COMMENTS RECEIVED ON PUBLIC DISCUSSION DRAFT

BEPS ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

19 January 2015
<table>
<thead>
<tr>
<th>Table of contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFME and BBA</td>
</tr>
<tr>
<td>AlixPartners</td>
</tr>
<tr>
<td>AOTCA-CFE</td>
</tr>
<tr>
<td>Arnaud Booij</td>
</tr>
<tr>
<td>BDI</td>
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<tr>
<td>BDO</td>
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<tr>
<td>BEPS Monitoring Group</td>
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<tr>
<td>BIAC</td>
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<tr>
<td>Brose</td>
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<tr>
<td>BUSINESSEUROPE</td>
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<td>CBI</td>
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<td>Christian Aid</td>
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<td>Confederation of Swedish Enterprise</td>
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<td>Deloitte</td>
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<td>EBIT</td>
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<td>Ernst &amp; Young</td>
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<tr>
<td>Fernando Serrano</td>
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<td>FIDAL</td>
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<tr>
<td>Global Financial Integrity</td>
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<tr>
<td>Grant Thornton</td>
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<td>IAPT</td>
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<td>IBA Taxes Committee</td>
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<td>ICAEW</td>
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<td>ICC</td>
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<td>ICI Global</td>
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<td>Irish Tax Institute</td>
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<td>Loyens &amp; Loeff</td>
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16 January 2015

By email to: taxtreaties@oecd.org

Marlies de Ruiter
Head, Tax Treaties
Transfer Pricing and Financial Transactions Division
OECD/CTPA

Dear Marlies,

BEPS action 14 Discussion draft on making dispute resolution mechanisms more effective

AFME¹ and the BBA² welcome the opportunity to respond to the OECD’s discussion draft entitled: “BEPS action 14: make dispute resolution mechanisms more effective”. We wish to make clear that while AFME and the BBA have separate and distinct memberships, for the purposes of the OECD discussion draft, both organisations have decided to submit a single, combined response since our respective members share the same concerns with respect to the proposals in the discussion draft.

Given the relatively short time available to respond to the discussion draft – and the large number of other OECD discussion drafts currently open for comment – it has been difficult to consider all aspects of the proposals and we are therefore providing our initial comments on the most important issues of concern to us. We may decide to write to you again with further observations once we have had a chance to consider the proposals in greater detail.

General comments

We support the OECD’s consultative approach on the development of these proposals. We believe that this will benefit both policymakers and business, by helping to reduce any

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¹ The Association for Financial Markets in Europe (AFME) represents a broad range of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks and other financial institutions. AFME advocates stable, competitive and sustainable European financial markets, which support economic growth and benefit society.

² The BBA is the leading trade association for the UK banking sector with more than 230 member banks headquartered in over 50 countries with operations in 180 jurisdictions worldwide. Our associate membership includes over 80 of the world’s leading financial and professional services organisations.
unintended consequences arising from the OECD’s proposals. We also believe that it is essential for the OECD to take account of the views of business on the practical aspects of operating the intended policy.

Proposals to deliver effective dispute resolution mechanisms are an essential part of the BEPS project. It is therefore disappointing that it has not been possible for the OECD to set out more definitive proposals in the discussion draft; particularly that no consensus has been reached on moving towards a binding Mandatory Arbitration Procedure (MAP)

We believe that effective dispute resolution mechanisms need to be transparent, predictable and involve time-bound processes for all participants. This will provide greater legal certainty for banks and all businesses involved in cross border business and investment, as well as for tax authorities. We would also note that this certainty encourages greater cross-border investment and the attendant economic benefits which accrue from this investment. By focussing on a principles based, non-binding minimum standard, the proposals in the discussion draft fall short of meeting this criteria. We urge the OECD to recognise that effective arbitration processes are an integral part of the BEPS framework and to set out more definitive and binding plans to deliver these. In this respect, we would suggest that the OECD considers the EU Arbitration Convention which could be used as the basis for any future proposals.

The absence of a binding and effective proposal to improve dispute resolution mechanisms is a significant concern for our members, and all businesses conducting cross border trade and investment, as the proposals being taken forward under other BEPS actions will almost certainly lead to a greater number of disputes arising as both tax administrations and taxpayers adapt to any new policy changes. Unless there is an effective dispute resolution mechanism in place to mediate these disputes, it is likely that there will be a substantive increase in the risk of double taxation without the necessary recourse for business to mitigate this risk.

The development of effective dispute resolution mechanisms has also been cited as a means to mitigate business concerns in areas where it was not possible for the OECD to reach a consensus, or subjectivity remains, regarding the OECD’s recommendations with respect to other BEPS actions. If the OECD and its members are unable to agree developed proposals for binding dispute resolution mechanisms, we would envisage that some of the proposals agreed in relation to other BEPS actions would need to be revisited. This would arise as their effectiveness in tackling BEPS concerns without posing an increased risk of double taxation may no longer be the same in the absence of adequate dispute resolution mechanisms.

The discussion draft makes clear that the views and proposals contained in the discussion draft do not represent the consensus views of either the Committee on Fiscal Affairs (CFA) or its subsidiary bodies. We note that this has also been the case in other discussion drafts published by the OECD yet this has not prevented the other discussion drafts from suggesting best practice. Given the importance of this action in relation to legal certainty for banks and all businesses involved in cross border trade and investment we would strongly encourage the OECD and its members to be more ambitious in seeking a consensus which will deliver effective arbitration processes. For instance, we believe that establishing best practice guidance for mandatory time-bound and binding arbitration between countries would guide and encourage its development.

Although the proposals outlined in the paper would represent some progress in relation to the current position on MAP, we would consider it a missed opportunity if the BEPS project cannot, as part of its overall conclusions, reach agreement that mandatory binding arbitration is recommended as best practice.
Once again, we are grateful for the opportunity to share our comments with the OECD on the discussion draft. We would be happy to discuss any of the above comments in greater detail with the OECD and would be pleased to contribute further as the OECD’s work develops.

Yours sincerely,

Richard Middleton  
Managing Director  
Tax and Accounting Policy  
AFME

Sarah Wulff-Cochrane  
Director of Policy  
Taxation  
BBA
January 16, 2015

Marlies de Ruiter  
Head, Tax Treaties  
Transfer Pricing and Financial Transactions Division  
OECD/CTPA  
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France

Re: BEPS Action 14  
Make Dispute Resolution Mechanisms More Effective

Dear Ms. De Ruiter:

Introduction

Congratulations to you and your team for the very thoughtful discussion draft related to improving the process by which tax treaty-related disputes can be resolved in a principled and expeditious manner. As a general rule, intergovernmental processes work well for the most part, but there are further enhancements that can be considered.

My name is Steven D. Harris, and I am co-director of the North American Transfer Pricing Practice of AlixPartners LLP. AlixPartners is a leading global business advisory firm. We are the trusted advisors to corporate boards and management, law firms, investment banks, investors, and others who value objective advice, critical insight and actionable expertise. My career both in and out of government over the past twenty years has focused to a large extent on intergovernmental transfer pricing dispute resolution, principally through the Mutual Agreement Procedure (“MAP”) and Advance Pricing Agreement (“APA”) processes.

The comments and opinions I offer here are my own and do not necessarily represent those of AlixPartners.

Comments

1. **Issue K (page 12): Imposing excess or unduly onerous documentation requirements.**

Paragraph 26 of the discussion draft states that “excessive or unduly onerous documentation requirements (for MAP requests) may . . . discourage requests for MAP assistance and be an obstacle to an effective mutual agreement procedure.” This is obviously a point with which all taxpayers would agree. However, this principle could be interpreted as being in conflict with the
documentation requirements of BEPS Action 10, where greater documentation is likely to be required for every multinational. To facilitate speedy resolution of cases and avoid unnecessary or unproductive burden on taxpayers, I believe tax authorities should use as much as possible existing information prepared by the taxpayer in a MAP request, APA request, transfer pricing documentation or pre-existing responses to questions from tax authorities. If additional information is determined by a tax authority to be necessary, its request explicitly should state why they believe it is necessary for their consideration of the MAP request.

On a number of occasions in my career, I have objected to an information request on the basis that it was burdensome, irrelevant, or immaterial. While APA or MAP proceedings are voluntary processes, it is unreasonable to expect that taxpayers should have to expend time and resources to produce information of little or no relevant value. And when the question is one of taxpayer burden, in my experience the insight sought by the tax authority often could be satisfied in less intrusive or burdensome ways. An ongoing dialog between the taxpayer and the tax authority is the most useful tool to make sure that these potential issues are identified and ameliorated.

2. **Issue N (page 16): Clarifying the relationship between the MAP and domestic law remedies**

The draft argues that MAP resolutions are preferable to pursuing domestic law options, since a MAP agreement will provide a comprehensive, bilateral resolution of the case (assuming of course that agreement is reached, which is never guaranteed). To the extent the draft is considering a universal rule that would require filing a MAP request and not permit other options, it is ill-considered on a number of grounds. First, although a country may have a series of treaty networks, they may not all be effective for a variety of reasons. Second, at least in the case of the IRS, there is no requirement for the government to accept a MAP request; the implication of a policy to require a MAP request to be filed could produce substantial burdens on the tax authority. Third, it eliminates the taxpayer’s option to pick its forum for resolution of a matter; if the taxpayer determines, for whatever reason, that litigation is preferable, it should be allowed to pursue that option even when there is a MAP remedy available.

On a related note, the lack of a tax treaty or the lack of an effective mechanism to make compensating adjustments after agreement is reached also impose substantial impediments to making the MAP process ideal in every instance. Nonetheless, there is no doubt that a bilateral agreement generally is better for most taxpayer situations and should be encouraged.

3. **Item S: (page 19): Lack of co-operation, transparency or good competent authority working relationships**

In paragraph 40 (Page 20), the OECD has solicited comments as to additional measures - other than arbitration - to resolve MAP cases, if the tax authorities have not been able to resolve the case within two years of being accepted (which is the current standard for imposition of arbitration). Failure to reach agreement can occur for any number of valid reasons. But if the two year limit is not taken
seriously, the tax authorities will not be motivated to move the cases along quickly, which is the principal reason these time deadlines were imposed in the first place.

In my view, if the governments are unable to agree within the prescribed period, they certainly could be given an additional period of time to attempt to resolve the case. However, there need to be incentives to keep the case moving toward resolution, which is one of the benefits of having an arbitration provision. In addition to or in lieu of arbitration provisions, tax authorities could agree to provide a joint status report to the taxpayer indicating general areas of disagreement. Although a taxpayer is not part of the negotiation process, it certainly is the key stakeholder and deserves to know the status of its case. Further, the joint status report should be simultaneously provided to the senior management of each tax authority. By way of analogy, the IRS has required that taxpayers and APA team leaders do such a status report for senior management when time deadlines were not met – that was a powerful incentive to not miss deadlines.

As an additional option, if the governments are unable to agree, the OECD could recommend a procedure that would effectively say there is a rebuttable presumption that the approach taken by the taxpayer was correct.

4. **Item T.2 (page 20): Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases – Practical Issues; Appointment of Arbitrators**

The draft notes (page 22) that, although there are some general criteria, no standard set of qualifications for prospective MAP arbitrators exists. Option 27 supports development of criteria for the appointment and qualifications of arbitrators. I agree with this, and further propose some basic criteria, including a minimum of ten years of substantive, high level experience in transfer pricing in government and/or the private sector. Candidates also should have an advanced degree in law, economics, accounting, finance, or business.

To ensure uniformity in qualifications, the OECD not only should develop selection criteria, but also create a global pool of potential arbitrators, from which tax authorities would be encouraged to draw.

5. **Item T.2: Practical issues – confidentiality and communications (in the context of MAP arbitration)**

The draft notes in Option 28 (page 23) a number of provisions that would protect the confidentiality of taxpayer information submitted in the context of MAP arbitration. There is concern about the varying confidentiality standards and capabilities among the member countries. There is also concern about the involvement of independent arbitrators who are not formal employees of the tax authority. In today’s world, there is even more concern about internet hacking.
The OECD should consider providing a platform with the highest standards of internet security for use in arbitration cases by member countries. All information for all cases would flow through this server, which would have extremely tight security. Regarding the independent arbitrators, an appropriate bond or insurance coverage should be required, to the extent not otherwise provided.

6. **Item T.2: Practical issues: Other alternative dispute resolution mechanisms**

In paragraph 56 (page 26), the draft solicits suggestions for “other alternative dispute resolution mechanisms that could contribute to a more effective mutual agreement procedure.” The document has already discussed MAP generally, MAP arbitration and APAs.

The OECD also should investigate the possible use of mediation, which basically is a non-binding involvement of a facilitator to work with both sides to try to find a solution. There may be situations where mediation would be a better option than arbitration. If mediation is provided as an option, persons qualified to serve as arbitrators should also serve as mediators.

Thank you for your consideration of our comments. Of course, feel free to contact me should you have any questions.

Regards,

Steven D. Harris
Co-Director, North American Transfer Pricing
AlixPartners LLP
Joint Opinion Statement FC 3/2015

on making dispute resolution mechanisms more effective

(BEPS Action 14)

Prepared by CFE and AOTCA

Submitted to the OECD

in January 2015

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

The CFE is registered in the EU Transparency Register (no. 3543183647-05).

AOTCA (The Asia-Oceania Tax Consultants’ Association) was founded in 1992 by 10 tax professionals’ bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.
Introduction

The following comments relate to the OECD’s Public Discussion Draft “BEPS ACTION 14: Make Dispute Resolution Mechanism More Effective” (hereinafter “OECD Report”), published on 18 December 2014.

Please note that this is a preliminary Opinion Statement. The final version will be made available in the course of January 2015 on the CFE website.

We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

General comments

We find that a proper dispute resolution mechanism on treaty-related disputes is a key issue, as well as the actual enforcement of treaty provisions which represents a key element for building trust on taxpayers and in their effectiveness and real avoidance of the double taxation. The lack of trust may negatively impact cross border transactions.

As admitted in the OECD Report, in spite of several attempts to make dispute resolution mechanisms work better, further progress remains to be achieved. The current BEPS Action 14 is a unique opportunity to improve it and make some progress. But such mechanism will only be successful if it is able to facilitate final and binding decisions to be reached within an acceptable time frame. These issues become more important in these days when the number of MAP cases is constantly increasing and there is no indication that this trend will change in the near future.

We appreciate that the OECD Report precisely acknowledges some of the current problems with MAP procedures. Nevertheless, we are of the opinion that the proposed changes will not entirely secure in a satisfactory manner the removal of the existing problems. Even if the recommendations are followed, the initiative in solving the disputes will remain primarily with the States represented by their competent authorities. The taxpayer’s role is currently rather limited, and their involvement in the procedure should be further improved. The scope of the proposal should be expanded, so as to ensure the desired certainty and effectiveness.

Grounding the dispute resolution mechanism on the expectation that the two parties in the dispute will reach an agreement relying upon their acting in good faith will hardly reach a positive outcome and the desired certainty. In addition, the majority of the suggestions in the OECD Report refer to existing recommendations (e.g. MEMAP) which have not brought the satisfactory solution so far.

As indicated in the CFE opinion FC 15/2014 dated 19 December 2014, we favour the idea of introducing a dispute resolution mechanism through multilateral instrument. Such mechanism containing mandatory and binding arbitration represents a unified, effective and immediately applicable mechanism that will offer a real progress in dealing with treaty disputes. Proposing a mandatory and binding dispute resolution mechanism would demonstrate the OECD’s commitment to making the BEPS Action Plan a truly balanced undertaking to improve the international tax landscape for both tax administrations and taxpayers. Failing a real trade-off for the

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3 [http://www.cfe-eutax.org/node/4087](http://www.cfe-eutax.org/node/4087)
added compliance duties and tighter legislation resulting from the implementation of other BEPS measures and an effective tool to provide double taxation, the BEPS exercise risks becoming lopsided.

We note that there is no consensus within OECD on moving towards universal mandatory binding MAP arbitration. Nevertheless, we believe that whenever the parties are not able to reach an agreement within reasonable time (e.g. 2 years), there is no better way to reach the resolution of the case than by mandatory arbitration. Even if this solution is not accepted by all countries from the beginning, considering the history of other multilateral agreements it may be expected that after certain period of time the majority of countries will accede.

In our view, an effective approach to committing many more countries to arbitration would be through a multilateral instrument providing for binding procedures (under BEPS Action 15).

**Absence of an obligation to resolve MAP cases presented under Article 25(1)**

We agree with the necessity to clearly state the obligation of the competent authorities to resolve a case by mutual agreement (par. 10). The words “shall endeavour” as stated in par. 2 of Article 25 do not provide the legally binding undertaking to resolve the dispute and the practice shows that this delays effective solution of MAP cases. The change of the commentary may create certain pressure on the competent authorities but we doubt that such a change alone will secure the final resolution of the case.

**Ensuring resolution of the cases**

As it is admitted in the OECD Report (par. 36), the work on BEPS may lead to more stringent standards to be adopted and competent authorities will be called upon to develop common interpretations of the new tax treaty and transfer pricing rules. In other words, more disputes involving the interpretation and application of treaties may be expected.

The application of suggested measures such as principled approach to the resolution of MAP cases as well as an increase of co-operation, transparency or good competent authority working relationships may, to a certain extent, positively contribute to the resolution of MAP cases. We however doubt that it will be a significant improvement that will lead to a satisfactory solution of identified problems.

The MAP case is a result of different interpretations of competent authorities of two or more States on the interpretation and application of tax treaty provisions.

It is questionable to what extent the suggested “soft” measures (e.g. changing the commentary, commitment of parties to increase independence of competent authorities or to change performance indicators for competent authorities) will be sufficient to motivate a competent authority to give up its position, in particular in a situation when each party is persuaded that its view is objective and its claim is justified. Even if both sides undertake their best endeavours in order to take the objective view and to apply the treaty provision in good faith, it is very difficult to reach the change of one’s standpoint on the basis of the negotiation between two competent authorities. The competent authorities are part of state administration having their budgetary interests in mind, which even complicates the process of reaching an agreement. If the agreement between the disputing parties is not reached within reasonable time, the setting up of the dispute resolution with involvement of a third party leading them to a final and binding resolution is a must.

In this respect, we support the idea of setting up a permanent arbitration tribunal for international tax disputes that could not only facilitate the arbitration process but may provide the support in a pre-arbitration phase as well.
Lack of cooperation, transparency, resources or good working relationship

As mentioned in the OECD Report (par. 39), the lack of co-operation, transparency or good working relationship between competent authorities also creates difficulties for the resolution of MAP cases.

In our view it is of the utmost importance to focus and improve transparency and relationship building between taxpayers and tax authorities. Regular updates to taxpayers in connection with a MAP cases would be desirable (Option 21 is most welcome).

In addition, further information and data on resolved cases should be disclosed.

In our opinion the lack of expertise or proper training of tax authorities can also increase the difficulties found on the resolution of MAP cases. Further and specific training should be ensured (for developing countries outsourcing some of the MAP function, it could probably be an option to consider at least for short period of time while local officers lack the necessary expertise to deal with such cases).

Exchange of existing best practices among countries and Tax Administrations is welcome, since it could contribute to help identifying trends in disputes.

We believe that if there is a “threat” of involving a third party in order to reach the final decision (in case of mandatory arbitration), it may help to motivate the competent authorities to cooperate better and reach agreement in a pre-arbitration phase.

As far as the proposal to provide additional guidance on the minimum contents of a request for MAP assistance (Option 11 of the Discussion Draft), we welcome any measure that would contribute to improve clarity and reduce any unnecessary burden on taxpayers in terms of documentation.

Sovereignty issue

According to the OECD Report (par. 42), one of the main policy concerns with mandatory binding MAP arbitration relates to national sovereignty. We do not fully understand this argument. In the area of international public law, arbitration is generally recognized as an appropriate method of dispute resolution. The area of international tax law seems to be the only exception. We do not see any reasons for this. In the absence of consensus, it must be clearly recognised that the mechanism ensuring the binding resolution of the MAP case is necessary to achieve real progress. An appeal to good faith will not bring the desired results.

The scope of arbitration

We do not support the limitation of the arbitration’s scope as it may lead to uncertainty and in further delay in reaching a decision. In practice the limitation may trigger practical complications as to determination whether the particular case falls within the scope covered by the arbitration, in particular in cases involving application of provisions falling both within and outside the scope.

Form of decision

We do not find the “Final Offer” approach (used in baseball arbitration) to be appropriate. As indicated above and admitted in the OECD Report, as a result of BEPS there may be an increased
need for development of common interpretations of the new tax treaty and transfer pricing rules. However, the decision resulting from baseball arbitration does not state the reasons supporting it and as such will not help develop a common interpretation as these decisions cannot be used as an interpretation instrument for future cases involving the same issues. In addition, under this approach the arbitrators may choose only from the two offers presented by the parties. In cases when none of the presented offers represents a fair and objective resolution, this may lead to distorted interpretation of tax treaty provisions. Albeit we understand that the motivation behind the “Final Offer” approach may be cost and time effectiveness, unreasoned decision may undermine the trust in resolution of treaty cases. Therefore we prefer the “conventional” or “independent opinion” approach.

We believe that there are other techniques to achieve timely and cost effective arbitration, e.g. the permanent arbitration tribunal for international tax disputes, if established, could provide us with clear rules how the arbitration fees and other costs are to be determined as well as provide for time limits for reaching resolution.

Multilateral MAPs

The dispute resolution mechanism agreed in multilateral agreement will also enable to properly address the resolution of multijurisdictional international tax disputes (par. 57 and 58 of the Discussion Draft), which substantially increased in recent years.

The position of the taxpayer

Establishing a mandatory dispute resolution mechanism would be in our view crucial to prevent economic or juridical double taxation. In practical terms, we suggest as a possible solution to help improving the current framework, as well as to enhance the current position of the taxpayer while a dispute is pending.

The existing MAP procedure is usually a lengthy process. The taxpayer will probably be required to pay the tax (often in both countries) under their provisions which require it to act in very short periods – often as little as 60 days. A new alternative/provision allowing a taxpayer to interplead, pay the higher of the two amounts of tax and any applicable penalties arising from underpayment of that amount only, and then leave it to the competent authorities to work out which of them would be entitled to receive the amount, would in our opinion bring further fairness to the current framework. This would not in any case affect the Taxpayer’s interest in the MAP procedure, in the sense that the proper tax position might be the lower of the amounts in question.

Penalties should only be assessed on the basis of a tax default in one state. Therefore, only penalties arising from underpayment of the higher amount of tax claimed should have to be paid. No sanction should apply if the taxpayer has attempted to pay the tax to the right country.
By email: taxtreaties@oecd.org

OECD
Mrs. Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA

Amsterdam, January 11, 2015

Re: comment on Public Discussion Draft BEPS ACTION 14

Dear Mrs. De Ruiter,

Introduction

In my capacity as tax (litigation) lawyer I have often had to deal with cross border tax conflicts that were hard to solve. In my capacity as scientific researcher and lecturer, I am interested to see how international tax conflicts best could be solved. In my capacity as tax mediator I have experience in assisting parties to solve tax conflicts. In practice, I see that cross border operating companies have serious concerns how (potential) double taxation issues can effectively be resolved. Therefore, I anxiously took notice of the Public Discussion Draft of the OECD BEPS action 14 with the promising title: Make Dispute Resolution Mechanisms more effective. Both practice and science is waiting for the international community to make new steps forward in this respect.

I was happy to see that the document clearly describes the several obstacles that there appear to be in effectively solving MAP cases. However, overall I was a little disappointed, as to the expected effect of the options presented. The options described, leave a lot on the initiative of the States and their Competent Authorities themselves. One State may be more willing and has perhaps more resources to do something with the options presented than other States. If the several suggestion provided in the draft document are not given the same follow-up in all States, this may take a lot of years before a positive outcome can be measured. In addition, the document provides options to make only the MAP procedures more effective. The MAP procedure in itself is one way to solve the problem of cross border double taxation, but it is not necessarily the only mechanism that may work. The options that are produced in the discussion draft serve, of course, a good cause and it is very necessary that these options be presented. Due to the expected outburst of anti-avoidance rules on all levels (in tax treaties, in EU Directives, in domestic legislation) at one side aggressive tax planning will probably be discouraged, but on the other side, there is a risk of overkill, thus creating much more potential cross border tax disputes than before (as described in paragraph 28 of the draft). This way cross border transactions, cooperation and other cross border activities might instead be discouraged. That
should not be one of the results of the BEPS program. In my practice as tax litigator, I already see a movement in which domestic authorities are inclined to take unilateral measures in order to combat aggressive tax planning. That, in it self, is a good movement, but it also will lead to more cross border conflicts as to the range of the anti-avoidance rules.

How to make dispute resolution a success, is at the end of the day the only thing is what matters. Improving MAP access and MAP procedures will certainly help a lot, but judging from my experience I would believe that is not enough. No matter how carefully the procedures may be crafted, resolving a dispute remains people’s work. Competent Authorities first of all represent the disputing parties and the different views that gave rise to the dispute. As paragraph 10 of the discussion paper points out, they are obliged to take a principled approach to the matter in dispute. I assume that many competent authorities when initiating a MAP procedure truly believe their position is principled, and this may make it still harder for them to concede. It may be too much to expect from them that on top they should also single-handedly create and preserve the working conditions and atmosphere necessary for reaching a solution through reconciliation.

**Effective dispute resolution**

An effective dispute resolution for cross border tax issues is therefore very necessary. Effective means: finding a final solution that is in the interest of all parties involved (yes, also the tax payer and not only the States) in a relative short term. The paper provides for several options that indeed might help to speed up things a little bit. But I think this is not enough. Generally, taxpayers have to wait much too long for a final solution, and in the meantime they are faced with the double taxation that may hinder the cross border activities, and sometimes even put an unnecessary claim on their financial resources.

In my practice as tax mediator, I discovered that it is very well possible to have parties solve complicated tax issues in a relatively short term. That should also be possible in an international context. What parties in most cases need is not necessarily an expert on the case, not a real mediator, but rather a neutral person that gives structure and guidance in the case; an independent chairman, who has no interest at all in a certain outcome of the case.

**Suggestion: introducing the Professional Facilitator.**

Therefore, I would like to provide you with a new option that has not yet been considered: the use of a Professional Facilitator, acting for both competent authorities. The Professional Facilitator (PF) is a neutral person (or persons) that manages the MAP process and serves as a chairman/secretary at the meetings. The PF will not be involved in assessing the case itself, and is not serving as a mediator (but mediations skills are helpful).

One of the problems that were described in the discussion draft is the lack of resources of a competent authority (part D, paragraph 16). The PF might help to fill up the gap between the back offices of the competent authorities. The PF may help to staff of the competent authority to function better, thus also providing a solution for the obstacle described in paragraph 17.
In paragraph 39 the obstacle is described that there is sometimes a lack of co-operation, transparency or of a good working relationship between competent authorities that also creates difficulties for the resolution of MAP cases. A good competent authority working relationship is a fundamental part of an effective mutual agreement procedure. The PF may help to establish this good working relationship and transparency of all parties involved. In paragraph 40, commentators are invited to suggest what additional measures could be adopted in order to facilitate the resolution of a MAP case that competent authorities have been unable to resolve within two years of the MAP case being accepted. The introduction of a PF may accelerate the process. If however, also the PF comes to the conclusion that the MAP negations are likely not to come to an agreement within a reasonable timeframe (within two years, but if possible sooner) the PF may suggest to the parties other forms of dispute resolution, such as mediation, other forms of arbitration or the appointment of a specialist or a group of specialist that may be asked for an advice (binding or not, as agreed between parties) that may solve a part of the issues at stake.

The Professional Facilitator, in my view, needs to have, in any case, the following tasks:

a. To keep the agenda and set dates for the meetings;
b. To see to it that the Parties deliver timely a document with their views;
c. To make notes of the discussions and actions agreed;
d. To check if all necessary information is available to be able to discuss all relevant issues. This might include information about the (position of the) taxpayer, as a solution (as might agreed between States) that will lead to litigation in one or both States is likely not a good and effective one (as it is not final).
e. To check if all relevant issues (also for other years and other companies in the group) are on the table.
f. To coordinate all actions between parties involved.
g. To serve as a chairman in the meetings, to see to it that the discussions are effective and agreed actions are taken timely and to facilitate the discussion.
h. If the PF notices that the discussions between the Competent Authorities will most likely not result in an outcome, he may suggest that the parties will initiate arbitration as soon as possible, and coordinate the required action in this respect.

I think that a Professional Facilitator may play an important role to really speed up the MAP process. There will be a much shorter period in which the MAP can take place or in which it is decided to start arbitration.

This letter does not give you a list of persons that may qualify for his function and does not give you an outline how this could be organized. However, if the committee finds this idea worthwhile to consider and is willing to elaborate on this, I am confident that it is possible to solve the practical issues also in a relatively short timeframe. And I am happy to share my thoughts on this with you.
Please let me know if you have any additional questions. I am happy to provide you with an oral explanation on January 23 2015.

Best regards,

Dr J.Arnau Booster
(for your information, please find attached my resume).

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BDI comments on Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms more Effective

Dear Mrs. de Ruiter,

BDI\(^1\) refers to the OECD Discussion Draft “BEPS Action 14: Make Dispute Resolution Mechanisms more Effective” issued on 18 December 2014. We would like to thank you for the possibility to provide our comments that allow us to engage with you on these important issues.

The objective of Action Point 14 is to develop solutions that address obstacles which prevent countries from solving mutual agreement procedures (hereinafter “MAP”). The proposed solutions focus on the legal basis of the MAP (i.e. Art. 25 of the OECD Model and the related commentary) as well as the practice and resources of the tax administration in dealing with MAP.

**General Comments: Increasing number of Double Taxation Conflicts expected**

The work of the OECD in the BEPS Action Points will lead to an increasing number of double taxation conflicts. This relates in particular – but not exclusively – to the measures proposed in the following Action Items:

- Action Item 6: The work of the OECD regarding treaty abuse aims at restricting the legal entities and the items of income which can be covered by the double taxation agreements. As a result, in abuse cases often the MAP process will be denied through the competent authorities. Due to the fact that even in normal cases the general definitions –

\(^{1}\) BDI (Federation of German Industries) is the umbrella organization of German industry and industry-related service providers. It speaks on behalf of 37 sector associations and represents over 100,000 large, medium-sized and small enterprises with more than eight million employees. A third of German gross domestic product (GDP) is generated by German industry and industry-related service.
which are proposed in Action Point 6 – lead to the result that persons or items of incomes are not covered through the income, in many cases the principle purpose of income test (PPT) is necessary. It is clear that in this regard a big field of conflict will arise.

- Action Item 7: If the proposals regarding permanent establishments made in Action Point 7 will be implemented, it can be expected that states will proclaim new taxing rights for activities carried out in their territory. This mainly relates to commissioner structures and auxiliary activities. As a result, the likelihood of differing interpretations of the notion “permanent establishment” will increase and thus, more double taxation conflicts will arise regarding the taxation of the income generated in the above-mentioned activities.

- Action Item 8: Aligning the allocation of intangible related returns with the respective “value creation” will create significant problems, considering the fact that it is often difficult to exactly locate the source of “value creation”. Also the implicit reference to “people functions” in Chapter VI of the OECD Transfer Pricing Guidelines does not help in this regard, as this concept is very vague. This would for example mean that contract research activities would be entitled to a higher profit, since the researchers perform “people functions”. This move towards profit oriented methods will certainly lead to further complications and disputes in tax practice.

- Action Item 13: The information gathered by tax authorities in CbC templates should be used for risk screening purposes only. If the information is also used for transfer pricing audits, there is a risk that transfer pricing adjustments are made only on the basis of general allocation criteria such as people employed, turnover or assets. This approach would lead to more double taxation conflicts, since the allocation will likely not be accepted by the other states.

To summarize, the measures proposed in these and other Action Items will increase the double taxation conflicts significantly. According to the OECD statistic which has just been released, there has been an inventory of 858 unresolved MAP cases in Germany at the end of 2013. It has to be stressed that no other country had more MAP cases (USA: 732). Moreover, the average time to solve a MAP was approximately 24 months. If the measures proposed in many of the other Action Points will be implemented, it can therefore be expected that the inventory of unresolved MAP cases will increase even more, which is clearly not in the interest of taxpayers. If the time to solve MAPs will increase, the interest burden will increase as well.

**Specific Comments**

We welcome the following proposals of the Discussion Draft:

- Provide sufficient resources to competent authorities: This point is of significant importance since the competent authorities are expected to
deal with a higher number of MAP cases in the future and need the resources to do so.

• Improve the transparency and simplicity of the procedures to access and use the MAP: Only when the rules and procedures to access a MAP are clear, taxpayers can efficiently make use of this instrument. However it has to be noted that the German procedures and Circulars already fulfill this goal.

• Clarify the availability of MAP access where an anti-abuse provision is applied: It needs to be made clear that the measures proposed in this regard do not “block” the access of taxpayers to MAPs. In fact, if a state attempts to block access to the treaty, a MAP should be possible to decide on the access to the treaty benefits.

• Include interest and penalties in MAP negotiations: Currently, interest and penalties are not in the scope of a MAP. Since interest payments can reach a very high level in the course of time, it has to be welcomed that they are also included in MAP negotiations.

• Ensure that audit settlements do not block access to the mutual agreement procedure: It is a matter of fairness that tax auditors do not try to influence taxpayers to waive the right to MAP to gain more favorable audit results. Rather, a MAP should not be precluded by an audit settlement.

However, there are also areas where the Draft signals significant and worrisome changes to the dispute resolution principles and represents a substantial retrenchment from the existing OECD guidance on dispute resolution issued less than a decade ago:

• Clear policy positions on many issues in existing OECD Commentary and in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) Best Practices are now presented as mere “options”.

• Significantly greater latitude is signaled for unilateral rejection of cases with a new focus on whether competent authority considers a case as “justified” and “eligible” for MAP.

• The draft suggests that domestic rules on statute of limitation may trump agreed MAP filing deadlines stated in bilateral treaty if a case is considered “late”.

• The discussion of arbitration issues considers potential limits on scope, including denial of arbitration on – as mentioned above – “anti-abuse” grounds and requirement of “actual double taxation”.

The Draft focuses almost exclusively on improvements to mutual agreement procedures and describes Action 14 as seeking to (only) improve the effectiveness of MAP in resolving treaty-related disputes. However, we are concerned that the proposed measures are not far reaching enough to effectively provide more access to Mutual Agreement Procedure (MAP) to
address the proliferation of permanent establishments and double taxation issues that will be created by the other BEPS Actions. Also, while a short discussion of arbitration issues is included, the Draft does not seek to encourage mandatory binding MAP arbitration and rejects arbitration as a general remedy from the outset.

**Need for a mandatory arbitration procedure**

From an industry perspective, binding arbitration is of utmost importance to address the inevitable double taxation that will arise from the shift by the OECD away from the arm’s length standard to “special measures” such as profit splits. We also see a departure from bright line tests to general anti-abuse rules and looser standards that will put more discretion in the hands of tax auditors and lead to overlapping claims to tax the same income.

We are convinced that resolving double taxation disputes through arbitration is the most effective remedy. We believe that it will also benefit governments, including developing countries to obtain a neutral view towards the issues disputed.

Most importantly, there is the requirement for a strong “link” between the BEPS measures under the various Action Points and the dispute resolution mechanisms that are available to taxpayers. In other words: If the OECD-BEPS concept of future double taxation agreements leads to more taxation conflicts, a mandatory arbitration clause and an efficient MAP-procedure is a precondition for a fair treaty. A faster and certain resolution of disputes is essential. Otherwise the double taxation treaties will lose their guiding role in international taxation conflicts. This would contradict the aim of the OECD which is to contribute to the extension of world-trade. Therefore we strongly emphasize the need for a mandatory arbitration procedure and call on the G20/OECD Members to recognize that adopting a binding and universal arbitration framework should be an integral and inseparable part of the BEPS deliverables.

