ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

MANUAL ON EFFECTIVE MUTUAL AGREEMENT PROCEDURES (MEMAP)

February 2007 Version

CENTRE FOR TAX POLICY AND ADMINISTRATION

MANUAL ON EFFECTIVE MUTUAL AGREEMENT PROCEDURES (MEMAP)

PREFACE

This online Manual on Effective Mutual Agreement Procedures (MEMAP) is part of a broader project to improve the functioning of existing international tax dispute procedures and to develop supplementary dispute resolution mechanisms. More information about the project, the proposed supplementary dispute resolution mechanism, and other suggested improvements to the Mutual Agreement Procedures (MAP) process can be found at www.oecd.org/ctp under Dispute Resolution.

MEMAP is intended as a guide to increase awareness of the MAP process and how it should function. It will provide tax administrations and taxpayers with basic information on the operation of MAP and identify best practices for MAP without imposing a set of binding rules upon Member countries.

The following points are important elements to consider in understanding the status of the manual and its interaction with other OECD guidance:

- **The manual does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provision of any tax convention.**
- **Information contained in this manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of the OECD Model Tax Convention on Income and Capital (OECD Model Tax Convention) and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines).**
- **To the extent that there are any statements or information in the MEMAP which appear to conflict, or to be incompatible with a convention, domestic guidance provided by a country, the OECD Model Tax Convention, its Commentary, or the OECD Transfer Pricing Guidelines, then the latter guidance is controlling.**
- **"Best practice" is the term used in this manual to describe what is generally thought to be the most appropriate manner to deal with a MAP process or procedural issue. There is no priority or significance associated with their order or with the length of discussion of a particular practice. Although taxpayers and tax administrations should ideally strive towards implementing these best practices, it is recognised that it may not always be possible to apply a best practice as described in the manual or there may be situations where their application may not be appropriate.**

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INTRODUCTION

About this Manual

The aim of this online Manual on Effective Mutual Agreement Procedures (MEMAP) is to make available, to both tax administrators and taxpayers in the Organisation for Economic Co-operation and Development's (OECD's) Member countries and non-OECD Member countries, basic information on the operation of Mutual Agreement Procedures (MAP) under bilateral tax treaties and to identify best practices for MAP.

Purpose of the manual

The overall purpose of this manual is the continued improvement of the MAP process as it applies in countries' treaty relationships. For both OECD Member countries and non-OECD economies, this means the promotion of greater consistency in how MAP issues are dealt with, as well as improving the timeliness and effectiveness of the process.

This manual should be viewed as a general guide for the MAP process that highlights the best practices of the competent authorities of the OECD Member countries. As such, the MEMAP will encourage countries to improve the effectiveness of MAP. While the MEMAP does not impose a set of binding rules upon tax authorities or taxpayers, it is intended to describe recommended approaches for conducting MAP activities. The best practices for MAP developed by the MEMAP will facilitate and support the resolution of double taxation cases and other cases eligible for MAP consideration, while remaining general enough to be applicable to most jurisdictions.

"Best practice" is the term used in this manual to describe what is generally thought to be the most appropriate manner to deal with a MAP process or procedural issue, and best practices are generally the practices followed by most OECD countries. They are grouped functionally and there is no priority or significance associated with their order or length of discussion. There may be certain situations where a best practice as described in the MEMAP is not possible to apply or is not necessarily the "best" approach to resolving a problem or issue in a particular case. Although taxpayers and tax administrations should ideally strive towards implementing these best practices, it is recognised that there may be situations where their application may not be appropriate.

The OECD website includes a series of country profiles on Mutual Agreement Procedures for OECD Member countries, with information about the specific practices of the Member countries. In situations where specific country guidance is not available for MAP, this manual should provide general guidance on the process and on obtaining assistance from a competent authority.

The MEMAP is intended as a guide to increase awareness of the MAP process and how it should function. It does not, and is not intended to, modify, restrict or expand any rights or obligations contained in the provision of any tax convention. To the extent that there are any statements or information in the MEMAP which appear to conflict, or to be incompatible with a convention, domestic guidance provided by a country, the OECD Model Tax Convention or the OECD Transfer Pricing Guidelines, then the latter guidance is controlling.

Other references

The topics covered in this manual relate to issues addressed by the OECD publications noted below. Information contained in this manual complements, and should not be considered a substitute for, the criteria, procedures, and guidance specified in the current versions of these documents.

- OECD Model Tax Convention on Income and Capital (OECD Model Tax Convention), as amended from time to time.
- The principles of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Transfer Pricing Guidelines), as amended from time to time.

1. BACKGROUND

1.1. What is a Tax Convention?

A tax convention, or tax treaty as it is often called, is an official agreement between two countries on the administration of taxation when the domestic tax laws of the two countries apply simultaneously to a particular issue or taxpayer (e.g., when a taxpayer resident in one country derives income from sources in the other country). Tax conventions provide a means of settling on a uniform basis the most common problems that arise in the field of international double taxation.

Most tax conventions typically include the following broadly defined sections:

- A preliminary section on the scope of the convention (e.g. covering taxes on income and capital) and the definition of terms used.

- The main part of the convention which settles the extent to which each of the two contracting states may tax income (i.e. dependent upon different classes of income and capital and based upon whether the state is a source state or residence state) and determines how international juridical double taxation and international economic double taxation are to be eliminated.

- A key section on special provisions such as the MAP article, which establishes the mutual agreement procedures for eliminating double taxation and resolving conflicts of interpretation of the convention.

- Finally, a section on the implementing provisions such as the entry into force and termination provisions of the convention.

The OECD Model Tax Convention is a model tax treaty which has been developed by the OECD. The first version of the OECD Model Tax Convention was published in 1963, and the Model has been frequently updated since then. More than 2000 bilateral tax treaties between countries of the world are based on the OECD Model Tax Convention.

1.1.1. Purpose of a tax convention

The primary purpose of tax conventions is to eliminate double taxation and to prevent fiscal evasion. A tax convention will also serve, in effect, to allocate tax revenues on transactions taking place between residents of signatory countries. To these ends, a tax convention may resolve some common disputes and provide rules determining:

- the country in which a taxpayer is resident;

- the treatment given to specific types of income;

- the allowable rates of withholding tax on specific types of cross-border payments; and

- the manner in which issues of taxation not in accordance with a tax convention are to be resolved.

1.1.2. Double taxation – juridical and economic

International juridical double taxation can be defined as the imposition of income taxes in two (or more) states on the same taxpayer in respect of the same income. Juridical double taxation can arise, for example, where a resident of one country derives income from sources in the other country, and both countries' domestic tax legislation would tax that income. It can also arise where each country considers the taxpayer to be resident in that country under domestic tax laws. Tax conventions reduce juridical double taxation by allocating taxing rights between residence and source states on various categories of income, typically by eliminating or limiting source country taxation or by requiring a residence state to grant relief for source state taxation through a credit or exemption mechanism. For example, tax conventions typically provide that one country may not tax the business profits earned by a resident of the other country unless that resident has a taxable presence in the form of a permanent establishment in the first country and the profits are attributable to that permanent establishment. Tax conventions also reduce juridical double taxation by establishing criteria for determining an exclusive residency status for taxpayers. The most common instances of juridical double taxation disputes are disputes over residency or permanent establishment status, or over the characterisation of particular items of income and their coverage under particular provisions of the convention.

Economic double taxation means the inclusion, by more than one state's tax administration, of the same income in the tax base when the income is in the hands of different taxpayers. Transfer pricing cases are the best example of economic double taxation. For example, a tax administration adjusts a price charged between related parties with a resulting tax charged on the additional income in the hands of one related party, where tax has already been charged in another country on that same income in the hands of the other related party.

Double taxation has a detrimental effect on the movements of capital, technology and persons and on the exchange of goods and services. Thus tax conventions, when properly applied, remove the obstacles of double taxation, thereby promoting the development and flow of international trade and investment.

1.2. What is a Mutual Agreement Procedure (MAP)?

The MAP article in tax conventions allows designated representatives (the "competent authorities") from the governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a convention.

Since most probable occurrences of double taxation are dealt with automatically in tax conventions through tax credits, exemptions, or the determination of taxing rights of the contacting states, the majority of MAP cases are situations where the taxation of an individual or entity is unclear.

A noteworthy point is that the MAP article in most conventions does not compel competent authorities actually to reach an agreement and resolve their tax disputes. They are obliged only to use their best endeavours to reach an agreement. Unfortunately, on occasion competent authorities are unable to come to an agreement. Reasons for unresolved double taxation range from restrictions imposed by domestic law on the tax administration's ability to compromise to stalemates on economic issues such as valuations.

Some conventions currently include arbitration clauses in their MAP articles. However since these procedures are new, there has been limited guidance and experience in their use. Even the EU Arbitration Convention that first entered into force in 1995 has only had a few actual cases concluded. This lack of experience may change in the near future if more cases line up for arbitration and the OECD considers changes to the OECD Model Tax Convention to update guidance on supplementary dispute resolution mechanisms for MAP.

1.2.1. Taxation of enterprises and individuals "not in accordance with the Convention"

The MAP article (Article 25 (Mutual Agreement Procedure) of the OECD Model Tax Convention) usually sets out three general areas where two states endeavour to resolve their differences. The first area, covered by paragraphs 1 and 2 of the OECD Model Tax Convention's MAP article, applies to situations where a taxpayer believes that the actions of one or both of the contracting states has resulted or will result for him in "taxation not in accordance with the provisions of the Convention". This area is the most commonly used and most often referred to part of the MAP article since it deals with most international taxation disputes under tax treaties.

The taxpayer may request MAP assistance in these instances of taxation contrary to a convention, which in most cases involve double taxation. Historically the majority of these cases have been issues of transfer pricing where associated companies of a multinational enterprise group incurred economic double taxation due to an adjustment to their income from intra-group transactions by one or more tax administrations. Enterprises also request this kind of MAP assistance for non-transfer pricing cases, including disputes over such issues as the existence of a permanent establishment, the amount of profits attributable to a permanent establishment, or the application of a tax convention's withholding tax provisions to their income.

On occasion, individuals require MAP assistance for cases of taxation not in accordance with a tax convention when specific articles of a convention do not resolve a situation clearly. The most common occurrences for individuals are cases of dual residency (i.e., where an individual is considered a resident for tax purposes of two countries, under their respective domestic laws). This can happen quite commonly, because the domestic laws of the two countries may apply different tests for when residency is gained or lost. As part of its object and purpose of avoiding double taxation, a tax treaty will only allow one of these countries to treat that person as a resident for purposes of the treaty, and it therefore sets forth criteria to determine which of the two countries the person has the greater connection with. That will then be treated as the only country of residence when applying the treaty.

Paragraph 2 of Article 4 (Resident) in the OECD Model Tax Convention seeks to solve this problem by a series of so-called "tiebreaker" tests, each serving to determine the single residence country for treaty purposes if the previous tests have not resolved the issue. In the application of those tests, there may be different views taken by the two countries, for example as to where the person's "permanent home" or centre of vital interests is, and there might therefore be a need to resort to MAP to resolve differences between the treaty partner countries on this point.

Moreover, even if both countries agree on how the tiebreaker tests operate, these tests do not always give a result. The last of the tiebreaker tests tries to deal with this by providing that "the competent authorities of the Contracting States shall settle the question [that is - of individual residence for treaty purposes] by mutual agreement." In other words if the issue is not solved by the other tiebreaker rules, it should be solved by mutual agreement to help avoid double taxation.

1.2.2. Interpretation or application cases and double taxation in cases not otherwise provided for in a convention

Most MAP articles provide for the possibility of MAP in two areas other than instances of taxation "not in accordance with the Convention". The other two areas, usually mentioned in a provision corresponding to Article 25(3) of the OECD Model Tax Convention, involve questions of "interpretation or application of the Convention" and the elimination of double taxation in cases not otherwise provided for in a convention.

Specifically, the first sentence of Article 25(3) typically authorises the competent authorities to try to resolve by mutual agreement “any difficulties or doubts arising as to the interpretation or application of the Convention”. Under this provision, issues that require clarification or interpretation can be discussed and agreed upon between the contracting states. These MAP discussions frequently relate to topics of a general nature which concern, or may concern, a category of taxpayers rather than a specific taxpayer’s case.

The competent authorities may rely on this provision, for example, to reach agreement on the definition of a term used in the convention or to agree upon procedures for granting the relief called for by a convention. Situations where this provision has been usefully applied include, for example:

- The U.S.-Japan Memorandum of Understanding of 27 December 2005 on the meaning of the term “investment bank” in the Interest Article of their treaty;

- The U.S.-Mexico Mutual Agreement of 22 December 2005 on the criteria and procedures to be applied for purposes of granting treaty benefits to fiscally transparent entities;

Best Practice N°1: Resolving and publishing issues of interpretation or application

Many issues of a general nature regarding the interpretation or application of a treaty could be successfully addressed by competent authorities’ exercising their ability under the first sentence of Article 25(3) to reach a mutual agreement on those issues.

Competent authorities could greatly improve the implementation of treaties by identifying and pursuing opportunities to use this authority. Publishing any mutual agreements reached under Article 25(3) that apply to all or a general category of taxpayers would improve guidance and proactively resolve future disputes. Making such agreements public is therefore to be encouraged, unless the nature of the agreement (e.g., certain compliance-related agreements involving procedures for criminal cases) means that its publication would undermine its administrative goal.

The second sentence of Article 25(3) also typically authorises the competent authorities to “consult together for the elimination of double taxation in cases not provided for in the Convention”. This authority might allow the competent authorities to address, for example, a case where a third country resident has permanent establishments in each of the two treaty countries, and they disagree about the amount of profits attributable respectively to each of the two locations.

Best Practice N°2: Robust use of Article 25(3) power to relieve double taxation

The authority granted by Article 25(3) to resolve cases of double taxation not provided for in the Convention is closely linked to the fundamental purpose of the Convention, and competent authorities could faithfully fulfill that purpose by their willingness to exercise that authority in relevant cases, provided there is no domestic law impediment to doing so.

