, of the provisions of paragraph 2 of that Article.[30] 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".[31] 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.

33. 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[32] 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

28 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.

29 Annex II of Chapter IV of the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (note 22) provides guidance on the use of the MAP for the conclusion of APAs.

30 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.

31 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).

32 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.

permanent establishments of the same enterprise be assimilated to transactions between separate enterprises for purposes of determining the profits of the permanent establishment.

34. 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 will 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 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 MAP process

35. 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

36. 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. Subsections 5.4.2 to **Error! Reference source not found.** 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 subsection 5.4.5. Subsection 5.4.6 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. Subsection 94 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 a received a request. It should then assess whether the request meets the conditions for a valid presentation of a case and, it it does, it must be accept it (such acceptance 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 5.4.2.9 below)

After the request has been accepted, 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 assessement 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.

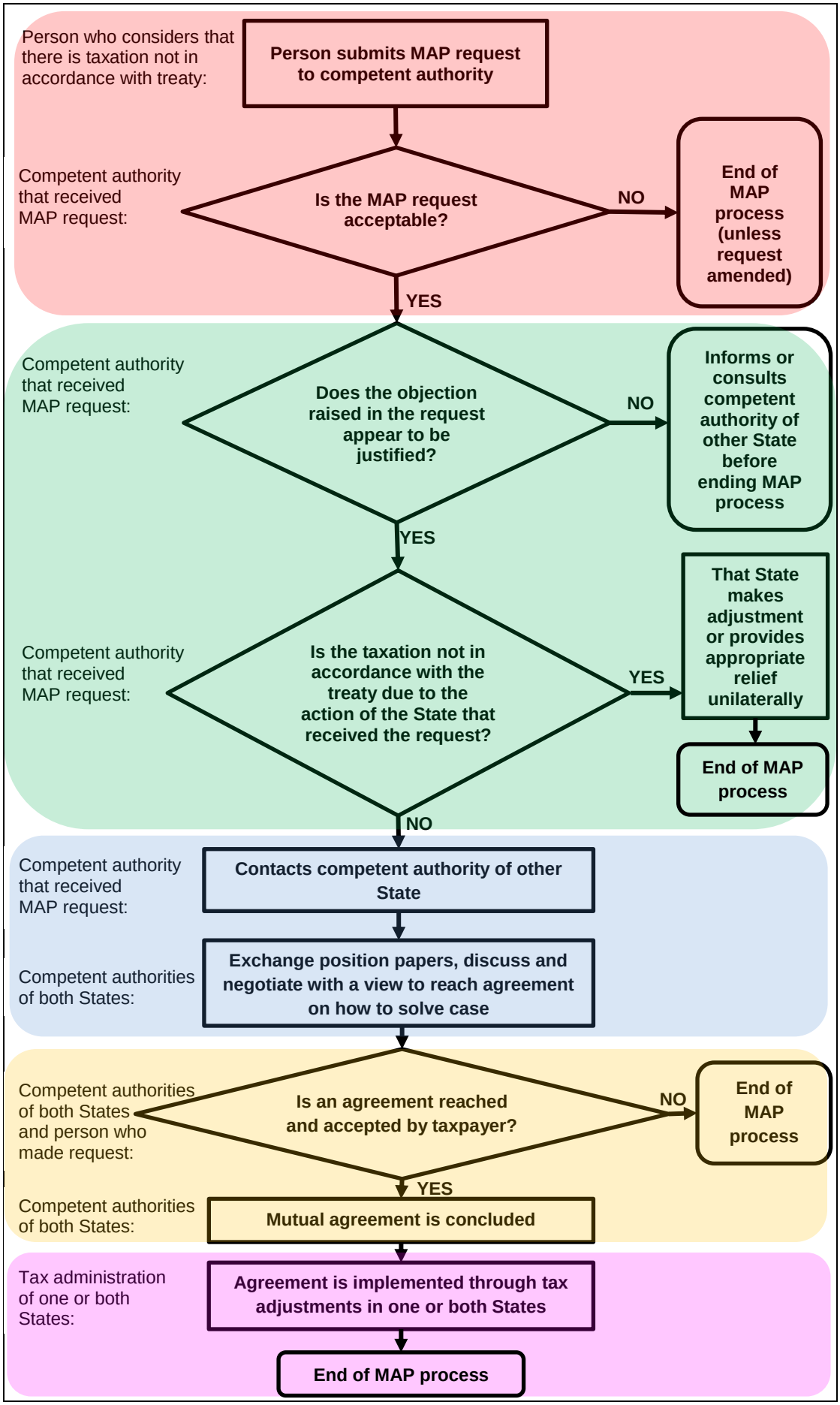
4. Conclusion of the MAP (section Error! Reference source not found. **below)**