In this context it has to be emphasized that the EU Arbitration Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises which already provides for a mandatory arbitration procedure has proven to be very successful in the past. In particular, the fact that there is a mandatory arbitration for the case that the mutual agreement negotiations fail has the positive side-effect that states more often find solutions in the preceding mutual agreement discussions. This positive effect could also be used when a mandatory arbitration clause would be implemented in the OECD Model.

If the G20/OECD does not succeed in establishing such a framework, further consideration must be given to how to mitigate the risks of double taxation caused by proposals under the other BEPS Actions and, if necessary, reconsider the results of those deliverables. When confronting taxpayers with more and more double taxation conflicts they must also be given the means to resolve these conflicts. There needs to be an effective balance to the measures proposed in other Action Points, which in our view can only be reached if a mandatory arbitration clause is implemented.
Please do not hesitate to contact us if you have any questions.

Sincerely,

Berthold Welling  Dr. Karoline Kampermann
Ms Marlies de Ruiter
Head, Tax Treaties
Transfer Pricing and Financial Transactions Division
OECD/CTPA
2 rue Andre Pascal
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16 January 2015

Dear Ms de Ruiter

PROPOSED DISCUSSION DRAFT ON ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

BDO welcomes the opportunity to comment on the OECD’s Discussion Draft issued on 18 December on ‘Action 14: Make Dispute Resolution Mechanisms More Effective’ (the ‘Discussion Draft’).

We agree that the need to overcome obstacles to the effectiveness of MAP is important. Indeed, we believe that it is an essential component of the work on BEPS issues. We concur with the general direction of the work and the options being considered.

We set out our comments and suggestions below:

Para 2

A step change in improving the efficiency and effectiveness of MAP is absolutely critical to the success of the BEPS project as a whole. How the success of BEPS will be perceived by business will depend on how successful tax administrations are in delivering ‘greater certainty and predictability’ to business to compliment actions to counter BEPS; a key component of that objective of the project is that of making dispute resolution mechanisms more effective.

We believe that this also needs to be complimented with an objective of reducing compliance costs for business arising from disputes (which for many smaller businesses can be disproportionate to the amount of tax that may be in dispute).

Para 3

It is disappointing to learn of the lack of consensus (in particular to binding arbitration). In that context, it would be good to see an explicit commitment to revisit the principles set out in the final OECD guidance on dispute resolution in, say, 3 years’ time (in a similar way to the commitment by BEPS participating countries to review transfer pricing documentation and country-by-country reporting standards under the Action 13 deliverable by the end of 2020).

We recognise the need for, and completely support the introduction of, complementary solutions for dispute resolution including the development of best practice guidance on supplementary dispute resolution building upon some of the processes outlined in the MEMAP report (February 2007).
Para 8

We very much welcome the prospect of a 'forum of competent authorities' being responsible for monitoring the overall functioning of the MAP and the measures to which countries will have committed. We see this as essential to the successful implementation of this part of the OECD’s work. We agree that, in addition to a monitoring role, the forum should facilitate ‘experience sharing and capacity building and, more generally, work to foster co-operative and collaborative competent authority relationships’. Indeed, we believe that it is necessary for the forum to go beyond a narrow monitoring role to one of measuring the outcomes of the application of the minimum MAP standards emanating from Action 14 and act as an advocate for compliance with a continuous improvement of standards and good practice in the context of dispute resolution. It must have a clear (and published) mandate with a requirement to publish its activity and outcomes on a regular basis to encourage transparency and accountability.

It is important that such a forum should have governance standards that preserve its independence, with a revolving composition of competent authorities and, potentially, other independent parties.

Para 12 et seq

We recognise that tax administration practices create an important environment in which competent authorities carry out their mandate and we believe that the work of the FTA MAP Forum is critical in establishing good practice/governance in connection with MAPs. It is important that competent authorities develop a more collaborative mindset and relationship, both between them and with taxpayers and their advisors, to seeking ‘the right answer’ in the context of a dispute based the application of a principled and objective approach. To many, this will require a significant cultural change - one that, if it is to be successfully applied in the level of MAP, we believe needs to be embedded in the administrative practices of tax authorities and their approach to dispute resolution more widely. As such, we believe that the work of Action 14 also needs to address dispute resolution practice more generally in providing good practice guidelines for tax administrators.

It would be a positive outcome if the parallel work of the FTA MAP Forum could be given the political weight (and thus the kind of commitment that the BEPS project has at governmental level) afforded by its incorporation into the outcomes of Action 14 and also if its outcomes could be promulgated and promoted by the proposed ‘forum of competent authorities’.

Para 16

Lack of resources of a competent authority - We believe that there is little doubt that BEPS will trigger a significant increase in MAP cases and that even the best resourced Competent Authority/tax administration will struggle to resource that increase in activity. If cases are to be dealt with in an efficient and effective way, new ways of managing and resourcing cases will be required. Consideration should be given to whether tax payers might play a more extensive role in the MAP process, the outsourcing of MAP case work by competent authorities to suitably qualified professional advisers or whether the ‘forum of competent authorities’ might provide resource (at a commercial cost) in periods of exceptional demand.

Para 19

Audit settlements as an obstacle to MAP access - In our experience, it is common for tax administrators to influence taxpayers not to initiate MAPs. We believe that a dramatic change in mindset and culture is required to curtail such practices before the proper and consistent application of treaties can be realised. Our experience is that differences between the tax (and
associated interest and penalties) which a tax administrator might suggest as a basis for agreement without the engagement of MAP and that which tax payers might be led to believe would be due if a MAP were to be engaged can be very significant. This can act as a very significant discouragement from engaging in a MAP. The time and resource (and potentially external professional costs) in pursuing a MAP can also be a significant deterrent for taxpayers – and disproportionately so for SMEs where the absolute amounts of tax involved might be relatively small.

As a means of achieving agreement (in the context particularly of those cases where the amount of tax is relatively small), a ‘last best offer’ or ‘final offer’ approach (‘baseball arbitration’ as described in paragraph 50 of the draft where arbitrators are involved) might also be worthy of consideration during the MAP process, regardless of whether arbitration might be an option. The contents of a request for MAP might also be lower for SMEs or where the amount of tax involved is lower.

The wording of Option 7 needs to carry more weight – The words ‘could commit’ should be replaced by ‘should commit’. We believe that it would be appropriate for the ‘forum of competent authorities’ to invite taxpayers to report independently to it of instances where they have been precluded access to MAP on treaty-related disputes by an audit settlement. Consideration might be given to publishing information of that nature to complement the MAP statistics currently published by the OECD.

Para 25

Complexity and lack of transparency of the procedures to access and use the MAP - The process needs to be streamlined and sped up. Simplified processes might be employed where less significant amounts of tax are involved with the publication of guidelines/procedures for access to simplified/streamlined procedures where appropriate.

Para 26/Option 11

Consideration should be given to the prescription of lower minimum contents of a request for MAP assistance for SMEs or where the amount of tax concerned is small.

Para 30/Option 13

We do not believe it is unreasonable that, if one competent authority accepts a MAP, the other should be obliged to do so, unless it can present very good reasons not to. This might be an area where the ‘forum of competent authorities’ might provide guidance and maintain a library of precedent/good practice.

Para 33/Option 17

We hold the view that collection procedures should be suspended pending resolution of a MAP in all cases and this should be explicitly stated in Option 17.

Para 34/Option 18

Time limits to access the MAP - It is not uncommon for tax audits to take place many years after the tax year under review. Thus the double taxation arising due to an adjustment on audit can be triggered at a time after the statute of limitations in the jurisdiction of the other Competent Authority has expired. Many late objections would be avoided if the double taxation is triggered earlier - A shorter domestic time limit for tax adjustments might help to achieve this, facilitated by the earlier and more effective conduct of case reviews and risk assessment by
tax administrations. In addition to the points set out in Option 18, consideration should be given to building upon other OECD work (for instance on its Draft Handbook on Transfer Pricing Risk Assessment and the MEMAP Report) to provide guidance to tax administrations as to best practice in this regard.

Paras 39 and 52

**Relationship between the competent authorities and role of the taxpayer** - As confirmed in the discussion draft, the taxpayer has no active role in the MAP. It is argued the involvement of the taxpayer results in a lengthier, more expensive and more complicated process. However, we believe that there are also many advantages to a taxpayer’s involvement in their MAP cases. As mentioned previously, some resource issues might be solved if more work is done by the taxpayer. Also, taxpayer involvement could motivate all parties to reach a conclusion in good faith.

Para 60/Option 34

We believe that secondary adjustments such as interest and penalties should be treated in the same way as the primary adjustment and dealt with under the MAP process (and at the same time). This will further encourage engagement in MAP.

**Conclusion**

We support the OECD’s efforts to put in place more effective mechanisms for dispute resolution in the context of MAP.

We would like to thank the OECD again for this opportunity to comment and should be happy to expand on these points and contribute to further stages of this review if required.

For clarification of any aspects of this response sent on behalf of the BDO transfer pricing network, please contact:

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Yours sincerely

Anton Hume
Partner - Global Transfer Pricing Leader
For and on behalf of BDO LLP
BEPS MONITORING GROUP

Comments on BEPS Action 14:
Make Dispute Resolution Mechanisms More Effective

This report is published by the BEPS Monitoring Group (BMG). The BMG is a group of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. This paper has not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives.

This paper has been prepared by Sol Picciotto and Jeffery Kadet, with comments and input from D. P. Sengupta (in a personal capacity).

We are grateful for the opportunity to contribute these comments, and would be happy to participate in the public consultation on this issue.

1. GENERAL REMARKS

1. Improving the dispute resolution mechanism (DRM) is an important element of ensuring an effective system of international taxation of multinational corporations (MNCs). However, the role of and form taken by dispute resolution must be considered carefully in relation to the characteristics of the system and the form of the rules concerned. Firstly, it should be obvious that any rules-based system should be designed to ensure that it occasions as few disputes as possible. A DRM should only need to be invoked in a tiny minority of cases. Secondly, such a procedure should itself be designed to reduce the necessity for recourse to it. The best way to achieve this is for parties to potential disputes to be able to anticipate the likely result of invoking the procedure, and hence to achieve a settlement without resorting to it. Such considerations seem to underlie many of the proposals made in this discussion draft (DD), although they are not articulated.

2. Option 1 proposes a new Commentary paragraph which would obligate states to ensure that disputes are resolved in a ‘principled, fair and objective manner’. We agree with this objective, but suggest that the implications of these important criteria should be spelled out in more detail in the Commentary. In our view, they are as follows:

principled: this requires that outcomes should take the form of reasoned decisions, based on analysis of the facts of the case, the applicable rules and how they have been interpreted and applied to the specific case;

fair: like cases should be treated alike, and decisions should be published, to ensure consistency;

objective: decision-makers should be independent of the disputing parties and have no vested interests or conflicts of interest; and rules to be applied should be formulated so as to be easily applicable to specific cases based as far as possible on their facts rather than requiring value-judgments.

The existing Mutual Agreement Procedure (MAP) in tax treaties is far from achieving this standard. At present it typically entails ad hoc agreements that have been kept secret among tax authority representatives and competent authority personnel. The only other privy parties are a small legion of tax advisers and the involved taxpayers. The inside knowledge they gain is a significant, and very inappropriate, commercial advantage for those tax advisers who may be involved frequently in such proceedings.
3. It is therefore important to consider transparency. Reasons for transparency perhaps need to be spelled out, since tax authorities are accustomed to maintaining strict confidentiality of the tax affairs of individual taxpayers. However, confidentiality does not usually extend to disputes which are referred to tax courts or tribunals, and in most countries these decisions are published. Secrecy is even less appropriate for international tax disputes. Firstly, such conflicts often involve very large sums, sometimes in the hundreds of millions or even billions of dollars. Few democratic countries would normally accept that decisions with such major implications should be taken behind closed doors by unaccountable officials. In cases unilaterally resolved or which are not accepted for MAP, the competent authority will have heard representations only from the tax authorities and the companies involved or their tax advisers. In bilateral MAP cases, the only additional parties involved are the other country’s competent authority and occasionally an arbitrator who has been sworn to secrecy. Even more importantly, secrecy greatly undermines all three of the criteria listed above.

Publication provides the best incentive for the decision-makers to ensure that the outcome they reach is defensible in principle, rather than the result of an ad hoc bargain. It enables the reasons which are provided to be tested and evaluated through public debate. Both the published decisions and the debate around them can therefore contribute to a better general understanding of how the rules should be interpreted and applied. Creating such a wide and public understanding is crucial to ensuring that the way the principles are interpreted and actually applied is consistent and hence accepted as fair. Transparency of the whole process is central to ensuring that it can be seen to be impartial and objective. A final point, of course, is that knowledge of the bases on which decisions have been reached will help MNCs and other taxpayers plan their activities so as to be within the rules for multiple countries and avoid both double taxation and the need for MAP assistance to correct it.

4. A second key element underlying the three criteria is that the rules themselves should be capable of being applied consistently and objectively. Rules which give decision makers wide scope for interpretation, or which permit a variety of acceptable alternatives, do not lend themselves to objective decision-making. For example, article 4(2) of the OECD model tax treaty lays down rules for determining the residence of an individual which are in quite specific terms, and then provides that, where an individual is resident of both or neither of the contracting states, the competent authorities ‘shall’ settle the question. This firm obligation to resolve the issue by agreement is easier to accept because the relevant rules themselves are formulated in relatively concrete terms. In contrast, the Mutual Agreement Procedure under article 25 establishes a weaker obligation on the parties to ‘endeavour’ to resolve both (i) claims by taxpayers of taxation ‘not in accordance with the convention’ (article 25.2), and (ii) ‘any difficulties or doubts arising as to the interpretation or application of the Convention’ (article 25.3). Whether this obligation can appropriately be strengthened, as proposed in Option 1 of the DD, is not simply a matter of the political commitment of states, but depends also on whether the rules are capable of objective interpretation.

5. Hence, we suggest that a higher priority should be given to ensuring that international tax rules are agreed which are simple, concrete, and clear to apply. This is actually more important than simply strengthening the disputes resolution mechanism. We are concerned that the outcome of the BEPS project will be the converse in a number of areas. The general approach which has been adopted, aiming to strengthen existing rules, seems in many respects likely to generate more conflicts and disputes, as countries selectively enforce the rules which they consider favourable to them. Furthermore, some of the rules proposed are either complex (e.g. those on hybrid mismatches, or Limitation on Benefits) or involve subjective judgments (e.g. the principle purpose test; or ‘facts-and-circumstances’ and functions-assets-risk analysis in transfer pricing). Such rules are by their nature difficult to
apply in a principled, fair and objective manner. Indeed, it seems to be the widespread concern that the BEPS rule reforms will lead to increased conflicts and disputes that is leading many, especially in the business community, to press for strengthening of the DRM. In our view this puts the cart before the horse. It is inappropriate to delegate to a DRM procedure the responsibility and power to resolve issues of principle in relation to individual disputes, which long negotiations have failed to deal with satisfactorily. The extensive discussions and negotiations through the BEPS project must create concrete easy-to-apply rules that will resolve issues. If it fails, then a very significant increased weight will fall on the DRM procedure. This is not advancing the goal of better and simpler tax administration either for governments or taxpayers.

6. That said, a well-designed DRM system could play an important part. It may be helpful to compare and contrast taxation with other areas of international business regulation where similar issues have been experienced: international trade, and international investment rules. The General Agreement on Tariffs and Trade (GATT) contained a dispute settlement provision similar to the MAP in tax treaties, for bilateral consultations between the parties to try to resolve conflicting interpretations of the treaty provisions. However, a procedure was created quite early in the GATT for reference of such disputes to Panels, which produced reasoned reports with recommendations, and which were published. After more than two decades of experience of this procedure, the creation in 1995 of the World Trade Organisation (WTO) included a full-blown dispute settlement system, with an Appellate Body acting essentially as a world trade court. Under the GATT there had already been a rapid growth in disputes, and the creation of the WTO also involved the creation of an extensive package of legal agreements regulating many aspects of trade. Although not uncontroversial, it is widely accepted that the Appellate Body has played an important part in ensuring the successful functioning of the WTO system. A key element of this success has been the quasi-judicial nature of the procedures, including publication of the decisions. International investment treaties have also experienced a similar evolution, but with fewer due process safeguards. Adjudication is still by ad hoc tribunals, a significant proportion of arbitral awards are not published, and there are concerns about the inconsistency of decisions and the quality and impartiality of arbitrators. As a result, the system may now fairly be described as in crisis, and major reforms are being considered. Although there are obviously differences between these fields and taxation, experience does seem strongly to suggest that an effective DRM should be carefully constructed, with adequate procedural safeguards, especially transparency.

2. SPECIFIC COMMENTS.

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

As we have argued above, it is important not to put the cart before the horse. A political commitment to resolve disputes requires first (i) agreement on concrete and specific rules which are capable of being applied objectively, and (ii) establishment of procedures with adequate procedural safeguards, especially transparency. We support the objective of ensuring that conflicts are resolved in a ‘principled, fair and objective manner’. But this cannot be achieved simply by an empty commitment. For us the test is whether governments are willing to accept transparency of the dispute settlement procedures. Without this, the proposed commitment would be a hollow one.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

The long-standing reluctance of many countries (including OECD members) to accept this provision is rooted in the ambiguous concept of ‘economic double taxation’. Article 9 is understood as requiring associated enterprises to be treated as independent of each other, and it empowers each country to make adjustments to the accounts of related entities to ensure an appropriate attribution of profits. The independent entity principle means that the companies’ accounts are considered separately, so there is no question of the same entity being double taxed. Rather, decisions by different tax authorities on taxation of two legally different entities, if inconsistent, may mean that some amount of income may be taxed twice by being included in the profits of two entities. In contrast, the concept of ‘economic double taxation’ requires viewing these two associated entities as part of a single centrally-managed enterprise, while the conventional understanding of article 9 is that they should be treated as if they were independent. In our view this independent entity principle is an inappropriate and ineffective approach, and the world would have a better and easier-to-administer system if associated enterprises were treated in accordance with their economic reality as unitary firms. Although the OECD has declined to consider a full unitary approach within the BEPS project, the discussed expanded role for the profit split method is recognizing some of this economic reality of these unitary firms. We believe that as countries that have chosen to exclude article 9.2 from their treaties see increased fairness from expanded use of the profit split method, they will be more accepting of article 9.2 and of a strengthening of the Dispute Settlement procedure to avoid double taxation. Until then, it is not surprising that many are reluctant to do so.

OPTION 3 – Ensure the independence of a competent authority

This is an impracticable suggestion particularly from the point of view of developing countries where there is acute shortage of trained officers. In such countries, officers combine many functions including administration of taxes or policy formulation. This does not imply that they cannot take an independent view in their functions as competent authorities. In certain developed countries, there are lateral entries from the private sector and officials often join the private sector after a stint in the office of the competent authority. If independence is to be stressed there should be rules also against the ‘revolving door’. It is not fair to cast aspersions on the functioning of the competent authority just on the basis of their provenance within the public service.

OPTION 4 – Provide sufficient resources to a competent authority

Tax authorities everywhere are under-resourced. The issue is therefore how to prioritise the allocation of scarce resources. As we have continually stressed, the outcomes of the BEPS project should be judged on whether they produce rules which are clear and easy to administer, and hence place the least burden on scarce resources of trained staff. As pointed out in section 1 above, a simpler more concrete system would also reduce the relative number of disputes, and make them easier to resolve. Asking governments to devote scarce resources to attempting to resolve disputes resulting from defective rules may be necessary, but it frankly does not seem appropriate.

OPTION 5 – Use of appropriate performance indicators

As pointed out earlier, in developing countries, competent authorities perform many other functions. When their performance is judged, it must be based on objective criteria. It should be appreciated that whether an outcome was principled or not is difficult to judge, especially in the developing country environment where there might be few in government capable of
judging such issues. We suggest that additional guidance on objective and easily measured criteria be provided.

**OPTION 6 – Better use of paragraph 3 of Article 25**

This provision concerns agreement by competent authorities on interpretations of treaty provisions, or even of issues not provided for in the treaty (‘legislative’ interpretations). States have been understandably reluctant to delegate power to unelected officials to develop rules, either as interpretations of existing treaty provisions, or even going beyond them. To some extent, of course, even resolution of specific cases may involve refinement or development of rules, but granting a specific authority to do so is far-reaching. To give such authority in an area so central to state sovereignty as tax policy is inevitably likely to be controversial. This is all the more so when it concerns the tax obligations of powerful and wealthy multinational corporations. Hence, the grant of any such power must be limited to defined circumstances, and subject to stringent procedural safeguards. A stronger case can be made for granting authority in relation to specific issues such as practical arrangements for DRM. But as stated above, it seems inappropriate to delegate to officials the power to interpret provisions which have resulted from a long process of negotiation and debate, as any ambiguities which remain are likely to be due to compromise formulations. Allowing bilateral interpretations could result in divergences among states.

If states wish to go in this direction, a formal procedure should be established when such an interpretation is proposed, to give all interested persons an opportunity to make representations, and where appropriate there should be a public consultation. Publication of such interpretations should be regarded as essential.

**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**

The concern here is that a taxpayer should not be dissuaded from seeking of the competent authority a principled interpretation by being offered a settlement conditional on giving up such a right. We would support this suggestion, although it would be easier to do so if the DRM in reality did provide such a principled decision. As we have pointed out, so long as it continues to take the form of secret decisions resulting from discussions behind closed doors, this is not the case. It is difficult to seek public support for strengthening corporate rights without greater transparency.

**OPTION 8 – Implement bilateral APA programmes**

In our view, APA programmes also need a thorough overhaul. It should now be clear, especially after the Lux Leaks revelations, that they can be a source of abuse. This is not only because of the possibility that some countries may provide favourable rulings protected by secrecy. A wider problem is that the negotiation of APAs has become dominated by a few tax advisers, mainly the Big Four accountancy firms and some law firms. This is largely because transfer-pricing rules have become increasingly complex and subjective, leading to reliance on micro-economic methodologies and requiring detailed documentation. These technologies introduce an appearance of objectivity, while placing tax authorities at a significant disadvantage in resource terms. The secrecy of APAs further reinforces the monopoly of the large advisory firms, who have inside knowledge due to their involvement. Both the adoption of simpler rules and improved transparency are therefore central to the reform of APAs, as with dispute settlement.

Like dispute decisions, a strong case can be made for publication of APAs, since the arguments made in section 1.3 above apply also to them. Redaction of some details could be appropriate, if necessary to protect commercial confidentiality. Publication is all the more
important for bilateral APAs. These have characteristics and effects very similar to decisions resulting from the MAP.

**OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs**

**OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP**

**OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance**

**OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied**

**OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities**

**OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”**

**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State**

These proposals all aim to strengthen the corporate taxpayer’s right of access to the MAP, incrementally. While they may be considered improvements, a higher priority should be given to the more fundamental reforms we have discussed above.

There is also a question of timing. We are concerned that making it easier for companies to access the MAP will lead to a further sharp increase in cases. The data show that the MAP caseload has increased faster than the rate of resolution of cases, resulting in lengthening of the time taken to reach a resolution. This is likely to be exacerbated by the changes introduced by the BEPS reforms, as all concerned may wish to seek clarification of the new provisions. As we have continually stressed, the highest priority in the BEPS process should be to ensure rules which are clear, concrete and easy to administer. Including proposals to facilitate access to dispute settlement as part of the BEPS package may lead to acceptance during the negotiations of rules which are ambiguous or require subjective judgment, leaving important issues of interpretation to be decided on a case-by-case basis. This would be a very bad use of resources, and obviously would disadvantage poorer countries.

Companies are clearly concerned that the BEPS project will take tax rules into unchartered waters. For this reason, many are pressing for the comfort of a strengthening of dispute resolution. This is misguided. Companies know all too well the delays and uncertainty involved in dispute resolution. As we pointed out in paragraph 1.1, a DRM should be a last resort, used in a tiny minority of cases.

Consideration should rather be given to a transition mechanism, to supervise the process of implementation of the BEPS reforms, monitor the way the rules are introduced by states, and provide advice and perhaps even interpretations. The G20 should consider what would be an appropriate institutional basis for such a continuing mechanism. The expansion of OECD Working Parties to include other G20 members, and now also some developing countries, provides only a temporary and rather unsatisfactory remedy to the institutional gap caused by the lack of an adequate international tax organisation. This question should be addressed through the only legitimate worldwide organisation, the United Nations, in the context of the forthcoming conference in Addis Ababa on Financing for Development.
OPTION 16 – Clarify the relationship between the MAP and domestic law remedies

The principle of exhaustion of local remedies before access to international dispute resolution is well established in international law, for good reason. The DD suggests that the MAP should have priority because it can provide a more comprehensive solution, but it can equally be said that until domestic channels are exhausted it will not be clear whether there is an international issue, or what the nature of that issue may be. Hence, it does not seem to us appropriate that recourse to MAP should have priority. On the other hand, publication of clear guidance on the relationship does seem desirable.

OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

Here also, clarification of the issues seems desirable, but the substantive suggestion, suspension of collection pending resolution of the claim, does not. The DD is sympathetic to the impact on the company’s cash-flow, but suspension of collection would have the same negative impact on government revenue. Allowing large companies to defer payment of taxes due while they pursue often complex legal claims is not popular with other taxpayers.

OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure

The Option 18 box included:

An alternative provision could also be added to the Commentary on Article 9 to limit the time during which a Contracting State may make an adjustment pursuant to paragraph 1 of Article 9.

Some treaty negotiators, especially from developing countries may be persuaded to agree to such limits. These are likely also to be the countries that have the least audit resources, and hence to need extra time to determine appropriate transfer pricing adjustments. We therefore strongly recommend against any such amendment to the Article 9 Commentary. Local law limitations on the timing of adjustments should apply.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

We are not convinced that a clear case has been made for giving a company a treaty right to seek a corresponding adjustment in all cases where it has filed an amended tax return. In some cases the motivation for the amendment may not justify granting a right under article 25.

OPTION 20 – Ensure a principled approach to the resolution of MAP cases

We refer to the discussion of the characteristics and implications of principled decision making in section 1, and our comments on Option 1.

OPTION 21 – Improve competent authority co-operation, transparency and working relationships

While the MAP continues to take its present form, improvement of co-operation seems desirable. However, it should be borne in mind that this is a two-way street. Developing country tax authorities are likely to have fewer resources and less experience, and may feel brow-beaten by their counterparts in developed countries. It is not unknown for diplomatic channels to be used to put pressure on a government to remove a person from the competent authority post if they are considered to have been ‘uncooperative’ by their counterpart from a more powerful country. The proposals here seem to envisage a limited form of
‘transparency’, restricted to officials and tax advisers. We suggest that a much better safeguard would be transparency to the public. This would help to elevate the MAP from a private procedure dependent on the personal interactions of officials to one which allows a wider public to judge the actions of those involved.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration

In our view there is a need for a wider debate about the relationship between national sovereignty and international tax rules, especially the introduction of mandatory arbitration. The DD seems to prefer to adopt an incremental approach by proposing a series of steps which could pave the way towards mandatory arbitration, while avoiding this wider debate. We consider it premature to remove footnote 1, or to introduce the other incremental measures suggested, until there has been such a wider debate. We have attempted to indicate some of the issues which we think need to be addressed in section 1.

OPTION 23 – Policy issues: Tailor the scope of MAP arbitration

We agree, as pointed out in section 1, that some issues are more suited to independent adjudication than others. Hence, it may be appropriate to allow countries to specify which issues they are willing to subject to such a process. As mentioned in section 1.4 above, article 4 of the model treaty already includes such a specific provision.

OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy

A Most-Favoured-Nation clause is a dangerous provision, and does not seem appropriate in tax treaties. A country may agree to include an arbitration provision in a particular treaty without adopting a general policy to extend the same to others. If a general change of policy is desired, it is relatively easily implemented through a treaty protocol.

OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies

OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

OPTION 27 – Practical issues: Appointment of arbitrators

It is very important to establish strong standards to ensure that arbitrators are independent, and can be seen to be so. There is a particular danger in a specialist field such as this of conflicts of interest, since arbitrators need to be chosen from a relatively small field of experienced and knowledgeable persons. While we support the proposal for a standard declaration, this alone seems insufficient. A Code could be developed to clarify the standards expected, especially to define what constitutes a conflict of interest, and to specify disclosure requirements.

OPTION 28 – Practical issues: Confidentiality and communications

Consistent with earlier comments, we strongly recommend public disclosure of arbitration results, redacted where appropriate. There would not only be greater knowledge of how disputes were resolved for the benefit of taxpayers and tax authorities generally, but there would be more pressure on the relevant competent authorities to act in a principled manner and not abuse their power.
OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

We believe that the discipline of baseball arbitration (final offer approach) forces the two sides to be more serious about the positions they take and the support they provide for their positions. A conventional approach encourages the two sides to start out farther apart, to be more combative, and to include in their written support everything they think might be influential with the arbitrator regardless of whether it is truly relevant. Hence, we recommend that the use of baseball arbitration be encouraged. This approach should also be more cost effective from the perspective of minimizing the costs of retaining and compensating the arbitration panel.

OPTION 30 – Practical issues: Evidence

These proposals again entail incremental changes which strengthen taxpayer rights, by allowing the taxpayer’s representatives to make oral or written submissions. As stated in our response to earlier questions it seems to us inappropriate to seek public support for such a strengthening without a parallel improvement in the transparency of the procedure.

OPTION 31 – Practical issues: Multiple, contingent and integrated issues

OPTION 32 – Practical issues: Costs and administration

It is obviously important for countries participating in arbitration to agree arrangements which can ensure that the costs are as low as possible. Consideration could also be given to making a charge to taxpayers for invoking the procedure, which could be tailored to provide an incentive to help ensure the procedure can be focused and swift.

OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

This question appears to conflate different issues. The main discussion concerns inclusion in the Commentary of provisions to facilitate multilateral MAP and APA procedures, which is unobjectionable. However, the final sentence mentions the possibility that such a provision ‘could be considered by the interested parties that will participate in the development of the multilateral instrument contemplated by Action 15’. The proposal under Action 15 suggests that an International Conference would be called to negotiate such a multilateral agreement, which we understand would be open to all states. We are therefore unclear what is meant by the reference here to ‘interested parties’. As is well known, many states are very reluctant to consider the inclusion of arbitration even in their bilateral treaties. Raising the issue of its inclusion in the multilateral convention would therefore greatly complicate successful conclusion of such a convention, which is very important to the BEPS process.

We find this mention particularly surprising since there has been little or no reference in any of the other Action Plan proposals of what might be included in the multilateral convention. We have in several of our comments on these proposals urged that the working parties writing them should consider whether and which of their proposals might be suitable for inclusion in the multilateral convention. Since that has gone largely unnoticed, it is strange to see here a suggestion for a possible inclusion in the multilateral convention of a proposal concerning arbitration that many would find inappropriate and unacceptable.
OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure

As we have commented above, while incremental improvements to the procedures may seem desirable, in our view a higher priority should be to take a wider view of the reforms needed to create a DRM for tax which can be truly principles, fair and objective.
Dear Marlies,

Thank you for the opportunity to comment on the Discussion Draft: OECD BEPS Action 14 – Make Dispute Resolution Mechanisms More Effective.

This Action Item is a critical factor in the success of the entire BEPS program. This is not because it deals itself with base erosion and profit shifting, but because it provides the necessary predicate for those issues to be successfully dealt with.

For the BEPS project to succeed, two things must happen. First, countries must be willing to truly support the project. Second, business must be willing to fully accept its outcomes.

- In relation to countries, there is going to be an unwillingness to participate in certain of the actions if the BEPS recommendations are viewed as giving a strategic advantage to another country, either in terms of enhanced revenue seen as taken from the first country, or in terms of the second country favouring its own taxpayers. Most observers have acknowledged that the BEPS project is likely to result in significantly increased instances of conflicting tax claims by countries. Therefore, a robust, and widely supported dispute resolution mechanism aimed at ensuring a fair and predictable application of the newly agreed standards will give countries confidence that their tax and revenue base can be protected from the unilateral actions of other countries, and, following from that, the confidence to enter into commonly agreed recommendations across the range of BEPS items. (This is even more important now, because the very welcome inclusion of many new countries in the consensus-forming process nevertheless means that the participants lack experience with one another’s commitment to applying mutually agreed standards.)

- In relation to business, success on this dispute resolution action item is also crucial. The concerns that we have raised before about the risks of double taxation discouraging cross-border trade and investment remain crucial – and these are equally important for countries themselves, which are anxious for foreign investment and the on-going success of their businesses. But there is a different, and perhaps more basic reason, why this action item must succeed. The BEPS outcomes will likely raise taxes on many businesses, and impose significant new reporting and compliance burdens on most. That is understood. However,
if the process also gives rise to a significant increase in cases of double taxation, the BEPS plan may fail for the simple reason that, if businesses do not feel they are being treated fairly, they will seek new ways to mitigate that double taxation. Put slightly differently, however many “hard law” aspects of BEPS are enacted, if the trust between businesses and governments (which is at the heart of “cooperative compliance”) breaks down, then we could find ourselves back in the adversarial situation that cooperative compliance sought to end – which will be to the substantial disadvantage of both sets of parties. Only if businesses feel that the new rules that will significantly increase burdens are balanced with an effective guarantee that their revenue will not be caught up in costly, lengthy, and potentially unresolvable disputes between states, will they be able to fully concur in the project’s conclusions.

I think I would be failing in my institutional BIAC obligation to the OECD if I did not make clear how serious a weak outcome on Action 14 could be, and the depth of the current concern.

************************************

Our comments are relatively brief on specific issues, although we support the more detailed comments that many of our members have sent in, as well as ICC’s ongoing work in the arbitration area. We have, however, surveyed our members on their actual experiences with MAP in their countries. We attach the results of that survey to our comments, and would be happy to answer more questions on these.

I did, nevertheless, want to pick out one or two particularly important points from our comments:

• As this is primarily an issue of tax administration, and as tax authorities have the greater interest in maintaining cooperative compliance models, we believe that the FTA and, in particular, the MAP Forum, should be central, rather than parallel to this process. The FTA can make a real difference here.

• A “political commitment” is not enough. There have to be robust mechanisms and processes actually brought into effect as a direct outcome of the BEPS process.

• Binding arbitration is a critical part of any solution. We understand some countries have genuine concerns, but that is not a reason for binding arbitration not to be the general standard for countries that are fully committed to avoiding double taxation.

• The MAP process must be properly resourced and suitably positioned in the structure of a tax authority.

Again, thank you for the opportunity to comment and we look forward to working with you on this critical item.

Sincerely,

Will Morris, Chair
BIAC Tax Committee
BIAC Consensus Comments on Action 14

1. BIAC welcomes the OECD’s work to “make dispute resolution mechanisms more effective”, but we are very disappointed and concerned about the proposals made in the discussion draft. We firmly believe that adequate and effective dispute resolution mechanisms are crucial for cross border trade, which increasingly suffers from double taxation. A comprehensive framework of legal remedies, including domestic measures as well as Mutual Agreement Procedures (MAP) and Arbitration, should provide for more legal certainty. It is important that these mechanisms are robust and well defined, and effectively implemented. They should work in a transparent, predictable and expeditious manner and be accessible for taxpayers. BIAC believes that a “political commitment” is not enough to achieve success under this action. We invite the G20/OECD countries and all other members of the BEPS process to commit themselves more strongly to those principles, starting by replacing the “could” recommendations with firm “should” commitments, and by endorsing and adopting mandatory binding arbitration.

2. To assist with the effective delivery of firmer commitments, we strongly believe that the Forum of Tax Administrators, and more specifically, the MAP forum, should be central to the process. Success will only be achieved if the administrative aspects of the proposals are considered. Only through the use of such forums can we be sure that the MAP processes will be sufficiently resourced to ensure that disputes can be efficiently resolved.