1.3. What/Who is a Competent Authority?

A “competent authority” is a term used in tax conventions to identify the position, person, or body to whom issues can be addressed within the contracting state that is one of the two parties to a tax convention.

The competent authority for each country is typically identified in the Definitions article of the tax convention (for example, under Article 3 (General Definitions) of the OECD Model Tax Convention). A typical designation would be "the Minister of Finance or his authorised representative" or "the Secretary of the Treasury or his delegate". As will be described below, the authority is usually delegated within a tax administration to a level that will administer a country's MAP program.

Assistance by a competent authority is generally provided under the MAP article contained in a tax convention. As well, competent authorities are often referenced in other articles of a convention and in certain situations other articles may apply directly to allow for competent authority assistance on particular questions (for example, under Article 9(2) (Associated Enterprises) or Article 4(2)(d) (Resident) of the OECD Model Tax Convention).

1.3.1. Overall purpose of a competent authority

Generally speaking, a competent authority is committed to ensuring a good faith application of a tax convention and endeavours to resolve competent authority requests in accordance with the applicable tax convention, the OECD's Model Tax Convention and the OECD Transfer Pricing Guidelines.[1] To fully carry out this obligation, every effort should be made, including both competent authorities looking for appropriate opportunities to compromise, to reach a satisfactory resolution of the issues involved.

Best Practice Nº3: Principled approach to resolution of cases

In the resolution of MAP cases, a competent authority should engage in discussions with other competent authorities in a principled, fair, and objective manner, with each case being decided on its own merits and not by reference to any balance of results in other cases. To the extent applicable, the Commentary to the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines are an appropriate basis for the development of a principled approach.

As part of a principled approach to MAP cases, competent authorities should be consistent and reciprocal in the positions they take and not change position on an issue from case to case, depending on which side of the issue produces the most revenue. Although a principled approach is paramount, where an agreement is not otherwise achievable, both competent authorities should look for appropriate opportunities for compromise in order to eliminate double taxation.

To the extent possible, competent authorities who face significant recurring issues in their bilateral relationship may wish to reach agreement on the consistent treatment of such issues.

In order to improve the MAP process, competent authorities ideally strive to resolve cases in a timely manner and keep the taxpayer informed of the status of their request on an on-going basis. Once a decision has been made or a solution agreed to by the competent authorities on a particular case, the taxpayer should be advised of the decision in writing. It is understandable that a taxpayer may wish to know the basis of the competent authority decision or agreement on its case and therefore should be afforded a satisfactory explanation by the competent authorities. Each of these issues is dealt with in the relevant section of this manual.

1. Other relevant sources such as other model tax conventions and commentaries may be useful as well, depending upon the origin or basis of a particular tax convention.

2. MAKING A MAP REQUEST

2.1. What is a MAP Request?

Where a person considers that the actions of one or both countries' tax administrations result or will result in taxation not in accordance with a tax convention, the person may request competent authority assistance under the MAP article of the relevant tax convention. In most cases, such an action is an adjustment to, or a formal written proposal to adjust, income related to an issue or transaction to which the person is a party.

Generally, taxpayers must approach the competent authority of their country of residence to request relief under a tax convention. In cases where an adjustment is made that affects related parties in both jurisdictions (e.g., a transfer pricing adjustment by one of the countries to the income or expense of one company from a transaction entered into with a related company in the other country), it is often advisable for each taxpayer to make a separate request for assistance to the competent authority of the country in which it is resident. If the taxpayer is a non-resident of the relevant countries but is entitled to a treaty benefit based on nationality in one of the countries (such as protection under a provision comparable to Article 24(1) (Non-Discrimination) of the OECD Model Tax Convention), then a request may be made to the country in which it is a national.

Some conventions are more flexible and allow a taxpayer to present a request to the competent authority of either contracting state. Taxpayers should refer to the text of the particular MAP article to determine their entitlement to present a request to a particular competent authority.

2.1.1. Typical scenarios requiring competent authority assistance

The following are some typical examples of taxation not in accordance with a tax convention where one might make a MAP request:

- A taxpayer is subject to additional tax in one country because of a transfer pricing adjustment to the price of goods or services transferred to or from a related party in the other country. The taxpayer may request that the competent authority of the first country reduce or withdraw the adjustment and/or that the competent authority of the second country allow a corresponding adjustment to the income of the related party to prevent economic double taxation.

- A taxpayer is considered to be a resident of two treaty countries under each country's domestic law, and each country asserts that the taxpayer is a resident of its jurisdiction for purposes of the tax convention. If unresolved, the taxpayer could be subject to taxation not in accordance with a convention and therefore liable for tax on the same income in both countries. A request to the competent authorities would initiate discussions between the competent authorities regarding the proper application of the tiebreaker rules contained in the residency article of the convention. The taxpayer should approach the competent authority of the country in which the taxpayer asserts residency and in some cases where it is incorporated.

- A withholding tax is levied beyond what is allowed within an applicable tax convention by one treaty country on a payment to a resident of the other country. The taxpayer may request the competent authority of its country of residence to address the taxation not in accordance with the tax convention with the competent authority of the other country.

- A taxpayer operating a branch in one treaty country is subject to additional tax because of an adjustment by that treaty country of the income allocated to the branch. The taxpayer may ask the competent authority of its residence state to prevent double taxation by allowing an increased foreign tax credit or exemption or by seeking the other competent authority's agreement to give relief from the adjustment.

- A taxpayer subject to tax as a resident in one country on income, including income from carrying on a business in the other treaty country, is taxed in that other treaty country on the business income earned there, despite not having a permanent establishment in that country under the tax convention. The taxpayer may request the competent authority of its country of residence to address the issue of taxation not in accordance with the tax convention with the competent authority of the other country.

- A taxpayer is uncertain whether the convention covers a specific item of income, or is unsure of the characterisation or classification of the item related to a cross-border issue; the taxpayer may approach the competent authority for clarification.

In all of these situations a taxpayer may generally obtain assistance or relief via the MAP process.

In order for a taxpayer to seek assistance from its competent authority in cases of potential taxation not in accordance with the convention, it is generally sufficient if the resident establishes that such taxation is probable. In other words, an actual adjustment is not necessary and taxpayers may contact the competent authority to notify of an impending adjustment. Establishing the probability of inappropriate taxation does not mean that the taxpayer must prove this to a 51 percent probability, and in borderline cases it is appropriate for the competent authority to give the benefit of the doubt to the taxpayer for purposes of accepting the request. Further guidance on the probability of inappropriate taxation and the extent required to submit a request is provided in Paragraph 12 of the Commentary on Article 25 of the OECD Model Tax Convention.

A resident may also contact its competent authority for clarification as to the interpretation and application of a convention, as described in paragraph 3 of the MAP article. In such cases, the conditions of paragraph 1 of the MAP article relating to the need to establish probability of inappropriate taxation do not need to be met.

2.2. How to Make a Request for Competent Authority Assistance

In almost all cases, MAP cases are initiated through a taxpayer's request for competent authority assistance. Essentially the request is the means by which a taxpayer informs or notifies a competent authority that it believes there is an action by one of the treaty countries involved which has resulted or will result in taxation not in accordance with the relevant tax convention.

Some countries publish specific guidance on how to make a MAP request and how they conduct their MAP cases. The MAP country profiles of OECD Member countries published on the OECD website include references to such guidance and should be consulted by taxpayers considering making a MAP request.

<u>Best Practice Nº4</u>: Transparency and simplicity of procedures for accessing and using the MAP

Competent authorities should, where appropriate, formulate and publicise domestic rules, guidelines and procedures concerning use of the MAP, and OECD Member countries should ensure that their country profiles on the OECD website including references to this information are kept up to date.

Notwithstanding the amount of information required to deal with some MAP cases and the necessity of some procedures, formalities involved in instituting and operating the MAP should be kept to a minimum and any unnecessary formalities eliminated.

Often, competent authority cases are fact-intensive, particularly transfer pricing cases, and therefore usually require considerable information. However, the amount of information required should be balanced with the complexity of the issues; it should recognise the burden such requests for information place on a taxpayer, and it should be specific to the issue being addressed.

2.2.1. General format of a MAP request

In cases where there are no prescribed forms for requesting competent authority assistance, the taxpayer should provide the following relevant information, if applicable:

1. the name, address, and taxpayer identification number of the taxpayer;

2. for transfer pricing cases, the name, address and, if possible, the taxpayer identification number of any related foreign taxpayer involved;

3. the name of the foreign tax administration involved and if possible identification of the regional or local tax administration office that has made, or is proposing to make, the adjustment (if relevant);

4. the tax convention article(s) that the taxpayer asserts is not being correctly applied, and the taxpayer's interpretation of the application of the article;

5. the taxation years or periods involved;

6. the relationship, situation, or structure of the transactions, issues, or related parties involved (advising of any changes in these matters that occur after the request has been filed would be helpful);

7. a summary of the facts and an analysis of the issues for which competent authority assistance is requested, including any specific issues raised by the tax administrations affecting the taxpayer and the related amounts (in both currencies and supported by calculations, if applicable);

8. for transfer pricing cases, documentation as described in domestic legislation of the taxpayer's state of residence, if available (where documentation is inordinately voluminous, a description of the documentation prepared in connection with the transactions which are the subject of the MAP request may be acceptable);

9. a copy of any other relevant competent authority request and the associated documents filed, or to be filed, with the competent authority of the other contracting state, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in

response to the action or proposed action of another tax administration (if applicable, translated copies are helpful and where documentation is voluminous, a description of the documentation may be acceptable);

10. an indication of whether the taxpayer or a predecessor has made a prior request to the competent authority of either contracting state on the same or related issue;

11. a schedule of the time limitations in each jurisdiction (domestic as well as tax convention time limits) in respect of the years for which relief is sought (in cases of multiple taxpayers, a schedule for each);

12. a statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or comparable document in either of the relevant jurisdictions;

13. where the request for competent authority assistance involves issues that are currently or were previously considered by the tax authorities of either contracting state as part of an advance pricing arrangement, ruling, or similar proceedings, a statement to that effect;

14. if consent has not already been provided for a person to act as an authorized representative, a signed statement that a representative is authorized to act for a taxpayer in making the request;

15. any other facts that the taxpayer may consider relevant;

16. a copy of any settlement or agreement reached with the other jurisdiction which may affect the MAP process; and

17. the taxpayer's views on any possible bases on which to resolve the issues.

The request should generally be signed by the taxpayer, or by an authorized person on behalf of the taxpayer, confirming the accuracy and completeness of the facts and information presented in the request. Alternatively, an accompanying document, stating as much, may be provided within a reasonable period of time after the submission.

Typically there are no fees charged by the competent authorities for MAP cases. There may be fees associated with Advance Pricing Arrangement programs (discussed elsewhere in the manual) or for the rare occurrences of using independent experts or mediators.

<u>Best Practice Nº5</u>: Providing complete, accurate, and timely information to the competent authorities

The completeness and accuracy of the information included in a request has a direct impact on the time required for the competent authorities to carry out the MAP process. To deal with a case in an expeditious manner, a competent authority needs sufficient details to analyse, understand, and ultimately prepare to discuss a position with both the taxpayer and other competent authority.

Ensuring both competent authorities have the same information at approximately the same time will facilitate a common understanding of the facts and will undoubtedly encourage earlier resolution. Therefore, copying the other competent authority on both submissions of information and subsequent requests will reduce the risk of misunderstandings. If two competent authorities receive conflicting information, the outcome will likely be a delay in the MAP process until the parties can agree upon the information or facts presented.

Certain competent authorities may delay acceptance of a case where a taxpayer has failed to provide complete and accurate information or may deny competent authority assistance where the taxpayer has misrepresented facts.

<u>Best Practice Nº6</u>: Allowing electronic submissions

For the benefit of the tax administration and taxpayer, electronic correspondence and copies of a competent authority submission are often helpful in encouraging simultaneous delivery of information to the two competent authorities. Electronic copies may also ease the burden of submission for the taxpayer while facilitating the administration of a request by the competent authority. Some governments may not currently accept this medium of submission, while other governments may with a disclaimer.

2.2.2. Use of information within MAP process

All information obtained or generated during a MAP process is fully protected by the confidentiality provisions of the applicable tax convention, specifically the Exchange of Information article (Article 26 of the OECD Model Tax Convention) and in almost all cases by domestic legislation, as would be the case for domestic issues.

In addition, a competent authority should recognize that the disclosure of sensitive or confidential information such as a trade secret could harm a taxpayer's competitive position, and should ensure that all measures are taken to protect such information.

3. HOW MAP WORKS

3.1. The Basics

Where a request is made to a competent authority under the MAP article of a tax convention, the competent authority should first, if the request appears to be justified, attempt to resolve the matter unilaterally.

For example, in a case involving a taxpayer assertion that the action of one or both contracting states results in taxation contrary to the convention, if the competent authority considers that the request for relief is justified and this relief is within the bounds of the tax convention, it could provide the relief without consulting the other competent authority. If the competent authority is not able itself to arrive at a satisfactory solution, it will engage the other competent authority and endeavour to resolve the matter by mutual agreement.

Once notified of a case, the competent authorities discuss the merits (and in some cases deficiencies) of the case or issue usually based upon a position developed by one of the competent authorities. These discussions can take place via correspondence, telephone, videoconference, or in person. Typically after a thorough discussion, which may involve a formal rebuttal to a position paper, the competent authorities in most cases come to an agreement on a mutually acceptable resolution of the case.

In double taxation cases, the agreement between competent authorities will outline to what extent each jurisdiction will provide relief and how the relief will be provided. Details such as method of relief (e.g. adjustment to income, credit, exemption, etc.), repatriation, and timing are usually recorded as a summary record followed by an exchange of letters between the competent authorities, which formalizes the agreement.