If the competent authorities are able to reach agreement, a tentative agreement is presented 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 Error! Reference source not found. **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


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:
Is the MAP request acceptable?
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 justified?
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

37. The requirements for a MAP request to be validly made under paragraph 1 of Article 25, which are described in paragraph 15 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.

38. As will be seen below, 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 BEPS Inclusive Framework to "publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers".[33] The web site that includes the MAP profiles of these countries[34] allows easy access to the MAP information published by some of these countries and developing countries may use that information as a basis for developing their own guidance.

5.4.2.1 Who is allowed to make a MAP request?

39. 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 on a minimum amount of taxes in dispute for making a MAP request.

40. The person making a MAP request could be 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 discrimination 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.

41. 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. Clearly, when making a MAP request, a person does not have to provide definitive proof that taxation not in accordance with the convention has occurred or will occur. For the

33 Minimum standard 2.1 (see Annex).

34 See paragraph 110 below.

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 the facts of its case.[35] 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 accepted (see section 5.4.2.8 below)

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

43. MAP requests related to the likeliness that future taxation may not be in accordance with the treaty provisions are less frequent than requests dealing with taxation that has already occurred. 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[36] 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?

44. 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.

45. 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."[37]

46. 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,[38] 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

35 Last part of paragraph 14 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.

36 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.

37 Paragraph 17 of the Commentary on Article 25 of the OECD Model.

38 Minimum standard 3.2 (see Annex).

which the MAP case was presented does not consider the taxpayer's objection to be justified".[39] Developing countries that 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.

47. In many cases, a taxpayer will also send a copy of the request to the competent authority of the other treaty state involved.[40] In these cases, the request should mention that fact in order to facilitate coordination between the competent authorities.[41]

5.4.2.3 When should a MAP request be made?

48. 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.

49. Although some bilateral 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.[42] Countries that are members of the BEPS inclusive Framework, however, have committed to allow the presentation of MAP requests within a period of no less than three years[43] and could not, therefore, agree on a lower time limit.

50. 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.[44] 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

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39 Note 5, page 22.

40 In fact, 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 24 of the OECD Model.

41 See item (*v*) of the suggested contents of a MAP request, paragraph 56 below.

42 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.

43 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.

44 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.

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,[45] 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 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, 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.[46]
- *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 determined with reference to the notification to the taxpayer of the last of the relevant actions or decisions taken by either Contracting State. The example provided by the Commentary is where the state of source levies tax not in accordance with the convention 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

45 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.

46 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

taxation, the time period should be considered to begin with the notification of the denial of relief.

51. 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.[47] 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.

52. On the other hand, developing countries, especially those with limited resources and MAP experience, 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.

53. 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 the competent, while accepting the request, does not have to examine its merits until such notification is received.[48]

5.4.2.4 Format and contents of a MAP request

54. Article 25 does not set forth 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 will be important to keep in mind the need to balance the competent authority's wish to obtain complete information with the importance of not imposing unreasonable compliance requirements on the taxpayer, which could discourage the use of the MAP.

55. In order to facilitate access to the MAP, the MAP guidance that a country should publish[49] should include information on how a MAP request should be presented, to whom it

47 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.