3. Several of the BEPS Action Items are expected to increase disputes and associated double taxation for cross border business. The business community expects proposals under Action 14 to mitigate the risk of double taxation to the greatest extent possible.

4. Therefore, we ask all countries involved in the BEPS process to recognize that adopting a binding and universal arbitration framework should be an integral and inseparable part of the BEPS deliverables. If the G20/OECD does not succeed in establishing such a framework, further consideration must be given to how to mitigate the risk of double taxation caused by the OECD’s proposals under the other BEPS Actions. In such a case, we believe that this should extend to a reconsideration of proposals where the widespread risk of double taxation appears to be unavoidable.

5. BIAC is convinced that having the ability to resolve disputes through arbitration is the most effective remedy to address the risk of double taxation. We believe that arbitration also benefits governments, including developing countries, in that it promotes a more impartial view towards disputed issues.

6. We are, therefore, surprised and very concerned that the aim of implementing mandatory arbitration is not proposed as a viable option under Action 14. At the same time, we note that the specific measures outlined in the discussion draft are only intended to establish a non-binding minimum standard to which participating countries may commit. Bearing this in mind, we do welcome the comment in para 7 of the discussion draft that the final proposals under Action 14 will also include more binding additional measures, such as, for example, MAP arbitration. However, we note again in this regard that the discussion draft only suggests that countries “may also wish to commit to adopt [the additional measures] in order to address obstacles to an effective MAP in a more comprehensive way.” Firmer commitments will be required for countries to adopt these additional standards.
Outside the world of taxation, much experience has been gained with alternative dispute resolution. We believe that the OECD should make use of the lessons learned through the use of these other dispute resolution mechanisms, by adapting them to reflect different needs of tax disputes, and by applying those lessons in a tax context. Many of the perceived downsides of arbitration will fade as arbitration proliferates. For example, as arbitration expands, the quality of arbitrators would improve. Advantages of arbitration, such as to depoliticize the intergovernmental process of avoiding double taxation, would also be achieved.

Preferably, all parties should have access to arbitration in addition to MAP. Countries that have committed themselves to arbitration already should give good examples of practically workable and useful mechanisms for all other countries. To have an effective two-step approach, MAP should, as mentioned above, be a transparent, predictable and expeditious mechanism with an appropriate role for the taxpayer.

The OECD discussion draft states that full implementation of MAP treaty obligations in good faith shall be ensured. To that end, we recommend that tax administrations should be required to publish a standardized annual report that outlines several criteria relevant to measuring progress in meeting the objectives. Transparency in this area would certainly help to encourage countries to dedicate sufficient resources, and to follow appropriate policies in their MAP efforts.

The criteria in such a report should include, in addition to the MAP statistics items OECD countries have already committed to report annually, the number of officials dedicated to the competent authority (CA) division, a description of performance evaluation criteria for CA officials, the number of cases submitted to the CA in the past year, the number of cases refused by the CA (through joint country CA consideration, as well as unilaterally), high, low and average times to CA resolution, number of CA waivers sought (and obtained) in the course of local tax audits, and a listing of best practices from MEMAP used in the local country’s CA process.

We also believe that a great achievement would be to integrate the Action 14 MAP process commitments into the “multilateral instrument” (BEPS Action 15). This would expedite the adoption of best practices, and would empower countries to resolve disputes where bilateral tax treaty relationships may not exist. Another useful approach would be to improve the MAP timelines, for example, by committing to binding, compulsory arbitration after a 12 month period with no breakthrough.

In addition to these points, we are pleased to provide you with the attached annex that outlines the results of a BIAC MAP survey conducted in fall 2014. The annex highlights best practices and obstacles encountered with the MAP process, and also provides suggestions for improving MAP processes.
Annex 1

BIAC MAP Questionnaire
Summary of BIAC members’ responses

In October 2014, in advance of the OECD Discussion Draft on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, BIAC released a questionnaire asking its members for feedback on their first-hand experiences with MAP proceedings. The BIAC survey result provides useful and insightful information on issues encountered by MNEs with the MAP process and gives examples of where the MAP process does and does not work as intended. We have provided below a summary of the written responses received from the international business community in response to the BIAC MAP questionnaire (and referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution).

Question 1:
Please give examples of where you have experienced “best practices” with the MAP process, along with a description of these practices.

<table>
<thead>
<tr>
<th>“Best Practices” experienced in the MAP process (and referenced to OECD MEMAP’s best practices)</th>
<th>Description of these best practices</th>
<th>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</th>
</tr>
</thead>
</table>
| Mandatory, binding arbitration | • Existence of mandatory, arbitration clauses in treaties helps create an incentive for competent authorities to settle the case.  
• Binding arbitration provides taxpayers with a mechanism to obtain resolutions and certainty in tax disputes expeditiously.  
• Mandatory arbitration is available for cases that have gone on for 2 years or more without resolution.  
• Taxpayers can choose to reject the arbitration board recommendations and pursue their challenge of the issues in the domestic courts. | OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases |
<p>| Guidance for assessing and using MAP - Transparency and simplicity of procedures for accessing and | • Guidelines issued to provide guidance and clarification regarding application of MAP process and remedies available to taxpayers within the framework. | OECD Discussion Draft, section 3J: Complexity and lack of transparency of the procedures to access and use the MAP |</p>
<table>
<thead>
<tr>
<th><strong>Using the MAP (MEMAP Best Practice No. 4)</strong></th>
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<tbody>
<tr>
<td><strong>Cooperation and transparency with taxpayers</strong></td>
<td></td>
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<tr>
<td>- Taxpayer presentations to competent authorities (MEMAP Best Practice No 13)</td>
<td></td>
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<tr>
<td>- Cooperation and transparency (MEMAP Best Practice No 14)</td>
<td></td>
</tr>
<tr>
<td>- Decision summaries (MEMAP Best Practice No 17)</td>
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<tr>
<td>• Well-developed consistent submission from the taxpayer to both countries competent authorities is crucial.</td>
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<tr>
<td>• Anecdotal examples shared by BIAC members:</td>
<td>OECD Discussion Draft, section 4R: <em>Lack of a principled approach to the resolution of MAP cases</em>; and section 4S: <em>Lack of co-operation, transparency or good competent authority working relationships</em></td>
</tr>
<tr>
<td>- Communication with taxpayer: CA gave solid feedback to taxpayer regarding possible changes in positions.</td>
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<td>- Open-minded and willing to thoughtfully consider the taxpayer’s position in developing positions.</td>
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<tr>
<td>- Cooperation with taxpayer: Both taxpayer and CAs were well-prepared in advance of the MAP process, which allowed a conclusion to be agreed in a short time-frame.</td>
<td></td>
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<tr>
<td>• Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.</td>
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<tr>
<td><strong>Interaction between Competent Authorities</strong></td>
<td></td>
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<tr>
<td>- Face-to-face meetings between competent authorities (MEMAP Best Practice No 15)</td>
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<tr>
<td>- Bilateral process improvements (MEMAP Best Practice No 16)</td>
<td></td>
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<tr>
<td>- Recommendation for MAP cases beyond two years (MEMAP Best Practice No 18)</td>
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<tr>
<td>• MAP works best where there is reciprocity of trade. Trust between the treaty partners is critical.</td>
<td>OECD Discussion Draft, section 4R: <em>Lack of a principled approach to the resolution of MAP cases</em>; and section 4S: <em>Lack of co-operation, transparency or good competent authority working relationships</em></td>
</tr>
<tr>
<td>• Anecdotal examples shared by BIAC members:</td>
<td></td>
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<tr>
<td>- Proactive steps undertaken by CAs to try and narrow the differences in their opinions, resulting in more efficient processes.</td>
<td></td>
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<tr>
<td>• Regularly scheduled meetings, both between the taxpayers and the governments, and between governments helpful.</td>
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<tr>
<td><strong>Suspension of collections during MAP (MEMAP Best Practice No 21)</strong></td>
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<tr>
<td>• Suspension of collection during MAP proceedings.</td>
<td>OECD Discussion Draft, section 3O: <em>Issues connected with the collection of taxes</em></td>
</tr>
<tr>
<td>• Partial relief may be provided by some other countries but it tends to be limited.</td>
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<tr>
<td><strong>Roll-forward application of MAP treatment</strong></td>
<td></td>
</tr>
<tr>
<td>• Taxpayers may request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not</td>
<td>OECD Discussion Draft, section 2H: <em>Lack of APA programmes</em></td>
</tr>
</tbody>
</table>
Implementing and Promoting ACAP and Bilateral APA Programs (MEMAP Best Practice No 25)

- Materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed.
  - MAP resolutions have been transferred into APA discussions further enhancing the value of the MAP process.

<table>
<thead>
<tr>
<th>Multilateral MAP proceedings</th>
<th>Description of these best practices</th>
<th>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Openness to multilateral MAP proceedings</td>
<td>OECD Discussion Draft, section 4U: Issues related to multilateral MAPs and APAs</td>
</tr>
</tbody>
</table>

**Question 2:**

Please give examples of where you have experienced obstacles with the MAP process, along with details of what went wrong (or could have been better).

<table>
<thead>
<tr>
<th>Obstacles encountered with the MAP process</th>
<th>Description of these best practices</th>
<th>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</th>
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</table>
| Limited use of CA function authority to relieve double taxation | • Limited commitment to the avoidance of double taxation.  
• Competent authorities demonstrate little willingness to compromise, undertake proactive negotiations and discussions to reach a mutually agreed outcome.  
• Anecdotal examples shared by BIAC members: - CA is not interested in considering taxpayer’s position much less those of other governments involved forcing taxpayers to seek resolution in the domestic courts.  
• No compulsory participation of countries which impedes the starting of the MAP process.  
• No time limit to MAP procedure if there is no arbitration clause specified in the treaty.  
• No compulsory result if there is no arbitration clause specified in the treaty. Cases may conclude without reaching an agreement. | OECD Discussion Draft, section 1A: Absence of an obligation to resolve MAP cases presented under Article 25(1); and section 2F: Insufficient use of paragraph 3 of Article 25 |

Exclusion from MAP process

- Adjustments are proposed by CA after expiration of a time limitation for

OECD Discussion Draft, section 3L: Right to access
- **Avoiding exclusion from MAP relief due to late adjustments or late notification** (MEMAP Best Practice No 10)
- **Consideration of MAP assistance for cases described as “tax avoidance”** (MEMAP Best Practice No 11)
- **Countries eliminate or minimize “exceptions” to MAP** (MEMAP Best Practice No 12)

  - Unilateral rejection of cases based on avoidance arguments with allegations of law abuse or administrative penalties used to justify a denial to access MAP.
  - Countries reserve the right to exclude from MAP consideration any case in which auditors assert the existence of “tax avoidance” even on a secondary basis without legal determination.
  - Anecdotal examples shared by BIAC members:
    - Bilateral APA application unilaterally terminated two years into the process with CA citing BEPS as the reason. No reason was provided to the treaty partner, and no attempt to justify the decision to the taxpayer.
    - Repeated requests over a 3 year period for negotiations with a treaty partner on a transfer pricing case was not acknowledged by the competent authority.
    - Transfer pricing adjustments are recharacterized as “non-deductibles” under domestic law in an effort to deny the taxpayer access to MAP.
    - CA excludes selected issues from MAP consideration without agreed limitation and notice in treaty.

**MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied**

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<tr>
<th>Cooperation and transparency with taxpayers</th>
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<tr>
<td><strong>Taxpayer presentations to competent authorities</strong> (MEMAP Best Practice No 13)</td>
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<tr>
<td><strong>Cooperation and transparency</strong> (MEMAP Best Practice No 14)</td>
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<tr>
<td><strong>Decision summaries</strong> (MEMAP Best Practice No 17)</td>
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  - Limited taxpayer’s involvement in the MAP procedure.
  - Lack of transparency and communication between CAs and taxpayers makes it difficult for taxpayers to assess the status of the case during the course of the proceedings.
  - The lack of information and regular updates from tax authorities once receipt of the documentation set has been acknowledged can be frustrating for business.
  - Taxpayers may not have the opportunity to meet with the CAs to discuss the case. Given the magnitude of the numbers involved, a meeting can, at times, be helpful to ensure that both CAs understand the facts, and

**OECD Discussion Draft, section 4R: Lack of a principled approach to the resolution of MAP cases; and section 4S: Lack of co-operation, transparency or good competent authority working relationships**
<table>
<thead>
<tr>
<th>Interaction between Competent Authorities</th>
<th>the reasons for the claim for relief from double taxation.</th>
<th>OECD Discussion Draft, section 4R: Lack of a principled approach to the resolution of MAP cases; and section 4S: Lack of co-operation, transparency or good competent authority working relationships</th>
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<tbody>
<tr>
<td>- Face-to-face meetings between competent authorities (MEMAP Best Practice No 15)</td>
<td>- Lack of preparation in advance of the MAP process. This makes it difficult for both CAs to have any effective discussions or negotiations during their meetings and creates further delay.</td>
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<tr>
<td>- Bilateral process improvements (MEMAP Best Practice No 16)</td>
<td>- Unprincipled approach to the resolution of cases.</td>
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<td>- Recommendation for MAP cases beyond two years (MEMAP Best Practice No 18)</td>
<td>- Anecdotal examples shared by BIAC members:</td>
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<td>- structuring agreements based on specified percentages of revenue;</td>
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<td>- insisting on the right to tax at least 50 percent of the income at issue;</td>
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<td>- taking a position that taxpayers have a permanent establishment in their jurisdiction solely because it has customers there or has registered for VAT purposes; and</td>
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<td>- unilateral view that absent a contract, no transaction should be deemed to have been entered into regardless of economic realities and clear need for remediation of an error or unforeseen extraordinary event.</td>
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<td>- Length of MAP procedure is also a source of complaint. The MAP process is too long a procedure as compared to the rhythm of business life. MAP procedures takes at least 4 years on average for resolution. Some countries have also allowed MAP cases to remain pending for 8 to 10 years with no obvious prospect of resolution in the near term.</td>
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<td>- Anecdotal examples shared by BIAC members:</td>
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<td>- CA took more than a year to begin a dialogue with its treaty partner;</td>
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<td>- Lack of clear timetable with MAP process likely to extend beyond 2 years; and</td>
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<td>- CA failed to reach an agreement within a reasonable time period.</td>
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<td>MAP access blocked in audit settlements</td>
<td>- Competent authority offers a lower assessment to settle a case if MAP is waived, including in some cases contrary to stated policy.</td>
<td>OECD Discussion Draft, section 2G: Audit settlements as an obstacle to MAP process</td>
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<tr>
<td>- Avoid blocking MAP access via audit settlements or</td>
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<td><strong>unilateral APAs (MEMAP Best Practice No 19)</strong></td>
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<tr>
<td><strong>Interest relief</strong> (MEMAP Best Practice No 20)</td>
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<td>• Failure to address interest relief as part of the MAP resolution.</td>
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<td>OECD Discussion Draft, section 4V: Issues related to consideration of interest and penalties in the mutual agreement procedure</td>
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<td><strong>“Pay to play” requirements to access MAP</strong></td>
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<tr>
<td>• “Pay to play” requirements to access MAP. Taxpayers are often required to pay all taxes owing in full to both tax jurisdictions until the matter is resolved. This is a significant period of time to have large amounts of cash tied up that could otherwise be used in the taxpayer’s normal business.</td>
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<td>OECD Discussion Draft, section 3O: Issues connected with the collection of taxes</td>
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<td><strong>Objectivity and resources of Competent Authorities</strong></td>
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<td>• Lack of qualified MAP staff is a consistent issue.</td>
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<td>• Lack of impartiality and independence.</td>
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<td>• Anecdotal examples shared by BIAC members:</td>
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<tr>
<td>- MAP cases are reviewed by the same economists and audit staff that were involved in the original assessment;</td>
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<td>- Local tax authorities participate in the MAP process. Conflicts in approach or opinions between the central and local tax authorities’ acts as a barrier in reaching a reasonable outcome for the MAP process;</td>
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<td>- Competent authorities required to approve all tax adjustments involving international transactions in advance. This gives the competent authorities an investment in the position that makes it extremely hard to negotiate a settlement; and</td>
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<tr>
<td>- No clear authority in cross-border matters. Tax authorities do not view the competent authority as a decision maker in the process, fails to communicate with the competent authority and cooperate with the treaty process.</td>
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<td>OECD Discussion Draft, section 2C: Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes; and section 2D: Lack of resources of a competent authority</td>
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### Roll-forward application of MAP treatment

- Implementing and Promoting ACAP and Bilateral APA Programs (MEMAP Best Practice No. 25)

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<tr>
<td><strong>Limited or no ability, in practice, to roll-forward the application of MAP treatment to future filed years. Taxpayers should be allowed to request for assistance for subsequent tax years on the same issue as long as the underlying facts and circumstances are not materially different. This allows taxpayers to gain certainty on issues for all open tax years for which tax returns have been filed.</strong></td>
<td>OECD Discussion Draft, section 2H: Lack of APA programmes; and section 4U: Issues related to multilateral MAPs and APAs</td>
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### Confidentiality of sensitive information

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<td><strong>Politicization of MAP process, often with public comments regarding particular cases or threats of press leaks.</strong></td>
<td>OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases (see option 28: Confidentiality and communications)</td>
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<td><strong>In an anecdotal example shared by BIAC members, tax authorities leaked facts of MAP cases to the press.</strong></td>
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### Multilateral MAP proceedings

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<td><strong>MAP proceedings are generally limited to cases involving direct transactions with a party in the treaty partner jurisdiction, with no participation in discussions of indirect transactions.</strong></td>
<td>OECD Discussion Draft, section 4U: Issues related to multilateral MAPs and APAs</td>
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<tr>
<td><strong>CAs typically refuses to engage in trilateral discussions.</strong></td>
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### General comments

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<td><strong>MAP can be a heavy process not suitable for small amounts as it can trigger a tax audit in the other state.</strong></td>
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**Question 3:**

*How do you think the MAP process could be further improved?*

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<tr>
<td><strong>Suggestions for improvement</strong></td>
<td><strong>Referenced to the OECD Discussion Draft on BEPS Action 14: Dispute Resolution</strong></td>
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</tbody>
</table>
| **Obligation to reach an agreement**  
- An agreement should be made mandatory with outcomes that are binding on tax authorities. | OECD Discussion Draft, section 1A: Absence of an obligation to resolve MAP cases presented under Article 25(1); and section 2F: Insufficient use of paragraph 3 of Article 25 |
| **Mandatory, binding arbitration** | OECD Discussion Draft, section 4T: Absence of a |
- Introduction of mandatory arbitration clauses can help to speed up the MAP process and ensure the resolution of double taxation. In cases where the competent authorities cannot come to an agreement, taxpayers should have the ability to initiate process for an independent, binding arbitration.
- Arbitration can help developing countries obtain a neutral, external view to the issues disputed.
- The form of arbitration should be consistent.
- Suggested periods on when arbitration should be enforced ranges from 0 to 2 years - the presumption is that the audit work has been completed and the tax authorities’ files are in a state to support the position. Generally, transfer pricing issues have a 7 year statute barred date - adding an additional 4 years or more to the issue means that we are dealing with issues that are potentially 11 years old. Documentation and people are very difficult to obtain as issues get this old.
- An international permanent court of arbitration (e.g. the WTO panel) could be established.

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<tr>
<th>Peer reviews of MAP</th>
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<tbody>
<tr>
<td>Conduct peer reviews of country conduct of MAP (measured against OECD MEMAP’s best practices) with solicitation of confidential taxpayer and treaty partner inputs.</td>
</tr>
<tr>
<td>Monitor exclusions from MAP process: Track how many cases are lodged and refused.</td>
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<tr>
<td>Exchange of best practices between countries and tax administrations</td>
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<tr>
<td>KPIs: tax assessments should be raised based on fundamental transfer pricing principles (instead of tax revenue targets).</td>
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<th>Guidance for assessing and using MAP</th>
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<tr>
<td>More guidance on MAP. Develop processes to resolve inter jurisdictional disputes quickly and provide certainty for the conduct of international business.</td>
</tr>
<tr>
<td>Document MAP process such that it is clear to all parties (i.e. taxpayers and tax authorities) what can be expected of each, why and when at all stages.</td>
</tr>
<tr>
<td>Create a model MAP request document to prepare a single submission. Standardized information requests can help to expedite the MAP process and also assure countries that the same information is being received.</td>
</tr>
<tr>
<td>Provide guidance on interaction between MAP and domestic handling of other audit issues.</td>
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| OECD Discussion Draft, section 2E: Performance indicators for the competent authority function and staff |
| OECD Discussion Draft, section 3J: Complexity and lack of transparency of the procedures to access and use the MAP; section 3K: Excessive of unduly onerous documentation requirements; and section 3N: The use of domestic law remedies may have an impact on the use of the MAP |

| OECD Discussion Draft, section 4R: Lack of a principled approach to the resolution of MAP |

- Joint fact-finding. Pre-filing discussions should be encouraged e.g. joint presentations to competent authorities.
Taxpayer involvement in joint meetings can help ensure that there is mutual understanding of the facts at an early stage.  
• Focus on transparency and relationship building between taxpayers and tax authorities. Regular updates should be provided to taxpayers involved in MAP proceedings.  
• Promote consistent case law. Publicize anonymised MAP agreements that could be relied on by other taxpayers or countries.  
• Countries could also develop a “fast track” MAP for commonly disputed issues thereby alleviating work load and resources, both for taxpayers and tax administrations.  
• Countries should accept all cases regardless of the value of the transaction, particularly if it pertains to commonly disputed issues.

### Interactions between Competent Authorities

- Strict and short time-table with agreed timeframes for discussion.  
- More frequent meetings between competent authorities.

### Suspension of collections during MAP

- Taxpayers should not be required to pay any assessment once the MAP process is initiated.  
- An escrow account could be established with the monies made available to either tax authorities as full and final settlement of the taxes when the dispute is ultimately resolved.

### Independence and resources of a competent authority

- Adequate staffing for competent authority function both in terms of headcount and skilled resources.  
- Training for CA staff on the purposes and conduct of the CA function.  
- CA experts with a clear, consistent understanding of the MAP process should be made available and identified in each territory as decision makers.

### Roll-forward application of MAP treatment

- Expand “roll-forward” application of agreed MAP treatment to future filed years.  
- Linkage of MAP to APA should be encouraged, and accelerated CA combined with a domestic appeals process should be encouraged.  
- Automatic application of the solution to future years (and to other countries if the case is similar).
- More flexible approach to adjustments to closed years.
- Adopt multi-year analysis in MAP.

**Multilateral MAPs and APAs**
- Trilateral MAP and APA proceedings. Provisions for triangular cases.
- Improved treaty network for developing countries.
- Multilateral agreement for MAP process.
- Agreement between governments, as part of the treaty conclusion process, to commit to following the OECD MEMAP best practices.

OECD Discussion Draft, section 2H: Lack of APA programmes; and section 4U: Issues related to multilateral MAPs and APAs

**Confidentiality of sensitive information**
- Information obtained in a MAP process should be fully protected by confidentiality provisions.

OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases (see option 28: Confidentiality and communications)

**Costs and administration of MAP proceedings**
- The fees for access to MAP and/or during the MAP proceedings should not be dissuasive.

OECD Discussion Draft, section 4T: Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases (see option 32: Costs and administration)

**General comments:**
- Make an effective MAP process a pre-condition for countries to obtain TP documentation packages (i.e. country-by-country report and master file).
Discussion Draft: Make Dispute Resolution Mechanisms More Effective

Dear Mrs. Marlies de Ruiter,

We appreciate the opportunity to provide our comments on the Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective.

For an export oriented family owned business, globalisation is not new, but the pace of integration of national economies and markets especially outside the EU has substantially accelerated in recent years. Combined with an ever-increasing importance of managing tax risks and avoiding double taxation, effective dispute resolution mechanisms are key for a sustained and successful global business.

Against this background, it is specifically worrying, that in general the aggressiveness of local field auditors to raise tax revenues has increased significantly on a global basis. Rather seldom the local field auditor applies an international perspective; in most cases not even a country perspective is applied but a single local perspective. Therefore it is not astonishing that the number of international tax disputes has increased.

From the perspective of a MNE, the tax risks including the risk of double taxation, significant interest burden as well as penalties are already high and are still substantially increasing. We therefore highly appreciate the focus of the Committee on Fiscal Affairs (CFA) of the OECD on Action 14 to make dispute resolution mechanisms more effective and we support the notion to establish a monitoring mechanism to check the proper implementation of the political commitment.

Mandatory binding MAP arbitration

From the perspective of a MNE, there is no alternative to universal mandatory binding MAP arbitration combined with a 2 year time limit to ensure certainty and predictability for business.

Globalisation has resulted in a shift from country-specific operating models to global models based on matrix management organisations and integrated supply chains that centralise several functions at a regional or global level. A fierce competition is the flip side of the coin “globalisation”, which makes it necessary for MNEs to be as efficient and productive as ever possible in the game “sur-
vival of the fittest”. Any double taxation or lengthy process of a MAP reduces investment possibilities and hinders business to adapt to a fast changing competitive global environment in a timely manner.

Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

We fully support the options provided in the discussion draft to ensure that administrative processes promote the prevention and resolution of treaty-related disputes.

Option 4: For a timely resolution of treaty-related disputes it is specifically important to provide sufficient resources to the increasing inventory of MAP cases. Sufficient resources not only means increased headcount, but equally important is an economic background of the personnel to ensure an efficient dealing with the specific and sometimes complex transfer pricing cases which are closely linked with sound economic behaviour.

Option 5: The explanation for additional compliance burden to business through new transfer pricing documentation requirements was “to enhance transparency for tax administration” according to Action 13. Vice Versa to enhance transparency for business the performance indicators for the competent authority function and staff could be communicated as a risk assessment at the beginning of the audit.

Option 7: We support the suggestion for the notification of the competent authorities of both Contracting States of the details of such settlements.

Additional Option: Some countries try to attract new business for certain parts of their country (often with a high unemployment rate) via tax incentives according to a State Aid Programme. For an investment incentive beneficiary, the correct setting of transfer prices according to the arm’s length principle is one of the key prerequisites for drawing tax relief. Unless this condition is met, the beneficiary completely loses the entitlement to this benefit. In addition the burden of proof in respect of arm’s length prices is shifted to the beneficiary of the tax benefits. For a sound business decision regarding the sustained attractiveness of a country some kind of fast track APA would be helpful (see also the comment to option 31 below on page 3).

Ensuring that taxpayers can access the mutual agreement procedure when eligible

We specifically support option 12, 16, 17 and 19.

Ensuring that cases are resolved once they are in the mutual agreement procedure

We fully support the options provided in the discussion draft to ensure that cases are resolved once they are in the mutual agreement procedure.

Option 21: To improve competent authority co-operation, transparency and working relationships it would be quite helpful, if competent authorities could also commit to provide taxpayers regularly and in a timely manner with updates on the status of their MAP cases including a perspective regarding the further timeline. In order to facilitate the resolution of a MAP case that competent authorities have been unable to resolve within two years it should be possible to invite the taxpayer to participate in the discussion.
Option 23 and 24: To adopt a MAP arbitration provision with a limited scope, e.g. only in cases of actual double taxation, instead of no provision at all, is a very sensible approach as it provides for the participants of such a MAP the possibility to gain further experience, which might finally lead to a MAP arbitration provision with no limited scope, if the experience proves to be successful and beneficiary for all parties involved.

Option 30: As suggested for the MAP (Option 21) the arbitration panel might also benefit from direct interaction with taxpayers. This could be limited to certain questions or could include an oral presentation of the background of the case as well as the position of the taxpayer. Alternatively or in addition the taxpayer could be allowed to submit a brief for the consideration by the panel. Which process proves to be best depends on the facts and circumstances of the case.

Option 31: Another multiple, contingent and integrated issue are investment incentives which depend on the agreed arm’s length transfer prices (see additional option as explained on page 2 above).

Option 34: Penalties and specifically interest for late payment on taxes play a significant role, especially against the background that the interest rates to be paid to the tax authority are much higher than the market rates. Therefore it is very important, that interest and administrative penalties that are directly connected to the taxes agreed in the MAP should be treated the same way.

We hope our comments and suggestions are helpful to foster the further discussion.

Please do not hesitate to contact us, if we can be of any further assistance.

Kind regards

Brose Fahrzeugteile GmbH & Co. KG

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Head of Taxes Brose Group

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Submitted by email: taxtreaties@oecd.org


Through its members, BUSINESSEUROPE represents 20 million European small, medium and large companies. BUSINESSEUROPE’s members are 41 leading industrial and employers’ federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BUSINESSEUROPE is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft entitled “Make Dispute Resolution Mechanisms More Effective” 18 December 2014 - 16 January 2015 (hereinafter referred to as the Draft).

General Comments

BUSINESSEUROPE appreciates the OECD’s work to improve dispute resolution mechanisms by encouraging the inclusion of such provisions in tax treaties, developing solutions to address obstacles that prevent countries from resolving treaty-related disputes or that deny access to MAP and arbitration in certain cases.

The importance of adequate dispute resolution mechanisms cannot be overstated. In combination with uniform application and implementation of consistent and predictable international tax rules, effective dispute resolution provides MNE’s with crucial legal certainty to foster cross border trade and investments and enhance a well-functioning and flourishing global economy.

The occurrence of double taxation in cross border situations today is still prolific. In December 2013 BUSINESSEUROPE published a brief study at the behest of the EU Platform for Tax Good Governance regarding the occurrence of double taxation outside the transfer pricing area. This study confirms that double taxation outside the transfer
pricing area remains a problem and an obstacle for cross border trade and investments. In addition to the actual cases where double taxation have occurred, MNE’s express concern that double taxation is likely to increase due to expected new, complex tax proposals following the BEPS-project.

Furthermore, the application of MAP has steadily increased over the years. The recently published Mutual Agreement Procedure Statistics 2013 by the OECD show that between 2006 and 2013 the number of new MAP cases almost doubled from 1,036 to 1,935 and that the total MAP cases in the same period also doubled from 2,352 to 4,618. The statistics only provide information about the number of MAP cases; we propose to also publish statistics about arbitration cases. Moreover, new statistics about the lead time of MAP and arbitration cases would be insightful underpinning the importance of resolving disputes timely. The OECD in paragraph 3 proposes that solutions have a measurable impact. Limiting the period of time for completion of MAP and arbitration cases will improve the effectiveness of these remedies to resolve treaty-related disputes, improving the transparency and legal predictability of the mechanism also vis-à-vis the position in the domestic legal framework.

It is therefore crucial that work is undertaken regarding Dispute Resolution Mechanism and Arbitration. Not in the least, because a number of countries is still very reluctant to include dispute resolution provisions in their tax treaties, so that - apart from domestic legal remedies - in these cases there is no recourse at all for MNE’s. Too often it proves difficult to come in a timely manner to a satisfactory outcome for all parties involved.

BUSINESSEUROPE feels that the Discussion Draft could be more ambitious in its objective in making dispute resolution mechanisms more effective. Although the intentions behind the 34 proposed revisions to the Model Treaty are to be commended, the actual proposed revisions are too non-committal to truly address the obstacles preventing dispute resolution through MAP. We are concerned that due to the absence of more direct language the dispute resolution process going forward will not ensure reducing double taxation. Suggestions for more direct language for the proposed revisions are included in the specific comments.

BUSINESSEUROPE is of the opinion that the OECD should be at least as resolute in resolving issues regarding double taxation as it has in previous Discussion Drafts shown to be in issues regarding double non-taxation. Its recommendations to deal with the former can therefore not be watered down on the argument of possible loss of sovereignty to the country in question, if these same considerations do not play a significant role in the recommendations regarding the latter. BUSINESSEUROPE would therefore suggest that as a prelude to the three pronged approach suggested in paragraph 3, the OECD achieves political commitments of its members to adopt Article 25 of the Model Treaty in all newly concluded tax treaties and include this provision in all existing treaties through the multilateral instrument envisaged by Action 15 where appropriate. This general improvement through the multilateral instrument is increasingly important as MNE’s expand into new markets globally.
BUSINESSEUROPE appreciates that there is no international consensus yet on mandatory binding arbitration. However, we would plead that OECD describe best practices regarding binding arbitration and encourages states that would consider binding arbitration to include these. This would improve the effectiveness of the proposals in the Discussion Draft and creates a standard on which to further build future international consensus.

In addition to the suggested measures regarding improved expertise and clear documentation requirements, binding arbitration could be helpful in speeding up MAP timelines.

Specific comments

Below BUSINESSEUROPE provides comments to the specific options presented in the Discussion Draft. Options that are not explicitly discussed can be supported by BUSINESSEUROPE.

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

Paragraph 10 appears to suggest that a major obstacle to resolving disputes under MAP is that there is no obligation to actual resolve an MAP case and therefore there should be an obligation to do so in the Model Treaty text. However, the revision is to the Commentary rather than the Treaty itself. BUSINESSEUROPE therefore suggests amending the text of the Model Treaty itself or at the very least change the revision to the Commentary so it reads "shall resolve" instead of "are obliged to seek to resolve".

OPTION 3 – Ensure the independence of a competent authority

It appears to BUSINESSEUROPE that participating countries should be mandated to commit to adopt the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. Therefore, in the wording of the revision "could" should be replaced by "shall".

The exact same amendment should be made to the proposed revisions regarding MEMAP best practices under OPTION 4, OPTION 5, the second bullet point of OPTION 6, OPTION 10, OPTION 11 and OPTION 21.

OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

BUSINESSEUROPE would also suggest more direct wording: "could commit to take appropriate steps" should be replaced by "shall take appropriate steps" and "or to implement procedures" should be replaced by "and to implement procedures".
OPTION 8 – Implement bilateral APA programmes

BUSINESSEUROPE supports the commitment that participating countries implement bilateral Advance Pricing Agreement (APA) programmes. In addition, we feel it would be beneficial if countries that already have APA programmes in place are assisted in improving these through best practices.

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

We support the implementation of an appropriate procedure in these cases. It is important for the procedure to be simple and quick in order to be effective. The procedure could be based on the grouping together of disputes; for example, in cases of multi-year depreciation or amortization of an asset. It is also positive that the countries commit to provide the roll-back of APA in appropriate cases. It could be useful to have an open list of cases when the roll-back is possible or at least set of guidelines for assessing these cases.

OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

We are requested to point out other obstacles related to the documentation and information requirements. An excessive amount of documentation is hard to read and taxpayer and Administration often waste time because they do not focus on the problem to be solved. In our understanding, there should be two different approaches in terms of documentation: i) "basic" information and documentation provided by the taxpayer or the Administration to assess access to MAP and ii) "comprehensive" information requested when the procedure is ongoing. In this case the information should focus on the specific problem to be resolved. Another obstacle is the language in which the information or and documentation is provided. Therefore, there should be mechanisms to minimize the burden of translation. It is a good practice to have hearings to explain the relevant information and documentation in the language the Administration is familiar with.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

BUSINESSEUROPE is of the opinion that the question if an anti-abuse provision is applied correctly should always allow access to MAP. Doing otherwise would effectively negate the legal certainty that the MAP seeks to provide for MNE’s.

Furthermore, we strongly feel that application of an anti-abuse provision, such as the PPT or LOB rule, resulting in the denial of treaty benefits should not be possible through unilateral action by one authority. As such, there cannot only be an obligation
to notify the treaty partner, but the other contracting state should also concur with the application of the anti-abuse provision.

**OPTION 13 – Ensure that whether the taxpayer's objection is justified is evaluated prima facie by both competent authorities**

BUSINESSEUROPE welcomes the intention of this revision that it should be impossible to deny access to MAP unilaterally, since this would negate the purpose of the MAP. However, the proposed revision does raise some questions as to how this would be put into practice. We would read the revision in such a way that MAP access can only be denied if both contracting states agree that a prima facie evaluation shows that the taxpayer's objection is not justified. In all other instances, MAP access should be granted. We would propose to clarify the language of this revision in this manner.