In such cases, if the other competent authority (the competent authority in the jurisdiction where the issue or adjustment did not arise) agrees to provide all or some correlative relief, then in most cases the relief is provided through a "corresponding adjustment". The term "corresponding adjustment" is used to describe an adjustment made by a treaty partner in order to relieve double taxation caused by an adjustment initiated by the first mentioned tax administration.

Once the agreement between the competent authorities has been finalized, the taxpayer is notified in writing of the decision and is provided with an explanation of the result. Upon the acceptance by the taxpayer, written confirmation of the agreement is exchanged between the administrations and provided to the taxpayer. Soon afterwards the results are processed by the tax administration and relief is obtained.

3.2. Acceptability of a MAP Request

While the suggested general format of a MAP request (above) may seem extensive, competent authorities normally seek the following key elements in considering a MAP request:

- there is an applicable tax convention covering the issue or transaction;

- the person considers that the actions of one or both countries results or will result in taxation not in accordance with the provisions of the tax convention;
- the competent authority is notified within the time limits specified in the applicable tax convention; and
- the issue or objection seems to be justified.

Assuming those requirements are met, taxpayers are entitled to initiate a competent authority request even before an audit is completed or they have received formal notification of an assessment. Often, however, competent authorities require that an adjustment to income or issue be confirmed by the conclusion of the audit and a complete request be submitted before committing resources to the analysis or evaluation of a MAP process. This may be particularly true where the competent authority feels unable to evaluate the case before the audit function has completed the factual development and related analysis. Although this may delay the work by a competent authority on processing an individual MAP case, it should not prevent notification or presentation of a case to a competent authority or in any way obstruct a person's access to MAP.

Best Practice Nº7: Allowing early resolution of cases

A MAP application process that is capable of being initiated at an early stage of a potential dispute, perhaps in conjunction with a flexible initial review process, may allow the competent authority to help in the identification of pragmatic alternatives that may become apparent before either the tax administration or the taxpayer becomes overly burdened with unnecessary costs or excessive preparation of a case.

Notwithstanding the obvious benefits of an early resolution, many competent authorities prefer to limit their early involvement (prior to the conclusion of the audit), giving due consideration to maintaining a level of independence as outlined in **Best Practice Nº23: Independence and funding of a competent authority**, to making suggestions that relate to general policy and process issues, rather than discussing the specific details of a case which their office may be required to review in the future. For example, these suggestions could address issues regarding the general viability of an adjustment as it relates to time limitations or proposals for an Advance Pricing Arrangement or simultaneous audit.

It is advisable that taxpayers review the specific country's guidance on MAP and the relevant convention for further details or consult with the competent authority directly.

It is common for competent authorities to notify taxpayers in writing whether their request for competent authority assistance has been accepted or declined within a reasonable period of time (30 days is suggested as reasonable). Where a request is declined, it is constructive for the tax administrations to provide reasons for the decision.

In addition, where the decision to accept or deny a MAP request is borderline (for example, where there is a question as to whether notification/presentation of a case to the competent authority was made within the specified time limits of a convention), it is important that the competent authorities bear in mind the spirit and objectives of the convention and also that the MAP process is designed to be inclusive as opposed to limiting participation. This is especially true in cases where the issue of "probability of taxation" arises or cases where time limits exclude a person from competent authority assistance.

3.2.1. Time limits for requesting access to MAP

Tax conventions frequently include one or more time limits relevant to MAP requests. One type of limit is that found in Article 25(1) of the OECD Model Tax Convention. It provides that a case of taxation "not in accordance with the Convention" must be "presented" to the competent authority of the taxpayer's residence country "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention". For most tax administrations this generally means three years from the date of the notice of adjustment. (Further guidance on the starting point of the three-year time limit in the OECD Model Tax Convention is available in the Commentary to Article 25.) However, there are many variations of time limits in various countries' treaty networks and therefore it would be prudent to verify the specifics for any one particular case. If the taxpayer does not meet this timeliness requirement for presenting its case to the competent authority, it may be denied access to the MAP.

Best Practice Nº8: Earlier notification of a potential case

It is advisable for taxpayers to consider filing a MAP request and/or notifying the appropriate competent authorities of a potential MAP case as soon as it appears likely that an issue will result in taxation contrary to the applicable convention. This is the point when it becomes evident that there is a probability, and not just the possibility, that taxation not in accordance with the applicable convention will result (see Sections 2.1.1 *Typical scenarios requiring competent authority assistance*, and 2.2 How to Make a Request for Competent Authority Assistance).

Notifying or presenting a case in advance of a formal action giving rise to inappropriate taxation will help to ensure a convention's time limits for requesting MAP or notifying competent authorities are met.

The general purpose of time limits within a convention is to prevent tax administrations from having to make or react to adjustments many years after the taxable period at issue. Such late consideration of adjustments may be difficult since the information may very well be stale or no longer available. Records, information, and details regarding an issue or transaction may be very difficult to come by, especially in the case of a country that is unaware of the issue until long after the taxable period at issue.

Best Practice Nº9: Liberal interpretation of time limits and advising of treaty rights

Balancing a tax administration's need for reasonable time limitations with the necessity of providing MAP assistance to those entitled to treaty benefits can be a difficult issue. Keeping in mind the spirit and objectives of the convention, however, taxpayers should not be unduly prevented from obtaining assistance via MAP due to overly strict interpretations of a convention's time limitation for requesting MAP. Simply put, taxpayers should receive the benefit of the doubt in borderline cases.

While the onus for making a timely request in order to preserve access to the MAP may rest with the taxpayer and taxpayers should take all reasonable steps to ensure that time limits do not expire, it would be helpful for a tax administration making an adjustment to advise the taxpayer of their rights under the applicable convention, including information about any time limitations in the convention for initiating MAP. This written notice or advice could be included at the time of formal notification of a proposed adjustment and could include general guidance on the availability of MAP and how to go about protecting the availability of access to this mechanism. Some administrations have implemented this best practice of advising taxpayers of both their domestic and convention rights and obligations at the time of the proposed adjustment, with successful feedback and results.

Domestic law provisions, including time limitations, should not be an impediment to access to the MAP unless they are reflected in the terms of the convention itself. A competent authority relying upon a domestic law impediment as the reason for not allowing a taxpayer to initiate MAP should inform the other competent authority of this and duly explain the legal basis of its position. See Section 4. MAP and domestic law for further guidance on the interaction of domestic law and the MAP process.

3.2.2. Time limits for implementation of relief where treaties deviate from the OECD Model Tax Convention

Although the OECD Model Tax Convention states that a MAP agreement shall be implemented notwithstanding domestic time limits of the contracting states, a number of countries have reserved their position on this point. Thus, some conventions do not have any wording similar to the second sentence of Article 25(2) of the OECD Model Tax Convention; while other conventions provide explicitly that a country is not required to implement a MAP agreement in contravention of domestic law limitations if that country's competent authority has not received notification that a MAP case exists within a specified period of time (e.g. within a specified number of years from the end of the taxable year to which the case relates).

Advance notice of time limits, as mentioned above in Best Practice Nº9: Liberal interpretation of time limits & advising of treaty rights, would be especially useful in cases where a convention differs from the OECD Model Tax Convention. In these instances, the tax administration could usefully inform a taxpayer of a need to notify the other competent authority of an adjustment within a specified time in order to preserve the possibility of MAP-based relief from that other country.

Nevertheless, taxpayers should be cognizant that their failure to take timely protective measures to prevent the loss of rights because of the expiration of treaty-based or domestic law time limitations in the case of conventions that deviate from the wording of the second sentence of Article 25(2) of the OECD Model Tax Convention may undermine the effectiveness of the MAP to provide relief from taxation not in accordance with the convention. Accordingly, taxpayers should take all reasonable steps to ensure that such time limitations do not expire without appropriate protective measures on their part.

In those specific cases where a convention deviates from the OECD Model Tax Convention and contains an explicit provision specifying that a competent authority must receive notification of a MAP case within a specific time period in order to be obligated to implement any relief through the MAP, it would be contrary to the spirit of the MAP for this requirement to be applied in an overly strict manner. For example, even though competent authorities may expect a notification to contain specific details of "tax not in accordance with a convention" such as identification of the issue, amounts of the adjustment, and calculations of the tax at issue, deadlines for these particular requirements should not be used to exclude a person unreasonably from obtaining relief through a MAP agreement which can be implemented by both countries. This is especially true in cases where a tax administration is delayed in presenting these details to the taxpayer. Furthermore, if a notification is considered improperly filed and therefore notification requirements have not been met, it would be appropriate for a competent authority to advise the taxpayer of the reasons and how the situation may be rectified.

Where a country's tax administration has failed to advise a taxpayer of the likelihood of an adjustment until after the expiration of such a time limit explicitly set forth under a convention for notifying the other country's competent authority of a MAP case, and the result is that the taxpayer would be barred from obtaining relief from the other country through implementation of a MAP agreement, the first country's competent authority should, in most cases, be prepared to withdraw its country's adjustment unilaterally in order to prevent double taxation.

Best Practice Nº10: Avoiding exclusion from MAP relief due to late adjustments or late notification

When an adjustment has the potential to give rise to a MAP case, tax authorities should notify the taxpayer as soon as possible of their intention to make the adjustment, especially in cases where the provisions in the MAP article of the applicable convention for presentation/notification of a case and implementation of a result differ from those of the OECD Model Tax Convention. This notice should not only advise the taxpayer of any requirements for initiating MAP (as mentioned in Best Practice Nº9) but also of requirements to obtaining relief via MAP, such as notifying the other country's competent authority of the adjustment where such timely notification is necessary to preserve the right to MAP-based relief from that other country.

Double taxation may arise if one country makes a late adjustment and the other country is unable or unwilling to grant relief through MAP because of time limitations in the treaty or in its domestic law. Where the obligation of implementing mutual agreements notwithstanding domestic time limits is explicitly stated in the convention, a good faith application of the convention requires adherence to that obligation.

In general, countries that have conventions that deviate from the wording of the second sentence of Article 25(2) of the OECD Model Tax Convention should try to ensure that their audit practices do not unduly create the risk of late adjustments for which taxpayers may not be able to obtain MAP relief. For their part, taxpayers should take all reasonable steps to ensure that time limitations in the other country do not expire without appropriate protective measures on their part.

Where an adjustment is proposed after the expiration of a time limitation specified in the bilateral treaty that eliminates a taxpayer's opportunity to obtain relief through MAP from the other country, the country making the adjustment may be prepared to withdraw its adjustment unilaterally to prevent double taxation, except in cases where the adjustment relates to an act of fraud, wilful default, or gross negligence.

3.2.3. Tax avoidance and MAP

Some competent authorities have had a tendency not to discuss a case where an adjustment is based upon anti-avoidance provisions of their country's domestic laws. This means, generally, that if a competent authority were to consider a request for assistance in such a case, it would limit itself to forwarding the case to the other competent authority for any relief that the foreign competent authority may provide at the latter's discretion.

It may be helpful to generally review whether domestic "anti-avoidance" laws conflict with a country's obligations under the provisions of a tax convention. Of course this issue is very specific to the domestic laws of each country and any one particular tax convention. Some conventions specifically allow for domestic anti-avoidance provisions and therefore application of such provisions in a particular case may not necessarily be contrary to the convention. However, even under such conventions, the mere assertion that a domestic anti-avoidance provision may apply to a particular case is not enough to justify excluding from MAP the question of whether there is or may be taxation in contravention of the convention.

In other situations where there isn't an explicit exception, one is left to look at whether a particular domestic "anti-avoidance" law or policy operates consistently with the convention and in particular, whether there is clear evidence that the convention is being abused, as described in OECD Model Tax Convention's Commentary on Article 1. If it can be determined that the application of an anti-avoidance provision creates taxation not in accordance with the provisions of a convention, then in the absence of an explicit exception, the convention should override the domestic anti-avoidance law. Even in the absence of such a determination, however, countries should specifically observe the specific obligations enshrined in their tax treaties to relieve double taxation as long as there is no clear evidence that the tax treaties are being abused. In the absence of a special provision, there is no general rule denying perceived abusive situations going to MAP.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides more guidance on conflicts between conventions and domestic law and deals with this issue further.

Best Practice N°11: **Consideration of MAP assistance for cases described as "tax avoidance"**

Given the wide scope of the meaning or interpretation of the term "tax avoidance" in some countries, it would be reasonable for competent authorities of both contracting states to, at a minimum, consider granting assistance in MAP cases where an action taken by a tax administration is done under anti-avoidance provisions, and the requirements of Article 25(1) are met. In the absence of a special provision, there is no general rule denying access to MAP in the case of perceived abusive situations. Even where a special provision exists, the mere assertion that a domestic anti-avoidance provision may apply to a particular case is not enough to justify excluding from MAP the question of whether there is or may be taxation in contravention of the convention.

Moreover, if the use of an anti-avoidance provision is supplementary or secondary to another domestic law provision, or of questionable basis, consideration should be given to the adverse and cumulative nature of the results of double taxation in combination with any anti-avoidance penalties and interest. Accordingly, the outright denial of competent authority assistance may have an unintended and added punitive effect.

In cases where the authorised application of domestic "anti-avoidance" laws prevents relief by one country's competent authority, this should not prevent the other competent authority from providing any relief that the latter considers appropriate.

3.2.4. Other potential barriers to MAP

There are sometimes other issues that some competent authorities have decided not to consider in MAP, notwithstanding the obligation under the MAP article to consider all "justified" objections of the taxpayer to taxation not in accordance with the convention. As an example, some competent authorities may not provide relief in the form of a notional expense for a notional income adjustment raised by a treaty partner. Other competent authorities may decline to engage in MAP if a taxpayer's situation presents an issue on which their tax administrations wish to obtain a judicial precedent. These types of exceptions to the availability of MAP tend to undermine the spirit and purpose of the MAP process. The recognised general principle of international law is that domestic law, even domestic constitutional law, does not justify a failure to meet treaty obligations. It follows that countries should not, without due deliberation, take the view that a matter is not eligible for MAP consideration.