48 While countries that are members of the BEPS inclusive framework have committed to seek to resolve MAP cases within an average timeframe of 24 months (minimum standard 1.3; see paragraph ?? 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 43, page 52.

49 See paragraph 38 above.

should be presented and what information it should include. The importance of doing so was recognized in the BEPS Action 14 minimum standard,[50] 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[51] should obviously be followed in these countries.

56. The documents that were prepared for the purposes of the peer review of the compliance with the BEPS Action 14 minimum standard[52] include the following suggestions as to the information and documentation that could be included in a MAP request.[53] 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.

50 Minimum standard 3.2 (see Annex).

51 See paragraph 38 above.

52 Note 8.

53 "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 43, page 57.

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 treat y 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 content 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 content 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.

57. 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.

SAMPLE MAP REQUEST

1 November 06

Ms Jane Doe, Delegated Competent Authority
MAP Program Unit
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,

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

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 endeavour 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. *Foreign tax administration*: The foreign tax administration that issued the assessment which 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 (PE), 7 (Business Profits), 12 (Royalties), 23B (Credit Method), and 25 (Mutual Agreement Procedure).

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 Appeals Board of State B, which is the administrative instance to which the complaint was made, will be informed of this MAP request and is expected to agree to suspend its treatment of the complaint until the completion of the MAP.

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 different 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 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).

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. 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 his 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 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 took the position that company XCO had 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 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 to 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 and the treaty definition must prevail over that of domestic law. 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 17 of the Commentary on Article 5 of the 2010 OECD Commentary as quoted in paragraph 15 of the Commentary on Article 5 of the 2017 UN Model), 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 40,000 for failure to file a tax return for 01 and for underreporting of income. It has also assessed SBP 10,000 of interest on the amount of unpaid 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 it 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 was added to the alleged unpaid tax.

You will find in Annex [X] a statement by Ms Am Elia, director and Chief Financial Officer of XCO Inc. certifying that all the information and documentation included in this MAP request and annexes is accurate to the best of her knowledge and indicating that 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.

If you have any questions concerning this request, please contact Mr. John Smith of ABC LLP by letter or email at john.smith@network.com (tel: 01 23 45 67 89).

We appreciate your assistance in this matter.

Sincerely,

[Signed]

John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A
on behalf of Company XCO Inc.

[The relevant annexes would be attached to this request]

58. The above sample request is merely indicative of a MAP request could include. 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.[54] It should rather accept the MAP request as valid and request additional information from the taxpayer as part of its consideration of the case.

59. It is essential to distill substantive and decisive elements of the case in a MAP request. The MAP request is often the result of long lasting and extensive audit process and a subsequent adjustment. During such process, large amounts of documentation will typically be produced, which may include evidence that is irrelevant to the MAP. Hence, it is essential for taxpayers to distill substantive and decisive elements of the case when deciding what to include in rhe request. This is particularly important in complex transfer pricing cases.

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

61. A requirement for immediate payment of interest and penalties on the tax that is the subject of a MAP may, if a similar requirement does not apply in the case of a domestic recourse, discourage a taxpayer from using the MAP. This issue is discussed in the Commentary, which recommends that 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.[55]

62. In the absence of a 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

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

55 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.

that confidentiality is safeguarded, tax administrations may consider it helpful to allow the electronic submission of a MAP request and other documents to be communicated during the MAP. This will facilitate the communication of information from the taxpayer to the competent authorities as well as between the competent authorities.

63. 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 discuss the possible 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.