Also, the wording "could commit to a bilateral consultation and/or" should be replaced by "shall commit to".

**OPTION 16 – Clarify the relationship between MAP and domestic law remedies**

A taxpayer's choice for either a domestic remedy or MAP should not result in the exclusion the application of the other. Paragraph 32 appears to confirm this, but this should be clarified.

There doesn't seem to be a compelling argument to make the MAP the first option, other than that domestic law recourse might not result in the subsequent adjustment in the other contracting state. Making MAP the first option would however subject the taxpayer to the risk of undue delay. To not unnecessarily limit the recourse possibilities open to the taxpayer, the better solution would be to have participating countries commit to perform the counter adjustments when the domestic law remedy applies. To achieve this, access to a MAP and arbitration should also be available after domestic remedies have been exhausted.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**

Pursuant domestic law remedies, the application of MAP should result in a deferral of payment of the tax assessment until a decision is reached.

**OPTION 23 – Policy issues; Tailor the scope of MAP arbitration**

BUSINESSEUROPE would encourage countries to adopt binding arbitration in their tax treaties, or at least to take steps to move in the direction of binding arbitration. For this purpose it could be conducive to explicitly define any limits on arbitration in the provision of the tax treaty.
OPTION 30 – Practical issues: Evidence

BUSINESSEUROPE welcomes the comment about the role of the taxpayer in arbitration cases. Competent authorities should permit taxpayers to present its position orally. We would propose a similar opportunity for taxpayers in MAP cases.

OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

BUSINESSEUROPE would support the development of a specific provision that would address MAP issues that arise in multilateral situations. This would for instance be helpful in providing guidance in triangular situations with back-to-back transactions and the relevant tax treaties offer no recourse to MAP for the second part of the transaction.

BUSINESSEUROPE would be willing to engage in a constructive dialogue with the OECD on Dispute Resolution Mechanisms.

On behalf of the BUSINESSEUROPE Tax Policy Group

Yours sincerely,

James Watson
Director
Economics Department
16 January 2015

CBI RESPONSE TO THE OECD PUBLIC DISCUSSION DRAFT ON BEPS ACTION 14: MAKING DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

• The CBI is pleased to comment on the OECD’s Public Discussion Draft on Action 14: Making Dispute Resolution More Effective.

• As the UK’s leading business organisation, the CBI speaks for some 190,000 businesses that together employ around a third of the private sector workforce, covering the full spectrum of business interests both by sector and by size.

• The CBI continues to support the BEPS programme to update international tax rules to reflect modern business practice, tackle abusive tax structures and target the incidence of double non-taxation. However, we are concerned that if complexity and uncertainty are not avoided, the outcome will be an increase of double taxation and resulting legal disputes, which could have a substantial and negative impact on cross border trade and investment, but also on tax administrations with limited resources.

Overview

• The CBI believes that as a result of the overall BEPS programme, the number of cross border tax disputes is going to increase as tax authorities get used to the application of the new rules and differences arise in local interpretation and application of the rules. Whether it be in transfer pricing matters (which have historically been the main focus of MAP) or other new issues such as the change in thresholds for permanent establishments, there will be a change, or a perceived change, in the taxing rights for group’s profits and that will invariably lead to disputes.

• An effective dispute resolution mechanism is critical for business, and indeed for the competitiveness of nations. Any uncertainty over financial positions could undermine investor confidence and share prices, and can undermine the attractiveness of a county as a location for businesses. However, the consistent application and implementation of cross border international tax rules together with an efficient dispute resolution measure should enhance cross border trade and investments and support the global economy.

• The identification of the issues regarding the availability of MAP and the reaching actual resolution under the current programme outlined in the discussion document is comprehensive. We commend the OECD for highlighting the range of issues. One further area that may be considered is local cultural issues where it may seem disrespectful, or lead to a breakdown in trust between taxpayers and tax authorities, if MAP procedures are enforced or even requested by a taxpayer.
• Whilst each of the proposed solutions are generally positive, and would improve the current process, it is our view that they do not go far enough to achieve actual solutions, and that stronger commitments are needed. We understand that certain countries have reservations about going further, especially with perceived concerns about maintaining national sovereignty. However it could also be argued that a state has exercised its sovereign rights in entering into the treaty, that binding arbitration should simply deliver what the state has agreed to in the treaty, and that the state retains the sovereign right to withdraw from the treaty.

• If, for example, binding arbitration is not acceptable, there are other forms of dispute resolution techniques which can be deployed - for example facilitative or evaluative mediation involving a third party mediator, which does not result in a binding outcome but can help the parties to reach agreement. However, this should not stop a framework being established for a majority of countries which may wish, and are able, to go further.

• In our view, the following would be key features in a best practice framework for dispute resolution:
  • There should ultimately be mandatory binding arbitration if no acceptable resolution can be found between the tax authorities.
  • The process should be concluded in a set timeframe (so the binding arbitration is automatically triggered after a certain period of time).
  • Businesses should be represented in the MAP discussions between the tax authorities.
  • The taxpayer must be able to obtain certainty when the different stages of MAP commence and be assured as to no unnecessary delays.
  • A good independent audit body is required to review both the process and the final resolutions. There should be some form of open anonymised publication of the results of these reviews.

• If, for example, binding arbitration is not acceptable to some countries, there are other forms of non-binding mediation which can take place. These include a number of existing frameworks which are already used in international disputes in other areas. For example, there is the Qatar Dispute Resolution Centre (where the centre will actually pay expenses of both sides to attend) and the Permanent Court of Arbitration in The Hague, Netherlands. However, it should be clear these are not the best practice.

• MEMAP should provide the best practice for dispute resolution. However, this does not currently follow the existing best practices that are generally used and agreed in other dispute resolution procedures outside of the tax environment. A key principle that should be outlined would be to split out a fact gathering exercise from the legal argument. The basic outline should be structured as set out below, and dates should be assigned to each phase at the commencement of MAP proceedings:
  i. Statement of the case
  ii. Outline and agreement of the facts
  iii. Outline of the legal analysis
  iv. Decision (application of the legal analysis to the facts)

• Given the critical importance of this issue, we encourage the OECD to clearly conclude in its proposals what best practice should entail, and a clear requirement for governments to commit to that best practice. We believe that the conclusions under Action 14 should be as strong in relation to removing double taxation as those reached in tackling double non-taxation through other BEPS Actions. Whilst the OECD has the ability to tackle a number of legal/technical issues, some of the issues regarding the access to MAP and finding resolutions within MAP are of a practical nature relating to the behaviour of
tax authorities. We recommend that it is made clear as to who will be responsible, going forward, for dealing with the practical issues. We believe that the Forum on Tax Administration should be used.

- It is our view that binding arbitration should be the core recommendation of the BEPS project, but unless such a provision is unequivocally stated as best practice and standard, it will never achieve widespread adoption. This recommendation should be as strong as any outcome from the BEPS process (equal to the recommendation to adopt country by country reporting and hybrid mismatch rules).

**Detailed Comments**

Below are responses to each of the specific questions raised in the discussion draft.

<table>
<thead>
<tr>
<th>Option No.</th>
<th>Comments</th>
<th>Technical/Practical Solution</th>
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<tbody>
<tr>
<td>1</td>
<td>Whilst this proposed change would be an improvement, it does not go far enough. The wording should be changed from “shall endeavour to resolve” to “shall resolve” and the model treaty should also be updated accordingly.</td>
<td>Legal – consider including within the bilateral treaty in Action 15 to expedite the implementation</td>
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<td>2</td>
<td>We agree that participating countries should commit to using paragraph 2 of Article 9.</td>
<td>Legal – through the bilateral treaty in Action 15</td>
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<td>3</td>
<td>We agree with this proposal. We think countries should also confirm whether this could be undertaken on a statutory basis so the competent authority team is a legally separate organisation from the tax authority (for example, the Office for Budget Responsibility in the UK is a separate body by statute from HM Treasury).</td>
<td>Legal.</td>
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<td>4</td>
<td>We agree with this proposal. We commend the OECD on its current capacity building programme with developing countries and would recommend that a review is undertaken to see if developed countries could contribute further resources to such programmes to help the developing world in this area.</td>
<td>Practical</td>
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<td>5</td>
<td>We agree with this proposal, but would also recommend that MEMAP is reviewed and improved as outlined above. MAP statistics should be published annually.</td>
<td>Practical</td>
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<td>6</td>
<td>We do support the publication of guidelines as to points of principle on companies which were able to use MAP and the reasons why other companies may not. We would not be in full support of the publication of all arbitration decisions without understanding first how confidentiality of commercial information can be achieved.</td>
<td>This could be put on either a statutory footing, or best practice could be established by local tax authorities.</td>
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<td>7</td>
<td>We agree with this and note that this has been a particular issue with some larger European Tax Authorities to date.</td>
<td>It is an issue which needs to be incorporated in local country law.</td>
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<td>8</td>
<td>We agree with this proposal (especially if done in conjunction with Option 4 on capacity building in this area).</td>
<td>Legal</td>
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<td>9</td>
<td>We agree this should be possible for both multi-year issues and the roll back of APAs. We accept that such provisions need to be subject to there being no change in material facts and</td>
<td>Legal</td>
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<td><strong>10</strong></td>
<td>We agree with this proposal and would also recommend the best practice includes time limits for each stage.</td>
<td>Ideally, this would be written into statute, but in the short term, it could be a practical undertaking.</td>
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<td><strong>11</strong></td>
<td>We agree with this proposal. The Competent Authority of each country should engage and meet with the taxpayer as part of the MAP preparations to help ensure all parties are as prepared as possible in the most efficient manner and permit facts and background information to be obtained and understood.</td>
<td>We would recommend that minimum standards are included in law.</td>
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| **12** | We believe this is an absolutely critical option. We would recommend that the following steps should be undertaken:  
- The anti-avoidance provisions able to override treaties should be published on a publically available list  
- Any provisions to override must be notified in advance to the tax authorities of the treaty partner  
- All overrides should be reviewed as part of an audit process by an independent body (OECD/UN etc)  
- Anti-avoidance legislation must not override fundamental treaty rights. | This should be a legal remedy included within the treaty itself. |
<p>| <strong>13, 14, 15</strong> | We would support the implementation of each these proposals. However, if only one could be implemented, we would recommend option 15. | Legal (through treaties. We would recommend reviewing whether this could be changed within the multi-lateral instrument in BEPS Action 15) |
| <strong>16</strong> | We would welcome the adoption of either parts of this option. | The relationship should be outlined on a legal footing under domestic law. |
| <strong>17</strong> | We would agree further consideration is needed including guidance from the OECD as to whom payment should be made whilst a MAP procedure is ongoing. One further step that could be considered is that a company could make a payment to a third party (UN/World bank organisation) of the highest amount which could be payable under the dispute. The third party would only release funds on the resolution by the participating states. Any excess payment would be refunded to the tax payer with interest. The benefit of this would be that tax payers would not be subject to any interest after payment is made to the third party. The tax authorities would then be more compelled to reach an agreement as otherwise they would not receive any funds. | Legal issue to be addressed by the OECD |
| <strong>18</strong> | We would welcome this option with clear guidance on the time limits for both taxpayers and tax authorities to notify of the | This should be a legal remedy specifically outlined in the treaty and |</p>
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<td>intention to initially request MAP to be adopted. We would specifically agree that clear guidance as to when is the “first notification” that will start the timeframe from when binding arbitration becomes mandatory. Our members have had specific experience of trying to start an arbitration procedure, but the tax authorities claiming the period had not started despite the dispute going on for a number of years.</td>
<td>clarification in the Commentary on Article 25.</td>
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<td>19</td>
<td>We would welcome the ability for tax payers to be able to make “self-initiated” adjustments under the law of participating states. This might enable simpler cases to be resolved without any formal procedures. Overall, the need to address double taxation is critical, and this is just one option. We would also recommend that some form of notification to the other treaty partners tax authority should be made prior to an adjustment being made final so that the tax authorities in the country where the tax liability may be lowered would have the ability to intervene and implement MAP/reach an agreeable adjustment before a company has to pay the higher amount in the first state.</td>
<td>Further clarification on self-initiated adjustments should be included in the Commentary.</td>
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<td>20</td>
<td>We would recommend that, if possible, a reference to utilising the best practice in MEMAP is included within a treaty especially if MEMAP is updated in line with global best practice for dispute resolution as outlined in this letter.</td>
<td>Ideally this would be a local legal or treaty solution, but a practical undertaking would be better than nothing.</td>
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<tr>
<td>21</td>
<td>We would welcome the commitments outlined in this Option. We would also welcome that such commitments be subject to an independent review/audit, the results of which should be publicly available. In discussions between the two countries, we would welcome taxpayer involvement to facilitate the process and help focus the discussions on the real key elements of the value chain.</td>
<td>This should be a legal solution through the treaty or subsequent exchange of notes</td>
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<td>22</td>
<td>The issues outlined in this option are critical and dilute the impact that the work in the BEPS Action and the output from this paper could have. Arbitration is a critical part of any agreement between two parties – there must be a binding mechanism to resolve disputes otherwise there is no incentive to do so. It is our view that binding arbitration should be the core recommendation of the OECD, with no ability to state reservations. Countries are still obviously able to negotiate the terms of their own tax treaties in line with their national interests, but unless such a provision is unequivocally stated as best practice and standard, it will never achieve widespread adoption. This recommendation should be as strong as any outcome from the BEPS process (equal to the recommendation to adopt country by country reporting and hybrid mismatch rules).</td>
<td>OECD guidelines and treaties should be updated accordingly. We recommend that mandatory binding arbitration should be included within the multi-lateral instrument to be adopted under Action 15 so that countries would have to specifically opt out of such a clause.</td>
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<tr>
<td><strong>23</strong></td>
<td>We would also suggest that countries which do not adopt full binding arbitration publically state their policy and legal analysis.</td>
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<td></td>
<td>Such wording should be in the OECD guidelines only and not the model treaty.</td>
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<td></td>
<td>If countries are unsure about the introduction of mandatory binding arbitration, then alternative options can be stated which could include the partial adoption on key articles (5,7,9) or the use of non-binding mediation.</td>
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<td></td>
<td>The treaty should also provide the taxpayer the right to insist on the parties entering into a formal mediation after a set period of time in the same way the taxpayer can force an arbitration. If a country is willing to be subject in principle to mediation, it should not fear being under a duty to submit to such mediation, given that the mediation will not generate a binding result against its wishes.</td>
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<td></td>
<td>However, such options should be made clear that they are not considered best practice and should only be adopted in preference to no arbitration at all.</td>
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<td><strong>24</strong></td>
<td>We would recommend that most favoured nation articles and the multi-lateral instrument under Action 15 could both facilitate the early adoption of binding arbitration and therefore clear guidance on the application of both should be included within the final OECD recommendations on this Action.</td>
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<td>To be included in both the OECD guidance and the Multi-lateral instrument under Action 15</td>
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<td><strong>25</strong></td>
<td>We would recommend clear guidance is provided both domestically and any improvements to the Commentary on Article 25 made.</td>
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<td></td>
<td>Local guidance is needed, plus updates to the Article 25 commentary</td>
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<td><strong>26</strong></td>
<td>There ought be only limited circumstances where tax authorities should be able to defer the MAP process without recourse and approval of the taxpayer (e.g. if there is evidence the taxpayer has not made full disclosure of facts and circumstances).</td>
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<td></td>
<td>Otherwise, any decision to defer MAP (and a move into binding arbitration) must be subject to taxpayer approval.</td>
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<td><strong>27</strong></td>
<td>Whilst we agree that this should improve the situation, we believe this option could go further. The OECD/UN (whichever body is deemed appropriate) could build a list of approved arbitrators (with the necessary legal and technical expertise) that would be available as independent chairs of both MAP discussions and/or arbitration meetings, and in due course, to form the arbitral panel. Countries, on entering into treaty negotiations, could then agree as part of that treaty to either appoint from that list as standard, or appoint from that list if agreement on an arbitrator is not reached in a short time frame.</td>
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<td></td>
<td>This is both a treaty solution and also a practical solution for the OECD/UN to establish such a list.</td>
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<td><strong>28</strong></td>
<td>As noted above, taxpayer confidentiality is an important issue, especially with commercially sensitive information which may form part of transfer pricing disputes (in particular). We would recommend that such provisions are specifically made in the treaty (by cross referencing Article 25 to Article 26) to ensure legal enforcement.</td>
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<td></td>
<td>This should be a legal solution through tax treaties (including any implementation through the Multi-lateral instrument in Action 15)</td>
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| 29 | “Baseball arbitration” is an interesting approach in so far it forces tax authorities to really look at the best offer they can provide to taxpayers, and can provide a route to expedite a resolution. However it is recognised that this could then provide an answer which is not “right” and, as a minimum, as you have noted, it would need to make sure that no legal precedent is set. A resolution should be based upon a principled approach and eliminate the prospect for any party to seek an emotive settlement instead of one founded on facts, law and objective criteria focused on the actual case. Where binding arbitration is available, we would recommend that a full independent decision is reached. Where there is no independent arbitration available under MAP, then we would recommend that a “final offer” approach is adopted after a set time period. |
| 30 | We welcome the proposals outlined, but would recommend that this option goes further. One of the concerns that the CBI has in relation to the MAP process is the lack of input from business. We also note that an auditing authority is likely to spend a significant amount of time and resources in preparing a case compared to the defending competent authority, which is likely faced with a potential adjustment at a much later point in time. In finding a settlement based upon merit, no party should be at a disadvantage in terms of preparation, and a taxpayer, being the common link between the competent authorities, is often best placed to help assure all parties have a common understanding of the facts in an efficient way. MAP is often used for transfer pricing issues, often covering detailed, complex value chains that take a long time to understand. Most MAP procedures are supposed to be resolved in a number of hours, which in many cases would not be long enough to fully evaluate the position from documentary evidence. We therefore recommend that the MAP process does consider the involvement of the taxpayer to help focus the discussions (which may or may not subsequently involve the taxpayer) on the key issues and confirm the relevant facts. |
| 31 | Mutually agreed guidance on multiple issue cases (which is available to the taxpayers involved) should be an important part of the process to ensure transparency. We recommend the OECD considers producing a standard set of guidelines as part of the model treaty guidance to enhance the chances of global application on a consistent basis. |
| 32 | We have already outlined a number of key recommendations to help improve the efficiency of the MAP process. These include:  
  - taxpayer involvement to help clarify facts and key issues without starting from scratch reviewing numerous files;  
  - sensible time limits to move on to the next stage of the process. |

This is a treaty solution for which clear guidance should be provided by the OECD.  
Taxpayer involvement in the MAP process would require both treaty and local laws to be amended.  
To be included within the OECD guidelines.  
Most of the solutions would be in the form of tax treaty updates or improvements to the OECD guidelines.
process to reduce never ending cases; and
- the holding of monies by a third party until resolution to focus the tax authorities on resolving the case.

There are also some international mediation bodies that provide free facilities and cover costs (such as Qatar).

| 33 | As already outlined in this letter, one potential option would be for the OECD/UN to develop a list of approved international arbitrators. Such arbitrators could then be used to resolve the position on a multi-lateral basis and not just a bi-lateral basis between only two of the countries involved. | The use of the multi-lateral instrument in Action 15 could address both this, and a number of key issues in this paper. |
| 34 | We would recommend that the imposition of penalties and interest in a MAP case form part of the original treaty negotiation so the position is clear. We would recommend that the suspension route would be the best alternative outlined. If our recommendation of placing worse case funds earning interest with a third party were to be adopted, which are only released to the tax authorities and the taxpayer at the end with the interest, there would be no further issue (as the funds were placed on deposit up front, there should be no case for penalties). | Clear guidance (preferably as part of the treaty or exchange of notes) should be provided. |

We trust that you will find the above comments helpful in understanding the potential impact of the proposals outlined in your paper. We remain committed to ensuring that each BEPS Action achieves its stated goals, whilst ensuring that genuine business arrangements are not unduly impacted to which this Action forms a key part.

We remain at your disposal should you wish to discuss the issues we have raised in this paper in more detail. Please contact neil.anthony@cbi.org.uk for more information.
Christian Aid Submission

OECD BEPS project

Discussion draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

January 2015
Introduction:

Christian Aid is a Christian organisation that insists the world can and must be swiftly changed to one where everyone can live a full life, free from poverty. We work globally in 45 countries for profound change that eradicates the causes of poverty, striving to achieve equality, dignity and freedom for all, regardless of faith or nationality. We are part of a wider movement for social justice. We provide urgent, practical and effective assistance where need is great, tackling the effects of poverty as well as its root causes.

Christian Aid welcomes the opportunity to provide feedback on the Discussion Draft on Dispute Resolution. Christian Aid has been working on the challenges developing countries face in respect to sustainable economic development for many years. This has included looking at trade, debt and taxation issues and how policies at corporate, national and international level on all these issues affect the ability of developing countries to generate the resources that they need to be able to fund their own development.

Christian Aid has been focussing on challenges the international tax/financial system poses to developing countries since 2008, when we launched our report Death and Taxes¹. Since then we have continued to work with partners around the world to call for changes in tax policies at all levels (national, regional, international) to enable developing countries to provide a reliable, sustainable source of long term financing to finance development. Within this work there have been several key themes that we see as vital to creating an international tax system that works for all countries. Perhaps the most important of these are transparency, and including all countries in creating international rules, regulations and processes that are appropriate and applicable for all.

We believe that these principles are equally applicable to dispute resolution, and rather than seek to go through each option detailed in the discussion draft we seek below to illustrate why these principles are important in dispute resolution should be borne in mind in both the decision making process and the proposals being made on dispute resolution.

A summary of key points are:

- Minimising disputes is the best dispute resolution method. More fundamental reforms to international tax may be the best way to achieve this
- APAs have potential risks as well as potential benefits for developing countries. These need considering and addressing before APAs are pursued/advocated for.
- A dispute resolution system for tax treaties needs to work for developing countries too
- A dispute resolution system is more likely to work for developing countries if it is: transparent, simple and cheap. These need not compromise its efficacy for developed countries
- Developing countries should not be coerced into a mandatory arbitration process

• The best way to get a system that works for developing countries is to make sure they are included, and supported, in the process of setting up the system. The BEPS process is not currently doing this.

Minimising Disputes

The best form of dispute resolution mechanism is to reduce the number of disputes to start with, however it appears from various comments being made, especially by the private sector, that it is expected that the BEPS process will achieve the opposite result, and increase the number of disputes. This view would appear to have emerged as the BEPS process is seen as looking to add complexity to existing rules, rather than exploring opportunities to more significantly reform international tax rules and norms that could be both fairer in terms of aligning taxing rights more closely with economic activity as well simplifying the system. A fairer and simpler system of international taxation would not only benefit developing countries by enabling them to raise more revenues, it would also have benefits for all countries, and businesses, in reducing significantly the number of disputes.

If such an approach is not ultimately taken through the BEPS process (or outside it in an alternative forum) not only is there a risk that disputes may increase between OECD/G20 jurisdictions, but there is also a risk that disputes with counties outside of the OECD/G20 also increase. The evidence is increasing that both the international rules, and many tax treaties, cause problems and often disadvantage developing countries. If those concerns are not addressed properly there is a clear risk of developing countries taking increasingly unilateral action to protect their tax bases, which will inevitably lead to more disputes.

It therefore seems clear that the primary approach to making dispute resolution mechanisms work should be to ensure that both the BEPS process, and another process to include non-BEPS issues, should be willing to be bolder in proposing more fundamental reform to international tax, are inclusive of developing countries, and that all proposed outcomes are assessed for their impact on developing countries.

We do note that in the discussion draft some measures are proposed to seek to reduce disputes, for example setting up Advance Pricing Agreement (APA) programmes, especially bilateral APAs. While there are some potential advantages in this approach there are also some concerns for developing countries adopting such an approach. APAs do require time, resources, and information to negotiate, all of which may be lacking in developing countries, putting them at a disadvantage in negotiations. Therefore while such options should not be discounted, indeed there may be possibilities for mutually beneficial bilateral APAs, to ensure that the outcomes are positive for developing countries greater consideration on the impact of such measures on developing countries are likely to be necessary, as well as how to provide support and assistance to developing countries that wish to pursue APAs.

Principles for a global dispute resolution system

Even with a simpler and more effective international tax system disputes are still likely to occur, and in resolving them it is vital that a process is not recommended that is likely to disadvantage

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developing countries. Key factors that are likely to work against developing countries in dispute resolution are; opacity, complexity and cost.

Perhaps the best way to illustrate this is in the problems that developing countries see in the Investor State Dispute Settlement (ISDS) process included in many Bilateral Investment Treaties. In ISDS developing countries are increasingly concerned at having to pursue long and expensive legal cases before arbitrators who may have a vested interest in perpetuating the number of cases and their costs. They are also concerned that equal weight is not given to all arguments, and that commercial interests prevail over environmental needs or human and social rights. Finally being able to monitor the approach taken by arbitrators is difficult as many of the determinations are kept secret. Such is the level of concern that some countries have decided to terminate their BITs, while many more (and some developed countries too – e.g. Australia) have decided to exclude ISDS from treaties.

It should be clear that any dispute resolution mechanism for tax treaties should seek to avoid the problems inherent in ISDS. It is therefore necessary that a dispute resolution mechanism be:

**Transparent**

Whilst there is a default preference for confidentiality by many when tax is concerned, there is no reason why there should not be a transparent dispute resolution process. Disputes within a country are often resolved through tribunals or courts, and those decisions are generally made public in many countries. International tax disputes are arguably even more deserving of being made public. The sums involved are often significant, often millions, and potentially billions of dollars, it is vital the citizens are able to ensure accountability for decisions being made. By making the decisions public not only can governments be held accountable, but through knowing they may have to defend their decisions there is a clear incentive to reach good decisions, that can be defended to citizens of both countries. Making decisions public can also help to improve future decision making, through enabling a wide range of stakeholders, including the general public, to test and evaluate the decisions and their rationale. It would also help build confidence and trust in the process as objective and impartial.

**Simple**

Obviously the more the rules are simple the easier it will be for disputes to be resolved simply, but the process also needs to be as simple as possible too. Developing countries are at a significant disadvantage in terms of their capacity, for example for Sub Saharan Africa to have the same number of tax officials as the world average they would need to find another 650,000 officials (and train them, provide the IT and other infrastructure to enable them to work productively etc). This is a significant gap that will not be bridged in the near future, even if capacity building were to be scaled up from its current very low share of ODA. Since this gap exists it is necessary to find ways to ensure that developing countries are not unfairly disadvantaged by their situation as developing countries, and that any dispute resolution process doesn’t in practice favour developed countries. Currently the time and resources that

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dispute resolution can consume does clearly risk a bias against developing countries, and that
developing countries may well be put under pressure to settle disputes for less to avoid dispute
resolution/MAP procedures and/or arbitration.

Cheap(er)

In a similar way for the need for a dispute resolution to be simple, it also needs to be cheap
enough for developing countries to be able to use it. It is noted that the discussion draft
highlights lack of resources as a problem in how dispute resolution currently works, but the
proposed option of increasing resources is likely to be impossible for many developing
countries to fulfil as there are many more pressing competing demands for scarce resources.
Attention must also be paid to how to reduce costs, not just in arbitration (as the discussion
draft suggests), but across the whole process to ensure that developing countries are able to
effectively engage in dispute resolution.

Turning principles into action requires involving developing countries

It should be noticed that none of these three principles, transparent, simple or cheap would be
detrimental to developed countries, and so there are no reasons why they should not be
pursued. Indeed it may be argued that developed countries will be pushing for the same
principles, at the very least in terms of simplicity or costs. However what appears simple
and/or cost effective to developed countries may well appear complex and prohibitively
expensive to developing countries, especially Low Income Countries. For this reason it is vital
that developing countries are closely involved in the development of new ideas for dispute
resolution and how the process can and should work.

While there has been a welcome increase in developing country engagement in the BEPS
process recently, this still falls short of what is necessary, i.e. full engagement by developing
countries. There is a clear expectation that the BEPS outcomes will be applied globally, and if
developing countries are to be expected to implement the outcomes, it is both right and fair that
developing countries have a chance to be involved in producing them, and it is also necessary
that the outcomes work in and for developing countries; if not the process will have failed.

Given the earlier noted capacity constraints on developing countries, developing countries need
more than limited access to the BEPS discussions. Capacity constraints exist not just on
administering tax policies, but also in determining tax policy. Therefore to properly include
developing countries as full participants in developing dispute resolution, it is not just necessary
to provide access to the discussions, but also to provide support to developing countries to
meaningfully engage (i.e. to help develop policy proposals, interpret and test the impact of
proposals etc.). In terms of both access to the negotiations and support to participate on an
equal footing in them the BEPS process is falling short, for dispute resolution the risks are that
this creates not only a tax system that has more disputes, but also in creating and perpetuating a
resolution mechanism that doesn’t work a large number of countries.

If such a system, that doesn’t work for a large number of countries, is created, it will either not
be used by them, or because of their lack of economic and political power it will be forced upon
them. Both outcomes need to be avoided, we hope by following the principles outlined in this
paper that a system will be developed that all states will choose to use. Should this not happen,
and developing countries not be fully integrated into creating a new/revised dispute resolution
mechanism it is vital that developing countries are not coerced into using a process they are not happy with. For this reason we support the clear position of the discussion draft that efforts should not be taken to move towards a universal mandatory binding MAP arbitration.
OECD BEPS Action 14 – Make Dispute Resolution Mechanisms More Effective
Response by the Chartered Institute of Taxation to OECD Public Discussion Draft
(‘Action 14 Paper’)

1  Introduction

1.1 The Chartered Institute of Taxation (CIOT) is pleased to submit this response to the Public Discussion Draft issued on 18 December 2014 by the OECD which considers BEPS Action 14: Making Dispute Resolution Mechanisms More Effective.

1.2 We set out below some general observations and recommendations on the Action 14 initiative as well as specific comment on the Action 14 Paper Options.

2  Executive summary

2.1 The OECD’s Mutual Agreement Procedure (MAP) statistics for the years 2006 to 2013 show that the number of treaty-related international disputes has almost doubled in recent years. We expect that the outcomes of the OECD BEPS action plan, which are likely to change important concepts in tax treaties, such as the definition of PE (action 7), new treaty anti-abuse rules (action 6) and approaches to transfer pricing (actions 8-10) will result in further increases in such disputes. We therefore welcome the work to identify and address the obstacles preventing countries from resolving disputes through MAP.

2.2 We believe that improving MAP is essential if double taxation is to be reduced. After all, there is only resort to MAP in cases where double taxation arises.

2.3 We note and agree that the OECD’s recognition of the need to improve the efficiency and management of Treaty-related disputes is not limited to the BEPS programme itself.

2.4 We welcome the improvements identified to MAP, its procedures and the OECD commentary as set out in the discussion draft – particularly Options 7 (ensuring that
OECD BEPs Action 14 – Make Dispute Resolutions More Effective:
CIOT Comments 16 January 2015

audit settlements do not block access to MAP); 17 (tax collection during MAP); 19 (the treatment of self-initiated adjustments in MAP); and 34 (guidance on consideration of interest and penalties during MAP). Our detailed comments on the Options are set out in Section 3.

2.5 We are disappointed there was no consensus on moving toward universal mandatory binding MAP arbitration. It is therefore important that the proposal to adopt minimum standards of responsiveness by all Member States to the challenges identified in the Action 14 Paper, is accepted.

2.6 We believe there would also be benefits to tax authorities in the adoption of non-binding Collaborative Dispute Resolution (CDR) programmes including the full range of Supplementary Disputes Resolution (SDR) techniques to support that process. Such programmes could be included in a treaty, or adopted through an agreement on working procedures between tax authorities. Experience of CDR programmes in some countries, including the UK, demonstrates that they can reduce the time taken to resolve disputes and sometimes avoid litigation, or arbitration. Inclusion of a CDR programme does not depend on the adoption of an arbitration clause. We have set out more details on CDR in the appendix.

2.7 We welcome the idea of an appropriate Forum to monitor not only the way MAP is implemented in treaties, but also its application and outcomes. The mandate should be clearly set out and published and its results made publicly available on a regular basis in the interests of transparency and accountability consistent with encouraging a better collaborative environment. The Forum should also encourage Member States to achieve minimum levels of best practice. The experience of the Global Forum on Transparency and Exchange of Information for Tax Purposes offers a good model.

2.8 We agree that Competent Authorities need to foster a more positive, collaborative and collegiate relationship not only amongst themselves but also in conjunction with taxpayers and the tax advisory community. Addressing the issue of efficient dispute resolution must have the support of governments and tax authorities. Competent Authority processes must be adequately resourced so that issues of double taxation are resolved in a timely and efficient way.

2.9 MAP is only one aspect of the dispute resolution process. We would like to see a better approach to the way tax administrations and taxpayers engage throughout the whole dispute resolution process. Consideration should be given to improving risk assessment and tax audit resolutions before entering into MAP (this may have the beneficial effect of reducing the number of MAP cases); lowering the barriers to entering MAP; as well as the improvements to the MAP process suggested in the discussion draft. We support the work of the Forum of Tax Administrators (FTA) on Cooperative Compliance and on improving dispute resolution processes. We urge the FTA to continue including additional members outside the OECD.

3 MAP

3.1 To summarise: we believe that attention should be given to improving the whole ‘dispute experience’, including:

- Risk assessment for the selection of cases for audit;
- The audit experience pre-MAP;
OECD BEPs Action 14 – Make Dispute Resolutions More Effective:
CIOT Comments  16 January 2015

• The MAP experience (including barriers to entry to MAP and the conduct of MAP processes); and

• The ultimate resolution of international disputes (we support arbitration, and set out our thoughts on this in Section 4).

In this Section we focus on the MAP experience.

3.2 We are pleased to see set out in the discussion draft a wealth of options and improvements which go some way to address some of our concern. We would like to highlight and comment on those to which we believe priority should be given.

3.3 **Option 7 (ensure that audit settlements do not block access to MAP).** We consider that the option should be strengthened and that there should be an absolute bar on the practice of trying to persuade taxpayers to waive MAP rights in return for ‘more favourable’ audit settlements and similar. We consider that reports of such practices should be made to the Monitoring Panel/Forum noted in 2.7 above, and that action should then be taken to encourage best practice or, at the very least, that such practices should be noted in its publications.

3.4 **Option 8 (bilateral APA programmes).** We strongly support this option, and urge the adoption by CAs and taxpayers of a collaborative mindset in entering into APAs. We have concerns that some Tax Authorities regard APAs as part of their audit programme and see the ‘compromise’ result inherent in such agreements as a ‘leakage’ of tax. In fact, APAs allow taxpayers to be more forthcoming and to refrain from adopting aggressive positions in respect of one or other Tax Authorities. The collaborative nature of an APA Programme should be recognised as well as the significant savings in resource use by all parties (time and cost).

3.5 **Option 10 (transparency and simplicity).** Not only is there a need for transparency and simplicity in process but also a more willing application of that process by Competent Authorities – attempts to bar taxpayers from entry to the process must be discouraged, and the process itself needs to be speeded up.

3.6 **Option 13 (bilateral notification / consultation process).** We recommend a rebuttable presumption that if one Competent Authority accepts MAP, the other is obliged to, unless there are good reasons for not doing so which the Monitoring Panel / Forum (see para 2.7 above) could address.

3.7 **Option 15 (application may be made to either CA).** We strongly support this.

3.8 **Option 16 (MAP / domestic law remedies).** We recommend that it is never a precondition for entering MAP that a taxpayer has to exhaust or waive domestic remedies. We recommend it should always be possible to engage domestic remedies and then put them on hold pending MAP. We recommend further that Competent Authorities always have discretion to negotiate the audit position in a MAP.

3.9 **Option 17 (collection of taxes).** This does not go far enough. We recommend that the Adjusting Authority should in all cases agree to postpone collection of tax on the adjustment until the MAP is completed.