Best Practice Nº12: Countries eliminate or minimize "exceptions" to MAP

It would be considered in the best interest of all stakeholders and would better reflect the spirit and purpose of the tax conventions for countries to rectify inconsistencies between domestic laws or policies and their network of tax conventions by eliminating issues that they exclude from MAP considerations. At the very least, these countries should publicise the exclusion so that taxpayers and other tax administrations are aware of the MAP exceptions.

A competent authority relying upon a domestic law or policy impediment as the reason for not allowing a MAP to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position.

3.3. Role of the Taxpayer

3.3.1. Providing information to the competent authorities

Even though the taxpayer is excluded from parts of the MAP process, its participation and effort will have a considerable effect on the time it takes to complete a case. In the long-term, the taxpayer would be well served by providing information to the competent authorities in a timely manner. Once a competent authority request has been accepted, the taxpayer can best help itself by supplying the competent authority with complete and accurate information required to resolve the case. The taxpayer has every interest and advantage in keeping the competent authorities as up-to-date as possible on all material changes in the information or documentation previously submitted as part of, or in connection with, a request, as well as new information or documentation relevant to the issues under consideration.

Without proper information and documentation, competent authorities may be unable to resolve disputes expeditiously and the risk of unrelieved double taxation increases. As mentioned in the Best Practice Nº5: Providing complete, accurate, and timely information to the competent authorities section, where a request also involves a related foreign taxpayer making a request to a foreign competent authority, it would be constructive and advantageous for the taxpayers to ensure that the same information is provided to both competent authorities at the same time. It is particularly important to make sure that the two competent authorities do not receive conflicting information from the taxpayer or its related party, so all submissions to each competent authority should be carefully reviewed for accuracy and consistency by the taxpayer and any foreign related party.

3.3.2. Contributing to the MAP discussions

MAP discussions between competent authorities are a government-to-government process in which there is generally no direct taxpayer involvement. Therefore, taxpayer involvement in the MAP is generally limited to presenting the taxpayer's views and assisting in the fact-finding without participating in the competent authority-to-competent authority discussions. However, taxpayers may be invited to make a presentation before the competent authorities, where appropriate, to ensure a common understanding of the facts of a particular case.

It is generally desirable for taxpayers to be given every reasonable opportunity to present the relevant facts and arguments to the competent authorities both in writing and orally.

Best Practice Nº13: Taxpayer presentations to competent authorities

Particularly on fact-intensive, unusual, or complex cases it may be a valuable exercise to have the taxpayer make a presentation to both competent authorities at the same time, typically prior to the commencement of discussions. The purpose of the presentation would be to clarify issues, transactions, etc., and the presentation is typically limited to this type of information. It does not imply taxpayer involvement in the actual negotiations between competent authorities. Such a presentation would normally be pursuant to a mutual agreement by the competent authorities. Whilst such presentations should not be viewed as standard practice for all cases and should not be a substitute for taxpayer cooperation at the examination level, competent authorities are encouraged to consider inviting such presentations in appropriate cases, time and resources permitting.

In addition, experience has shown that proposals for resolution from the taxpayer can sometimes be valuable and constructive. If a proposal for resolution is included, however, there can be the risk that one competent authority may unduly rely upon this position as "the taxpayer's position" and therefore be unwilling to explore in good faith other options. All parties should bear in mind that the ultimate goal is resolution of the case, which may or may not have elements of a taxpayer's proposal.

3.3.3. Interaction between taxpayers and competent authorities

An expeditious MAP process is beneficial to all stakeholders. Consequently, making all relevant documentation and information accessible to a competent authority, as soon as it is available, will assist in the smooth and efficient operation of the MAP process. Likewise, competent authorities ensuring that taxpayers are well aware of the status of their case will foster a more productive relationship with taxpayers and will help to avoid misunderstandings regarding the acceptance, stage of work, or completion of their case.

Co-operation among the stakeholders involved in the MAP process is crucial to a responsive and well functioning MAP program. The provision of information and assistance when requested will promote transparency and consistency. Thus, cooperation amongst these stakeholders or parties (taxpayers and competent authorities) to the MAP process is paramount.

A party's failure to co-operate during any part of the competent authority process may have direct consequences on the length of time to obtain relief and whether such relief can ultimately be provided under the MAP. For instance, a competent authority may request additional information beyond that which was requested during an audit, or it may request information that was requested but not provided during an audit, still keeping in mind the purpose of this information is to resolve double taxation. Or perhaps a taxpayer's request to generally review or discuss a competent authority's position, prior to its formal discussion with the other competent authority, goes unanswered. In either of these cases, the lack of cooperation may create undue delays thereby preventing the completion of a case in a reasonable period of time.

Where the failure to provide information within a reasonable time hinders a party's ability to perform its respective duties related to MAP in an efficient and effective manner, it may lead to disengagement, delays, or ultimately double taxation or taxation not in accordance with a tax convention.

Best Practice Nº14: Cooperation and transparency

Governments and taxpayers will benefit from a cooperative and fully transparent process. The timely provision of requested information, both from taxpayers and between competent authorities, is essential to enable competent authorities to reach an equitable and expeditious conclusion.

For taxpayers, providing the same documentation package to both competent authorities with all relevant details will go a long way in advancing the competent authorities' common understanding of the facts.

For tax administrations, timely and frequent communication with the taxpayer regarding the status or issues of a case will increase transparency in the process and help to ensure a clearer understanding of the case usually resulting in a faster and more appropriate resolution. Whilst giving due respect to the confidentiality of government-to-government communications and without allowing taxpayers to become involved in the actual MAP negotiations, competent authorities are encouraged to consider obtaining input from the taxpayer on factual and legal issues that may arise in the course of the MAP.

3.4 Analysis and Evaluation by the Competent Authorities

Competent authorities customarily commence their evaluation of a MAP case upon receiving a detailed submission from the taxpayer. This is the beginning of the second stage of the MAP process, as outlined in the timeline in Annex 1. To encourage consistency and move forward in this stage of the process, competent authorities may wish to ensure that they are both dealing with the same information.

Since a misunderstanding of, or disagreement over, the facts of a case is one of the primary reasons for delays or disputes in MAP cases, a common understanding of the facts is vital to a smoothly running MAP case. If both competent authorities can agree upon the facts of a case, then a MAP case often comes down to international tax principles, policy concerns, and choosing an appropriate result upon which all stakeholders can agree.

Involvement of the taxpayer at this stage may be beneficial to both competent authorities for the purposes of clarifying any outstanding issues regarding the taxpayer's particular situation, relationships, environment, etc. as outlined in Best Practice Nº13: Taxpayer presentations to competent authorities.

A competent authority's view or position on an issue or transaction is the principal outcome of the analysis and evaluation of a case. In order for this position to be well founded and conveyed in a comprehensible manner, competent authorities should be prepared to explain in sufficient detail the nature of the adjustment and to a lesser extent the applicability of domestic law. Most important however, are the laws and principles that the two jurisdictions have in common, namely: the tax convention between the two contracting states; any commentary, technical explanations, or specific country guidance related to that convention; and finally published guidance by the OECD. All of these elements should be taken into account in the analysis and evaluation of an issue.

In many MAP cases the overriding principles that both competent authorities adhere to, beyond the applicable tax convention, are found in OECD guidance such as the OECD Model Tax Convention, including its Commentary, and the OECD Transfer Pricing Guidelines.

3.4.1. Position papers

To achieve timely resolution and to facilitate meaningful discussions, it is recommended that the competent authority consider the preparation and transmission of a position paper as a matter of priority. Sufficient detail in a position paper will enable the other competent authority to understand the issue and determine the best course of action, in other words the best method to relieve double taxation or resolve the issue. The type of information and level of detail suggested for the position paper are set out below.

The country that has taken an action that led to the taxation which is alleged to be contrary to a convention routinely provides a position paper (regardless of whether that is the competent authority to which the taxpayer has made its request). To facilitate consideration of a MAP case, a position paper provided on a timely basis and containing all the necessary information, as listed below, for the relieving competent authority would be helpful.

a) Legal name and address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;

b) The contact details of the competent authority official in charge of the case;

c) Overview of the issue, transactions, business, and basis for adjustment;

d) Applicable taxation years;

e) Amount of income and tax adjusted for each taxable year, if applicable;

f) Summary of relevant information from the original tax return;

g) Description of the exact nature of the issue or adjustment and the relevant domestic laws and treaty articles;

h) If relevant, calculation with supporting data (may include financial and economic data and reports relied upon and explanatory narratives as well as taxpayer documents and records where relevant and appropriate);

In transfer pricing cases, the following additional information would be helpful:

i) Outline of comparable transactions and methods for adjusting differences;

j) Description of the methodology employed for the adjustment;

k) An explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer's submission).

In response to a position paper, the other competent authority naturally reviews the case and then provides its views. In cases where there is disagreement or clarification is required, a rebuttal position or a request for more information may be warranted. This exchange of positions and evaluation by the competent authorities is best undertaken as a matter of priority. To enable the competent authorities to identify the areas of disagreement and to understand the position of the responding competent authority, a rebuttal or response paper could include the following:

a) Indication of whether a view, proposed solution, or relief proposed in the initial position paper can be accepted;

b) Indication of the areas or issues where the competent authorities are in agreement or disagreement;

c) Requests for additional information and explanations necessary to clarify particular issues;

d) Presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and

e) Submission of proposals or views to resolve the issue.

If the competent authorities involved intend to hold a face-to face meeting, some of the issues listed above may then be addressed at the meeting. In such a case, it would be beneficial if a response to an initial position paper includes item e) above.

3.5. Interaction between Competent Authorities

Taxpayers, tax administrations, and the international tax community in general are all committed to a streamlined and effective MAP process. For their part, tax administrations can attempt to continually enhance communication and coordination between competent authorities.

Case analysts or competent authority analysts, who are charged with the analysis and development of a position as well as the day-to-day management of a case, are encouraged to consult with their counterparts to discuss or clarify specific issues throughout the MAP process. All such discussions between analysts are best documented to provide a historical summary if the file must change hands within the competent authority office.

Although the competent authorities need not exchange copies of all documents provided by the taxpayer, since doing so may simply replicate the documents already submitted by the taxpayer, an appropriate mechanism could be arranged to corroborate the completeness and details of documents and information supplied by the taxpayers.

Competent authorities often discuss MAP case via means such as letters, facsimiles, e-mail, telephone, and face-to-face conferences. Although it is recognized that face-to-face conferences are often the most productive means by which to discuss a MAP case, the competent authorities are encouraged to determine the most appropriate means of communication to best resolve a case in an expeditious but practical manner. It is also considered beneficial, if face-to-face conferences are conducted, to involve the specific competent authority case analysts whenever possible and practical. In addition, in order to achieve a timely resolution of a MAP case, the competent authority staff with the authority to resolve a case should be present at the time of discussion.

<u>Best Practice Nº15</u>: Face-to-face meetings between competent authorities

Face-to-face meetings may allow for a more open discussion and collegial approach and perhaps a more relaxed environment. A more unified approach towards problem solving may in turn lead to "win-win" solutions in the resolution of MAP cases.

One other benefit of meeting in person is usually it triggers a milestone event in the timeline of any one particular case that often causes a level of activity and progress. In other words, meeting in person usually helps advance a case. Preparation prior to a meeting and the generation of follow up plans afterwards generally produces results.

Conference calls can be easily postponed, deadlines can get pushed back, but meetings once committed to and arranged can be difficult to set aside.

Considering the diverse cultures and the proliferation of MAP cases, it is recognized that in some cases interpreters may be required to help facilitate face-to-face meetings.

3.5.1. Problematic cases

The early identification of problematic cases is crucial to concluding these cases in a reasonable period of time. Once identified, a specific case plan that addresses the critical issues can be developed and monitored. Allocating sufficient resources and experienced personnel to the most contentious cases may also improve the results in these cases.

Although these actions can be carried out in one country, it is best if both competent authorities approach this as a joint effort. A bilateral focus, with appropriate oversight can have a very positive effect on the outcome of MAP cases.

Alternative methods other than the traditional MAP process have been considered and tested as of late. Arbitration, mediation, and the use of experts all bring specific attributes to the process. Expertise in the specific area of the taxpayer's business (e.g. banking, pharmaceutical, etc.), in tax law, economics, etc. can bring clarity to issues and help identify key information and concepts to resolve the case. In some cases, mediation or the use of experts may be useful, informal mechanisms to consider in order to resolve particularly problematic issues, depending upon the matter being addressed. They may also avoid the need to initiate more formal arbitration proceedings under those treaties that provide for the latter.

3.5.2. Mediation

Process-related assistance such as the use of a mediator or facilitator could help provide a perspective on the discussions, identify process hindrances, and in some cases bring more of a problem solving focus to the discussions. Neutrality and impartiality on the part of the mediator/facilitator is crucial to a successful outcome.

A mediator's role may offer an opportunity for the competent authorities to view a specific case, or the MAP process itself, from a much different perspective. This perspective, perhaps acquired through the mediator's restatement of the positions or of the critical issues, may illuminate elements of a case or of the MAP process that are not perceptible when viewed from the standpoint of an administration defending an adjustment or one that is being asked to provide relief. In this regard, mediation may assist in resolving some of the more systemic issues of a MAP relationship.

The primary responsibilities of a mediator are the clear identification and reinforcement of the goals of the MAP proceedings, clarification of facts, objectively restating positions, and ultimately seeking opportunities for resolution. In addition, the mediator's ability to disengage parties from a classic dispute pattern, typical of a zero sum game, and shift the focus to a more collegial and collaborative approach to resolving the issues at hand will facilitate the competent authorities in reaching a satisfactory result.

As with most case specific taxation issues, the use of any independent third party in the MAP process would of course require that all stakeholders are in agreement on the terms and conditions of their participation and that they adhered to the relevant confidentiality provisions.