THE RE-DRAFTING OF THE FOLLOWING SECTIONS WILL BE COMPLETED AT A LATER STAGE:

5.4.2.5 What happens if the taxpayer who requests a MAP is also pursuing domestic recourses (such as a court challenge)

5.4.2.6 MAP request related to recurring issues

5.4.2.7 Withdrawal of a MAP request

5.4.2.8 Role of the competent authority that receives the request

5.4.2.9 Can a MAP request be rejected by a competent authority?

5.4.3 The unilateral stage of the consideration of the MAP case

5.4.3.1 Consideration of the merits of a MAP case

5.4.3.2 Can unilateral relief be provided?

5.4.3.3 Can taxes be collected if a MAP is ongoing?

5.4.4 The bilateral stage of the consideration of the MAP case

5.4.4.1 Initiation of substantive discussion - timing, organization, involvement of audit function etc.

5.4.4.2 Position papers - form, content, additional information requests

5.4.4.3 Involvement of the taxpayer in the MAP discussions

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

5.4.4.5 Time required to complete a MAP case

5.4.5 The conclusion of the MAP

64. A MAP case typically reaches its conclusion when:

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.

b) The competent authority to which the MAP request was presented is able to provide 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 as a result of inaction by the taxpayer or one or both competent authorities.

65. The preceding subsections have dealt with the situations where a MAP case does not proceed to the bilateral stage of the MAP, where the request is withdrawn and where taxation not in accordance with the treaty is eliminated as a result of domestic remedies. This subsection addresses the cases where the competent authorities reach a proposed agreement and the rare cases where there is no agreement.

5.4.4.6 Proposed mutual agreement

66. When the competent authorities reach a tentative agreement in a MAP case, they should document the details of that proposed agreement through an exchange of notes. These notes 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.

67. In order to avoid possible disagreement as to what was agreed to during the MAP discussions and facilitate the presentation of the proposed agreement to the taxpayer, this exchange of notes should occur as soon as possible after the conclusion of these discussions.

5.4.4.7 Taxpayer's notification and acceptance of a proposed agreement

68. 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 who 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 in the context of a closing meeting.

69. 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."[56] In order to avoid a situation where the competent authorities 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 the treaty states, the Commentary goes on to recommend that the conclusion of a mutual agreement should 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.[57]

70. 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.

71. 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.

72. 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 it would be very rare for a taxpayer to do so.

73. 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[58] indicates that there would no grounds for rejecting a request for such a deferred acceptance, it also indicates that the competent authorities might prefer to take the view that where a taxpayer has undertaken both

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

57 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.

58 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.

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.

74. Where the taxpayer definitely 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 domestic tax remedies that may still be available concerning the issues that were dealt with through the MAP.

75. 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 a conditional agreement subject to the acceptance of the taxpayer, which means that once this condition is met, the mutual agreement is automatically concluded.

5.4.4.8 No agreement

76. 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 2016[59] indicate that this happens in less than 1% of MAP cases.

77. 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.

78. 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), one of the competent authority should then take the initiative of formally ending the MAP so as to avoid undermining the reliability of the MAP and creating uncertainty for taxpayers.

59 Paragraph 7 and note 1 above.

5.4.6 The implementation of a mutual agreement reached through the MAP

79. 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.

80. 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 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.

81. 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.

82. 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 treaty between the two states. 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,[60] 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.

83. In cases dealing with transfer 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.[61]

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

61 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.

84. 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.

85. 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 favour 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. 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.

86. 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 should not make any tax adjustment with respect to a given tax year), the competent authority may need to coordinate with the service 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.

87. 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,[62] it should be noted that the application of domestic

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

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

5.4.5 Summary of the different actions involved in a MAP

88. The following table summarizes the different actions involved in a MAP process that were discussed in the preceding subsections. It also provides a tentative timetable showing reasonable deadlines for each of these different actions. While the deadline for the presentation of a valid MAP request is mandatory (that deadline is provided by treaty provisions similar 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.

89. In practice, some of the actions included in this list 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.

63 Minimum standard 3.3 (see Annex).

SUMMARY AND TIMETABLE 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 **1 month** of the receipt of the request
Competent authority of the other state	If it wishes to do so, 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 • Acceptance 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 by 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	**If the competent authority determined that the case may be solved through unilateral relief**, tax	Within **3 months** after the competent authority's determination

BY WHOM?	WHAT?	WHEN?
request	administration makes the necessary tax adjustment	
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
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 any 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 *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

BY WHOM?	WHAT?	WHEN?
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

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

90. As already mentioned,[64] paragraph 3 of Articles 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 convention 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 Contracting States and the double taxation involves the profits of these two permanent establishments.