3.10 **Option 19 (self-initiated adjustments and MAP).** This does not go far enough. Whilst we acknowledge that the Fiscal Authority in which the adjustment has been made has not had the opportunity to review the basis of the adjustment nor to agree with it, we believe it should be universally accepted that a self-initiated adjustment should not be a bar for entry into MAP and that participating countries should adhere
to this principle. To bar such adjustments is to discriminate against compliant taxpayers.

3.11 **Option 34 (guidance on interest and penalties).** We do not think Option 34 goes far enough. It should, we suggest, if impediments to the process are to be addressed, also include secondary adjustments which we believe should also be treated in the same way as the original adjustment and dealt with under the MAP process at the same time. Furthermore and acknowledging the need for rate differentials, we believe there should be symmetry of levying of late payment interest with that attaching to repayments following resolution under MAP. In particular participating countries should commit to interest being levied or paid in the same way as for tax demands or repayments unconnected with a MAP claim in their territory. Currently some territories differentiate and do not include any interest on repayments made following MAP. We strongly agree under the option that interest and penalties should be considered as part of the MAP claim.

4 **Arbitration**

4.1 We are disappointed that there is no consensus at the moment on moving towards universal mandatory binding MAP arbitration. The Action 14 Paper identifies in this respect as one of the main policy concerns the issue of national sovereignty but also highlights other potential obstacles and practical issues which have been identified by Member States as reasons either individually or cumulatively for them being wary of and not agreeing to arbitration.

4.2 We welcome all the proposed Options which go some way to dealing with those identified concerns and comment on some of them more specifically below (see 4.9 onwards).

4.3 We do recommend that the principle of arbitration should remain as a fundamental element in the dispute resolution process with Member States being given the flexibility to adopt some or all of its processes either on a case by case basis or, eventually, through an enabling Protocol in its Treaty network. The requirement to go to Arbitration after a prescribed period of time will of itself add impetus to the MAP process and encourage settlements prior to arbitration.

4.4 We feel that taxpayers should be given more involvement in their MAP case as well as Article 25(3) cases which have a direct impact on them. This recommendation is part of the CDR approach for greater involvement of all parties as well as greater transparency.

4.5 We note the OECD Model Tax Convention contains in its annex a sample mutual agreement on arbitration and we recommend this form of agreement is reviewed with a view to bringing it up to date and expanding its terms to include and deal with some of the concerns identified in the Action 14 Paper.

4.6 In this respect, we recommend that the taxpayer involved in any dispute as well as the arbitrators themselves could be made a party to the Arbitration Agreement certainly so far as the communication of information and confidentiality is concerned so that there is a more assured and contractual basis for managing such matters. In this respect, where as part of the CDR Programme, the Competent Authorities agree to a mediation (or a facilitated structured discussion) we recommend the parties involved enter into an appropriate Facilitation/Mediation Agreement, based on a Model developed for that purpose as part of the CDR Programme.
4.7 We recommend that arbitration decisions should be published in anonymised form with commercially sensitive information (including the name(s) of the taxpayer) excluded for reasons of confidentiality.

4.8 We have specific comments on the following options:

4.9 **Option 26 (arbitration and timetable delay).** If a CDR Programme is introduced (as we recommend: see the appendix) as part of the enlarged MAP process, we do not see in what circumstances there could be the need for any delay in initiating MAP arbitration. The circumstances would have to be very prescriptive and subject to the Panel / Forum monitoring procedure.

4.10 **Option 27 (appointment of arbitrators).** The concern with being overly prescriptive of enlisting criteria for the qualification of an arbitrator is that in some disputes (eg transfer pricing experience) many individuals who otherwise would be excellent arbitrators would be excluded. We wonder if this is a matter best left to the common sense of the Competent Authority and to the other arbitrators in relation to the Chairman. We also suggest the development of a panel of international experts (arbitrators and mediators) recognised by the OECD to assist the CDR Programme.

4.11 **Option 28 (confidentiality and communications).** We suggest that the arbitrator and the taxpayer should be made parties to the Arbitration Agreement to provide a contractual basis for dealing with confidentiality. As regards forms of communication we believe normal e-mail communication (possibly secured) should be possible although we are aware of one case in which two Competent Authorities could not agree on that form of communication.

4.12 **Option 29 (default form arbitration).** The time and resource (and potentially external professional costs) in pursuing a MAP can be a significant deterrent for taxpayers – and, often disproportionately so for SMEs where the absolute amounts of tax involved are relatively small. As means of achieving agreement in the context of those cases where the amount of tax is relatively small, a ‘last best offer’ or ‘final offer’ approach (‘baseball arbitration’ as described in paragraph 50 of the draft) might be considered at an earlier stage of the process (as defined) than as a mechanism for final arbitration.

4.13 **Option 30 (evidence).** We have concerns about being too prescriptive. What the arbitrators are likely to need is more facts from the taxpayer whether or not previously considered by the Competent Authorities and a mechanism should be in place to allow the arbitrator to have access to the taxpayer and vice versa.

4.14 **Option 32 (cost and administration).** The best way of cutting costs is to have written submissions with a maximum length and for the arbitrators not to meet (other than in exceptional circumstances) but conduct discussions in conference calls or via internet video communication facilities or more formal telephone video conference links.
5 The Chartered Institute of Taxation

5.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT’s 17,000 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification.
Collaborative Dispute Resolution (CDR) Programme

1.1 We believe the largest single obstacle to the effective resolution of disputes is the absence of a holistic approach to dispute resolution management, starting from risk assessment and on through tax audits and on again into MAP.

1.2 We recommend the development of a suitable programme to focus on establishing a collaborative working environment not only between Competent Authorities but also taxpayers and their advisers. This would include a voluntary best practice protocol covering the ‘whole journey’ from the time the dispute arises to its resolution building on the MEMAP recommendations (in particular paragraph 3.5.2 of the 2007 Report). The programme would incorporate the full range of SDR techniques including: facilitated structured negotiations involving mediation techniques, facilitative (and evaluative) mediation, non-binding expert determination and similar techniques.

1.3 The programme would be non-binding but all Member States would be encouraged to adopt its principles, all designed to enhance not replace MAP practices (including arbitration, where agreed) and be seen as part of MAP (potentially enlarging its ambit as a result) to reduce the delays in resolving disputes which are currently experienced.

1.4 The CDR Programme would establish a range of best practices taking into account also the work of the FTA Forum and its recently published ‘Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement’ and its adoption, operation, application and output would be monitored by an appropriate Forum (see para. 2.7 above) as the Action 14 Paper suggests (at paragraph 8; pages 5 and 6).

1.5 The application of the CDR Programme could start no later than the point at which any party feels the ‘dispute’ has reached, or is likely to reach, a point when the introduction of the formality of MAP needs to be considered. It should not be a process left, say, for the two year period of a MAP case being accepted. It should be seen as part of the MAP process, or the MAP process being part of it (see Action 14 Paper para 40; page 20).

1.6 By way of example, in the UK such a programme has been successfully developed for managing certain domestic tax disputes (between Tax Authority and taxpayer), and we see no reason why such principles and procedures could not be used in cross-border Tax Treaty disputes (between Tax Authorities where the taxpayer is also involved) with similar results including significant savings in time, cost, efficiency and enhancement of relationships.

1.7 We believe that one of the principal benefits would be to enable countries to make better and more efficient use of their existing Competent Authority resources.

1.8 The techniques rely on mediation principles and often use a third party mediation-trained facilitator being either one person appointed by both parties or two individuals acting one for each party.

1.9 We note the OECD has already identified the potential of some of these techniques in its 2007 MEMAP Report (at paragraph 3.5.2).
1.10 There are a number of detailed considerations that would need input to develop a CDR programme. The CIOT would be very pleased to make available to the OECD those of its members who have experience in this area for that purpose.

The Confederation of Swedish Enterprise is Sweden’s largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled "BEPS Action 14: Make Dispute Resolution Mechanisms More Effective" 18 December 2014 - 16 January 2015 (hereinafter referred to as the Draft).

General Comments

The Confederation of Swedish Enterprise appreciates the efforts by the OECD to enhance the dispute resolution mechanisms by addressing certain obstacles that prevent countries from solving treaty-related disputes under the Mutual Agreement Procedure (MAP).

The linkage between well-functioning dispute resolution mechanisms and cross border trade and investments should not be underestimated. Predictability and legal certainty are crucial for any business investment and effective dispute resolution mechanisms can facilitate that, thus enhancing cross border trade and the global economy.

Although we acknowledge the lack of consensus regarding mandatory binding arbitration, it still is, or at least should be treated as, a crucial part of the BEPS project.

Several of the BEPS Action Points are expected to increase disputes and the risk of double taxation for cross border business. Consequently, it is of utmost importance...
that Action Point 14 presents effective dispute resolution mechanisms to mitigate those risks. If an effective dispute resolution mechanism cannot be reached, the proposals under the other Action Points may have to be reconsidered.

Bearing this in mind, we are disappointed that the OECD seems to have dropped the ambition to create mandatory binding arbitration and instead has settled for a list of non-binding measures that will constitute a minimum standard to which participating countries may commit.

We believe that a far more effective solution concerning the dispute resolution mechanism can be reached and encourage OECD to raise their ambitions regarding action 14. For example, as will be obvious in the specific comments, the language needs to be much more direct in order to be sufficient. In its current form many of the proposed revisions are too non-committal.

Specific Comments

**OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)**

Option 1 seeks to resolve the problem that arises from the absence of an obligation to resolve Article 25 MAP cases by adding to the Commentary that Contracting States are “obliged to seek to resolve the case in a principle, fair and objective manner”. Confederation of Swedish Enterprise questions the effectiveness of such a revision of the Commentary. Instead we suggest an explicit obligation to resolve MAP arbitration cases, by using the words “shall resolve”. Preferably this change would be added directly in to the Model Treaty itself, and not the commentary.

**OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties**

The Confederation of Swedish Enterprise supports this option.

**OPTION 3 – Ensure the independence of a competent authority**

We believe that adoption among countries of the best practices included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) would contribute to the independence of a competent authority. However, in order to ensure a uniform adoption, the words “could commit” should be replaced by the words “shall commit”.

**OPTION 4 – Provide sufficient resources to a competent authority**

The same reasoning as regarding option 3., i.e. that the adoption of the best practices included in the MEMAP would contribute to elimination of the obstacle that
the competent authority lacks sufficient resources, but the words “could commit” needs to be replaced by “shall commit” to ensure a uniform adoption.

**OPTION 5 – Use of appropriate performance indicators**

Same as our comments to options 3 and 4 above.

**OPTION 6 – Better use of paragraph 3 of Article 25**

The Confederation of Swedish Enterprise welcomes the suggestion to make article 25 (3) agreements publicly available.

Regarding the suggestion on adopting the best practices included in MEMAP, we have the same comment as in relation to option 3-5.

**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**

The intention of the suggestion is positive. However, yet again the wording should be more direct. We suggest that “could commit to take appropriate steps” be replaced by “shall take appropriate steps”.

**OPTION 8 – Implement bilateral APA programmes**

The Confederation of Swedish Enterprise share the belief that the increased use of Advanced Pricing Agreements (APAs) would lead to enhanced levels of tax certainty and lower the risk of double taxation. Consequently, we fully support measures intended to commit countries to implement bilateral APA programmes. For countries that already have APA programmes in place, the OECD should develop best practices to help improve these programmes.

**OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs**

The Confederation of Swedish Enterprise fully supports the implementation of a procedure to request for MAP assistance with respect to recurring issues. The procedure needs to be quick and simple in order to be effective. We also support the suggestion that countries commit to provide for roll-back of APAs.

**OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP**

We support this option to improve transparency and simplicity of procedures to access and use the MAP. However, as indicated in our other comments regarding
the adoption of the best practices in the MEMAP, the wording should be changed from “could commit” to “shall commit”.

**OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance**

We welcome additional guidance on the minimum contents of a request for MAP assistance and support the adoption of best practices included in the MEMAP. As previously indicated we suggest changing the wording from “could commit” to “shall commit”.

It is important that the requirements for documentation regarding a request for MAP assistance is not to excessive. Requirements for excessive documentation may in many cases mean unnecessary work for both the taxpayers and competent authorities. Therefore our recommendation is that the documentation requirement for a request for MAP assistance is limited to basic information. When the procedure is ongoing, more specific documentation can be provided by the taxpayer if necessary. The language in which the documentation shall be provided is also a complicating factor. Mechanisms to mitigate the burden of translation are needed.

**OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied**

The Confederation of Swedish Enterprise welcomes the clarification regarding access to MAP where an anti-abuse provision is applied. In our view, all cases involving the application of an anti-abuse provision, irrespective of whether it is a domestic provision or a treaty provision, should allow access to MAP.

**OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities**

We welcome the intention that one country should not be able to unilaterally deny access to MAP.

We do however have some concerns regarding the effectiveness of the proposal, as it seems to indicate that the resident country still can deny access to MAP unilaterally. For obvious reasons we would prefer a wording that clarifies that there needs to be consensus from both countries in order to deny access to MAP.

**OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”**

Such a clarification would be welcomed, making it more predictable for taxpayers to know under what circumstances access to MAP can be denied.
**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State**

The Confederation of Swedish Enterprise welcomes the option to permit a request for MAP to the competent authority of either Contracting State. Such a possibility is particularly relevant if one competent authority is more experienced and has better resources than the other competent authority. However, the goal should naturally be that all competent authorities have the necessary experience and resources making it less important for companies to be able to turn to the competent authority of their choosing.

**OPTION 16 – Clarify the relationship between the MAP and domestic law remedies**

The Confederation of Swedish Enterprise believes that MAP and domestic law remedies should not exclude each other. A taxpayer should be free to choose either of them.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**

Deferral of the payment of tax assessed is often available in domestic law remedies. The possibility of deferral should also be available in case of a MAP until a decision has been reached.

**OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure**

Clear guidance regarding time limits to access MAP is of interest to all parties. Consequently, the Confederation of Swedish Enterprise supports this option.

**OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure**

Self-initiated foreign adjustments are likely to give rise to disputes. The Confederation of Swedish Enterprise supports clarification of these issues.

**OPTION 20 – Ensure a principled approach to the resolution of MAP cases**

The Confederation of Swedish Enterprise supports this option as it would simplify the resolution of MAP cases.
OPTION 21 – Improve competent authority co-operation, transparency and working relationships

The Confederation of Swedish Enterprise supports this option but, as previously stated in relation to the adoption of best practices in the MEMAP, States “should commit” to adopt these practices.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration

We fully support the removal of the footnote to article 25 and the modifying of paragraph 65 of the commentary as it would increase transparency by requiring countries to enter an observation, reservation or position explaining their views.

OPTION 23 – Policy issues: Tailor the scope of MAP arbitration

The Confederation of Swedish Enterprise fully supports this option and encourages countries to include mandatory binding arbitration in their tax treaties or at least take steps in the direction of broader mandatory dispute resolution. Any limitation to the arbitration should be expressly defined in the treaty.

OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy

A favored nation clause would make the adoption of MAP arbitration easier for countries and is therefore a welcomed suggestion.

OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies

The Confederation of Swedish Enterprise supports this option as clarification of the relation between MAP arbitration and domestic law remedies would mean increased certainty for taxpayers.

OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

We agree that there might be circumstances under which a referral to MAP arbitration may be premature. However, a decision to defer the initiation of MAP arbitration should not be possible unless approved by the taxpayer.

OPTION 27 – Practical issues: Appointment of arbitrators

We share the belief that mutually agreed criteria for determining the appointment of arbitrators is essential for a well-functioning arbitration mechanism.
OPTION 28 – Practical issues: Confidentiality and communications

We agree with the proposed amendments.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

We welcome the initiative to develop a default decision-making mechanism in MAP arbitration.

OPTION 30 – Practical issues: Evidence

The Confederation of Swedish Enterprise welcomes the comment that the taxpayer be permitted to orally present its position in arbitration cases. The same should also apply in MAP cases.

OPTION 31 – Practical issues: Multiple, contingent and integrated issues

We support option 31.

OPTION 32 – Practical issues: Costs and administration

We support option 32.

OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

A provision addressing MAP issues in multilateral situations would be welcomed by the Confederation of Swedish Enterprise.

OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure

We support option 34.

On behalf of the Confederation of Swedish Enterprise

January 16, 2015

Krister Andersson
Head of the Tax Policy Department
Ms. Marlies de Ruiter  
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division  
Centre for Tax Policy and Administration  
OECD  

By Email: taxtreaties@oecd.org  

16 January 2015  

Dear Marlies  

Discussion Draft on BEPS Action 14: Make dispute resolution mechanisms more effective  

Thank you for the opportunity to comment on the Discussion Draft - BEPS Action 14: Make dispute resolution mechanisms more effective published on 18 December 2014 (the ‘Discussion Draft’).  

Multinational businesses should be taxed only once on their commercially generated profits and other business income. Governments have long recognised that agreeing double tax treaties and providing assurance and certainty are essential to remove a potentially significant barrier to international trade, and are important factors in countries’ ability to attract inward investment.  

The mutual agreement procedure (MAP) provisions in Article 25 of the Model Tax Treaty are a key element in ensuring that double taxation is eliminated in practice. It provides for resolution where two tax authorities may take different views on taxation of items subject to a tax treaty. It is particularly important (and has been used most often to date) for resolution of disputes arising from taxation of trading profits: in relation to transfer pricing (under Article 9 of the OECD Model Tax Treaty), permanent establishments (Article 5) and business profits (Article 7) where the establishment of countries’ taxing rights is heavily based on the gathering and interpretation of facts.  

Some tax authorities have made significant progress in ensuring that treaty obligations under MAP are met, and there are many examples where the process has worked well. In our experience most cases that get into MAP are ultimately resolved.  

However, we agree with the OECD that there is more that needs to be done, as evidenced by the length of the Discussion Draft. The main issues that arise currently are i) getting access to MAP and ii) the length of time that it takes for MAP cases to be resolved. In addition, the volume and pace of change arising from the BEPS project in areas including permanent establishment and transfer pricing will lead, in the short to medium term at least, to an increase in the number of disputes between tax authorities as new rules and approaches become established. This will increase the importance of having effective MAP practices.
The Discussion Draft is primarily focused on MAP, and as such we have directed our comments in this area. It remains important that countries have robust legislative and tax authority governance frameworks to ensure that disputes between tax authorities and businesses are dealt with efficiently. This will ensure that cases that go to MAP are appropriate. We welcome the additional work of the Forum on Tax Administration's MAP Forum (FTA MAP Forum) and their focus on audit procedures. As part of this, alternative dispute mechanisms, such as mediation, may be appropriate.

We strongly agree with the importance of a three-pronged approach to MAP as outlined in the Discussion Draft. The political will to ensure that treaty obligations are met will be essential, and the political backing for the BEPS project provides the opportunity for this to be achieved. The proposal for a monitoring mechanism to ensure that this political will is administered in practice will also be an essential tool, and we note the success that the OECD has had in monitoring countries’ practices in other areas, e.g. the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes in relation to peer reviews. We look forward to swift implementation of a framework for monitoring of countries’ MAP implementation.

The most appropriate and important resolution mechanism under MAP remains the inclusion in double tax treaties of mandatory binding arbitration. This is the only outcome that will ensure that a business is not taxed twice on the same profits and it should remain the best practice in the Model Tax Treaty as recommended by the OECD. We recognise that some G20 countries have reservations about mandatory binding arbitration on grounds of a sovereign nation’s right to tax. To the extent possible, we would welcome a programme of continuous improvement that enables countries to progress towards full mandatory binding arbitration, and note with interest the observation in the Discussion Draft that binding arbitration may be acceptable for some Articles of tax treaties in preference to others, which may be a useful starting point. We suggest that as part of the political commitment to MAP countries should be asked to publish their views in respect of binding arbitration to aid businesses with their decision-making. In addition, the monitoring process should outline countries’ progress towards binding arbitration in all double tax treaties.

It is also notable that the presence of a mandatory binding arbitration clause in a double tax treaty acts as a deterrent, such that cases may be settled by tax authorities under MAP without the need for the arbitration process to be invoked. This is in itself a useful safeguard. At the same time, it is important that the pre-arbitration part of MAP procedures functions as efficiently as possible in order to minimise the occasions when arbitration is necessary. It would be an unhelpful outcome if the presence of binding arbitration in a bilateral tax treaty were to encourage some of the practices highlighted in the Discussion Draft where tax authorities may seek to deny businesses access to MAP in the first place.

Many of the points raised in the Discussion Draft relate to the effective implementation and extension of the best practices set out in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP). We agree this will be helpful, particularly in combination with the proposed framework for monitoring tax authorities’ procedures for potential MAP cases.

Finally, a key challenge will be ensuring that tax authorities have sufficient resources in order to be able to satisfy obligations under MAP, especially in light of the potential for increased numbers of disputes (some of them multi-jurisdictional) arising from other areas of BEPS work.

The Discussion Draft is a comprehensive and helpful assessment of the difficulties that currently may arise in relation to MAP, and improvements that result from this and other work by the OECD will be welcomed by business. Detailed comments on some of the options proposed in the Discussion Draft are set out in the attached appendix.
If you would like to discuss any of the points raised in this letter, please do not hesitate to contact either me (bdodwell@deloitte.co.uk), Edward Morris (edmorris@deloitte.co.uk) or Alison Lobb (alobb@deloitte.co.uk). We would be happy to speak on this topic at the Public Consultation meeting on 23 January 2015 if it would be helpful.

Yours sincerely

W J I Dodwell
Deloitte LLP
Appendix

This appendix sets out specific comments on some of the options proposed in the Discussion Draft in relation to improving MAP.

Option 4 – Provide sufficient resources to a competent authority

This will be an important factor in ensuring that MAP treaty obligations can successfully be met. It is clear that this will be a challenge for many tax authorities, particularly given the expected increase in MAP cases in the short to medium term as new rules arising from other BEPS Actions are introduced and interpreted.

Option 6 – Better use of paragraph 3 of Article 25

Better use of paragraph 3 may have an important part to play in ensuring that the outcomes from other BEPS Actions, or other anti-avoidance rules introduced by countries, are implemented in a way that does not give rise to double taxation. It would be helpful to clarify the legal status of the second sentence of paragraph 3 of Article 25. In addition, best practice for competent authorities should be to ‘consult together for the elimination of double taxation in cases not provided for in the Convention’ in situations where double taxation resulting from domestic base erosion and profit shifting rules is capable of elimination using common treaty principles. Common treaty principles would include, for example, those in relation to Article 9 on transfer pricing and Article 7 on business profits. This is consistent with the approach proposed in Option 12 in relation to anti-abuse cases.

Option 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

Audit adjustments must be in accordance with the applicable double tax treaty. Furthermore, all audit adjustments should be available to go to MAP if a taxpayer so requests. At the very least, tax authorities that offer reduced audit settlements on condition that businesses waive their rights to MAP access should publish the circumstances in which this is the case and make clear that it is each business’s choice whether the settlement (and resulting double taxation) is to be accepted. The proposed monitoring mechanism for implementation of MAP may assist with ensuring that audit administration is in line with published policy.

Option 8 – Implement bilateral APA programmes

We strongly support this option. Businesses welcome the certainty that APAs can bring, and the changes brought about by the BEPS work are likely to increase their popularity. It is important for competent authorities and taxpayers to enter into APAs collaboratively. Some Tax Authorities regard APAs as part of their audit programme and see the ‘compromise’ result inherent in such agreements as a ‘loss’ of tax, which can hinder the process. The collaborative nature of an APA programme should be recognised as well as the significant savings in resource used by all parties (time and cost) compared to audit followed by MAP.

Option 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

A key issue that arises in relation to the use of MAP is the time that it may often take to get to resolution. Businesses would appreciate transparency within the process and swift resolution. Any measures that can improve the time taken to reach agreement would be welcomed.
Option 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

We agree with the proposal that MAP access should not be denied in cases where a treaty anti-abuse provision or a domestic anti-abuse rule that may conflict with the provisions of a treaty is applied. If countries seek to limit or deny access to MAP in such cases this should be advised to their treaty partners and also published so that businesses may make decisions accordingly.

Option 13 – Ensure that whether the taxpayer’s objection is justified is evaluated *prima facie* by both competent authorities

To ensure that access to MAP is not limited unduly, if one competent authority accepts a case into MAP the other should be obliged to do so as well. Combined with a provision for binding arbitration, this is an important provision in ensuring that cases are allowed access to MAP.

Option 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State

This is a helpful improvement, but does not necessarily assist with swift resolution of cases. The best practice for swift resolution is for requests to be made simultaneously to both competent authorities. We are not aware of a good policy or practical reason why this should not be the case.

Option 16 – Clarify the relationship between the MAP and domestic law remedies

Provision for domestic law remedies to be put on hold pending a MAP procedure may be helpful in some circumstances. In addition, countries publishing clear guidance on the relationship between MAP and domestic law remedies is essential to ensure that businesses have the necessary information to make decisions.

Option 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

This is a significant issue for businesses. The tax authority making the adjustment should in all cases agree to postpone collection of tax on the adjustment until the MAP is completed. It may be appropriate in some cases involving significant risk of non-payment for tax authorities to safeguard their position by requiring a guarantee or bond from the taxpayer that ultimately the tax will be paid.

Option 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

Many countries already allow self-initiated taxpayer adjustments into MAP. This is particularly important as in many countries businesses are legally required to make such adjustments, such as under self-assessment compliance requirements. A self-initiated adjustment should not be a bar for entry into MAP. This is consistent with co-operative compliance objectives.

Option 22 – Policy issues: Increase transparency with respect to MAP arbitration;
Option 23 – Policy issues: Tailor the scope of MAP arbitration;
Option 24 – Policy issues: facilitate the adoption of MAP arbitration following a change in treaty policy
We note that there is no current consensus amongst governments on moving towards universal mandatory binding MAP arbitration. The Discussion Draft identifies as one of the main policy concerns the issue of national sovereignty over taxation. It also highlights other potential obstacles and practical issues which have been identified by countries as reasons either singularly or cumulatively for them being sceptical of and not agreeing to arbitration. Businesses will welcome all the proposed options in relation to arbitration which go some way to dealing with those identified concerns.

The principle of arbitration should remain a fundamental element in the dispute resolution process. Countries should be encouraged to adopt binding arbitration in double tax treaties, either by negotiation bilaterally or via an implementation mechanism such as the Multilateral Instrument envisaged under BEPS Action 15. Where countries have issues of law or principle with binding arbitration then these should be published. In the absence of a country’s ability to agree to full binding arbitration then the flexibility to adopt a modified version (e.g. binding arbitration restricted to some Articles of the double tax treaty, as mentioned in Option 23, or arbitration with a non-binding outcome) is desirable. The requirement to go to arbitration after a set period of time is likely, on its own, to add impetus to the MAP process and encourage settlements prior to arbitration.

**Option 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies**

The publication of this information by countries will ensure that businesses can make appropriate decisions.

**Option 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate conditions**

The circumstances would have to be very clearly and narrowly defined and subject to the proposed monitoring procedure.

**Option 27 – Practical issues: Appointment of arbitrators**

The concern with being prescriptive in setting criteria for the qualification of an arbitrator is that in some disputes (e.g. transfer pricing experience) many individuals who otherwise would be excellent arbitrators would be excluded. This may be best left to the common sense of the competent authority (and to the other arbitrators in relation to the chairman).

**Option 28 – Practical issues: Confidentiality and communications**

The arbitrator and the taxpayer should be made parties to the arbitration Agreement to provide a contractual basis for dealing with confidentiality. As regards forms of communication we believe normal e-mail communication (possibly with additional safeguards) should be possible although we are aware of one case in which two competent authorities could not agree on that form of communication. The OECD Model Tax Convention contains in its annex a sample mutual agreement on arbitration and this form of agreement could be modernised and expanded to assist with this.

**Option 29 – Practical issues: Default form of decision-making in MAP arbitration**

The ‘final offer’ approach or ‘baseball arbitration’ is an attractive option for resolution of MAP disputes. By the time a case reaches arbitration the facts and issues will have been considered by the business, commonly also by professional advisers, by one tax authority under audit, and by the second tax authority
under MAP. There may be limited additional expertise that arbitrators can bring to this process under the ‘independent opinion’ approach. Baseball arbitration has the advantage that it encourages competent authorities to focus on the issues involved and potentially adopt a more reasonable approach (rather than a starting point for negotiations) at an earlier stage. It may also assist with questions about the need for directly relevant expertise in the appointment of arbitrators.

Option 30 – Practical issues: Evidence

The arbitrators may need facts from the business (whether or not previously considered by the competent authorities) and a mechanism should be put in place to allow the arbitrators to have access to the business on request.

Option 32 – Practical issues: Costs and administration

The best way of minimising costs in relation to arbitration is to have written submissions with a maximum length and for the arbitrators not to meet (other than in exceptional circumstances) but conduct discussions in video or telephone conference calls. A baseball arbitration approach is also likely to reduce costs.

Option 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

One point that tax authorities may wish to consider further is whether in some cases joint audits with an in-built MAP agreement at conclusion would be appropriate in terms of efficiency for tax authorities and certainty for businesses. For example, this could be considered in situations where the transfer pricing profit split method is applied.

Option 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure

We agree with the proposals for the treatment of interest and penalties. Countries should commit to apply interest on repayments following resolution under MAP in the same way as interest is charged on late payment of tax (albeit that there may be a rate differential based on commercial lending/borrowing rates) and consistent with the usual domestic regime for interest payments or repayments in relation to tax that is unrelated to a MAP claim. Currently some territories differentiate and do not include any interest on repayments made following MAP.

In addition, any secondary adjustments should also be treated in the same way as the original adjustment and dealt with under the MAP process at the same time.
European Business Initiative on Taxation (EBIT)

Dear Marlies,

EBIT is grateful for this opportunity to provide comments on the OECD Public Discussion Draft on BEPS Action 14 entitled: “Make Dispute Resolution Mechanisms More Effective” 18 December 2014 – 16 January 2015 (hereinafter “the Discussion Draft”).

**General comments**

EBIT Members welcome the work done by the OECD to try to make existing dispute resolution mechanisms more effective through a preliminary inventory and identification of existing obstacles to the current Mutual Agreement Procedure (MAP) and offering potential solutions to address those obstacles. This issue is highly relevant and extremely important to us.

As businesses working across borders every day, we see this as an important and necessary first step, yet more needs to be done to make a real difference. We urgently need significant and material improvements to the MAP system that will really eliminate double taxation in practice, create more legal certainty and predictability for business and, importantly, allow for definitive resolution and final closure of cases within acceptable time-frames.

EBIT notes that apparently no consensus could be reached within the CFA around universal mandatory and binding arbitration, which is disappointing from our perspective. Whilst we welcome the many options for improving MAP offered in the Discussion Draft, for the Members of EBIT, mandatory and binding arbitration is the preferred and most effective solution for resolving the still growing number of deadlocked MAP cases, and for eliminating double taxation. Mandatory and binding arbitration could also help speed up MAP timelines (e.g. binding, compulsory arbitration after a 12-month no breakthrough period). Binding arbitration, with no ‘get-outs’ for tax authorities, should in our view therefore surely be a key recommendation of the OECD.

In addition, some of the proposed language revisions mentioned in the Discussion Draft are in our view unfortunately too non-committal. We believe that standards should also be seen as mandatory (i.e. “shall” rather than “could”). In the absence of this direct language, EBIT Members are concerned that the dispute resolution process going forward will not ensure a single level of tax nor reduce double taxation.
EBIT’s Members welcome the proposed “specific measures” to adopt “minimum standards” for all BEPS-44 to commit to but it will be essential that the standards be mandatory and as practical as possible so they can be easily adopted and built on by all tax administrations. Mere political commitments will not suffice in our view to ensure implementation of specific measures. We believe that the OECD needs to take this approach one step further and ensure that the highest tax policy officials of BEPS-44 tax administrations collectively support and implement the specific measures and that they also be held accountable for the results. For EBIT’s Members, the new FTA MAP Forum is the preferred dedicated vehicle for taking this to the next level. The “monitoring of the overall functioning of the MAP procedure, including assessment of the measures to which countries will have committed” envisaged in the Discussion Draft, should be carefully set up. It is essential that such monitoring ensures full transparency and accountability in order to boost companies’ confidence in the dispute resolution system and the elimination of double taxation going forward.

Specific comments

1. ENSURING THAT TREATY OBLIGATIONS RELATED TO THE MUTUAL AGREEMENT PROCEDURE ARE FULLY IMPLEMENTED IN GOOD FAITH

EBIT welcomes the obstacles and corresponding options presented to ensure that treaty obligations related to MAP are fully implemented in good faith. With regard to Option 1, we do not see a material difference between the phrases “shall endeavour to resolve” and “to seek to resolve.” EBIT therefore recommends removing the words “to seek,” so as to stress that competent authorities are under an obligation to resolve MAP cases.

2. ENSURING THAT ADMINISTRATIVE PROCESSES PROMOTE THE PREVENTION AND RESOLUTION OF TREATY-RELATED DISPUTES

EBIT Members fully agree with the proposed solutions and with the concept that administrative “best practices” are critically important to ensuring competent authorities are able to effectively and efficiently carry out their mandates and treaty obligations. We do have some concerns and recommendations regarding the best way in which some of the solutions and specific measures can be implemented.

C. Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes

In EBIT’s view, participating countries should commit to adopting the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. We therefore recommend replacing the verb “could” with “shall” in the proposed revision under OPTION 3.

D. Lack of resources of a competent authority

With regard to OPTION 4 “Provide sufficient resources to a competent authority”, EBIT recommends replacing “could” with “shall” in the proposed revision text.

E. Performance indicators for the competent authority function and staff

With regard to OPTION 5 “Use of appropriate performance indicators”, we recommend replacing “could” with “shall” in the proposed revision text.

H. Lack of advance pricing arrangement (APA) programmes

EBIT welcomes OPTION 8 in the Discussion Draft and the assessment that bilateral APAs provide an increased level of tax certainty in both treaty jurisdictions, make double taxation less likely and may proactively prevent transfer pricing disputes. EBIT strongly recommends that all BEPS-44 participating countries implement bilateral APA programmes, and also urge the OECD to identify and promote best practices.

I. Failure to consider the implications of a taxpayer’s MAP or APA case for other tax years

We support the implementation of appropriate procedures by participating countries provided such procedures are kept as simple, efficient and business-friendly as possible.

3. ENSURING THAT TAXPAYERS CAN ACCESS THE MUTUAL AGREEMENT PROCEDURE WHEN ELIGIBLE

EBIT generally agrees with the obstacles identified and solutions offered by the Discussion Draft.

J. Complexity and lack of transparency of the procedures to access and use the MAP

With regard to OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP, EBIT welcomes the solution offered and recommends replacing “could” with “shall” in the proposed revision.

K. Excessive or unduly onerous documentation requirements

EBIT’s Members welcome the options and solutions proposed by the CFA in the Discussion Draft. If indeed implemented across the board by participating countries, they would take away most of the excessive and unacceptable obstacles which some of our Members are increasingly being confronted with today in certain countries when they flag a desire to commence a MAP procedure. However, this remains a persistent and fundamental problem in practice in certain countries. EBIT recommends that competent tax authorities develop and adopt consensus guidelines for addressing practical and legal impediments to MAP access.

L. Right to access MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied

We welcome OPTION 12: clarify the availability of MAP access where an anti-abuse provision is applied per the Discussion Draft. Companies urgently require much-needed certainty and predictability as to what the objective standards on the application of such anti-abuse provisions will be, especially in the context of BEPS Action 6, which may result in a proliferation of domestic anti-abuse rules to deny treaty benefits.