Best Practice Nº16: Bilateral process improvements

Some competent authorities have devoted considerable time to bilateral and multilateral deliberations on both process and on substantive treaty issues, which has proven to advance the MAP process. Specific process improvements have been produced by way of published MAP guidance ranging from specific process timelines to establishing broad objectives or mandates. (See, e.g., 25th October 2000 Administrative Arrangements agreed between U.S. and U.K. competent authorities, as well as PATA Guidelines). The benefit of this guidance is that it reaffirms what is sometimes intuitive to experienced personnel and then memorialises the outcome via agreement and publication. The result is a legacy agreement or understanding that will encourage its continued application.

Where treaty partners have significant caseload, bilateral memoranda of understanding have been successful in enhancing consistency and providing a roadmap for continued improvements. Bilateral training where competent authorities have taken the exact same training courses or have carried out joint sessions has been successful. Maintaining these process improvement initiatives over an extended period of time would likely continue to serve the MAP process well.

3.6. Competent Authority Agreements

Competent authority agreements or resolutions are often case and time specific. They are not considered precedents for either the taxpayer or the tax administrations in regard to adjustments or issues relating to subsequent years or for competent authority discussions on the same issues for other taxpayers. In fact, the letters exchanged between competent authorities to resolve a case often state as much. This is because the competent authorities have reached an agreement that often takes into account the facts of the particular taxpayer, the differences in the provisions of the tax law in each country, as well as the effects of the economic indicators on the particular transactions at the relevant time. Any review or adjustments of subsequent years by a taxpayer or tax administration is best based upon the particular circumstances, facts and documentary evidence existing for those years.

In most cases, a taxpayer cannot accept the terms of an agreement for only some issues or taxation years involved, unless both competent authorities agree. This is due to the fact that the competent authorities commonly consider the original request by the taxpayer, which is usually multifaceted, in its entirety and often consider all aspects (issues and taxation years) involved at one time and as one case, and ultimately one outcome. Practical and pragmatic solutions to contentious MAP cases are regularly the result of compromise and concessions made by parties involved and therefore a holistic approach is routinely used.

As mentioned in the Section 3.8. What Happens When an Agreement is Reached?, if a taxpayer is not satisfied with the agreement arrived at by the competent authorities, the taxpayer may reject it. If this occurs, the competent authorities may consider the case closed and advise the taxpayer accordingly or they may reconsider any new, reasonable, alternative position proposed by the taxpayer at that time. Assuming a competent authority agreement has been rejected and a valid notice of objection or an appeal has been lodged under applicable domestic procedures, the taxpayer typically has the option to proceed through the appeals process and/or to court, if applicable. If the other redress mechanism (appeal or court decision) does not reverse the adjustment in its entirety, double taxation may remain.

In such cases, it would be appropriate for the competent authority to accept another request (or reconsider the original request) by the same taxpayer on this same issue and years to address any remaining double taxation. For the most part, competent authorities only present the case to the other competent authority for the latter to provide relief to the extent it believes is warranted and will not themselves consider the provision of relief on a second request. Taxpayers should be cautioned that both competent authorities may share the same view or policy that relief will not be provided on a second request when full relief was offered and rejected by the taxpayer on the initial MAP case.

3.7. Debriefing the Taxpayer

Although competent authority proceedings are a government-to-government process and taxpayers do not have a specific right to attend or observe discussions between the competent authorities, the competent authorities recognize that the taxpayer is a stakeholder and client in the MAP process.

As such, it is appropriate to debrief the taxpayer after each substantial MAP discussion (usually via telephone) and at the conclusion of a file. The debriefing need not be a detailed summary of the meeting nor should it be a full disclosure. The debriefing should give the taxpayer a general sense of the direction of its case and some estimation, if possible, of the time to resolve it.

3.7.1. Transparency at the resolution stage

Transparency is one issue where competent authorities in general can improve. It becomes even more important at the resolution stage of the MAP to dispel allegations that competent authorities have traded cases. Thus, advising the taxpayer not only of the outcome but how the competent authorities arrived at the decision is important.

Best Practice N°17: Decision summaries

A summary of a MAP decision provided to the taxpayer, which describe the underlying reasons and principles of an outcome, will assist in examining why a particular result was agreed to.

These summaries can be either via closing letter to a case or provided orally in a closing meeting. Meetings would be beneficial in contentious cases or cases with unusual outcomes to ensure all elements of the decision are understood.

3.8. What Happens When an Agreement is Reached?

When the competent authorities resolve a MAP case, this resolution should be confirmed by an exchange of letters. Since some MAP agreements can be rather complicated, it is best to exchange these letters soon after the conclusion of the discussions to ensure an accurate reflection of the terms agreed upon. At this time it would be appropriate for the competent authorities to agree upon a tentative schedule for the implementation of the agreement.

In addition, competent authorities are encouraged to communicate the terms of the resolution to the taxpayer as soon as possible. This communication may take place prior to the exchange of letters if mutually agreed to by the competent authorities.

If the terms and conditions of the resolution are not satisfactory to the taxpayer, the taxpayer may be entitled to withdraw from the MAP process and pursue other domestic redress mechanisms still available. If the terms are satisfactory, the taxpayer usually accepts the MAP results in writing and agrees to withdraw its domestic objections (if filed) or to refrain from seeking any further recourse on the same issue and years.

Competent authorities should not implement the resolution under the MAP process with a taxpayer until the exchange of letters between competent authorities has occurred.

Once letters have been exchanged, and where required the taxpayer has accepted the resolution, a competent authority should give, or arrange to give, it effect in its jurisdiction.

3.9. Recommended Timelines for MAP

Whilst the time taken to complete a MAP case may vary according to its complexity, most competent authorities endeavour to complete a case within two (2) years from the date of acceptance of the taxpayer's MAP request. The chart in Annex 1 suggests an ideal timeline for a typical MAP process. Of course timelines may be extended or cut short depending upon the facts and circumstances of a particular case.

Regular updates to taxpayers and the other competent authority can be a valuable tool to focus a competent authority (and more specifically competent authority analysts) on the specific timelines of a case. During the evaluation stage, the competent authorities may find it particularly useful to advise each other on their progress at least every three (3) months. Regular reports may be provided by way of telephone, briefing notes, correspondence, teleconferencing, face-to-face meetings or any other form of communication acceptable to the competent authorities. The objective of these communications is to ensure that both competent authorities are kept informed of a case's progress to facilitate timely resolution.

A common goal of four (4) to six (6) months for a competent authority to provide an initial position paper is widely considered to be realistic and appropriate. This time period would most appropriately begin with the latter of: (i) the receipt of a complete submission of pertinent information and (ii) the receipt by the competent authority responsible for drafting the initial position paper of confirmation of the competent authorities' mutual understanding to accept the case. If this goal is not achievable, advising the other competent authority in writing as to the reasons for the delay and the likely timeframe for producing a paper would help competent authorities to manage cases, office workload, and resources.

It is expected that the evaluation and response (written or verbal) by the other competent authority be within the six (6) months following receipt of the position paper. Should it be necessary, supplementary questions and responses prior to a meeting can be helpful to explain any remaining unclear issues. In addition, it would be constructive to exchange relevant information well in advance of a face-to-face meeting in order to conduct more efficient and productive meetings. This will allow competent authorities to have sufficient time prior to the meeting to give due consideration to a particular case or issue.

Best Practice Nº18: Recommendation for MAP cases beyond two years

In some instances a competent authority may not be able to meet a two-year timeframe, or other timeframe agreed upon by the competent authorities, to complete a case (See Annex 1 for an ideal timeline for MAP). For example, this may occur when information is not received in a timely manner or the particular case is unusually complicated. In such situations, the competent authorities may simply continue their discussions or may find it useful to agree to a reasonable extension of the timeframe within which they expect to be able to resolve the case. For cases that have exceeded, or are likely to exceed, a reasonable period of time, it is advisable for senior officials of the competent authorities to undertake a review of the case to determine the reasons for the delay and then agree upon an approach to ensure the efficient completion of the case.

4. MAP AND DOMESTIC LAW

4.1. Interaction between MAP and Domestic Recourse Provisions

With respect to adjustments or actions by a tax administration, it is advisable for taxpayers to protect, for greater certainty, their rights of domestic appeal or redress and they should take note of the domestic processes for doing so. Although in most cases the competent authorities reach agreement and relieve taxation not in accordance with the tax convention, there is no further recourse when a MAP agreement cannot be reached using all of the available mechanisms or programs of MAP (including possible avenues within MAP such as mediation, arbitration, advance pricing arrangements, etc., if available) if domestic rights have not been protected.

In most cases, tax administrations prefer to deal with an issue either via MAP or domestic recourse, but not both at the same time (with the exception of some countries offering a simultaneous MAP and domestic recourse program) to avoid duplication of effort. Therefore depending upon which process is chosen, it is recommended that the other process be held in abeyance pending the outcome of the first, taking into consideration the consequences of doing so in each jurisdiction.

Choosing domestic recourse such as court proceedings over MAP may in some jurisdictions result in a tax administration's being bound by the decision of the court and prevented from providing relief through MAP. Where a competent authority takes the position that it cannot, or will not, deviate from domestic court decisions in MAP, it should make this position public and duly explain the legal basis of its position.

Notwithstanding the above, a taxpayer may in many instances make a competent authority request regarding one issue of an adjustment, and independently pursue another separate issue with domestic recourse.

Competent authorities are not bound by a decision given by a foreign court or a foreign appeal settlement. The granting of any relief to a taxpayer by a competent authority in such situations will depend more on the merits of the case rather than on another country's inability to provide relief. Therefore, a country refusing access to, or relief via, MAP cannot genuinely expect the other country to provide unilateral relief for that reason alone.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides for further guidance on the interaction of MAP and domestic recourse provisions.

4.2. Taking Protective Measures to Preserve Ability for MAP Agreement to be Implemented

The OECD Model Tax Convention provides an avenue of recourse as established in Paragraph 1, of Article 25, "…irrespective of the remedies provided by the domestic law of those States…". Paragraph 2 of the same article provides the means by which a mutual agreement is implemented: "[a]ny agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States."

However, not all countries follow the exact wording of the OECD Model Tax Convention in their specific treaties, as noted in Subsection 3.2.2. Time limits for implementation of relief where treaties deviate from the OECD Model Tax Convention. As a result, it is advisable that taxpayers verify the wording of the applicable convention in order to protect their ability to obtain relief. Alternatively, if specific OECD wording (or something similar) is not included in either the MAP article or other appropriate article of the convention, a taxpayer would be well advised to ensure that the years in question do not expire due to time limits under domestic law (i.e. becoming statute-barred). Taking this extra precaution ensures that the competent authority is able to provide the requested relief despite the expiration of the normal domestic time limits. In this regard, a taxpayer should protect its domestic rights by filing waivers of domestic time limits on assessments (if possible), a protective claim, or lodging an appeal, if applicable.

Valid waivers (or similar extensions of time limits) may permit tax administrations to make adjustments, thereby providing relief or otherwise amend an adjustment as a result of competent authority negotiations for years that would otherwise be legally barred from being adjusted.

Taxpayers should note that in most jurisdictions a domestic waiver, in itself, does not constitute a presentation of a request to a competent authority. A separate presentation to the competent authority is typically required. Again, depending upon the domestic tax system, taxpayers are sometimes responsible for keeping their other relevant income tax filings (regional, state, provincial, etc.) open, where consequential adjustments may be made.

In cases involving related foreign parties, it is advisable also to take such timely action as may be necessary with the foreign tax administration, especially in cases where the applicable tax convention contains its own time limits or where it is unclear whether the applicable tax convention overrides the domestic time limits. The reason for doing so is that competent authorities will often not rescind an initial adjustment solely for the reason that the taxation year of the related foreign taxpayer is beyond the time limits (or its statute-barred date) in the foreign jurisdiction.

In some jurisdictions, other levels of government (states, provinces, territories) have the ability to assess and charge income tax but are sometimes not bound by tax conventions. Even though competent authority settlements are often automatically implemented in these jurisdictions it would be prudent for taxpayers to review domestic law and where necessary preserve their domestic rights to appeal or otherwise change their taxes payable to coincide with the competent authority settlement.

4.3. Audit Settlements

Audit settlements have been used as a resolution tool in many countries to promote a quicker conclusion of audit files, and both tax administrations and taxpayers alike have welcomed the ability to come to an agreement on the pragmatic conclusion of an audit file. As the word settlement implies, there are usually concessions made on behalf of the parties involved which creates a difficult issue for the MAP process.

One concession tax administrations sometimes seek is a limit on further recourse, in other words the adjustment agreed to at the audit stage is the final adjustment. Unfortunately, some tax administrations have included the MAP process in these requested concessions (i.e., by conditioning the audit settlement on the taxpayer's agreement not to pursue MAP for the issue), and in many cases taxpayers have offered to agree not to seek MAP assistance. The unfortunate result of these types of settlement arrangements can often be the occurrence of double taxation. Effectively, these arrangements preclude the tax administrations from resolving double taxation under MAP in such situations and may indeed cause the other government to deny relief under its domestic law for the tax paid to the first government upon settlement of the audit.

In some jurisdictions where a taxpayer has, in return for giving up the right to relief under MAP, obtained procedural advantages or concessions from a tax administration that would reduce the administration's competent authority ability to defend its case in a MAP discussion (e.g., where the administration has compromised its proposed adjustment on the understanding the taxpayer would not seek to obtain a further reduction through MAP), then those jurisdictions often impose the policy that the affected issues cannot be reversed or overturned in MAP proceedings. This effectively limits the availability of MAP relief from that competent authority and may cause the other competent authority to resist giving MAP relief as well.