64 Paragraph 10 above.

91. Where mutual agreements reached under paragraph 3 deal with issues of interpretation or application of the treaty to 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[65] (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

92. 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.[66]

93. 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 treat 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.

65 Best practice 2 (see Annex).

66 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…".

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.

94. The second sentence of paragraph 3 only 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 one of the state has concluded with a third State (such as a treaty with State T, in the preceding example). 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. [67]

95. 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.

96. 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).

5.4.7 Communication with the other competent authority

97. 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.

98. 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 formally such a commission, preferring instead informal meetings of the competent authorities. The Commentary explanations of how such a commission would work and, in particular, the suggestion that each delegation should be

67 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.

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"[68] suggests the setting up of a body that is more formal than what is typically found necessary to deal with MAP cases.

99. 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.

100. 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.

5.5 How should the competent authority perform its MAP functions?

5.5.1 Organization of the MAP function

101. 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 dramatic developments in the area of exchange of tax information,[69] the addition to many treaties of provisions on assistance in collection of taxes[70] and the increased number of MAP cases,[71] the importance of these different roles has increased significantly over the last decades.

68 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.

69 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/.

70 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.

71 See paragraph 7 above.

102. As already noted,[72] 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.[73]

103. 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,[74] 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.

104. 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 provisions of tax treaties will provide all the necessary legal basis for dealing with MAP cases and reaching and implementing mutual agreements. As already noted,[75] however, it will be 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, relationship with domestic dispute resolution mechanisms, the process involved in the MAP discussions, and the rights of the taxpayer in a MAP case.

105. Regardless of the administrative organisation of the MAP function, it is important that the persons that will actually perform the MAP functions of the competent authority have sufficient authority 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

72 Paragraph 12 above.

73 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.

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

75 Paragraph ??? above.

if the competent authority function is delegated to senior tax officials who are actively and directly engaged in the MAP process.[76]

106. 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.[77]

107. 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.

108. 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. The evaluation of the performance of these officials should not, however, be based on factors such as the number of 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[78] which could deter a competent authority from compromising and reaching agreements.

109. In addition to skilled personnel, the competent authority should be provided with adequate financial resources to meet its obligations under the treaty. In some cases, expenses related to face-to-face meetings with other competent authorities (such as travel and accommodation expenses) may need to be incurred, although developing countries 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.

110. 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.[79] Also, the

76 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.

77 Minimum standard 2.5 (see Annex).

78 Minimum standard 2.4 (see Annex).

79 Paragraph ??? above.

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."[80] This means that the contact details of the competent authorities of a large number of countries may be accessed from a single web site.[81]

111. 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.[82] Internal records of previous MAP cases facilitate the processing of similar cases and contribute to the consistent interpretation of a treaty where the issues are the same.

112. Competent authorities are often part of the tax administration but need a high degree of independence 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.

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

5.5.2 How should a competent authority approach a MAP case?

114. 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.

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

116. 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

80 Minimum standard 2.2 (see Annex).

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

82 Minimum standard 1.5 (see Annex).

opinions on whether or not the treaty or the law reflects an appropriate tax policy and whether or not they should be amended.

117. 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*[83] will be relevant when dealing with transfer pricing issues.

118. 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, 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

119. The functioning of the MAP may be improved through the conclusion 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 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.[84]

120. 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

83 Note 22.

84 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

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

121. Since technology is ever evolving, the question arises of whether new technologies could be used to improve how competent authorities deal with the MAP, 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 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.

122. 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.

123. 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 treaties with respect to which MAP arbitration is allowed, information also needs to be exchanged between the competent authorities and the arbitrators. 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.

124. 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.

125. 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.

126. 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.

127. 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[85]

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.

85 Final Report on Action 14, note 5.

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).