EBIT therefore recommends formally adding to the Commentary to Article 25 that the competent authority of the country which believes that its domestic laws preclude the application of a treaty benefit should fully inform their treaty partner counterpart of this fact, and also that the interpretation and/or application of that rule falls within the scope of the MAP.
EBIT Members consider that the denial of the discretionary grant of treaty benefits should also be within the scope of MAP and recommend to include this formally in Article 25 as a bilateral resolution of a proposed denial of treaty benefits under the discretionary grant provision. The Commentary related to Article 25(2) should be amended to say clearly that the interpretation and application of domestic laws are subject to the MAP negotiations.

N. The use of domestic law remedies may have an impact on the use of the MAP

With regard to proposed OPTION 16, one of our Members has seen first-hand instances in which the overseas competent authority has not been able to take forward/resolve a MAP application on account of their hands being tied by a domestic ruling (leaving them with double taxation). In our view it is fundamental that competent authorities are free to undertake MAP discussions free of the constraints of any domestic rulings.

4. ENSURING THAT CASES ARE RESOLVED ONCE THEY ARE IN THE MUTUAL AGREEMENT PROCEDURE

Universal mandatory and binding arbitration is the preferred and most effective approach from our perspective but we understand that unfortunately there is no consensus among countries.

R. Lack of a principled approach to the resolution of MAP cases

EBIT Members strongly agree with the notion that competent authorities should enter every single MAP case negotiation based on a “fair and principled” approach. We welcome Option 20 but we suggest that best practices should also be considered and addressed by the FTA’s MAP Forum.

S. Lack of co-operation, transparency or good competent authority working relationships

EBIT considers that competent authorities must take responsibility for the MAP process i.e. ensure the proper functioning of MAPs, implementation of specific measures and full transparency. The language proposed under OPTION 21 is very non-committal in our view and would depend solely on the willingness and reasonable behaviour of the relevant competent authorities in practice, without any accountability for the implementation of specific measures and adherence to minimum standards. EBIT’s Members strongly believe that the FTA’s MAP Forum has a role to play in proactively promoting better cooperation, transparency and good competent authority working relationships, e.g. via training programmes and pooling and stimulating best practices. We also believe it is essential that policy officials at the highest levels of tax administrations subscribe to this and agree on specific procedures and protocols to set appropriate expectations amongst competent authorities and taxpayers. Ensuring convincing moves towards full transparency and accountability in the short run will certainly help boost and restore our Members’ confidence in the MAP system and the elimination of double taxation going forward.

T. Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases

EBIT Members find it disappointing that the OECD seems to have for now given up on the prospect of a consensus on mandatory and binding arbitration, particularly when the other

BEPS Actions and proposals will undoubtedly lead to a significant increase in the need for dispute resolution. Binding arbitration, with no ‘get-outs’ for tax authorities, should surely be a key recommendation of the OECD. In this respect bilateral investment treaties are a good example of where access to arbitration has been agreed between treaty partners, and, importantly, have shown to be effective. Helpfully, each BIT sets out the arbitration mechanism in detail and gives countries the ability to agree the arbitration process around some key principles.

Mandatory and binding arbitration could also help speed up MAP timelines (e.g. binding, compulsory arbitration after a 12 month period with no breakthrough). Whilst the timelines for access to MAP are discussed in the Discussion Draft, there is no commentary on possible solutions to ensure a faster resolution process. We do appreciate that other suggested measures may assist here, e.g. improved expertise, clear documentation requirements, etc.

EBIT recommends that at a minimum those participating countries which aspire to best practice, agree to a mandatory arbitration process (so that where two countries have signed up to mandatory arbitration it will create more certainty bilaterally). This should encourage the contracting states that currently dissent, to adopt the same approach later so as to be in line with best practice.

Whilst there are helpful suggestions in the Discussion Draft to improve the treaties themselves, EBIT Members note that there is no comment on concrete improvements to the treaty network which is becoming increasingly important as MNCs expand into new markets globally. Given the time it would take to negotiate all treaties, a supra-national agreement would achieve this.

Role of the taxpayer

EBIT believes that taxpayers should have a material role in the arbitration process. In certain cases, the taxpayer may be in the best position to assist the arbitration panel in understanding the relevant facts and economic analyses. We agree with the recommendation in Option 30 yet encourage the OECD to more explicitly consider and embrace the role of the taxpayer in the arbitration process.

EBIT trusts that the above comments are helpful and will be taken into account by the OECD in finalising its work in this area. We are committed to a constructive dialogue with the OECD and are always happy to discuss.

Yours sincerely,

European Business Initiative on Taxation – January 2015

For further information on EBIT, please contact its Secretariat via Bob van der Made, Tel: +31 6 130 96 296; Email: bob.van.der.made@nl.pwc.com.

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16 January 2015

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Comments on the OECD Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. De Ruiter:

EY appreciates the opportunity to submit these comments to the OECD on the discussion draft on BEPS Action 14: Make dispute resolution mechanisms more effective, dated 18 December 2014 (Discussion Draft).

The Discussion Draft recognizes the importance of improving the effectiveness of the mutual agreement procedure (MAP) as a component of the BEPS project. Increasingly, treaty-related disputes go unresolved. Changes in the international tax environment as a result of the BEPS project will undoubtedly put even more pressure on the current dispute resolution mechanisms. Tax treaties cannot facilitate cross-border investment and provide a stable investment environment unless the treaty is effectively implemented by the tax administrations of the respective countries. It is therefore critical to find a way to develop solutions in this area.

Action 14 mandates that dispute resolutions be more effective, which may be achieved by introducing mandatory binding arbitration. The effectiveness of the MAP would be greatly enhanced by this measure and every effort should be made to find a way forward to reach consensus on this issue so that it constitutes a minimum standard to which countries would commit. This measure has proven extremely useful in practice for resolving disputes when negotiations did not lead to resolution. It also encourages a more disciplined approach to the dispute resolution process as a whole.
Therefore, a broader discussion of mandatory binding arbitration should be facilitated so that the process may be fully understood by those hesitant to undertake this approach. Moreover, it would be an opportunity for countries that have already implemented this measure to share their experiences about the process as well as the legal hurdles that had to be overcome.

While there are merits to the “independent opinion” approach for decision making in the arbitration process, the “final offer” approach may be preferable from a legal, practical and timing perspective. Concerns about sovereignty may be alleviated because under this approach, the final decision is based on evaluating and choosing one of the proposals put forward by the competent authorities of both contracting states rather than having an independent third party resolve the dispute by rendering his own independent adjudication.

It will be important to ensure that mandatory binding arbitration does not alter the rules or conditions for accessing MAP, however. We have observed that in some cases, the fact that mandatory binding arbitration exists in a treaty has led the competent authorities to give further consideration to whether the case should have access to the MAP process in the first place.

Reaching consensus on mandatory binding arbitration is critical and should be given as much time as necessary, even if this means extending the September 2015 deadline.

Additional comments on some of the options outlined in the Discussion Draft relating to arbitration

**Option 22**, deleting footnote 1 to Article 25(5), would be an appropriate way to increase transparency with respect to country positions on mandatory binding arbitration.

In general, the option to request arbitration should not be limited in scope, for example to actual double taxation cases only. **Option 23**, which proposes tailoring the scope of MAP in order to encourage more countries to adopt mandatory binding arbitration, could be acceptable, provided such proposal is for a limited time frame. For example, one option would be to provide that for the first 5 years, only transfer pricing cases would be submitted to arbitration. After an evaluation of the MAP arbitration process as applied in those cases, further matters could be added to the process. The risk of this approach however, may be that the initial period of evaluation is never extended and so it would be necessary to have rules in place to mandate an assessment of the process after the initial phase.

Further, **Option 24** (proposal with respect to the most favored nation provision), is practical and deserves serious consideration.
The Discussion Draft includes several proposals to resolve practical issues that arise in the context of MAP arbitration. **Option 26**, which proposes deferring MAP arbitration in appropriate circumstances, may be a practical solution in certain situations where, for example, the competent authorities are close to reaching a resolution in MAP. Although there is practical merit in this proposal, it would be necessary to ensure that this option is not exploited by a tax administration. To avoid this, one suggestion would be to require both competent authorities to agree to extend the period for MAP negotiation for a specific period of time before the arbitration phase commences, and notify the taxpayer of such extension. This extension should also be agreed to by the taxpayer.

Competent authorities should be required however, to share their final offers within a reasonable period before the arbitration deadline and continue to negotiate based on those offers only. This would likely prevent a competent authority from taking too aggressive a position at the outset of the proceedings only to give up on the position once the arbitration phase was reached.

With respect to the appointment of arbitrators, **Option 27** provides some practical proposals. An analogy may be drawn with the procedure under the EU Arbitration Convention, where EU Member States appointed a limited number of arbitrator candidates and the list of candidates is public. The potential arbitrators must attest to their fitness to serve as arbitrators. It should be made clear that MAP arbitrators, like judges, mediators and commercial arbitrators, have a strict confidentiality obligation and proper procedures ought to be put in place in this regard. Further, consistent with **Option 28**, it is important that confidentiality be maintained as this is central to the integrity of the process. The practice of some competent authorities of requiring that taxpayers authorize disclosure of relevant information to arbitrators is prudent. Reference can be made to the experience and procedures under the EU Arbitration Convention in this respect.

**Manual on Effective Mutual Agreement Procedures**

We commend the OECD on the excellent work it has done in developing the Manual on Effective Mutual Agreement Procedures (MEMAP). The high value of recommendations in MEMAP is evident from the Discussion Draft, which suggests in many cases that countries commit to the best practices currently included in the manual. We would recommend that the OECD take a further step in this regard and incorporate the best practices of the MEMAP in the Commentary to Article 25 of the OECD Model Tax Convention on Income and Capital (OECD Model).

The Discussion Draft provides a catalogue of issues to be addressed in order to enhance the MAP process and offers a number of valuable solutions. Below are some additional comments on some of the options identified in the Discussion Draft.
1. Ensuring treaty obligations related to MAP are fully implemented in good faith

**OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)**

The suggested addition to paragraph 5.1 of the Commentary on Article 25 of the OECD Model to clarify the importance of resolving cases presented under Article 25(1) might help, but will likely not go far enough in reaching the goals set by the Discussion Draft. When a tax treaty is entered into, it should be made clear that double taxation or taxation not in accordance with that treaty is unacceptable and that the term “shall endeavour to resolve” means nothing less than “shall resolve.”

**OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties**

The suggestion that countries include Article 9(2) of the OECD Model in all their tax treaties is helpful. However, it should be reiterated that the absence of Article 9(2) is not grounds for denying MAP in transfer pricing cases and that such a position would be contrary to the Commentary on Article 25. Article 25(3), which allows for discussions between the competent authorities in cases where the resolution of double taxation is not provided for in the tax treaty, can be applied in cases where Article 9(2) is not included in the treaty.

2. Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

**Paragraphs 12 and 13 of the Discussion Draft**

The involvement of the FTA MAP Forum in the work on improving the effectiveness of dispute resolution mechanisms is welcome as long as that involvement is in line with the commitments outlined in the Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement. Competent authorities should have a substantial role in the process of enhancing administrative practices and monitoring the overall functioning of the MAP. However, the work of the FTA MAP Forum may not be as transparent as it could be, it should involve as many competent authorities as possible, and given its mandate it should have a business advisory committee. In addition, the timing of the FTA work should be coordinated with the BEPS project, to avoid having countries implement the measures with respect to other BEPS Actions without considering the outputs of the FTA MAP Forum and the OECD dispute resolution working group with respect to developing cooperation and monitoring mechanisms.

**OPTION 3 – Ensure the independence of a competent authority**
Independence is essential to effective and efficient tax administration and dispute resolution. This is particularly important when a country’s domestic dispute resolution processes – administrative and/or judicial – are perceived as not offering a realistic chance of success for a taxpayer. In addition to the relevant best practices included in the MEMAP, the MAP function should be placed in a dedicated separate department within the tax administration at the same or higher level as domestic administrative appeals departments, where the actions of tax administrations can be subjected to administrative review.

OPTION 6 – Better use of paragraph 3 of Article 25

It would seem especially important to clarify the legal status of an Article 25(3) mutual agreement in the domestic legal order of various countries and to ensure it is being employed where needed. Article 25(3) could also be helpful as a preemptive dispute resolution tool in cases where there is a high probability of double taxation such as in the third jurisdiction in triangular cases.

OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

This is an issue that has been discussed in the MEMAP, and it is so serious and detrimental to the effectiveness of the MAP process, as well as being incompatible with the spirit of double tax treaties, that it merits special attention. In practice, offers of audit settlements are increasingly being conditioned on taxpayers surrendering their right to invoke MAP, and as a result many cases of double taxation remain unresolved. This practice should be halted. The Commentary on Article 25 should state unambiguously that such provisions in audit settlement agreements are null and void and not binding on competent authorities.

The alternative suggestion for implementing procedures for spontaneous notification between competent authorities on the details of settlements precluding access to MAP is not acceptable because increased transparency, on its own, would not be sufficient to protect taxpayer interests and because it would endorse a practice that is inconsistent with the purpose and goals of the MAP.

OPTION 8 – Implement bilateral APA programmes

Bilateral APA programmes are effective tools for preventing double taxation and transfer pricing disputes. They may also foster closer and better bilateral relations between tax authorities because they help resolve transfer pricing issues in a transparent, principled and consistent manner. However, APAs are expensive and time consuming for both taxpayers and tax authorities. Introducing such a programme requires significant investment in developing the appropriate capacity and maintaining
qualified resources. To promote commitment to introducing APA programmes the OECD could consider offering support for countries willing to pursue this option – for example, in the form of training of tax administration personnel and hands-on assistance with fledgling APA programmes.

Bilateral APAs are an extension of the MAP programme and should be treated as a viable, and often superior, dispute resolution tool for recurring international tax disputes, rather than as a privilege available in limited cases.

**OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs**

APA rollbacks are an extremely valuable component of APA programs, benefitting both taxpayers and tax authorities. Rollbacks can allow taxpayers to implement a consistent result in prior open years, typically without adverse consequence. Without a rollback, taxpayers may be reluctant to approach the tax administration for an APA for fear of excessive penalties or interest exposure in prior periods. Much like voluntary disclosure programs, penalty protection in APA rollbacks encourages tax compliance. Rollbacks may also serve to resolve audit disputes in back years, while the APA secures agreement for future years.

3. **Ensuring that taxpayers can access the MAP when eligible**

**OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP**

**OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance**

It would significantly help if the MEMAP were given more binding power, for example, by elevating its status and making it part of the Commentary on Article 25. Tax authorities can currently deviate from the MEMAP without any consequences. If a monitoring mechanism were established that serves to follow up on compliance with the recommendations of the MEMAP, there would be an incentive for countries to consider the MEMAP more closely. The FTA MAP Forum, with appropriate business advisory involvement, could serve as the body responsible for monitoring that individual countries’ administrative processes are applied appropriately and that access to MAP is provided effectively.

**OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied**
The political commitment to eliminate taxation not in accordance with a tax treaty will not be successful if access to MAP is denied in cases where a domestic or international anti-abuse provision is applied. The proliferation of domestic anti-abuse provisions, together with inconsistent application of such provisions by the courts of different countries, will undoubtedly contribute to double taxation, and there must be a way to resolve those cases. Unresolved double taxation would serve as a “hidden” penalty that would apply in addition to penalties that are imposed pursuant to domestic laws. Such treatment would be particularly harsh in cases where the taxpayer considers that the conditions for applying the treaty anti-avoidance rule are not met or that a domestic rule is not in line with the applicable double tax treaty. Recourse to MAP should be available where the requirements of Article 25 are met.

**OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”**

**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State**

The Commentary on Article 25 would benefit from clarification of the meaning of the phrase “if the taxpayer’s objection appears to it to be justified.” The text in the Commentary should be as inclusive as practically possible underlining that the meaning of “appears to” is broad and should only exclude marginal cases. In practice, taxpayers often encounter refusal by tax authorities to take up cases due to a lack of “double taxation” or where, based on domestic law, penalties apply in relation to the primary adjustment. It should therefore be made clear in the Commentary that all cases of taxation not in accordance with the treaty are eligible for MAP, even if such cases do not result in double taxation or where statutory penalties have been applied.

Amending Article 25(1) to clarify that a request for MAP can also be filed to the competent authority of the other country would help, and is already covered in the MEMAP, where taxpayers are encouraged to file MAP requests simultaneously in both jurisdictions.

**OPTION 16 – Clarify the relationship between the MAP and domestic law remedies**

Tax authorities should commit to clarify the relationship between MAP and domestic law remedies. For example, some countries clarify in their domestic law that taxpayers may suspend domestic law proceedings while the MAP is pending, which is a good practice. Countries should commit to provide guidance in this context.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**
The collection of tax assessments creates cash tax costs for taxpayers. To the extent that disputes are resolved quickly and overpaid tax is refunded swiftly, the cost can be minimized. However, tax disputes tend to take a long time to resolve and collected taxes may not be refunded in certain jurisdictions. Therefore, taxpayers should qualify for extensions of time for payment when filing for MAP until the MAP is completed.

The MEMAP provides valuable guidance on this issue and should be broadly applied.

**OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure**

Uncertainty as regards the time limits to file for MAP is likely to cause cases to be excluded from the MAP process. Therefore, clarification of these time limits is much needed. We also note the guidance included in the MEMAP to avoid exclusion from MAP relief even when countries opted out of including the second sentence of Article 25(2) in their treaties.

We generally support the suggestion to add to the Commentary on Article 9 a provision limiting the time during which an adjustment pursuant to Article 9 paragraph 1 may be made. However, such change should be carefully worded so as not to allow any limitation to the taxpayer’s right to access MAP.

**OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure**

Self-initiated adjustments are often not allowed under domestic law. Obtaining corresponding adjustments would require additional input from competent authorities and the MAP process. However, if the arm’s length standard is to be applied objectively, there seems to be no proper argument to disallow self-initiated adjustments provided they are filed timely. In this respect, Canada’s implementation of rules for the acceptance of downward (self-initiated) adjustments into the MAP process, albeit with conditions, is a step in the right direction.

4. **Ensuring that cases are resolved while in the MAP**

**OPTION 20 – Ensure a principled approach to the resolution of MAP cases**

**OPTION 21 – Improve competent authority co-operation, transparency and working relationships**

The MAP process is likely to benefit from training and specific hiring (experienced hires) to balance out the obstacles raised under Options 20 and 21. Monitoring the performance of the competent
authorities by a body such as the FTA MAP Forum, with appropriate business advisory involvement providing transparency, could also serve to reach the goal of ensuring principled approaches and improving competent authority cooperation. Taxpayer involvement may be a relevant factor to reduce the identified obstacles as well, however. Improving communication, transparency and good working relationships should be a goal not only as regards interactions between tax authorities, but also as regards interactions between tax authorities and taxpayers.

**OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure**

Ideally, interest and penalties should be considered part of the MAP claim. Similarly, MAP claims should also include secondary adjustments.

If penalties are applied statutorily, they may have the effect of barring access to MAP and for that reason they need to be considered. Reference can be made to the same discussion under the operation of the EU Arbitration Convention. Where possible, there ought to be symmetry between the levying of late payment interest and refund interest following resolution under MAP. Consideration of a treaty partner’s treatment of interest may provide alternatives for the equitable management of a significant burden of sometimes nondeductible interest costs. In particular participating countries should commit to interest being levied or paid in the same way as for tax demands or repayments unconnected with a MAP claim in their territory. Currently some jurisdictions differentiate and do not include any interest on repayments made following MAP.

Finally, the waiving of interest for periods of undue delay during the MAP process (which could be considered anything beyond 2 years) would be considered fair and reasonable given the government to government character of the procedure.

5. **Additional obstacles identified and options suggested**

*Other administrative practices not mentioned in the report that affect the effectiveness of MAP*

In practice the initiation of a MAP often triggers a tax audit in the other country. The tax authorities conduct these audits in an attempt to identify grounds for collecting additional tax before having to make a corresponding adjustment. This practice is an obstacle for MAP, as taxpayers rarely want to face a second audit and therefore forego initiation of MAP.

Another obstacle encountered in practice is that a lot of time in the MAP process may be lost where the competent authorities present unreasonable positions at the outset of the process and continue to
request additional information from the taxpayer. Initiating the MAP process with extreme positions fosters distrust and generates an unwillingness to cooperate. Thus, the MAP is slowed down altogether.

**Additional measures (other than arbitration) that could be adopted in order to facilitate the resolution of a MAP case**

Mandatory binding arbitration is the ultimate tool for ensuring resolution of MAP cases. However, the following additional measures may facilitate or accommodate resolution of tax disputes as well.

Mediation may be an excellent way of resolving treaty disputes (domestically or bilaterally) that are relationship-based. Due consideration should be given to using it more broadly.

A forum should be made available to allow for informal escalation of issues between competent authorities to resolve cases. This could include independent third party arbitration if necessary. Often MAP obstacles are rooted in government-to-government procedures or disagreement on having to give up revenue base and less so in taxpayer-government discussions. This forum or tribunal might operate by way of a form of peer review. An example of how the FTA MAP Forum could be involved in monitoring the application of the MAP would be mandating it to develop and maintain a platform for reporting unresolved MAP cases or bad administrative practices. The results could be evaluated by an independent review body within the FTA MAP Forum and a sub-committee within that forum could then be a precursor for an international tax dispute resolution center. Alternatively, the independent forum or tribunal could consist of authoritative experts based at international institutions such as the OECD, the UN or another independent qualifying organization.

Fundamentally amending the principles under which double taxation disputes are resolved could be considered by allowing the taxpayer an alternative to MAP – for example, the option to take the dispute to an independent expert panel not unlike the dispute resolution procedure available under the OECD Guidelines for Multinational Enterprises.

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The Discussion Draft provides a catalogue of issues to be addressed in order to make improvements to the operation of the MAP process. There is urgent need for an efficient and effective dispute resolution mechanism today and the need will be all the greater in the future with the uncertainty and increase in disputes that is expected to arise with the measures being developed in the BEPS project. Therefore, the OECD should ensure that improving dispute resolution remains high on the agenda for
the BEPS project and is included in the discussions with respect to Action 15 and the multilateral instrument.

If you have questions or would like further information regarding any of the points discussed above, please contact Barbara Angus (barbara.angus@ey.com), Arlene Fitzpatrick (arlene.fitzpatrick@ey.com), Gerrit Groen (gerrit.groen@ey.com), Paul Mulvihill (paul.f.mulvihill@ca.ey.com), Craig Sharon (craig.sharon@ey.com), Monique van Herksen (monique.vanherksen@ey.com), or me, Alex Postma (alex.postma@ey.com).

Yours sincerely
On behalf of EY

Alex Postma
COMMENTS ON THE DRAFT DISCUSSION DOCUMENT ON BEPS ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE.

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«BEPS Action 14: Make dispute resolution mechanisms more effective: Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases».

We have taken the opportunity to draw some commentaries, following the invitation of the OECD Committee on Fiscal Affairs to all interested parties to comment on the obstacles and options described in the Discussion Draft and to identify other obstacles to an effective MAP that are not addressed in the discussion draft. We have included as well different options to address some of the obstacles identified in the note, in particular, concerning organizational matters to ensure that administrative processes promote the prevention and resolution of treaty related disputes.

I. Introduction.

The BEPS cornerstone is with no doubt action 14 due to a couple reasons: first, since the actions to counter BEPS must be complemented with the needed legal certainty and predictability for business, such legal certainty could be reached in an internationally coordinated way, mainly by means of a empowered and reloaded Mutual Agreement Procedures (hereinafter MAP) program; and, second, MAP program performs somewhat the equilibrium between the Tax Administrations and Taxpayers, so that the improvement of the effectiveness of the mutual agreement procedure is a must for the countries concerned and international bodies.

We do envisage that the interpretation and application of novel rules resulting from the BEPS work will introduce elements of uncertainty and tax conflicts that should be minimised as much as possible. Therefore, BEPS Action 14 must examine and address obstacles that prevent countries from solving treaty-related disputes under the MAP and consider any other alternative dispute resolution methods, as the existing MAP provisions in tax treaties with a mandatory and binding arbitration provision. We consider highly recommendable to establish a monitoring mechanism or Commission to check the implementation of the commitments agreed on such topic with participation of the competent authorities and other representatives of legal operators and businesses. Such monitoring mechanism in hands of an international agency or body may be included in the BEPS Multilateral Instrument.

Nevertheless, non-OECD countries and little experienced countries on MAP could produce the lack of consensus to solve international tax conflicts and the no observation of the
international tax standards by such countries. Such inconsistencies could lead to an increase of the number of unresolved tax conflicts.

II. Ensuring that Treaty Obligations related to the MAP are fully implemented in Good Faith.

The dispute resolution mechanism provided by Article 25 of the OECD Model obliges, as a part of the International Tax Treaty – Double Taxation Convention, to a Contracting State to comply and implement in good faith the provisions of abovementioned article, in accordance with its terms and in the light of the object. The full implementation of Article 25 offers some obstacles to implement the content of article, in particular, the absence of an obligation to resolve MAP cases presented under Article 25(1).

As described in Paragraph 2 of Article 25 competent authorities “shall endeavour” to resolve a MAP case by mutual agreement. It has been argued that the absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP, which is one the pitfalls of the MAP. Therefore, this misinterpretation must be faced with legal tools for the taxpayers asking for the country responsibility before the judicature or the International Commission or Forum in charge of the MAP monitoring task.

In our view, just explaining via Commentaries to the OECD Tax Treaty Model Convention the obligation to seek to resolve the case is not enough. It is necessary, first, to monitor the tax conflict life and the countries’ efforts to reach an agreement, and second, to resolve the case in a principled, fair and objective manner in accordance of International Law. We cannot forget the different possibilities used by countries through reservations and observations for not following the Model Tax Convention and avoiding the OECD recommendations.

These two obstacles (Obligation to resolve & way to resolve) could only be solved if there is an international and independent body in charge of the MAP monitoring cases with sanctioning power in case of DTC breach and obviously if there is a truly political commitment for a powered MAP. If the competent authority has not obligation to explain why there is no solution for a tax conflict in a DTC context, in fact the tax treaty obligations are triggered and Article 25 would not have any kind of legal effects.

III. Ensuring that Administrative Processes Promote the Prevention and Resolution of Treaty Related Disputes.

In times of fiscal constraint Tax Administrations increasingly scrutinize cross-border transactional flows to assure or improve a revenue base, heightened pressure has been brought to bear on those charged to ensure that the principles embodied in the DTC network are properly applied to minimize incidents of double taxation, unintended double non-taxation and taxation otherwise not in accordance with applicable tax conventions. So that, MAP effectiveness must be an obligation in order to meet the needs of both governments and taxpayers or revenue and predictability and legal certainty.

Undoubtedly, Tax Administration practices may ensure an environment in which competent authorities are able to fully and effectively carry out their mandate. Nevertheless, most of Tax
Administrations jeopardizes such environment, in a way or another, i.e. the effectiveness of the MAP could be triggered. Let’s see some examples:

A) Where a MAP competent authority is not sufficiently independent from a tax administration devoted to audit or examine, for instance, because:

- The tax audit personnel and the MAP competent authority direct or indirectly involved in a tax conflict are the same or there is any kind of influence from the tax inspection to the competent authority. It is highly recommended that competent authorities remain independent from the staff who were directly or indirectly involved in the adjustment and then should not take part in the competent authority discussions. However, with the agreement of the competent authorities, personnel of the Tax Agency 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. In such situation, taxpayer and tax administration should ideally be in the same legal situation; or,

- Policies, practices, goals and procedures designed within the Tax Administration that could unduly influence the MAP work performed by the competent authority; or,

- the MAP competent authority confuses its tasks as DTC policy maker in the framework of DTC's negotiation and its function as solving tax conflicts in a MAP. Sometimes the competent authority could include through a MAP resolution the DTC changes wanted instead of its renegotiation.

Competent authority independence is the cornerstone of the MAP system and its roots derived directly of the DTC, which is an international treaty. Taking into consideration that competent authority has to be objective on the light of provisions of the applicable treaty and apply it to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty, challenges faced by competent authorities in front of the tax inspection are a critical issue in everywhere. Some examples of such challenges could be identified as for example:

- Tax audits with instructions delivered by the General Directorate of the Tax Agency, which direct or indirectly affect and influence cases under MAP resolution with a protective intention of taxable bases. This kind of instructions could be included in the Annual Tax Inspection Map Route or through internal interpretative letters or meetings. As a matter of fact, Tax Agencies have the documents and information used in every tax audit, included those that are a MAP case;

- Unilateral approach or policy designed by the Ministry of Finance bearing in mind just internal goals as tax revenue or tax base protection avoiding international standards;

- Bonus on the wages of tax inspectors considering the amount of the tax assessment discovered by the tax audit;
Unfortunately, it happens most of the cases, although there is a formal and functional detachment, in current practice there is not or very weak separation. Therefore, our recommendation is to set up an independent department in charge of MAPS and APAS exclusively with personnel well-prepared, not pertaining exclusively to the Tax Administration;

B) Where a competent authority is not provided with a sufficient number of well-trained personnel and with experience in the DTC’s principles and technical resources.

First, concerning the amount of human resources required, such number will depend on:

- the extent to which the competent authority’s tax administration is engaged in audit activities resulting in adjustments to tax positions reported by resident and non-resident businesses and individuals; and,

- the extent to which resident businesses and individuals are engaged in foreign business or investment activity exposing them to tax adjustments made by other tax administrations.

As explained, one of the challenges for the Tax Administrations and Competent Authorities is maintaining or increasing the staff, due to the foreseen rise of tax cases, to meet workload demand, but also should take steps to ensure adequate training programs to develop and/or enhance expertise.

Inadequate resources experienced by many countries nowadays can impair substantially the ability of a competent authority to conduct effective mutual agreement procedures and consequently the ability of their partner competent authorities to conclude cases. It could be checked that nowadays due to the budget shortfall in every country the lack of trained personnel is the common denominator. Unfortunately, the unique mechanism in International Taxation where a sort of equilibrium may be seen between the taxpayer and the tax administration does not receive a corresponding support and is left to the countries decision. This is the reason for us to defend a political commitment by the countries in the framework of BEPS Action 15. Otherwise, MAP will keep on being a mere half dissuasive instrument with no impact on resolving the increase of international tax conflicts.

As explained before and included as well in the MEMAP, in a healthy and effective MAP environment 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 DTCs. In particular, human resources are likely to have the most fundamental impact on the Contracting State’s ability to operate an effective MAP program.

In terms of organization for a good MAP environment, the competent authority function should be split between:

1. 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,

2. a policy area for issues involving general interpretation as well as general issues concerning the application of the tax convention (Art. 25.3) where specific taxpayers are not involved. This area should be specially promoted due to the fact that its results have a higher impact to solve tax conflicts.

**Concerning organizational matters**, competent authorities should 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. It is important to emphasize that competent authority should not rely on third personnel depending, for instance, on the Tax Agency or outsourcing, in particular, in such important economic matters.

- **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, although must be independent from the Tax Agency, which should be a loyal collaborator supplying all kind of information and documentation needed and helping when required.

Such ideal organization could be difficult to set up in some countries since the competent authority office is very small and therefore sometimes must rely upon expertise from Tax Agency. There is only a benefit of a small competent authority office may be greater consistency; however, the bunch of 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 and of course the lack of independence could be so important that could make the MAP inefficient and with a little feeling of rely from the taxpayers prospective. In such situations, apart from trying to change the inefficient state of art from the MAP point of view, the responsible high level official should monitor closely the progress of the MAP cases and the management of resources. Sometimes, even this task is hard to realize it in such conditions.

Following the work organization in order to reach a powered and reloaded MAP, it is also important to “risk-assess” a MAP request at the earliest possible stage to enable the
competent authority or the responsible high-level official to assign the MAP case in the most effective way. Effectiveness at the MAP environment is brought by timing in its solving. Therefore, the risk assess could offer the following solution:

- When a case is highly complex, or 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; and,
- Routine cases involving limited amounts may be assigned to less experienced staff, assuming they are properly supervised. By adopting this approach, the risk of small cases being shelved over a long period of time is more reduced.

Insisting on the MAP timing, the case or workload management has a significant effect. 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 and of course if such data management could have an international inventory of cases, the synergy obtained could multiply the legal and time-saving effects.

In conclusion, 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.

C) Where the competent authority function is evaluated based on inappropriate performance indicators. Therefore, we do think in the following indicators as a tool for a healthy and empowered MAP:

- time taken to resolve a case, bearing in mind the complexity of every case;
- consistency;
- case outcomes focusing on principled and objective results; and,
- Personnel evaluations based upon these criteria and then the right person is or can be working at the right place and at the right moment.

Nevertheless, the economic and financial situation of European countries and the USA in recent years is well known and has had an impact in the fall of both GDP and revenues. However, a number of measures and structural adjustments has allowed to turn the wheel and recover a little the path of growth, as noted by the OECD and other international institutions. Therefore, the competent authorities and Tax Administrations have been forced to innovate in different ways to be more efficient with less financial means, the different instruments applicable to MAP procedures are the following:

- Optimization - taking full advantage of our resources (human, technological, organizational, etc.);
- Digitalization: it is essential to evolve from face to face procedures to electronic procedures;
- Strategic focus, balance between enforcement and incentives;
- Simplification, reengineering, rethink services and procedures, etc. – reduction of burdens, proactivity, etc; and,
- Follow-up and monitoring mechanisms.

Existing Competent Authorities have had to change, innovate and implement different MAP policies with the goal to reach better results. Therefore, considering MAP as political commitment within BEPS, such activity associated with government priorities and the Minister of National Revenue’s mandate must be protected.

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.

Concerning the Tax Administration practices we have to deal with tax audits, which sometimes are not aligned with international standards in terms of procedures and principles, producing a MAP overloaded with wicked interferences with the MAP environment.

Audit settlements as an obstacle to MAP access

Tax inspectors in some countries acting under a Tax Audit procedure may look for influencing taxpayers not to utilize their right to initiate a mutual agreement procedure in relation to audit adjustments that result in taxation not in accordance with an applicable tax treaty (e.g. by entering into a settlement with the taxpayer under which the tax authorities will agree not to apply penalties, or not to regularize some tax obligations in return for the taxpayer’s waiver of its right to seek MAP assistance under the applicable treaty). Taxpayers feel pressured into giving up access to the mutual agreement procedure if they are given the choice between a high assessment without any suspension of collection, but with access to MAP, or a relatively moderate assessment without access to MAP. Taxpayers may additionally accept such settlements based on broader concerns for their future relationship with the tax administration involved. Such audit settlements may be a significant obstacle to the proper application of the treaty as well as to the functioning of the mutual agreement procedure. They lead to situations in which taxation not in accordance with the Convention remains whilst the treaty partner is not aware of the situation and may be vulnerable to self-help measures taken by the taxpayer. As a result of such settlements, the competent authority of the country where the audit took place may also remain unaware that the treaty has been improperly applied and is thus unable to take appropriate measures to ensure that the treaty is applied according to its object and purpose.

Therefore, to ensure that audit settlements do not block access to the mutual agreement procedure, BEPS countries that allow their tax administrations to conclude such audit settlements must terminate with this practice. The termination of such practices has its roots in the double taxation international framework, which stays, even when there is not in accordance with the corresponding DTC. Different options to cope with:
1- Through the **Multilateral Convention** in which consists BEPS Action 15, which should imply a political commitment.

2- **Spontaneous notification** of the competent authorities of both Contracting States of the details of such settlements.

3- **Changes to the Commentary on Article 25** could also address the obstacles to an effective mutual agreement procedure created by audit settlements, just prohibiting them and preventing for no waiver the right of the taxpayer to MAP initiate. It consists on an inalienable right with no option to include reservations or observations on it.

4- **Joint Audits and multilateral controls with a common agreement** could help to solve double taxation not in accordance with a DTC and avoid unresolved tax conflicts.