In other jurisdictions a taxpayer cannot forfeit its right to access MAP, regardless of the deals struck at the audit level. Still, even if this right is explicit in these countries, taxpayers may be unwilling to test this right if they have already agreed not to seek the assistance of MAP. This may be especially true in cases where the taxpayer will encounter the same tax administration office and auditor in the next cycle.

As mentioned, sometimes taxpayers offer to settle and not to go to MAP, since they had not planned to go anyway. In these cases, taxpayers often see a larger risk in exposing themselves to the other tax administration, where they have not yet been audited. Cautious taxpayers are often concerned that exposure in the MAP process could potentially lead to an audit referral.

4.4. Unilateral APA

Unilateral Advance Pricing Arrangements (APAs) are one-sided tools addressing issues with bilateral implications. Bilateral APAs offer greater tax certainty and address the full scope of a transaction and are therefore favoured over unilateral APAs. Although unilateral APAs may be useful in certain circumstances, such as covering issues or transactions where no applicable tax convention exists, they may prove to have limited utility where both tax administrations actively review the type of transactions being covered.

In OECD consultations, business has advised that on rare occasions previously concluded unilateral APAs may preclude a taxpayer in some jurisdictions from accessing MAP if they later find themselves subject to double taxation. Such preclusions would diminish the effective operations of MAP and should be avoided.

Best Practice Nº19: Avoid blocking MAP access via audit settlements or unilateral APAs

It is a best practice for both taxpayers and tax administrations to avoid the inclusion of a waiver of access to MAP in audit settlements. Since MAP involves bilateral issues it is inappropriate to have two parties (the taxpayer and one tax administration) not include a third involved party (the other tax administration) in the final resolution of a file.

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

As for unilateral APAs, if a foreign adjustment is raised against a transaction or issue covered by a unilateral APA, the unilateral APA should be treated as the taxpayer's filing and therefore eligible for MAP and adjustable, as opposed to an irreversible settlement.

4.5. Relief from Collections, Interest, and Penalties

Many countries have differing views on whether interest and penalties on an underlying income adjustment are covered by a convention. In the view of some countries, the scope of some tax conventions does not extend to cover interest or penalties. In such cases, the competent authority is sometimes prohibited from directly waiving or dealing with interest or penalties resulting from adjustments that are the subject of a request for competent authority assistance.

4.5.1. Penalties and MAP

For example, the application of a transfer pricing penalty is often a related compliance issue (such as a documentation penalty) that is not covered by the MAP of a tax convention. Accordingly, a competent authority may not be able to address the amount or applicability of a transfer pricing penalty (depending upon the structure of the penalty) with a foreign tax administration. However, in many cases a transfer pricing penalty is linked to, or is a function of, the amount of the adjustment to income. In these cases, if the amount of the income adjustment changes as the result of a MAP agreement, the penalty gets adjusted indirectly, regardless of whether the countries otherwise view the convention as covering penalties.

Even where an adjustment, which has given rise to a penalty, is wholly or partially sustained in a negotiated MAP agreement, some countries are willing to consider providing relief from the penalty through the MAP agreement depending upon whether the initial justification for the penalty remains after the review of the facts and circumstances by the competent authority.

4.5.2. Interest relief and MAP

It is widely acknowledged that a taxpayer may suffer the economic equivalent of double taxation, even where underlying double taxation is eliminated through a MAP agreement, if there is considerable asymmetry between two countries' treatment of interest that may accrue on tax liabilities and refunds. For example, this typically happens where one country charges interest on a tax deficiency (or insists on collecting tax from the taxpayer prior to resolution of the dispute) and the other country does not pay interest on tax refunded to the taxpayer upon resolution of the dispute and the result is a notable monetary burden.

For cases where it has been accepted that the tax convention also covers relief of interest under Article 25(1) or 25(3), the competent authorities have the latitude to consider symmetry in their approaches to interest in order to prevent an undue burden on the taxpayer. A related issue involves the tax effect of interest (i.e., whether the taxpayer is taxable on interest received on refunds or is able to deduct interest paid on deficiencies). Countries' divergent domestic policies may make it difficult to balance out the tax effect of interest receipts and payments on tax amounts that have been in dispute in MAP cases.

In these examples, some countries are willing to offset or relieve interest in this manner to reduce the asymmetry created by the divergent treatment, but these countries usually expect reciprocity from the other country in similar but opposite cases, if applicable. Notwithstanding the complexities, competent authorities who bring a flexible and open attitude to such situations are often able to work out solutions that offer a reasonable level of symmetry to taxpayers.

Regardless of whether a taxpayer's interest burden is attributable to divergent policies of the two treaty countries, the relief of interest for the period of time a taxpayer is in the MAP process, especially if that period is beyond a reasonable period, may seem warranted given that the taxpayer is not in control of large segments of the MAP process, such as the competent authority-to-competent authority discussions. In countries where the scope of the convention does not cover interest, some tax administrations have adopted a policy to consider this interest relief via domestic remedies that may be dependent upon factors related to undue delays, hardship, or taxpayer cooperation. These countries, however, often take the position that interest relief should not extend to interest accruing outside the time boundaries of MAP, since it is their view that the MAP process is not the appropriate vehicle to try to harmonise divergent domestic policies in this area.

<u>Best Practice N°20</u>: Interest relief

It is desirable for competent authorities to consider adopting flexible approaches to diminish any undue interest burden on taxpayers attributable to the countries' divergent treatment of interest in MAP cases. Although complete harmonization across a treaty network may be unrealistic, competent authorities could consider developing general guidelines in conjunction with their counterparts for known and particularly adverse situations of undue interest burden caused by asymmetrical domestic policies on interest.

4.5.3. Collections and MAP

There are several reasons why suspension of the collection of tax pending resolution of MAP can be a desirable policy. Any requirement to pay a tax assessment specifically as a condition of obtaining access to MAP in order to get relief from that very tax would generally be inconsistent with the policy of making MAP broadly available to resolve such disputes. Even if a MAP agreement ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the MAP may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the MAP resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the MAP would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross-border trade and investment. Finally, another unfortunate complication may be delays in the resolution of cases if a country is less willing to enter into good faith MAP discussions when a probable result could be the refunding of taxes already collected. If the tax in question is in jeopardy of being lost due to bankruptcy or due to the taxpayer becoming a flight risk, then collection practices allowing for immediate recovery seem appropriate. Collection practices generally assess risk and therefore one would expect that a similar assessment could be made of the MAP applicants.

If risk assessment is not a possibility for some tax administrations, then allowing for the provision of security or the payment of interest by the tax administration on refund balances (if current laws or policies do not allow this already) could minimise this detrimental effect of double taxation. This provision is less desirable than outright suspension, since a taxpayer's working capital and therefore liquidity is normally affected by the encumbrance of an asset or the provision of the type of security required by a tax administration.

<u>Best Practice N°21</u>: Suspension of collections during MAP

The collection of tax as a condition to entering a program to relieve that very tax is generally considered to be unreasonable. Thus, it is a best practice and goal for tax administrations to provide a procedure for suspension or deferral of the requirement to pay a tax liability (including interest thereon) or the collection action of a tax administration on income tax that is the subject of the request for competent authority assistance. The decision to suspend or defer collection could be made after a risk assessment has been conducted by the tax administration to determine ability to pay or the creditworthiness of the taxpayer. The suspension/deferral could begin at the time of application and remain in place until the resolution of the case by the competent authorities.

In some countries suspension or deferral of collection actions is not possible due to various reasons beyond a policy determination. In these cases, the acceptance of security in lieu of payment during competent authority proceedings may be an opportunity to lessen the effect of double taxation.

Many states may require legislative changes to implement the suggested best practices on both interest relief and the suspension/deferral of collections.

The Commentary (with proposed revisions) to the OECD Model Tax Convention provides for further guidance on the interaction of collections, interest, and penalties with MAP.

4.6. Secondary Adjustments, Withholding Tax, and Repatriation on Transfer Pricing Adjustments

Transfer pricing adjustments made under domestic law may also give rise to so-called "secondary adjustments". For example, the amount of the income adjustment to a subsidiary for its excessive payment on a transaction with a non-resident parent may also be treated by the subsidiary's jurisdiction as a deemed dividend paid to the parent and therefore a withholding tax may be applicable. Under normal circumstances, these secondary adjustments are reversed if the primary adjustment is reversed or, in the case where correlative relief is provided by the other competent authority, if the taxpayer repatriates funds from the non-resident equivalent to the amount of the transfer pricing adjustment. In these two instances, relief from the secondary adjustment should be a consequence of the MAP settlement.

A mutually agreed upon settlement between the competent authorities in respect of a transfer pricing adjustment will normally include agreed terms for repatriation of funds involved in the primary adjustment. These terms are specific to the particular settlement between the two governments. The terms may vary, but generally allow for the repatriation of funds to be effected either by a direct reimbursement or through an offset of inter-company accounts. Typically, the agreed terms also allow a taxpayer to repatriate within a mutually agreed reasonable time period, free from withholding taxes by the country out of which the repatriation is made and from any additional taxable treatment in the country to which the repatriation is made. Repatriation may be subject to audit verification.

Subject to the discussions and best practices on interest relief, normally there is no waiver for interest applicable to the tax liability attributable to the initial primary adjustment, or part thereof, if it remains in place as part of the MAP resolution. However, where the country to which the repatriation payment will be made would otherwise require that payment to include an interest component to compensate its resident taxpayer for the foreign associated enterprise's use of that taxpayer's funds between the time of the initial transaction and the repatriation, the competent authorities may agree to allow the repatriation to occur without any interest component, in order to minimize the complications from the repatriation.

A repatriation agreement reached at an audit stage should not preclude a request by the taxpayer for competent authority assistance nor should it indicate concurrence or agreement with an audit adjustment. Where a taxpayer proceeds to request competent authority assistance after concluding a repatriation agreement, it is appropriate for the competent authority to amend the repatriation agreement for any changes made to the amount of the adjustment as a result of the MAP process and to waive any requirement for the repatriation to include an interest component. Where a taxpayer proceeds to request competent authority assistance without having concluded a repatriation agreement at the audit stage, the competent authority may agree on terms of repatriation with the competent authority of the treaty country.

5. GUIDELINES FOR COMPETENT AUTHORITY OPERATIONS

5.1. Authority and Accessibility

Tax conventions typically designate the person who is to act as each country's competent authority (e.g., "the Minister of Finance or his authorised representative" or "the Secretary of the Treasury or his delegate"). The subsequent delegation of powers of a competent authority usually happens within a country's tax administration. Since designations can be at a fairly senior level within government, it is for practical and administrative purposes that the powers and authority of the competent authority function are typically delegated to officials who will carry out the day-to-day responsibilities of the function.

Therefore most competent authorities delegate the full powers of the function (in other words, the legal authority to conclude a MAP arrangement) to the required personnel who carry out, or are involved in, the day-to-day functioning of the MAP program. It is advisable to have key personnel who will ultimately make the important decisions on a file intimately involved. In doing so, competent authorities will alleviate one common constraint to the success of any type of resolution process, which is having decision-makers too far removed from the information.

In order to administer tax conventions as effectively and efficiently as possible, it is beneficial to have a competent authority that is readily accessible to taxpayers and has the authority to complete its mandate.

Best Practice Nº22: Readily available access to a competent authority

It is important for a government to publicise the identity of the officials who have been delegated the responsibility to carry out the competent authority function, along with their contact details. OECD Member countries should ensure that their MAP country profiles with this information on the OECD website are kept up to date.

Moreover, the competent authority officials involved in the day-to-day casework are often the representatives who require the delegated decision-making powers to conclude a MAP arrangement. MAP discussions may become hindered if the "decision-maker" or individual making the final recommendation on a case is too far removed from the detailed bilateral discussions. As with most generic negotiations, if a person of influence or authority to conclude a case attends a MAP meeting, there is a better chance of progress and a forthcoming decision. Nevertheless, competent authorities may decide to consult broadly within their offices and make decisions via consensus (for example, an informal, internal review committee) to ensure consistency and internal transparency.

5.2. Structuring the Competent Authority Function

The competent authority function needs sufficient human (skilled personnel), financial (in particular to pay for translations and travel/accommodation expenses for face-to-face meetings with other competent authorities) and other resources (access to company databases, industry data and foreign tax laws) to be able to meet its obligations under the Convention. In particular, human resources are likely to have the most fundamental impact on the Contracting State's ability to operate an effective MAP program.

Sometimes the competent authority function is split between an area responsible for resolving taxpayer-specific cases (i.e., taxpayer requests about taxation "not in accordance with the Convention" as described in the first two paragraphs of the MAP article, or cases of double taxation not provided for in the Convention as described in the third paragraph of the MAP article) and a policy area for issues involving general interpretation as well as general issues concerning the application of the tax convention where specific taxpayers are not involved.

Competent authorities often have areas of expertise within their offices to handle the wide range of MAP cases. Ideally, the competent authority staff should be able to draw on individuals with the following areas of expertise:

- Legal analysis: knowledge in the interpretation and application of the relevant tax Convention. This would include knowledge of domestic and foreign laws, regulations, case law and of generally accepted international standards such as the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines.
- Economic analysis: knowledge and understanding (in particular in transfer pricing cases) of the economic aspects of the transaction as well as knowledge of market, industry and commercial practices.
- Accounting and statistical data analysis: knowledge of accounting standards and practices adopted by large taxpayers. In particular cases (e.g. MAP APAs for complex transfer pricing issues) knowledge in analysing statistical data is also required.
- Expertise in examination: since the examination records are often the main information resource in the MAP case, knowledge of the examination process (documentation requirements, burden of proof etc.) and techniques (e.g. comparability searches) is also required.

In some cases it is helpful to group files based upon geographical regions or industry specialisation, depending upon the composition of a competent authority's inventory of MAP cases. Industry specialisation may be advisable to strengthen industry knowledge or technical expertise, whereas geographical emphasis may assist in enhancing relationships between competent authorities if files are discussed with the same counterparts over a period of time.