**Lack of advance pricing agreements programmes.**

An APA is a contract, usually for multiple years, between a taxpayer and at least one tax authority specifying the pricing method that the taxpayer will apply to its related-company transactions. These programs are designed to help taxpayers voluntarily resolve actual or potential transfer pricing disputes in a proactive, cooperative manner, as an alternative to the traditional examination process. Because they operate in an increasingly regulated business environment, where transparency is key, taxpayers need a certain degree of certainty in managing their tax and their potential exposure to risk. Advance pricing agreements (APAs) help provide taxpayers with that certainty.

The Advance Pricing Agreement (APA) program allows the taxpayer and the tax authority to avoid future transfer pricing disputes by entering into a prospective agreement, generally covering at least five tax years, regarding the taxpayer's transfer prices. APAs specify:

- Transactions covered by the APA;
- Transfer pricing method (TPM);
- APA term;
- Operational and compliance provisions;
- Appropriate adjustments;
- Critical assumptions regarding future events;
- Required APA records; and,
- Annual compliance reporting responsibility

Taxpayers may enter into APAs with more than one tax authority – i.e., bilateral or multilateral APAs - through the mutual agreement procedure (MAP) included in most income tax treaties. Unilateral APAs involve agreements between only the taxpayer and one government.

Although styled as "advance" agreements, APAs often involve the resolution of transfer pricing issues pending from prior years—and in some cases can provide an effective means for resolving existing transfer pricing audits or adjustments.
For most taxpayers, certainty regarding their transfer prices is the single most important benefit gained through the APA process. Bilateral APAs also address the inconsistent and evolving interpretation and enforcement of TP rules in other countries and the risk of double taxation.

The potential cost of uncertainty regarding a Transfer Pricing Method (TPM) has risen dramatically in recent years as many countries have intensified their local TP enforcement efforts. These risks can be eliminated prospectively only by negotiating a bilateral APA.

The primary incentive for some taxpayers seeking an APA is the prospect of a rollback of a TPM developed in an APA to resolve past open tax years (rollback period). A rollback may provide a cost-effective way to resolve an ongoing TP dispute.

TP examinations are often time-consuming and expensive. The APA process generally takes substantially less time to complete than a TP examination followed by a dispute resolution mechanism, which can easily last three to four years, and in many cases longer with complex examinations.

An APA offers a company several other benefits. It provides greater certainty on the transfer pricing method adopted, mitigating the possibility of disputes and facilitating the financial reporting of potential tax liabilities. Importantly, an APA also reduces the incidence of double taxation, and the costs associated with both audit defense and documentation preparation.

Due to close connection between MAP and APA, in early 2012, the Advance Pricing Agreement (APA) Program merged with that portion of the Office of the U.S. Competent Authority (USCA) that resolves transfer pricing cases under the mutual agreement procedures of the United States’ bilateral income tax conventions to form the Advance Pricing and Mutual Agreement (APMA) Program. APMA’s mission is to resolve actual or potential transfer pricing disputes in a timely, principled, and cooperative manner. No doubts that is really a best practice.

With such practice, We believe it has the potential to:

1. Alleviate the backlog of pending APA requests in every country,
2. Provide additional travel resources and case staffing to allow for more efficient case development, consistent with that of our treaty partners’ APA programs; and,
3. Increase efficiency by eliminating procedural steps between APA development of recommended negotiating positions and the beginning of CA negotiations.

We would like to make some recommendations in order to have an efficient department MAP & APA jointly:

1. Increase the funding and resources. It is well-recognized that adequate funding of the APA & MAP programs is critical to its proper function as good environmental MAP.

2. Streamline the APA renewal process. That is the case when the conditions of the operation have not changed.
3. Increase integration of the competent authorities (important MAP competence) experience in the development of negotiating positions in APAs procedures.

4. Confirm that a substantially complete APA submission satisfies the transfer pricing documentation requirements for the proposed covered transactions while the APA request is pending.

5. Streamline the small business taxpayer APA process.

6. Formally involve taxpayers in the drafting process. Currently, taxpayers are not formally or consistently involved in the drafting of recommended negotiation position in case of bilateral APAs, briefing documents, or the APA Agreement. Given the current workload in general of the APA Program, we believe that the new APA-MAP Program should adopt formalized procedures whereby taxpayers assist in the process, by providing drafts of the central documents based upon APA-MAP Program-provided templates and interaction with the APA-MAP Team Leader. In addition, the role of the taxpayer would be more active, as we propose above.

7. Make prefiling conferences more proactive and efficient. Prefiling conferences are an informal way to explore the suitability of an APA, a proposed transfer pricing methodology and the level of information required by the tax authority in considering the request. To increase APA’s efficiency a senior staff person should be appointed to coordinate all prefiling meetings, that must be different from the person in charge of the APA’s negotiation. Following this approach, the APA-MAP Program would adopt a procedure where briefing memoranda or notes from the meeting would be memorialized for use by the APA teams of both the IRS and the taxpayer. To reduce the burden on the APA-MAP Program, the documents could be prepared by the taxpayer or its advisors and edited and consented to by the member/s of the tax administration who attended the prefiling conference.

8. Enhance communication between the Tax Administration in charge of APAs and taxpayers. The Service should streamline the e-mail correspondence rules and allow APA team members to exchange correspondence by e-mail.

9. Publish public presentations by APA-MAP Program personnel on the Program’s website. Such materials may provide helpful insight on the Program’s current trends and challenges.

10. Increase transparency on reasons for withdrawals and rejections of APA-MAP requests. Taxpayers and practitioners would find it useful to have more information regarding reasons for withdrawals and rejections of APA-MAP requests.

11. Involve taxpayers in continuous APA-MAP Program improvement. Such Program should have an ongoing dialogue with tax practitioners and taxpayers to provide continuous and ongoing input on the development of the Program. We recommend that the Program hold open and assembly style meetings and/or set up an advisory board.

12. Publish MAP competent authorities meeting schedules on APA-MAP website. Additionally, we recommend that the APMA Program consistently publish or furnish the schedule of
meetings with foreign competent authorities. The APA-MAP Program should take into account
the upcoming meeting schedule for purposes of case plans and prioritizing its resources.

Madrid, 16th January 2015.

Prof. Fernando Serrano

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January 16, 2015

Marlies de Ruiter  
Head, Tax Treaties, Transfer Pricing  
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OECD/CTPA

BEPS Action 14 Discussion Draft: Dispute Resolution Mechanisms

Dear Mrs. de Ruiter,

The partners of FIDAL’s Global Transfer Pricing Services would like to thank you for the opportunity to present our views with respect to the Organisation for Economic Co-operation and Development (“OECD”)’s public discussion draft entitled BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, released on December 18, 2014 (the “Discussion Draft”).

We are presenting our comments under two headings: Part I of this memo provides general comments dealing with the contents of the Discussion Draft overall and its proposed approach; and, Part II provides specific comments with respect to specific paragraphs and options outlined in the Discussion Draft (reference to the relevant paragraphs and options are indicated).

Part I: General Comments

A-  Realistic Discussion Draft

The changes to the rules governing international taxation proposed as a result of the BEPS project will certainly result in a growing number of controversies related to such rules, both domestically and bilaterally or multilaterally. For instance, the changes adopted and proposed with respect to Chapter VI of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the “OECD Guidelines”) in and of themselves will in all likelihood cause a significant increase in instances of double taxation as various tax authorities assert the right to tax the profits attributable to intangibles on the basis of legal ownership or participation in the development, enhancement or maintenance of intangibles. This, in turn, will result in an increase in the number of requests to resolve this double taxation pursuant to the mutual agreement procedure (“MAP”).
Generally speaking, MAP processes worldwide are already currently straining to deal with the existing cases. The inventories of MAP cases are increasing as well as the number of cases which take significantly more than two years to complete. To put it bluntly, the current MAP system is already functioning past its limits and this is costing substantial amounts to multinational enterprises (“MNEs) caught in its web.

The limits of the MAP system are not only dictated by issues related to resources. In other words, simply increasing the number of employees dedicated to the MAP will not solve the existing problems entirely. There are other factors that limit the effectiveness of the MAP, such as a lack of commitment to solve all cases of double taxation as well as the absence of rules or mechanisms to ensure that cases be resolved on a timely basis. There is also anecdotal evidence that some tax authorities seek to restrict access to the MAP either via rules or subjective decisions to deny eligibility for MAP (for instance, because adjustments are based on anti-avoidance provisions or substantial penalties are involved) or by simply refusing to respond to or process certain MAP requests.

We applaud the OECD for recognizing the above elements in the Discussion Draft and for proposing solutions which are clearly attempting to tackle each of the identified impediments to the proper functioning of the MAP process.

B- References to the MEMAP

We also wish to congratulate the OECD for bringing back to the forefront the Manual on Effective Mutual Agreement Procedures (“MEMAP”). We agree that the MEMAP does contain solutions to some of the current problems plaguing MAP programs worldwide and it deserves greater attention, rather than re-inventing the wheel.

C- Mandatory Binding MAP Arbitration

On the other hand, we feel that the OECD falls short of providing the best tool for ensuring timely resolution of all cases of double taxation when it decides to discard mandatory binding MAP arbitration on the basis that there is no consensus currently on this proposal. We respectfully submit that this is an area where the OECD should show its leadership and where it should convince those reluctant jurisdictions that mandatory binding MAP arbitration is the only known practical tool which would ensure both that all MAP cases be resolved and that they be resolved in a timely manner.

Indeed, it is clear that the current MAP system is no longer functioning properly and it is also clear that other forms of arbitration related to the MAP have not, in fact, proven adequate. For instance, although MAP arbitration clauses have existed for decades in a number of income tax conventions, there is no evidence that such arbitration ever took place. Similarly, although the European Union’s Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the “EU Arbitration Convention”) has included an arbitration mechanism going back as far as 1995, it has failed in practice as cases exceeding the 2-year mark continue to pile up in the MAP inventories of the member States with very few actually proceeding to arbitration.
In stark contrast, the type of mandatory binding MAP arbitration put forward in recent years by the US has begun to prove that, contrary to general MAP arbitration clauses and the EU Arbitration Convention, it does provide both guarantees of resolution and of timely outcome. The proof of this is provided by the effect that the inclusion of a mandatory binding MAP arbitration clause at paragraphs 6 and 7 of Article XXVI of the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital has had on Canada and US’ respective MAP programs. Canada and the US have between themselves one of the largest inventories of MAP cases in the world as they are each other’s largest trading partner. The inclusion of mandatory binding MAP arbitration forced the competent authorities to meet the two-year deadline imposed in virtually all cases and, for the very few where the deadline was not met, mandatory binding arbitration guaranteed a result in timely fashion.

Thus, the experience and the evidence exist to show that mandatory binding MAP arbitration works and works very well, and we believe that the OECD should push the States participating in the BEPS work to recognize the real potential of this solution and to adopt it. In this respect, it might be worthwhile to organize a meeting with BEPS participant States to formally review the workings (procedure, costs, etc.) and the effects of the mandatory binding arbitration in the Canada-US context in order to dispel some of the apprehensions related to this mechanism, rather than simply “recognizing” a lack of consensus at this stage on this point.

The BEPS project was initiated because of the perception that a few MNEs were paying less than their fair share of taxes, but the result of the BEPS project will certainly mean greater instances of double taxation and crowded unworkable MAPs for all MNEs. The BEPS project focused on and is meant to attack situations where less than single taxation occurs. However, the OECD must be careful not to turn a blind eye to the risk of double taxation. Indeed, the main purpose of the OECD Model Tax Convention on Income and on Capital is “to clarify, standardise, and confirm the fiscal situation of taxpayers … through the application by all countries of common solutions to identical cases of double taxation.”

Thus, as it gets ready to conclude on the other 14 items of its BEPS Action Plan, we respectfully submit that the OECD has a duty to offer more than simply wishful options for the one item that will assist both tax authorities and taxpayers steer through the impacts (i.e., double taxation) of the BEPS reforms on the MAP system. Again, as the changes that will be brought about by the BEPS project will create a large influx of double tax cases while the current MAP system cannot even process the existing inventory in a timely fashion, it would be deplorable if the OECD missed the opportunity to adopt the best tool to assist in resolving all double tax cases in a timely manner: mandatory binding MAP arbitration.

D- Eligibility for MAP

In addition to mandatory binding MAP arbitration, there is another aspect of MAP that the OECD should fix: eligibility for MAP. There is a fairly high level of uncertainty in terms of access to MAP when some countries levy adjustments based on anti-avoidance provisions of their income tax law and, given the recently published public discussion draft entitled “BEPS Actions 8, 9 and 10: Discussion Draft on Revisions to Chapter I of the Transfer Pricing Guidelines (Including Risk, Recharacterisation, and Special Measures)”, that uncertainty seems to be set to
increase as tax authorities might be able to treat a transaction as if it was a completely different transaction (or simply ignore the original transaction altogether) and officially call it non-recognition (recharacterisation) or not by relying on other concepts such as economically equivalent transactions, options realistically available, accurate delineation of transactions, etc. These approaches or basis for adjustments will, in turn, lead to questions about eligibility for MAP.

In order to dispense with having to determine whether an adjustment is appropriately based on non-recognition or on anti-avoidance provisions or some other basis in order to decide whether it is eligible for MAP, and in order to preclude tax authorities from playing on those concepts in order to deny access to MAP in some circumstances, we strongly believe that the OECD should adopt a rule that clearly says that all cases of double taxation, however triggered, are automatically eligible for MAP.

In our view, automatic eligibility for MAP and mandatory binding MAP arbitration are the two most important features which the OECD must adopt in its revision of dispute resolution as part of BEPS action 14.

**Part II: Specific Comments**

We were in broad agreement with the bulk of the options proposed in the Discussion Draft. Thus, in the following paragraphs we only provide comments with respect to those options where we think a specific comment is necessary.

- **Option 1**: While the proposed addition of paragraph 5.1 is a welcome clarification, it arguably could go further and indicate two distinct obligations for the competent authorities: (1) the obligation to resolve the case (here, we would suggest using the words “shall resolve the case”; and (2) the obligation to approach the case in a principled, fair and objective manner.

- **Option 2**: Another possible way of dealing with this issue would be to add a paragraph to the Commentary of Articles 9 and 25 indicating that the MAP is always available for Article 9 cases regardless of the existence or absence of paragraph 2 of Article 9.

- **Paragraph 13**: In our view, there is also a need for tax authorities to monitor the quantum of the transfer pricing adjustments proposed by audit versus the amount retained after ultimate resolution (whether via the MAP, appeals, the courts, etc.) in order to best allocate their scarce resources. As part of a monitoring of the risk assessment process, this data would assist in identifying the areas/topics/industries where resources are better allocated.

- **Option 3**: See our general comment above with respect to the MEMAP.

- **Option 4**: As outlined in our general comments above, the commitment to provide competent authorities with sufficient resources alone will not solve the current issues facing the MAP. Such a commitment would indeed likely result in an improvement of the MAP processing times but it would not address other issues which prevent double tax cases from being resolved in a timely fashion, or resolved at all.
- **Paragraph 20:** We would suggest using some of the data provided by the Country-by-Country Reporting ("CbC") as well as domestic ratios to test or apply a sanity-check with respect to the reasonableness for proposed transfer pricing adjustments. In other words, if the proposed adjustments result in an unreasonable/unexplainable local profits-to-global profits ratio vis-à-vis the relative importance of the local functions, sales, etc., then audit should refrain from issuing such adjustments until and unless an appropriate explanation can be found.

- **Option 8:** While the availability of Advance Pricing Arrangements ("APAs") would be nice to have worldwide, it is not the highest priority at this time. Fixing the MAP is.

- **Option 9:** Similarly to Option 8, such programmes would be nice to have but not the top priority at this stage. One might also refer to the mention of Accelerated Competent Authority Procedure ("ACAP") in the MEMAP. One of the difficulties encountered in practice in the application of ACAP programs is the insistence by certain tax authorities that tax years be audited in order to qualify for ACAP. It would thus be advisable to specify that ACAP is to cover yet-to-be-audited taxation years and that it is available only to the extent that the relevant taxpayers confirm that there are no material factual differences between the taxation years under MAP and those proposed to be covered by ACAP. If an audit of the subsequent taxation years later revealed that there were material factual differences, then the ACAP would be null and void.

- **Paragraph 26:** There is anecdotal evidence of certain competent authorities delaying the start or acceptance of MAP cases by making requests for additional information (and, in some instances, avoid the start of the timeline for the application of mandatory arbitration). It would be useful to have guidelines covering these situations.

- **Options 13 through 15:** We believe that the rule should be that the taxpayer can present his request for MAP assistance to any one of the relevant competent authorities, and, as long as one of the relevant competent authorities believes that the request for MAP assistance has some merit, then the case should proceed – the other competent authority should not be able to unilaterally preclude this from happening.

- **Option 16:** We are not convinced that recourse to the MAP should always be the first option. There are instances where it is preferable to proceed through domestic law remedies: for instance, where there is a need to establish a precedent. We would suggest that the taxpayer should have the choice to proceed either with MAP or domestic law remedies.

- **Option 17:** With respect to the collection of taxes, we were surprised that the OECD did not refer to and re-state its recommendation contained in Best Practice No 21 of the MEMAP and adopt the suspension or deferral of the requirement to pay tax as the rule during MAP.
- **Paragraph 34**: We agree that the early discussion of MAP cases may contribute to a more effective and timely MAP process. However, in practice, some competent authorities do not begin the MAP process until actual final adjustments have been issued. This might be linked to the issue of limited resources and their allocation to actual double taxation rather than potential double taxation.

- **Option 18**: We would suggest that the rule should be that a Contracting State is not allowed to process an adjustment for which there is no relief possible via a corresponding adjustment in the other State by virtue of being statute-barred pursuant to a provision of the applicable treaty.

- **Option 19**: We would suggest adding language to deal with two additional situations: (1) the situation where the self-initiated adjustment does not result in an action by the relevant Contracting State (i.e., the Contracting State while accepting the payment of additional tax does not issue an administrative notice or assessment); and, (2) the situation where the self-initiated adjustment is part of voluntary disclosure process (i.e., a process by which the taxpayer discloses the need to pay additional taxes for past taxation years in order to avoid to pay penalties). We believe that both those situations should be acceptable MAP cases.

- **Paragraph 38**: We completely agree that competent authority discussions should be fair and principled and that competent authorities should take a consistent approach to the same or similar issues. We recognize in doing so that this may entail limiting the notion that MAP settlements are not precedent-setting. However, would that be such a bad result? Consistency of treatment between taxation years and between taxpayers for similar situations is, in our view, more important in terms of fairness and the perception of fairness of the tax system – which, incidentally, is one of the goals of the BEPS project.

- **Option 20**: In line with our comment above in respect of paragraph 38, we wonder whether it would be advisable, where MAP arbitration is available, for competent authorities to have the duty to advise arbitrators of prior MAP settlements involving the same or similar fact pattern.

- **Option 23**: We strongly disagree with the suggestion that cases involving the application of domestic law anti-abuse rules could be excluded from MAP and/or from MAP arbitration. The fact that double taxation has been generated, regardless of the domestic provisions relied upon, should be all that is needed for a case to be eligible for MAP and mandatory binding arbitration. Otherwise, the tax audit function of some Contracting States may be tempted to raise adjustments based domestic anti-abuse rules in order to bar taxpayers’ access to MAP – and perhaps force taxpayers to accept settlements that would otherwise not be appropriate.

- **Option 24**: We believe that mandatory binding MAP arbitration should be included in the proposed multilateral instrument pursuant to BEPS action 15.
- **Option 26**: We generally disagree with the deferral of the start of the arbitration process. We believe that it would be preferable to simply allow the competent authorities to continue negotiating while the arbitration process is on-going and, if the competent authorities reach agreement before the arbitration process is concluded, then the arbitration would automatically be stopped and cancelled. If, on the other hand, arbitration concludes first, then that result stands as the conclusion of the MAP process (subject to the taxpayer’s acceptance, of course).

- **Option 27**: It might be good to add that former government officials cannot become arbitrators in matters involving their former employer within 5 years of termination of such employment.

- **Option 29**: We strongly believe that the “last best offer” (or baseball-style) arbitration is the most conducive to both getting competent authorities to resolve MAP cases within their allotted timeframe and, where such resolution is not achieved, to obtaining an expeditious conclusion from an arbitration panel. Indeed, experience with this type of arbitration in the Canada-US context shows that, faced with the prospect of an all-or-nothing result, the competent authorities are much more conciliatory in their dealings and willing to seek an acceptable result rather than seeking the “perfect” result. In addition, where the arbitrators’ only choice is between two distinct position (without having to provide the rationale for their choice) rather than having to come up with their own solution and to justify that solution, the workload and time needed (and cost) for arbitrators to reach a conclusion should be much more limited.

- **Paragraph 52**: We do not agree with the suggestion that taxpayers’ involvement in the MAP arbitration would result in a lengthier, more expensive and more complicated process. We would challenge whether there is any evidence to support this. We suspect that taxpayers’ involvement might assist in clarifying the facts and, perhaps, in supporting which position makes the most sense from a business perspective. Obviously, there might be concerns that a given taxpayer’s approach will always support the position that is the most favourable in terms of tax result. However, we would suggest that arbitrators should be able to see through such an approach and reach the right result.

- **Option 31**: We would suggest that arbitrators be tasked with reaching agreement on each of the issues/adjustments identified in the MAP request.

- **Paragraph 54**: One of the situations where integrated issues are present is where there are at least two adjustments at play: one dealing, for instance, with the payment of a management fee by a distribution entity to a parent company, and the other dealing with the net distribution margin of that entity with respect to product purchased from its parent company. In that circumstance, while a determination of the management fee payable by the distribution entity could be an issue to be determined by the arbitration panel, the result would essentially be moot as the determination of the other issue (i.e., the appropriate net margin) would practically nullify the amount of the management fee.
- **Paragraph 56**: We would strongly suggest looking at the memoranda of understanding reached between Canada and the US with respect to their mandatory binding MAP arbitration. As stated in our general comments, we would recommend that the OECD organize a private information session for the BEPS participants to run through how such an arbitration mechanism functions both in theory and in practice.

- **Paragraph 59**: Another example of a multilateral situation would be a variation on the second example given in paragraph 58 of the Discussion Draft. It involves subsidiaries located in State B and State C and these subsidiaries both manufacture and distribute tangible goods in their respective countries. They transfer tangible goods between themselves. They also pay royalties to a parent company located in State A. Each of State B and State C’s tax administration finds that the profits of their subsidiary are too low and propose adjustments to the transfer prices of the tangible goods. In such a situation, it may be necessary to involve State A as the amount of royalties may be an issue.

François Vincent
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January 16, 2015

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Comments on BEPS Action 14: Make Dispute Resolution Mechanisms Effective

Thank you for the opportunity to comment on the OECD’s proposals with respect to strengthening the Treaty Dispute Resolution Mechanism.

General Comments and Specific Proposal for an Adjudication Panel

The changes proposed in this consultation document represent a soft approach to strengthening the mutual agreement procedure (MAP) which underpins the treaty dispute resolution mechanism. The MAP is used to resolve a variety of types of disputes (or to avoid them, in the case of the advanced pricing agreements), and we feel that in some cases the conservative changes are appropriate, but in other cases more significant change is needed.

We have the impression that the decision to take the approach of more minimal change is likely driven by countries’ concerns over their ability to have complete control over their taxing ability – or tax sovereignty. While we understand the concern (which impacts enforcement in other financial areas as well), the reality is that concepts of sovereignty that were originally formed hundreds of years ago are no longer effective in ensuring that a country’s tax base is solid, as much as a country may cling to the belief that it is. The problems that brought us to the BEPS process are proof of this.

The time has come for an independent adjudication system for tax treaty disputes. Independent adjudication helps overcome imbalances of power and resources that the OECD has identified as a problem when competent authorities endeavor to resolve cases by mutual agreement. We believe that this independent adjudication system should include the following attributes: i) the system should have a panel of adjudicators well-versed in global taxation and treaty issues, (ii) the number of adjudicators should be at least three, and preferably seven or nine, (iii) the adjudicators should be drawn from a variety of continents and include nationals from countries at differing economic levels, (iv) the panel should consider actual treaty disputes (as opposed to APAs, etc.), (v) the decision of the panel should be final (an appeals level can be considered at a later date should there be a need for it), and (vi) all decisions of the panel, and rationale for reaching those decisions, should be published online for worldwide reference.

The reasons for most of the conditions should be obvious, but we would like to note that the publication of decisions, with reasoning, is particularly important. Publication accomplishes several
things. First, the most effective way to ensure that the number of treaty-related conflicts decreases is to provide reference materials for parties to use to determine what standards and interpretations have been applied in the past to similar situations (precedent, if you will). Second, publication of decisions will enable the applications of the treaty provisions to be analyzed to determine if there have been unintended consequences stemming from treaty provisions that need to be addressed, improving the system over time. Third, publication helps keep the adjudicators honest.

Obviously there would be many more details to sort out should an adjudication system be created, such as how it would be financed, methods of working, and support staff, but the principle of establishing the panel and a timeframe for implementation could be agreed to now.

For the avoidance of doubt, we wish to make it clear that we do not support the idea of binding arbitration for treaty disputes. We do not think decisions of this great import should be left to one person, with one set of experiences and political and cultural biases, to decide. In addition, as a rule arbitral decisions are confidential, which deprives us all of the important body of precedent discussed above. Finally, there is too great a risk of corruption where one person is making such critical decisions.

Comments on Specific Options

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

We recommend that an independent adjudication panel be created as described above. If that approach is not taken, the proposed paragraph 5.1 is not objectionable but we are skeptical about its likely impact.

In addition, however, we also support the proposal by the BEPS Monitoring Group that the concepts of “principled, fair and objective manner” should be spelled out in more detail in the Commentary as follows:

- **principled**: this requires that outcomes should take the form of reasoned decisions, based on analysis of the facts of the case, the applicable rules and how they have been interpreted and applied to the specific case;

- **fair**: like cases should be treated alike, and decisions should be published, to ensure consistency;

- **objective**: decision-makers should be independent of the disputing parties and have no vested interests or conflicts of interest; and rules to be applied should be formulated so as to be easily applicable to specific cases based as far as possible on their facts rather than requiring value-judgments.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

We support the proposal of ensuring that paragraph 2 of Article 9 is included in tax treaties moving forward.

OPTION 3 – Ensure the independence of a competent authority

We recommend that an independent adjudication panel be created as described above in part to address the issues of bias identified by the OECD. Should that not be adopted, there is no harm in obtaining the commitments outlined in Option 3. We believe that it will be very difficult to ensure
objectivity, however, given that the competent authorities are employed by and within the
governments that have a vested interest in the tax revenue and/or the political ramifications of
ensuring that their corporations are happy with the outcome.

**OPTION 4 – Provide sufficient resources to a competent authority**
We recommend that an independent adjudication panel be created as described above in part to
address the issues of imbalance of power and resources identified by the OECD. We have significant
concerns that sufficient resources in a developing country are quite different from sufficient resources
in a developed country, entrenching the power imbalances that result from different levels of
resources. In an ideal world all countries would be able to resource their competent authorities to an
equivalent level, but the practical reality is that this is highly unlikely to be the result of such an
undertaking.

**OPTION 5 – Use of appropriate performance indicators**
The proposed change regarding performance indicators is critical under the current system, as it goes
directly to the heart of the issue regarding the objectivity problem we discussed in Option 3.

**OPTION 6 – Better use of paragraph 3 of Article 25**
The proposal in Option 6 seems logical, but the publication of the agreement reached (as specified in
the first bullet point), is a critical element of the approach and should under no circumstances be
removed. Secret agreements with respect to issues of taxation outside the scope of the Treaties
should be generally applicable (not undertaken in order to create an advantage for a specific entity)
and therefore be published as such. We also note that the reference in the final line to “principles of
international law for the interpretation of treaties” is too vague. Is the OECD referencing the Vienna
Convention on the Law of Treaties? If so, please state. Otherwise, referring generally to principles of
international law is no more illustrative than not including such a reference, given the number of
authoritative texts on principles of international law.

**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**
The proposal here is too soft. At no point should any part of any government act in a many which
precludes a taxpayer’s access to the MAP, unless the taxpayer agrees to end the dispute via settlement.
Competent authorities should be required to notify the competent authorities of the other contracting
state at issue of the details of the settlement, if not full publication of the same. Any settlement
provided by a contracting state to its taxpayer should be based on sound principles that should be
generally applicable. Publication of the decision dissuades competent authorities from basing decisions
on subjective factors or factors that may not be related to the principle(s) under consideration.

**OPTION 8 – Implement bilateral APA programmes**
More careful attention needs to be paid to the impact of the APA regime as currently practiced, and
changes need to be made if use of APAs is to continue. The OECD and G20 countries should be very
aware at this point of how APAs can be used to undermine other countries’ tax regimes, as highlighted
by the recent Lux Leaks scandal. APAs should be entered into for either specific, unique products or for
classes of products where there are no appropriate comparables from which to glean an appropriate
transfer price. Given that comparables are supposed to be public information used as a benchmark, it
makes sense that the prices agreed through APAs should be published so that they can supplement the
pool of comparable data available. There is no defensible justification for secret APAs.
OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs
We have concerns with respect to this proposal regarding roll-back. We recommend that roll-back only be permitted for the tax years during which the taxpayer’s request for assistance was pending. A roll-back is actually a claw-back, pulling funds from a national treasury. It is not appropriate to allow a claw-back of funds from a country’s current budget for monies that the taxpayer did not object to paying into the treasury at the time. A multi-year claw-back, possibly by multiple companies, could create a significant budget deficit for a developing country, for example, and is not warranted from the perspective of ensuring equity.

OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP
We support the OECD’s proposal in Option 10.

OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance
We support the OECD’s proposal in Option 11.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied
MAP access should be uniform among all treaty countries. No firm in any country should obtain a tax advantage or disadvantage because they are or are not permitted to access MAP. Therefore, we object to any proposal beginning with “If participating countries would seek to limit or deny MAP access in all or certain of these cases...” or its equivalent. We note that the creation of an adjudication panel with rules that apply equally to all applicants would be the most effective way forward.

OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities
We support the OECD’s proposal in Option 13.

OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”
We believe that the OECD should clarify what is meant by “if the taxpayer’s objection appears to be justified,” so that a global standard is established and applied. To do otherwise would create the insupportable situation where what is or is not a justified objection can differ for one contracting country in significant ways depending on which of its treaty counterparties is implicated. The potential lack of clarity for all parties involved could literally be dizzying.

OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State
We would support the approaches provided by Option 13 or Option 15, but one does not need both Options. Option 13 would reduce the forum shopping that Option 15 could create, but then again it would not be ideal to provide no alternative to companies resident in countries with poorly resourced, poorly performing, or non-independent competent authorities. Again, the best solution is an independent adjudication board to put these issues to rest and create instructive precedent.

We would also like to echo the BEPS Monitoring Group’s call for a transition mechanism. The Group stated in its submission that, “Consideration should rather be given to a transition mechanism, to supervise the process of implementation of the BEPS reforms, monitor the way the rules are introduced by states, and provide advice and perhaps even interpretations.” We take no position on the appropriate body to create and carry out this mechanism, however, apart from suggesting that it
might be prudent to create a body from which an independent adjudication panel could later be formed.

**OPTION 16 – Clarify the relationship between the MAP and domestic law remedies**
We do not take a position with respect to this issue.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**
Not paying taxes assessed should not be an option. We think that there may be a solution that can be implemented involving MAP escrow accounts, where disputed taxes could be held pending resolution of the dispute between contracting parties. Presumably double taxation will be at issue most of the time, and the tax payment could be split between the escrow accounts of the countries party to the dispute, with conditions of release of funds predicated upon a signed agreement between the countries party to the dispute with instructions as to the transfer of the funds. As long as they are unable to resolve the dispute, countries cannot access the funds and neither can the company. Perhaps this is a dispute resolution incentive structure to be considered (albeit with some alterations, we’re sure).

**OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure**
We do not take a position with respect to this issue.

**OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure**
This Option 19 and the domestic version of the issue described in paragraph 35 should not be taking place in a foreign or a domestic setting except in extremely rare circumstances. If a company has applied the appropriate rules and determined an arm’s length price, that price should not be subject to adjustment unless there has been true error (which we posit should be extremely rare once a tax return has been filed). Adjustment of the arm’s length price that has been determined, or the attribution of profits among entities, should not be adjusted based on the tax result the taxpayer would like to achieve. That is, in fact, one of the problems we are trying to solve. If correct pricing/attribution is leading to inequitable results, that needs to be resolved between the contracting parties and, if a systemic issue, addressed by the OECD.

**OPTION 20 – Ensure a principled approach to the resolution of MAP cases**
We refer back to our comments under Option 1.

**OPTION 21 – Improve competent authority co-operation, transparency and working relationships**
While we agree with President Obama that differences can often be worked out by sharing a beer and a bit of conversation in a rose garden, that is clearly not always the case.¹ In particular, cultural differences (such as length/brevity of response, formality and informality, and timeliness) can cause a person to misinterpret another person’s intention as aggressive/bullying, mendacious, inefficient or otherwise when a person’s behavior might be perfectly standard and without particular meaning in their own culture. And of course sometimes such behavior is very intentional. Ideally people discuss with one another when such impressions are being formed, but in our far-from-ideal world this is not a very common occurrence.

The fact of the matter is that some people are better at handling cross-cultural interaction than others. Given this, countries should ensure that there is an office independent of the competent authority, perhaps in the diplomatic section, where complaints about competent authorities can be made. Where sufficient concern has been raised about an individual in the competent authority, they should be removed from negotiating duties and replaced with someone more suited to the position.

It might also be helpful for the OECD to construct a shared platform where competent authorities can post when they have undertaken certain activities with respect to a case, so that even if a competent authority does not have time to send his/her counterpart a lengthy, descriptive email about where things stand, his/her counterpart (and others) can see that progress is being made. It is at least a semi-transparent accountability mechanism.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration
OPTION 23 – Policy issues: Tailor the scope of MAP arbitration
OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy
OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies
OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

As stated above, we do not support the idea of binding arbitration for treaty disputes. We do not think decisions of this great import should be left to one person, with one set of experiences and political and cultural biases, to decide. In addition, as a rule arbitral decisions are confidential, which deprives the public, practitioners, and the OECD of the important body of precedent discussed in our general comments above. Finally, there is too great a risk of corruption where one person is making such critical decisions.

OPTION 27 – Practical issues: Appointment of arbitrators
At the very least, a declaration requiring a list of known or potential conflicts of interest should be obtained from any arbitrator. The criteria that the OECD has laid out in paragraph 48 should be included in the recommendations for countries to adopt, by agreement, as a minimum criteria for selecting arbitrators.

OPTION 28 – Practical issues: Confidentiality and communications
An arbitrator who does not understand the requirement of confidentiality with respect to the subject matter of the arbitration and his/her communications with third parties is not a competent arbitrator. Any arbitrator should also be advised of his/her legal responsibilities with respect to the taxpayer information he/she is being provided under the laws of each relevant contracting party, and should sign an undertaking with respect to having been advised of both the laws and the penalties for violating them.

With respect to the final outcome of arbitration, however, we strongly believe that the results and underlying rationale should be made public if an independent adjudication mechanism is not put in place. Independent arbitration decisions will not make very good precedent, but they are better than no precedent.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration
We prefer forms of adjudication that bring decisions as close as possible to the “right” result as opposed “a” result. We therefore favor the independent opinion approach. The baseball approach has no substantive and independent value.

**OPTION 30 – Practical issues: Evidence**
A taxpayer’s position will inevitably be the construction which results in the payment of as little tax as possible. The “facts” of the case, with respect to the taxpayer, are the tax filings. This would be the case no matter which arbitral approach was taken. We see merit in making sure that the taxpayer is available for questioning by the arbitrator, but are not convinced that the taxpayer should be given an advocacy role in what is a country to country dispute regarding application of a treaty they signed.

**OPTION 31 – Practical issues: Multiple, contingent and integrated issues**
We do not take a position with respect to this issue.