In some countries the competent authority office is very small and therefore sometimes must rely upon expertise from elsewhere. One benefit of a small competent authority office may be greater consistency; however the disadvantages of limited resources and the inability to build in-house expertise may make the competent authority function reliant upon other areas that may have their own priorities. In such situations, the responsible high-level official should monitor closely the progress of the MAP cases and the management of resources.

It is also important to "risk-assess" a MAP request at the earliest possible stage to enable the CA or the responsible high-level official to assign the MAP case in the most effective way. For example, when a case is highly complex and large amounts are at stake, or when a case involves the interpretation of a tax treaty article which may have wider implications on the State's tax policy, it should be assigned to a high-ranking senior officer or to qualified and experienced staff. On the other hand, routine cases involving limited amounts may be assigned to less experienced staff, assuming they are properly supervised. By adopting this approach, qualified and experienced staff can focus on the complex and difficult cases. At the same time, this approach reduces the risk of small cases being shelved over a long period of time.

Case or workload management has a significant effect on timelines for MAP cases. A well-organized data management system can save significant time and prove extremely valuable in the management and monitoring of cases. Case-specific as well as aggregate program statistics can be useful in improving the performance and timeliness of a MAP program.

To enhance the level of objectivity, it is recommended that competent authorities remain largely independent from the field staff who were directly or indirectly involved in the initial adjustment and that the latter should not take part in the competent authority discussions. However, with the agreement of the competent authorities, they may be asked to serve in a consultancy role in order to provide details of the case and the basis for any adjustments that have been made and answer factual queries that may arise.

A competent authority sufficiently staffed at an appropriate level to address typical or anticipated workload will greatly enhance the efficient resolution of issues and cases. In addition to the appropriate number of staff, the appropriate skill set to address the issues at hand (for example, transfer pricing or treaty interpretation issues) would improve not only the qualitative output but also the efficacy of a MAP program.

Best Practice Nº23: Independence and resources of a competent authority

In order to enhance the independence of a subsequent review of a case by a competent authority, it is recommended that competent authorities maintain a level of autonomy from the audit function of a tax administration.

In some cases, the competent authorities may take a different approach from audit to explain an outcome or address an issue. This may be a valid exercise, especially for a transfer pricing case and should not necessarily be considered as "redoing the audit". For example, if a case is without merit and not well substantiated at the audit stage, the competent authority of the state that initiated the adjustment should provide unilateral relief by withdrawing the adjustment without engaging the other competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the convention, not to seek to uphold all adjustments proposed by the tax authorities of its country.

Independent and sufficient funding will also enhance the competent authorities' autonomy and enable it to carry out its mandate without becoming overly reliant upon other areas of a tax administration which do not share the competent authorities' primary objective, namely relieving double taxation. Tax administrations should ensure that the competent authority function is given sufficient resources, including qualified personnel, funding, training, and other program needs, to be able to carry out MAP responsibilities in a timely, effective, and efficient manner.

5.3. Performance Indicators and Training

Performance indicators such as time taken to resolve a case, consistency, and case outcomes focusing on principled and objective results, help support the overall goals and objectives of the MAP program. Use of personnel evaluations based upon these criteria, especially for new staff, may help reinforce these key elements.

Training in the area of soft skills such as conflict resolution and consensus building can be helpful in achieving amicable resolutions of MAP cases. Specific training on the "win-win" proposition would further promote the concept of joint problem-solving.

<u>Best Practice Nº24</u>: Performance indicators for the competent authority function and staff

Appropriate performance indicators for the competent authority function and staff relating to consistency, the time to resolve cases, and principled and objective MAP outcomes will reinforce these important goals for MAP. Appropriate training should be used to address deficiencies.

One indicator which must not be used to measure a MAP program or its staff's performance is the amount of sustained audit adjustments or tax revenue. Although tax administrations may wish to collect related data to assist in the evaluation of the quality of initial adjustments by an audit program, it is suggested that this information remain segregated from that used to assess competent authority programs.

6. OTHER MAP PROGRAMS

6.1. Accelerated Competent Authority Procedure (ACAP)

In addition to a request for competent authority assistance in respect of a specific adjustment to income, some competent authorities allow taxpayers to request assistance for subsequent filed taxation years on the same issue. Once an ACAP request has been received, a competent authority may consult with the appropriate authorities within the tax administration (audit function or field office) to determine whether an ACAP is suitable for the taxpayer's particular circumstances. Normally, the issue must be one that is recurring and relevant to a specific adjustment.

The competent authority then consults with the foreign competent authority under the MAP process endeavouring to resolve the issue. In most cases, the request or acceptance of an ACAP will not preclude or diminish a tax administration's right to later examine or review the issues addressed by the ACAP.

6.2. Advance Pricing Arrangements (APAs)

Many competent authorities also deal with APA requests. APA programs assist taxpayers in determining, in advance, transfer pricing methodologies and their application to specific cross-border non-arm's length transactions for specific periods of time, with the objective of avoiding double taxation that may otherwise occur. If an APA program is available, a taxpayer may request a bilateral APA with respect to specified cross-border transactions, which is conducted via the MAP article of a tax convention. Once concluded, bilateral APAs provide an increased level of tax certainty in both tax jurisdictions, thereby considerably lessening the likelihood of double taxation.

Bilateral APAs are becoming more popular because they proactively prevent disputes and over the long term are a cost effective tool for both taxpayers and governments. Many countries publish APA annual reports describing their programs and publicising statistical results to promote their use and ensure transparency in the process. For more details about the various APA programs available, please refer to the most current version of the OECD Country Profiles to obtain country specific guidance.

Best Practice Nº25: Implementing and Promoting ACAP and Bilateral APA Programs

Establishing and actively promoting ACAP and APA programs will reduce the number of international tax disputes and provide taxpayers and tax administrations with greater tax certainty. Mature ACAP and APA programs have provided taxpayers with an effective alternative to the typical MAP process.

6.3. Other Types of MAP Proceedings

Although not typical, a competent authority may, in rare cases, initiate competent authority proceedings and subsequent discussions without a specific request from a taxpayer in any situation where there is taxation not in accordance with a tax convention in order to protect domestic interests.

For example, a competent authority may disagree with the interpretation by its treaty partner of a provision in a tax convention. Such a situation could involve a specific taxpayer or a group of taxpayers. In either case and if warranted and practicable, taxpayers should be advised of the competent authority proceedings and could be invited to make representations, if applicable, and they should in any event be advised of the outcome.

Other MAP proceedings initiated without a taxpayer, where competent authorities seek to clarify with their treaty partner their interpretation or application of a convention, as described in Subsection 1.2.2 *Interpretation or application cases and double taxation in cases not otherwise provided for in a convention*, are more common.

ANNEX 1 – AN IDEAL TIMELINE FOR A TYPICAL MAP PROCESS

Stage	Action	Illustrative Target Time Frame
First	Initiation of MAP by taxpayer: submission of MAP request	Time-limit provided for by the treaty (OECD Model Tax Convention: 3 years from notification of action giving rise to taxation not in accordance with the convention).
	Confirmation of the receipt of MAP request to the taxpayer and advising the other competent authority (CA) of the request. In transfer pricing cases, the taxpayer or associated enterprise in the other country is also encouraged to contact the CA in the other country and to promptly and simultaneously provide all supporting materials. Preliminary review of case by CA that received request. Possible requests for additional information to taxpayer.	Within a month after initiation by taxpayer of MAP.
	Determination of eligibility for MAP by CA that received the request. Notification to taxpayer by that CA if the case is accepted or rejected. (If accepted) Proposal to the other CA to start MAP discussions: issuance of opening letter to the other CA.	Within a month after the necessary information is provided to the CA that received the request.
	Confirmation by the other CA of receipt of MAP request, preliminary screening for completeness of request and notification of decision to accept or reject request.	Within a month after the receipt of the opening letter from the CA that received the request.
Second	Analysis & Evaluation by the CA of the country that initiated the adjustment. Initiation of MAP consultations with other CA (if the CA of the country that initiated the adjustment is unable at this point to arrive at a satisfactory solution – i.e. provide unilateral relief): Issuance of position paper by the CA of the country that initiated the adjustment.	Ideally within 4 months, but no later than 6 months after agreement between CAs to enter into MAP consultations.

	Review of case by the other CA (the CA being asked to provide relief), preliminary screening for completeness of position paper and notification of missing information and determination whether it can provide unilateral relief to taxpayer. Response to the position paper by other CA.	Within 6 months of receiving the position paper.
	Negotiation between the CAs. [2]	6 months
Third	Mutual Agreement between the CAs: document the CA agreement in the form of memorandum of understanding.	Within 24 months of the acceptance date of a MAP request.
	Taxpayer's (and other interested parties'[3]) approval of mutual agreement.	To be submitted immediately after conclusion of mutual agreement. 1 month deadline to respond.
	Confirmation of mutual agreement with terms and conditions: exchange of closing letters.	As soon as possible after acceptance of mutual agreement by taxpayer (and possibly other parties).
	Implementation of mutual agreement.	No later than 3 months after exchange of closing letters.

[2] Face to face meeting(s) between the CAs can be organized in this stage, or in any other stages when necessary.

[3] Where the administrative-territorial subdivision's or any local tax authorities' consents are necessary or required.

ANNEX 2 – BEST PRACTICES

<u>Best Practice Nº1</u>: Resolving and publishing issues of interpretation or application

<u>Best Practice Nº2</u>: Robust use of Article 25(3) power to relieve double taxation

<u>Best Practice Nº3</u>: Principled approach to resolution of cases

<u>Best Practice Nº4</u>: Transparency and simplicity of procedures for accessing and using the MAP

<u>Best Practice Nº5</u>: Providing complete, accurate, and timely information to the competent authorities

<u>Best Practice Nº6</u>: Allowing electronic submissions

<u>Best Practice Nº7</u>: Allowing early resolution of cases

<u>Best Practice Nº8</u>: Earlier notification of a potential case

<u>Best Practice Nº9</u>: Liberal interpretation of time limits and advising of treaty rights

<u>Best Practice Nº10</u>: Avoiding exclusion from MAP relief due to late adjustments or late notification

<u>Best Practice Nº11</u>: Consideration of MAP assistance for cases described as "tax avoidance"

<u>Best Practice Nº12</u>: Countries eliminate or minimize "exceptions" to MAP

<u>Best Practice Nº13</u>: Taxpayer presentations to competent authorities

<u>Best Practice Nº14</u>: Cooperation and transparency

<u>Best Practice Nº15</u>: Face-to-face meetings between competent authorities

<u>Best Practice Nº16</u>: Bilateral process improvements

<u>Best Practice Nº17</u>: Decision summaries

<u>Best Practice Nº18</u>: Recommendation for MAP cases beyond two years

<u>Best Practice Nº19</u>: Avoid blocking MAP access via audit settlements or unilateral APAs

<u>Best Practice Nº20</u>: Interest relief

<u>Best Practice Nº21</u>: Suspension of collections during MAP

<u>Best Practice Nº22</u>: Readily available access to a competent authority

<u>Best Practice Nº23</u>: Independence and resources of a competent authority

<u>Best Practice Nº24</u>: Performance indicators for the competent authority function and staff

<u>Best Practice Nº25</u>: Implementing and promoting ACAP and bilateral APA programs

ANNEX 3 – MEMAP GLOSSARY

Accelerated Competent Authority Procedure ("ACAP")

In addition to an ongoing request for competent authority assistance, a taxpayer may request assistance for subsequent filed, but yet to be audited, taxation years on the same issue. The inclusion of these subsequent "ACAP" years in the MAP discussions not only prospectively resolves double taxation but also alleviates the burden of a separate audit and MAP process.

Advance pricing arrangements ("APA")

An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time. An advance pricing arrangement may be unilateral involving one tax administration and a taxpayer or multilateral involving the agreement of two or more tax administrations.

Anti-abuse rules / anti-avoidance laws

Domestic taxation laws that are intended to prevent taxpayers from avoiding tax or abusing tax laws for the sole purpose of obtaining a reduction, avoidance or deferral of tax.

Arm's length principle

The international standard that OECD Member countries have agreed should be used for determining transfer prices for tax purposes. It is set forth in Article 9 of the OECD Model Tax Convention as follows: where "conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly."

Arm's length range

A range of figures that are acceptable for establishing whether the conditions of a controlled transaction are arm's length and that are derived either from applying the same transfer pricing method to multiple comparable data or from applying different transfer pricing methods.

Assessment – taxation by

Taxation by means of either the tax authority or the taxpayer ("self-assessment") computing tax due over a period, usually a calendar or fiscal year. In effect, the taxpayer pays tax on an income amount after the gross amount has been received, as compared to taxation by a final withholding tax where a tax amount is retained and forwarded to the tax authorities before a net amount (of dividends, for example) is paid to the taxpayer.

Associated enterprises

Two enterprises are associated enterprises with respect to each other if one of the enterprises meets the conditions of Article 9, sub-paragraphs 1*a)* or 1*b)* of the OECD Model Tax Convention with respect to the other enterprise. See Article 3 for the definition of "enterprise".

Comparability (analysis)

A comparison of a controlled transaction with an uncontrolled transaction or transactions. Controlled and uncontrolled transactions are comparable if none of the differences between the transactions could materially affect the factor being examined in the methodology (e.g. price or margin), or if reasonably accurate adjustments can be made to eliminate the material effects of any such differences.

Compensating adjustment

An adjustment in which the taxpayer reports a transfer price for tax purposes that is, in the taxpayer's opinion, an arm's length price for a controlled transaction, even though this price differs from the amount actually charged between the associated enterprises. This adjustment would be made before the tax return is filed.

Competent authority

"Competent authority" is a term used in tax conventions to identify the person who represents the State in the implementation of the treaty, as defined under Article 3 of a tax treaty. A sample clause might be:

> The term "competent authority" means, in the case of Utopia, the Commissioner of Taxation or an authorised representative of the Commissioner and, in the case of Ruritania, the Minister of Finance or an authorised representative of the Minister.

The competent authority has certain specific functions under the treaty, including acting as a contact point for both taxpayers and the other competent authority in Mutual Agreement Procedures. Sometimes there are different competent authorities for different functions under the treaty.

Controlled transactions

Transactions between two enterprises that are associated enterprises with respect to each other.

Correlative adjustment

A term used in the transfer pricing context. An adjustment that creates an increase or decrease in the tax imposed on one member of the group of controlled taxpayers correlating to the "primary adjustment" made in respect of another member of the same group. The adjustment may be to the income of the group member or to an allowance of relief under a foreign tax credit or exemption mechanism. This term is generally seen as interchangeable with the term "corresponding adjustment", although when speaking of a *particular* monetary adjustment, some prefer to refer to "correlative adjustments".

Corresponding adjustment

An adjustment to the tax liability of the associated enterprise in a second tax jurisdiction made by the tax administration of that jurisdiction, corresponding to a primary adjustment made by the tax administration in a first tax jurisdiction, so that the allocation of profits by the two jurisdictions is consistent.

Dual Residence

The situation wherein a person, being either an individual or a company, is determined "resident" under the domestic tax laws of both the States having concluded a tax treaty. This would mean the possibility of juridical double taxation - both States taxing the person as their resident. The provisions of Article 4(2) and Article 4(3) of the OECD Model Tax Convention are designed to solve such situations by treating the person as resident - for purposes of the treaty - of only one of the States. See also: "Tie-Breaker Rules".

Economic double taxation

"Economic double taxation" is where two different legal persons are taxed on the same income or other taxable item by more than one State. This may occur, for example where two States take different views of the profits made in transactions between a subsidiary resident in one of the States in its transactions with a parent company in the other State, so that at least some part of the profits on the transaction are taxed in both States. The OECD Model Tax Convention does not often deal with economic double taxation, but Article 9 seeks to address aspects of this sort of double taxation of related entities. As noted by the Commentary on Article 10, at paragraph 40 certain States' domestic tax laws and treaty practice seek to avoid or mitigate economic double taxation caused by the simultaneous taxation of the company's profits at the level of the company and of the dividends at the level of the shareholder. Compare "juridical double taxation".

Exemption Method

The method of relieving double taxation under Article 23A of the OECD Model Tax Convention. Under this method, where a resident ("R") of one of the treaty partner States receives an amount that may be taxed in the other treaty State (which we can call for these purposes the "source State") under the tax treaty, the residence State must, when taxing R, exempt that amount from residence State taxation. In other words, R will not have to pay any tax to the residence State on the amount where the source State *may* levy tax under the treaty, whether or not it actually does so. This is the principle under paragraph 1 of Article 23A.
Paragraph 2 provides an exception, however in that where amounts are only liable to source State taxation to a limited extent under Article 10 (Dividends) or Article 11 (Interest), the State of residence need only give a credit, rather than an exemption in respect of that amount. Paragraph 4 provides an exception to the general exemption provision in paragraph 1. It provides that that obligation does not apply in certain circumstances where to apply it would result in double non-taxation as a result of different approaches to the application of the treaty which are both consistent with the meaning of the treaty. This system of tax exemption deals with avoidance of "juridical double taxation", where the person liable to the residence State taxation is the same person liable to the source State taxation.
Article 23A does not provide for a "full exemption" system, but is rather, an "exemption with progression" system (Paragraph 3). This means that although an amount which may be taxed in the source State is exempt in the residence State, the residence State is still allowed to take that amount into account when determining the amount of tax that the resident must pay on his or her other (that is, non-exempt) income. For example, the income may be taken into account as received in order to decide what marginal tax rate applies to the other income.

Foreign Tax Credit

A credit given for foreign tax in calculating the amount of tax to be paid in a person's country of residence. In effect, a taxpayer need not pay residence country tax on the income where the source country of the income taxes that income to an equal or greater degree. Where the residence country tax is higher, the amount of foreign tax is deducted from the amount of local tax otherwise to be paid. This avoids double taxation where, as is often the case, a tax treaty allows both the source and residence country some taxing rights.

Functional analysis

An analysis of the functions performed (taking into account assets used and risks assumed) by associated enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions.

Independent enterprises

Two enterprises are independent enterprises with respect to each other if they are not associated enterprises with respect to each other.

Juridical double taxation

"Juridical double taxation" occurs where the same legal person is taxed twice on the same income or other taxable item by more than one State. A common situation is where the source country taxes a payment as it flows to a person (by dividend or interest withholding tax, for example, which is in effect a tax on the recipient collected by a withholding agent such as the company paying the dividend) and the residence state of the recipient also taxes that person on the same item as part of his or her worldwide income. The division of taxing rights in the OECD Model Tax Convention, when combined with the effect of Article 23 is designed to prevent such juridical double taxation as far as is possible. Compare "economic double taxation".

MAP

See mutual agreement procedure.

Multinational enterprise group (MNE group)

A group of associated companies with business establishments in two or more countries.

Multinational enterprise (MNE)

A company that is part of an MNE group.

Mutual agreement procedure (MAP)

A means through which competent authorities consult to resolve disputes regarding the application of double tax conventions. This procedure, which is described and authorized by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment, but can also be relevant for other aspects of a tax treaty's operation. In the case of MAP relating to transactions between associated enterprises, see also Article 9, especially paragraph 2.

OECD Model Tax Convention

The Model Tax Convention on Income and Capital published by the OECD, as amended from time to time. The OECD Model Tax Convention includes Commentaries on the articles of the Model. The OECD Model Tax Convention serves as a model for the negotiation of bilateral tax treaties between countries.

OECD Transfer Pricing Guidelines

The Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations first published by the OECD in 1995, as amended from time to time. The Guidelines provide guidance on the use of the arm's length principle to determine transfer pricing between associated enterprises.

Permanent establishment ("PE")

Term given definition by Article 5 of the OECD Model Tax Convention, and used to determine whether the business profits of a resident enterprise of the treaty partner may be taxed under Article 7 in the other treaty partner. As Article 7 makes clear, the amount of business profits so taxable is the amount attributable under that Article to the permanent establishment. The PE test is broadly a test of whether there is the minimum economic connection necessary to justify source State taxation of such business profits under the tax treaty.

There are generally two aspects required for there to be a PE, a relationship to a particular place (the geographical aspect) and a presence for a particular point of time (the temporal aspect). There are, however, special rules for some types of PEs under the OECD Model Tax Convention, such as "construction" PEs, where the temporal period required is more than 12 months, and certain PEs constituted by "dependent agent" arrangements, where no time period applies. There are also some exclusions under the OECD Model Tax Convention, presences which are specifically stated *not* to be PEs, such as activities related solely to storage, display or delivery of goods or merchandise or other so-called "preparatory or auxiliary activities".

Sometimes the term "permanent establishment" is used in domestic tax legislation as well, but it may not have exactly the same meaning as in the tax treaties.

Primary adjustment

An adjustment that a tax administration in a first jurisdiction makes to a company's taxable profits as a result of applying the arm's length principle to transactions involving an associated enterprise in a second tax jurisdiction.

Repatriation

In the transfer pricing context, this term refers to the act by which an enterprise that has been party to a controlled transaction with an associated enterprise and has been found, in accordance with a transfer pricing adjustment, to have derived as a result of that transaction an amount of income that exceeds an arm's length amount, returns the excess funds to its associated enterprise.

Residence State

The residence State is the country where a person is resident under the treaty at the relevant time. In international tax law, this is a basis for taxation of the global income of the resident. See the text of Article 4, and its explanation, for more on treaty residence.

Secondary adjustment

An adjustment that arises from imposing tax on a secondary transaction in transfer pricing cases.

Secondary transaction

A constructive (that is, notional) transaction that some States assert under their domestic transfer pricing legislation after having proposed a primary adjustment in order to make the *actual* allocation of profits consistent with the primary adjustment. Secondary transactions may take the form of constructive dividends (that is items treated as though they are dividends, even though they would not normally be regarded as such), constructive equity contributions, or constructive loans.

Simultaneous tax examinations

A simultaneous tax examination, as defined in Part A of the OECD Model Agreement for the Undertaking of Simultaneous Tax Examinations, means an "arrangement between two or more parties to examine simultaneously and independently, each on its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest with a view to exchanging any relevant information which they so obtain".

Source State

The State where, for the purposes of a treaty, a taxable amount is regarded as arising. As rules in domestic law about where an amount arises differ (e.g. some might look to where the profits that become a dividend are made as the source of a dividend, whereas others may look to the State from which the dividend is paid), the OECD Model Tax Convention often provides implied or specific rules.
For example, a State A – State B tax treaty, if it was based on the OECD Model Tax Convention, would allow State B as the source State to impose a limited withholding tax on dividends paid by corporations resident in State B to residents of State A (see Article 10), but would prohibit State B from imposing a tax on dividends paid to a resident of State A by a corporation resident in State C, even if those dividends were paid out of profits earned by the corporation in State B (see Article 21).Source States may, under general international tax law, tax income sourced in that State. The residence State may then provide an exemption or a credit for tax paid in the source State under domestic law. A tax treaty often limits or prevents source State taxation, and also generally provides that the residence State must give a credit or exemption for tax paid in the source State under Article 23. Compare "residence State".

'Source' Tax

Tax on an item of income imposed in the State wherein that income is derived, or tax on an item of capital imposed in the State wherein that capital is situated. Many Articles of the OECD Model Tax Convention provide for an exemption from, or a reduction of, such "source" tax on certain items of income or capital.

Tested party

The participant in a controlled transaction that is the party by reference to whom a particular transfer pricing method is applied.

'Tie-Breaker' Rules

These rules, Article 4 of the OECD Model Tax Convention, at paragraph 2) for individuals, and paragraph 3 for companies, seek to determine a single residence for *tax treaty* purposes, in those cases where a person is a resident for domestic law purposes under the domestic tax laws of *both* treaty States. That can most obviously happen when the two States apply different tests for residency. The tie-breaker rules do not themselves affect the situation at domestic tax law generally, although domestic laws sometimes expressly provide that certain tax benefits are not available to a domestic law resident who is regarded as a resident solely of the treaty partner State under the relevant treaty's tie-breaker rules. See also: Dual Residence.

Transfer pricing

The terms and conditions applying in transactions between associated enterprises.

Transfer pricing adjustment

An adjustment to the tax liability of an enterprise when a tax jurisdiction applies the arm's length principle to transactions between associated enterprises in a transfer pricing case. See "primary adjustment" (by the initial tax jurisdiction), "corresponding adjustment" (by the jurisdiction of the other associated enterprise) and "compensating adjustment" (reported by the taxpayer based on the arm's length principle though it differs from the actual terms and conditions of the transaction). See also a "secondary adjustment" (an adjustment arising from taxing certain notional transactions).

Transfer pricing methodologies

The methods used to make transfer pricing adjustments. The following is a list of methods and terminology used in transfer pricing:

- Comparable uncontrolled price (CUP) method: A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.
- Cost plus mark up: A mark up that is measured by reference to margins computed after the direct and indirect costs incurred by a supplier of property or services in a transaction.
- Cost plus method: A transfer pricing method using the costs incurred by the supplier of property (or services) in a controlled transaction. An appropriate cost plus mark up is added to this cost, to make an appropriate profit in light of the functions performed (taking into account assets used and risks assumed) and the market conditions. What is arrived at after adding the cost plus mark up to the above costs may be regarded as an arm's length price of the original controlled transaction.
- Profit split method: A transactional profit method that identifies the combined profit to be split for the associated enterprises from a controlled transaction (or controlled transactions that it is appropriate to aggregate under the principles of Chapter I of the OECD Transfer Pricing Guidelines) and then splits those profits between the associated enterprises based upon an economically valid basis that approximates the division of profits that would have been anticipated and reflected in an agreement made at arm's length.
- Resale price margin: A margin representing the amount out of which a reseller would seek to cover its selling and other operating expenses and, in the light of the functions performed (taking into account assets used and risks assumed), make an appropriate profit.
- Resale price method: A transfer pricing method based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. The resale price is reduced

by the resale price margin. What is left after subtracting the resale price margin can be regarded, after adjustment for other costs associated with the purchase of the product (e.g. customs duties), as an arm's length price of the original transfer of property between the associated enterprises.

- Traditional transaction methods: The comparable uncontrolled price method, the resale price method, and the cost plus method.
- Transactional net margin method: A transactional profit method that examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction (or transactions that it is appropriate to aggregate under the principles of Chapter I of the OECD Transfer Pricing Guidelines).
- Transactional profit method: A transfer pricing method that examines the profits that arise from particular controlled transactions of one or more of the associated enterprises participating in those transactions.

Uncontrolled transactions

A transfer pricing term for transactions between enterprises that are independent enterprises (that is, that are not "associated enterprises") with respect to each other.

Unilateral relief

As part of the MAP process, one competent authority provides relief from double taxation or taxation not in accordance with the treaty. This unilateral relief can be by way of one competent authority withdrawing its initial adjustment or by the other competent authority providing a correlative adjustment.

Withholding Tax

A tax imposed at source, whereby a third party, the paying agent (such as a bank paying interest or a company distributing dividends to shareholders), must "withhold" an amount from the payment and remit it to the local tax authorities. It is a common way of ensuring that tax is collected from benefits accruing to overseas taxpayers who are beyond a State's immediate legal jurisdiction. Withholding tax will be "final" if there is no later adjustment as part of assessment. Otherwise, it is regarded as "provisional", and depending on the taxpayer's final tax liability there may be a refund or (more rarely) a requirement for further payment by the taxpayer. Articles 10 and 11 of the OECD Model Tax Convention set limits on allowable withholding tax rates on dividends and interest under the treaty. Whether the correct tax to be applied by a State is a withholding tax on gross receipts (such as under Article 11) or a tax on net amounts (such as taxation of business profits under Article 7 (Business Profits) can be a significant issue under treaties.