**OPTION 32 – Practical issues: Costs and administration**
Costs are certainly a concern, and an independent adjudication panel could be funded by apportioning costs among treaty participants in a manner proportional to, for example, GDP.

**OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)**
We do not take a position with respect to this issue.

**OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure**
We do not take a position with respect to this issue.

Thank you for your attentive consideration of our positions stated herein. Please do not hesitate to contact us should you have any questions regarding this submission.

Kind regards,

Heather A. Lowe
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15 January 2015  

Dear Marlies,

OECD public discussion draft - BEPS Action 14: Make dispute resolution mechanisms more effective
Grant Thornton International Ltd welcomes the opportunity to comment on the OECD public discussion draft entitled BEPS Action 14: Make dispute resolution mechanisms more effective, issued 18 December 2014. Our general observations and detailed comments are set out below.

General observations
In our experience, taxpayers are in favour of the mutual agreement procedure (MAP) process and would like to see improved access to the existing system, rather than a radical change in MAP or the creation of an alternative process.

Furthermore, where the MAP process has worked well for taxpayers, it has been between knowledgeable, experienced competent authority (CA) teams who had worked with each other a lot and who both wanted to resolve the issue of double taxation through applying a principles based approach.

Conversely, taxpayers have been reticent to engage in the MAP process where barriers were placed in the way of entering the process where the domestic tax collection continued during MAP and where previous experience suggested that the CAs were unlikely to come to agreement in a timely manner. The options presented in the discussion draft go some way to addressing these concerns.

We note that the introduction of other BEPS measures is likely to place greater pressure on the MAP and dispute resolution processes already in place. It was in recognition of this that the OECD have introduced BEPS action 14, in order to ensure swifter and more transparent dispute resolution. We would be disappointed if other BEPS actions were therefore introduced without sufficient support being given to Action 14.

We welcome the OECD’s recognition that there are currently barriers to entering the MAP process and to cases progressing once accepted into MAP. In particular, we welcome options 4, 7, 10, 16 and 17 of the discussion draft. These options relate to supporting CAs’ resourcing of MAP, improving the simplicity and transparency of MAP and clarifying the relationship between MAP and domestic laws, particularly regarding tax collection during MAP.

While we were disappointed that there was no consensus on moving towards mandatory binding MAP arbitration, we recognise that the options presented in the discussion draft are a serious attempt to address the obstacles to speedy and effective resolution of treaty-related disputes through MAP.
We note that MAP is one aspect of the dispute resolution process. Making improvements to that wider process may also impact on the success of MAP. For example, helping tax authorities to identify the most appropriate cases to audit, when to pursue and when to close a case, as well as working with taxpayers to resolve cases more quickly, could all relieve the, soon to be further increased, pressure on MAP.

**Further improvements**

**Taxpayers' charter**

In the UK, there exists a general 'taxpayers' charter', which sets out principles binding on both taxpayers and the fiscal authority. The taxpayer is expected to act honestly and in good faith and in return there is a promise of fair and principled behaviour and respect of taxpayer confidentiality by the fiscal authority.

A similar high-level charter relating to MAP procedures could provide protection for CAs by regulating taxpayer intentions about invoking MAP, without dictating in detail how a MAP procedure is to be run. The charter would, however, be a public reassurance for taxpayers that a CA remains open-minded about access to MAP and that the CA will abide by the principles of concluding MAP processes in a timely and unprejudiced matter. The charter could potentially become a first-stage test point for any third party who assesses whether MAP has been sought or granted appropriately.

Grant Thornton International Ltd believes that this proposal could potentially address in part the issues highlighted by options 10, 12, 16, 17, 18 and 28 of the discussion draft. These options address the transparency and simplicity of the MAP process, whether MAP can be applied to cases where anti-abuse legislation has been invoked at a domestic level, the wider relationship between MAP and domestic legislation and the time limits applied to MAP resolution.

**Paying an entry fee to MAP**

We are aware that all CAs face increased resource pressures, particularly in the area of MAP resolution. Some tax authorities charge an entry fee to participate in an advance pricing agreement and we could see a position where tax authorities similarly seek to charge for entry into the MAP process.

We do not accept the principle that taxpayers should pay in order to enter an arbitration or tax audit process, to which they are legally entitled under the relevant treaty. However, from a purely pragmatic perspective, if an entry fee was imposed in respect of MAP and that fee was nominal and the monies received were used to resource costs incurred by the CAs in running the MAP arbitration, then taxpayers may accept the charge.

**Comments on the options presented in the discussion draft**

Our specific comments on some of the options are summarised below:

**Option 1 – the importance of resolving cases** – CAs are more likely to strive for the resolution of a case if they have strong working relationships fostered by better co-ordination, transparency and trust between them (see option 21) and through adequate resourcing (see option 4 below).

**Option 4 – provide adequate resources to CAs** – an effective way to resolve disputes is vital if taxpayers are to embrace and accept the BEPS programme. This means, despite embracing ways to reduce the costs of MAP (see comments on option 32 below), the need for resources for resolving disputes is likely to be higher in the future. We therefore welcome this option, particularly as we believe that MAP applications will rise as a result of other BEPS actions.

**Option 7 – ensure that audit settlements do not block access to MAP** – it is important that taxpayers have full access to MAP and we therefore strongly support the move to discontinue the practice of preventing taxpayers seeking MAP at the conclusion of an audit.

**Option 10 – improve transparency and access to MAP** – given that BEPS may result in a larger number of taxpayers seeking redress through MAP than previously had been the case, many of whom may not have used the process before, all improvements to the transparency of and access to MAP are welcome. We strongly welcome this option.
Option 11 – guidance on minimum contents of a MAP request – while we agree that further guidance would be helpful to taxpayers, as noted in our comments on option 30 below, greater involvement of taxpayers in the process may allow quicker, more focused answers to questions of fact that will overcome the need to request large amounts of information at the start of the process.

Option 12 – clarify the availability of MAP access where an anti-abuse provision is applied – we fully support Option 12. We note that some territories, such as the UK with its proposed Diverted Profits Tax (DPT), are already contemplating the adoption of domestic anti-abuse rules in anticipation of the outcome of the BEPS project. The relevant tax authorities may argue that such measures do not fall within the ambit of double tax treaties.

We are concerned that such measures could lead to multiple tax charges on the same profits without the possibility of effective double taxation relief. For example, this might occur if one state argued that the activities of an enterprise in their jurisdiction are tantamount to a Permanent Establishment (PE) and impose tax on that basis under domestic anti-abuse rules whereas the state of residence of the enterprise does not consider the PE threshold in the relevant treaty or treaties is met.

The first-mentioned state might also argue that they are not obliged to allow a deduction for the expenses of the foreign enterprise where the expenses are paid to another group entity which in their view does not have sufficient commercial substance. We believe it is important that MAP can be used here to avoid double taxation and to allow an appropriate deduction for expenses in the relevant territories.

Paragraph 59 of the public discussion draft invites commentators 'to provide other examples of multilateral situations that raise issues for the mutual agreement procedure'. We consider the situations referred to above as suitable examples of where two or more jurisdictions may assert taxing rights over the same profits and a multilateral solution is necessary.

Option 16 – the relationship between MAP and domestic law remedies – we strongly believe that there should be greater flexibility allowed to taxpayers to enable them to pursue MAP, even if all domestic options have not been fully exhausted.

Option 17 – collection of taxes – we consider it vital that tax and interest collection is suspended while MAP is pending or in progress so that cash-flow issues do not prevent taxpayers from accessing the MAP process.

We also consider that domestic anti-abuse rules which require tax to be paid upfront based on an estimate issued in a notice by the tax authority need to be included within the scope of this measure, particularly given that such notices may in some cases significantly overestimate the tax that might ultimately transpire to be due. In this situation, where the MAP is invoked, no tax should be payable under the relevant domestic anti-abuse rules until the case is satisfactorily resolved.

Option 18 – issues relating to time limits and access to MAP – as per our comments in respect of option 10 above, it is important to clarify the meaning of terms such as 'first notification' so as not to disadvantage first-time MAP users.

Option 21 – improve CA co-operation, transparency and working relationships – measures to improve and strengthen the working relationships between CAs are likely to lead to cases being more speedily resolved.

Option 26 – deferral of MAP – we could not identify circumstances in which the deferral of MAP would be appropriate. Further examples of the situations in which deferral would be relevant is required in order to better understand this option.

Option 29 – default form of decision making – while we can see pros and cons of both forms of default decision-making, we have a preference for the so-called 'baseball-arbitration' as it requires tax authorities to focus on what is likely to be realistically acceptable to the arbitrator and the other tax authority.
**Option 30 – evidence** – we consider that taxpayers should be more involved in the MAP process to enable the quicker resolution of factual queries as well as to be more regularly informed on the progress of their MAP claim. Ideally, we would like to see taxpayers, their advisers and the CAs working together more collaboratively to reach an acceptable conclusion in a timely manner for all stakeholders.

**Option 31 – treatment of multiple, contingent and integrated issues** – BEPS is likely to increase these types of MAP claims. Guidance to arbitrators to help them navigate these types of issues is vital to prevent MAP from becoming too slow to be effective.

**Option 32 – costs and administration of MAP** – given that the number and complexity of MAP claims are likely to increase as a result of BEPS, there should be a recognition that the costs of administering the process will necessarily increase too. We consider that CAs should provide sufficient resources to enable the process to operate effectively (see comments on option 4). CAs should also adopt modern technologies (for example increased use of e-mail, video conference etc) wherever possible, to minimise costs yet maintain a high level of interaction between CAs.

**Option 34 – guidance on consideration of interest and penalties** – we consider that interest and penalties (as well the tax itself – see comments on option 17) should be suspended while the MAP process is pending or in progress. This option is also important in cases where interest may be levied on tax underpaid in one country but where no interest is paid in the other country where tax has been overpaid.

**Summary**

Grant Thornton International Ltd welcomes the OECD’s recognition of the current need to address the issue of access to and proper application of MAP and hopes that the comments set out above assist the OECD in this. If you would like to discuss any of these points in more detail then please contact Elizabeth Hughes, Director, Grant Thornton UK LLP at elizabeth.hughes@uk.gt.com or Annis Lampard, Senior Manager, Grant Thornton UK LLP at annis.lampard@uk.gt.com.

Yours sincerely

Global head - tax services

francesca.lagerberg@gti.gt.com
VIA E-MAIL

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Re: Comments on Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. de Ruiter:

The International Alliance for Principled Taxation (IAPT or Alliance) is a group of major multinational corporations based throughout the world, and representing business sectors as diverse as consumer products, media, mining, telecommunications, oilfield services, transportation, computer technology, energy, pharmaceuticals, entertainment, software, IT systems, publishing, beverages, and electronics.¹ The group’s purpose is to promote the development and application of international tax rules and policies

¹ The current membership of the IAPT is made up of the following companies: Adobe Systems, Inc.; Anheuser-Busch InBev SA/NV; A.P. Møller-Mærsk A/S; AstraZeneca plc; Baker Hughes, Inc.; Barrick Gold Corporation; BP plc; Chevron Corporation; Cisco Systems, Inc.; ExxonMobil Corporation; Hewlett-Packard Company; Johnson Controls, Inc.; Microsoft Corporation; Procter & Gamble Co.; Reed Elsevier plc; Repsol S.A.; Sony Corporation; Texas Instruments, Inc.; Thomson Reuters Corporation; Tupperware Brands Corporation; and Vodafone Group plc.
based on principles designed to prevent double taxation and to provide predictable treatment to businesses operating internationally.

The Alliance appreciates the opportunity to provide input to the OECD with respect to its Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, released on December 18, 2014. Our comments are set forth in the Annex to this letter.

As outlined in our attached comments, we view effective dispute resolution as the key to the viability and sustainability of all BEPS outcomes. The need for improvements is urgent and significant changes will be required. We urge participating countries to set expectations higher and continue work in this area. We have made every effort to provide constructive suggestions on how we believe the Discussion Draft can best be improved and to set forth the rationale for our suggestions.

Once again, the Alliance appreciates the opportunity to comment on this important element of the BEPS project and stands ready to respond to any questions or to provide further input as the work of the OECD on this item continues. As previously indicated by e-mail, I would appreciate the chance to speak on this topic on behalf of the IAPT at the public consultation to be held on January 23, 2015.

Sincerely yours on behalf of the Alliance,

Carol A. Dunahoo
Baker & McKenzie LLP
Counsel to the Alliance

Annex: Comments on the December 18, 2014 Discussion Draft on BEPS Action 14
ANNEX

INTERNATIONAL ALLIANCE FOR PRINCIPLED TAXATION

COMMENTS ON DECEMBER 18, 2014 DISCUSSION DRAFT ON BEPS ACTION 14:

MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

JANUARY 16, 2015
IAPT Comments on the December 18, 2014 Discussion Draft on BEPS Action 14:
Make Dispute Resolution Mechanisms More Effective

1. Executive Summary

1. Many businesses see Action 14 as the single most important item of the BEPS Action Plan. Effective resolution of the growing volume of tax treaty disputes has already become more challenging in recent years, but its importance has grown increasingly apparent as the BEPS project considers a series of novel options, many of which would introduce new levels of discretion and uncertainty in treaty interpretation.

2. As the competent authorities in the Forum on Tax Administration (FTA) MAP Forum and other officials have correctly acknowledged, both businesses and governments urgently need improvements in this area. Businesses must have greater tax certainty and predictability and access to more effective dispute resolution to ensure protection from double or multiple taxation. Governments similarly need more effective dispute resolution as tax disputes mount and investment climates worsen.

3. Improvements to ensure effective dispute resolution must be implemented contemporaneously with other BEPS actions. Effective dispute resolution is essential to ensure that the BEPS outcomes are sustainable and that the network of international tax treaties and the international trade and investment they are negotiated to promote can continue to function. To achieve this, effective dispute resolution must be treated as an essential component of the BEPS project, not as a mere “sop” to business. This is how the BEPS Action Plan was sold and this part of the bargain needs to be kept.

4. The Discussion Draft identifies many of the major impediments to effective dispute resolution. However, it unfortunately does not go nearly far enough in identifying and addressing the many needed improvements to dispute resolution. Much more work needs to be done on Action 14, particularly on arbitration and other potential game-changers that can bring material improvements. Access to and proper operation of the MAP procedure are also critical.

5. It is surprising that the Discussion Draft – unlike the Manual on Effective Mutual Agreement Procedures (MEMAP), the current Article 25 Commentary, the recent FTA MAP Forum Strategic Plan, and recent UN guidance – does not affirmatively recommend or advocate improvements. The Discussion Draft even appears to signal retreat in some respects from recent work by the OECD and the UN in this area. This needs to be remedied in coordination with stakeholders willing to commit to and implement change, including the competent authorities themselves through the FTA MAP Forum.

6. The work on each of the other BEPS issues presumes that any disputes will be resolved effectively as a result of the work on Action 14. An assumed reliance on the ability to resolve future disputes effectively appears to be fueling a willingness on the part of participating countries to consider
options under other BEPS Actions that pose high risks of disputes and potential double taxation. If effective dispute resolution cannot be ensured, other aspects of the BEPS work will need to be revisited and redesigned to reflect this, with much less scope for disagreement. Otherwise, the BEPS project will create chaos rather than clarity and will pose serious risks to the healthy flow of cross-border trade and investment needed to promote economic growth.

**General comments**

7. Tax certainty and predictability are essential to the conduct of business, and business simply cannot operate with any material level of double tax. This means that there must be effective dispute resolution measures in place.

8. Current trends show rising case inventories outstripping case resolutions, with dispute resolution growing ever more difficult due to a combination of internal and external factors. These factors have already stretched the dispute resolution process to the breaking point in many countries. We submit that both businesses and tax administrations urgently need real improvements in dispute resolution. Neither can continue operating as at present, given rising inventories and resource constraints, or continue to tolerate current levels of uncertainty, unpredictability, and disputes.

9. Improvements to ensure effective dispute resolution must be implemented contemporaneously with other BEPS actions. Effective dispute resolution is essential to ensure that the BEPS outcomes are sustainable and that the network of international tax treaties and the international trade and investment they are negotiated to promote can continue to function.

10. Businesses currently experience many practices around the world that impede effective dispute resolution in both OECD and non-OECD member economies, including many practices that are incompatible with the best practices identified by the OECD MEMAP and the similar UN guidance.

11. The need for improvements to ensure effective dispute resolution going forward is growing even more apparent as the BEPS project proceeds. With rare exceptions, the discussion drafts currently being issued do not reflect consensus positions of the participating countries, and many of the options under discussion would bring unprecedented levels of discretion and uncertainty to treaty interpretation and application.

12. Businesses have legitimate reason to be concerned, notwithstanding promises that a new political commitment will lead to dramatic improvements in dispute resolution, based upon these experiences with widespread bad behavior in addition to the trends cited above, the weakness of the Discussion Draft, and the options being considered under other Actions to allow the unilateral exclusion of issues from MAP or arbitration.

13. The Discussion Draft identifies many of the major impediments to effective dispute resolution and is to be applauded for this valuable work. As indicated below, we agree that the impediments identified by virtually all of the Options in the Discussion Draft are serious and need to be addressed. We
are concerned, however, that the Discussion Draft (i) does not address some of the important impediments to effective dispute resolution, and (ii) is too tentative in its discussion of the impediments it does identify.

14. We are concerned that the too limited scope and too tentative signals sent by the Discussion Draft signal a retreat by participating countries and organizations from their prior support for effective dispute resolution. This could call into question whether they are willing and prepared to lead that change, or at least to support and join it. Participating countries should agree, at a minimum, to follow all the best practices included in the MEMAP, which has already inspired similar UN guidance.

15. The Discussion Draft helpfully identifies a number of potential improvements to promote effective dispute resolution. In particular, it identifies several useful changes that should be made to current Model Convention and Commentary text. With a few exceptions, we generally agree that the Options identified by the Discussion Draft would be helpful and urge their adoption. We respectfully submit, however, that the Discussion Draft does not go far enough in its efforts to identify potential improvements.

16. Incremental measures alone simply will not suffice at this point. Ensuring effective dispute resolution requires not only that “mechanisms” such as MAP operate properly but that many other issues of both process and substance be addressed as well.

17. Political commitment alone will not suffice. The BEPS work on dispute resolution needs to be expanded, refocused, and taken forward through an integrated approach drawing upon and closely coordinating the efforts of (i) the CFA, Bureau-Plus, and subsidiary bodies, to identify all changes to the Model Tax Convention and Commentary needed to make clear the obligations of all parties to the dispute resolution process and to remove legal impediments; (ii) the FTA and its competent authority MAP Forum, to identify and address many of the institutional root causes of current difficulties, with support from the heads of their tax administrations; (iii) political-level support in each participating country; and (iv) real-time business input.

18. If the BEPS work is to be successful and sustainable, it must affirmatively recommend and ensure the prompt implementation of specific changes to ensure effective dispute resolution. All participating countries must commit to make agreed changes without delay and be held accountable for doing so.

19. To ensure implementation, IAPT members have a strong preference for a properly designed mandatory, binding arbitration measure, as it is the only one that has been tested and proven reliable. This is demonstrated by actual experience in recent years under the U.S. treaties with Canada and a number of other countries.

20. Although some objections to arbitration should not be given credence, there is much useful and constructive work that could and should be done to ensure the proper operation of tax treaty arbitration and encourage its adoption. The work on Action 14 should identify and analyze potentially legitimate
concerns – sovereignty, constitutionality, and resources – and systematically develop solutions to those concerns, which we believe are readily available.

21. We submit that all OECD member countries, at a minimum, should be in a position to adopt mandatory, binding arbitration provisions now and should be expected to do so as part of the BEPS project. Alternative measures should also be developed that countries with current constitutional or other issues precluding arbitration could implement as an interim matter to demonstrate a similar commitment to treaty partners and investors while the issues preventing arbitration are being addressed. We believe that the most effective such mechanism would be a peer monitoring process applied in targeted circumstances.

Comments regarding Options proposed by the Discussion Draft

22. IAPT members support many of the Options presented by the Discussion Draft to improve MAP dispute resolution as potentially helpful, although, as noted above, insufficient. We believe that the actions identified in the proposed Options should be implemented without delay, except as follows:

Option 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

23. All participating countries should commit to include the correlative adjustment provisions of paragraph 2 in Article 9 of their treaties, and the multilateral instrument to be developed under Action 15 should include a provision adding paragraph 2 to all treaties that lack it. In the interim, however, the current OECD Commentary stating that correlative adjustments should be required under Article 9 even in the absence of paragraph 2 should remain in effect, and it should be confirmed that Option 2 is not intended to give rise to a negative inference.

Option 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

24. We agree that clarity on this point is important, but are concerned by the suggestion that additional guidance needs to be provided at this point. The current Commentary on Article 25 provides detailed guidance that is clear and widely accepted and it should continue to apply. If there is doubt about its application, it could be expanded to confirm explicitly that a competent authority cannot unilaterally determine that there was “abuse” that prevents a taxpayer’s objection from being “justified”.

Option 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

25. We strongly support measures to suspend collection during MAP consideration, but believe that this Option sends an unduly negative message in this connection. We are particularly concerned about the suggestion that the relief available under domestic procedures could provide an appropriate limitation on MAP collection suspension, because there are special considerations in the cross-border context that call for broader relief (i.e., specifically the fact that two governments may otherwise have required the
taxpayer to pay the amount at issue, causing double the cash flow burdens that could arise in a purely domestic setting).

**Option 23 – Policy issues: Tailor the scope of MAP arbitration**

26. We are concerned by the suggestion that an alternative MAP arbitration provision with a narrower scope be added to the Commentary on Article 25 to encourage the adoption of MAP arbitration. This would send an unfortunate message that it is legitimate to deny effective dispute resolution to cases involving the application of treaty or domestic law anti-abuse rules or cases not involving “actual double taxation”. We disagree strongly with this. Countries that wish to limit the scope of their arbitration provisions in certain respects are already free to do so, but such limitations should not be granted the status of a Model approach.

**Option 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances**

27. While we appreciate that there may be appropriate cases to defer the commencement of arbitration, we are concerned that an open-ended exception could result in a general deferral of arbitration start dates. Since the efficacy of arbitration depends in large part on the creation of a deadline for competent authority agreement, exceptions should be rare and narrowly defined.

2. **Introduction**

28. The IAPT appreciates the opportunity to comment on the Discussion Draft on BEPS Action 14. We provide our views below on the specific Options identified by the Discussion Draft. To provide context for our comments, however, we would like to first offer our general perspectives on effective dispute resolution. These include the need for effective dispute resolution, current trends and experiences, impediments to dispute resolution, potential improvements, and implementation mechanisms.

3. **Need for Improvements to Ensure Effective Dispute Resolution**

3.1 **Business need for certainty and predictability**

29. Tax certainty and predictability are essential to the conduct of business. Businesses must be able to determine and compare the risk-adjusted rate of return on potential investments with adequate confidence. Otherwise, investment activity will be hampered.

30. This is particularly important for businesses operating internationally in the global economy, often in unfamiliar markets.

31. This means that unclear tax rules, excessive administrative discretion, and after-the-fact surprises must be avoided or, at a minimum, effectively neutralized with reliable dispute resolution procedures.
3.2 Business need to avoid double or multiple taxation

32. Double taxation of profits in more than one jurisdiction quickly makes trade and investment uneconomic. Business simply cannot operate with any material level of double tax.

33. Worse, taxation by multiple jurisdictions is increasingly a concern as more business activity involves more than two countries and tax policies and treaty interpretations diverge. Multiple taxation also must be avoided.

3.3 Needs recognized and shared by governments

34. Tax administrations are facing increased pressures as well. At the last meeting of the FTA in October 2014, more than three dozen heads of tax administration endorsed the Strategic Plan of the new FTA MAP Forum. That Strategic Plan proceeds from the recognition that “[a] convergence of global developments is creating elevated levels of tax risk and uncertainty for both governments and taxpayers” and concludes that:

“As governments in times of fiscal constraint increasingly scrutinize cross-border transactional flows to assure a strong revenue base, heightened pressure has been brought to bear on those charged under our global network of tax conventions as the authorities competent to ensure that the principles embodied in that network are properly applied to minimize incidents of double taxation, unintended double non-taxation and taxation otherwise not in accordance with applicable tax conventions.

“… It is incumbent upon all tax administrations … to work together to improve and expand programs designed to resolve tax issues effectively and efficiently such that business can operate in an environment of greater tax certainty”.2

35. We submit that both businesses and tax administrations need real improvements in dispute resolution. Neither can continue operating as at present, given rising inventories and resource constraints, or continue to tolerate current levels of uncertainty, unpredictability, and disputes.

36. Dispute resolution is an integral part of the BEPS project and must be treated as such. Dispute resolution is not a “sop” to business as some have suggested, or a “sweetener” to balance other aspects of the BEPS package. The work on each of the other BEPS issues presumes that any disputes will be resolved effectively as a result of the work on Action 14. An assumed reliance on the ability to resolve future disputes effectively appears to be fueling a willingness on the part of participating countries to

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consider options under other BEPS Actions that pose high risks of disputes and potential double taxation. If effective dispute resolution cannot be ensured, other aspects of the BEPS work will need to be revisited and redesigned to reflect this, with much less scope for disagreement. Otherwise, the BEPS project will create chaos rather than clarity and will pose serious risks to the healthy flow of cross-border trade and investment needed to promote economic growth.

### 3.4 Current trends

37. Tax treaty disputes have proliferated in recent years. According to the latest statistics reported by OECD member countries to the OECD, the number of disputes pending before competent authorities in Mutual Agreement Procedure (MAP) cases has almost doubled in the nine years reported since the OECD began collecting statistics in 2006.³ In the last reported year alone, there was an overall increase of more than 12 percent in case inventories, including an increase of approximately 10 percent in France, Germany, Ireland, Switzerland, and the United Kingdom, some 30 percent in the United States and Italy, and over 100 percent in five other OECD member countries.⁴ The number of new MAP requests is outstripping that of resolved cases year after year – by more than 25 percent in total in the last year alone. The OECD statistics exclude any cases not involving at least one OECD member country but, given that more than 90 percent of tax treaty disputes of OECD member countries are currently with other OECD member countries,⁵ they clearly evidence a general trend.

38. Effective resolution of the growing volume of tax treaty disputes has already become more challenging in recent years. At the same time as the number of disputes is increasing, the pace of case resolution remains materially unchanged.

39. Similar trends are also evident for cases being handled under the EU Multilateral Convention on Arbitration. Statistics for 2012 show that the number of cases initiated under that Convention outnumbered the number of cases closed by over 20 percent. A recent report of the EU Joint Transfer Pricing Forum shows that over 35 percent of the several hundred cases that had passed the deadline for

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⁴ See [http://www.oecd.org/ctp/dispute/map-statistics-2013.htm](http://www.oecd.org/ctp/dispute/map-statistics-2013.htm). Due to a change in reporting period, the U.S. statistics for 2013 covered a 15-month period ending December 31, 2013, but this growth remains extraordinary even on an annualized basis.

beginning arbitration by the end of 2012 had, for no legitimate reason, not proceeded on to arbitration and were still pending without resolution.6

40. The current challenges in resolving disputes appear to be arising from a combination of internal and external factors. Internal factors directly affecting competent authority operations include:

(a) Limited staffing that has not increased in proportion to the recent increases in MAP case inventories;
(b) The inability thus far to decrease materially the average time required to resolve MAP cases; and
(c) Austerity budget cuts in government services in many countries that have reduced even existing resources for staffing, training, travel, and other MAP program needs.

41. These challenges are heightened by broader institutional and external factors, such as:

(a) Increased budget pressure on many tax administrations to collect additional tax revenues in connection with austerity measures;
(b) Relative de-prioritization of dispute resolution resources in tax administrations seeking to collect additional revenues;
(c) Explicit or tacit institutional pressure to retain revenues collected or assessed, without compromise in MAP proceedings;
(d) General acceleration of change in tax treaty guidance, interpretation, and practice and related domestic law provisions;
(e) Political or policy pressure to increase revenue collection from foreign businesses or their affiliates, with or without change to current law; and
(f) Heightened political and public expectations regarding the taxation of foreign or global businesses, often without regard to current law.

42. These factors have already stretched the dispute resolution process to the breaking point in many countries.

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6 Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2012 (JTPF/012/REV1/2013/EN), December 2013 (“EUJTPF Report”). The remaining cases had also failed to proceed to arbitration, although there were colorable explanations for the delay in resolving those cases.
3.5 Current experience

43. Like other businesses, IAPT members currently experience many practices around the world that impede effective dispute resolution in both OECD and non-OECD member economies.

44. These include a wide spectrum of practices that are incompatible with the best practices identified by the OECD MEMAP and the similar UN guidance, including:

- (a) Politicization of the MAP process, often with public comments and press leaks regarding particular cases, or threats of leaks or other inappropriate retaliation, such as criminal charges;
- (b) Unprincipled approaches to the resolution of cases (e.g., seeking to structure agreements based on specified percentages of revenue; insisting on the right to tax at least 50 percent of the income at issue; taking inconsistent positions on issues, depending on whether the transaction is inbound or outbound; taking the position that a taxpayer has a permanent establishment solely because it has local customers or has registered for VAT purposes);
- (c) Offering a lower assessment to settle a case if access to MAP is waived;
- (d) Unilateral termination of MAP proceedings in some cases;
- (e) Limited commitment to the avoidance of double taxation in particular cases;
- (f) Exclusion from consideration of any case in which auditors have asserted the existence of “tax avoidance,” even on a secondary basis without a legal determination;
- (g) Exclusion of selected issues from consideration, without agreed limitation and notice in treaty;
- (h) “Pay to play” requirements to access MAP;
- (i) Not making MAP available for double taxation situations which arise outside the context of direct transactions between counterparts in the two treaty jurisdictions;
- (j) Characterization of a treaty issue as a domestic law issue (e.g., treating an adjustment item as “non-deductible” under domestic law, as opposed to a transfer pricing issue) in an effort to deny access to MAP;
- (k) Proposing adjustments after the expiration of a time limitation for notifying or filing a MAP request;
- (l) Failing to reach an agreement within a reasonable time period;
- (m) Failing to address interest relief as part of the MAP resolution; and
- (n) Inadequate MAP staffing in relation to examination resources.

45. Businesses thus have legitimate reason to be concerned, notwithstanding promises that a new political commitment will lead to dramatic improvements, based upon these experiences with widespread
bad behavior in addition to the trends cited above, the weakness of the Discussion Draft, and the options being considered under other Actions, such as the principal purpose test under Action 6, to allow the unilateral exclusion of issues from MAP or arbitration.

3.6 Future outlook

46. As anticipated by the BEPS Action Plan itself and based on current experience, we expect the volume and difficulty of disputes to increase even more rapidly in the foreseeable future as BEPS discussions continue and BEPS Actions are implemented.

47. Already, tax examination functions and competent authorities in many countries are citing or relying on BEPS concerns or options still under discussion as grounds for their assessments or positions. For example, businesses are frequently encountering assessments premised on broad recharacterization of transactions and structures, large assessments relating to the transfer or deemed transfer of “intangibles”, and assertions of taxing jurisdiction based on new PE theories accompanied by unprincipled profit attribution. These assessments often rely on proposed approaches or examples in BEPS discussion drafts still under active debate.

48. The need for improvements to ensure effective dispute resolution going forward is growing even more apparent as the BEPS project proceeds. With rare exceptions, the discussion drafts currently being issued do not reflect consensus positions of the participating countries even after months of deliberation. Many of the options under discussion would bring unprecedented levels of discretion and uncertainty to treaty interpretation and application. The potential for BEPS to lead to substantially increased numbers of difficult tax disputes has been recognized by governmental officials as well as business;7 indeed, the BEPS Action Plan itself stated, “The interpretation and application of novel rules resulting from the work described [in Actions 1-13] could introduce elements of uncertainty that should be minimised as much as possible.”

49. Factors that will make it even more difficult for competent authorities to reach reasonable case resolutions include:

(a) High-profile unilateral measures and initiatives in many countries that have raised revenue expectations;

The fact that many BEPS options under consideration will continue to permit, or even create, diverging interpretations and make compromise more difficult, because:

(i) They involve novel approaches to complex issues (e.g., the transfer pricing special measures and recharacterization rules proposed under Actions 8-10, the approaches proposed by the Task Force on the Digital Economy under Action 1 to increase taxation of remote sales, the group-based interest limitation proposed under Action 4, and the primary and secondary linking rules on hybrid mismatches);

(ii) Some are binary in nature, requiring a yes or no determination (e.g., the determination of whether a PE exists under Action 7 and the application of the principal purpose test proposed under Action 6);

(iii) Many involve a high degree of subjectivity (e.g., the principal purpose test and the transfer pricing special measures and recharacterization rules);

(iv) Many are indeterminate in nature, with no clear answer (e.g., the PE proposals and the principal purpose test);

(v) Many allow broad discretion for tax administrations or their competent authorities to make determinations (e.g., the transfer pricing recharacterization and profit split proposals and the principal purpose test);

(vi) Many might be seen as allowing much larger tax assessments on current facts than before (e.g., the transfer pricing profit split proposals under Action 10 and the proposed new PE definitions without profit attribution analysis); and

(vii) Many are highly divisive, already facing a lack of consensus among participating countries (including the great majority of Actions, for which non-consensus proposals have been issued).

Demands for a larger piece of the “entire value chain” can be expected to grow, as countries receive information regarding companies’ global operations from country-by-country reporting and transfer pricing documentation;

Experience shows that disputes regarding larger amounts are usually more difficult for competent authorities to resolve, and

Given the zero-sum nature of cross-border tax issues, it is inconceivable that the hoped-for “pot of gold” will materialize, at least in sufficient quantity to satisfy all expectations.

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8 See, e.g., MEMAP, page 40.
50. In combination, these factors have created a clear and urgent need for improvements to ensure effective dispute resolution.

4. Impediments to effective dispute resolution

51. The identification of current impediments to effective dispute resolution is an obvious prerequisite to their effective resolution. The Discussion Draft identifies many of the major impediments to effective dispute resolution and is to be applauded for this valuable work. As indicated below, we fully agree that the impediments identified by virtually all of the 34 Options in the Discussion Draft are serious and need to be addressed.

52. Our major concern regarding the work thus far on the identification of impediments is that the Discussion Draft does not go far enough. As discussed below, we are concerned that the Discussion Draft (i) does not address some of the important impediments to effective dispute resolution, and (ii) is too tentative in its discussion of the impediments it does identify.

4.1 The scope of the Discussion Draft needs to be expanded

53. The Discussion Draft stops short of a full diagnosis of the issues. Most of the issues it identifies were addressed already in the 2007 MEMAP and, to some extent, in the 2008 update to the Article 25 Commentary and subsequent UN guidance, but the solutions identified then have had very limited adoption in practice. At the same time, the Discussion Draft omits some MEMAP best practices, including important ones aimed at protecting the rights of taxpayers (such as advising taxpayers of their treaty rights and elevating MAP cases that cannot be resolved within two years), and even signals a fundamental revisiting of some of the MEMAP best practices (such as the ones relating to the relationship of MAP and arbitration to domestic law remedies, to exclusions for “anti-abuse” cases, and to the collection of tax). These differences risk creating potentially unhelpful negative inferences.

54. The Discussion Draft also falls short in not giving enough weight to many of the structural and political impediments, discussed below, that are currently creating much of the difficulty for dispute resolution. There is also surprisingly little acknowledgment in the Discussion Draft of the importance of relief from double (or multiple) taxation.

4.2 The approach of the Discussion Draft also needs to be more affirmative

55. We are also puzzled that the Discussion Draft states its analysis and conclusions in such a tentative manner and refrains from making affirmative recommendations for change.

56. The Discussion Draft is far less affirmative in this respect than the current dispute resolution guidance from either the OECD or the UN. The MEMAP describes its 25 “best practices” as “what is
generally thought to be the most appropriate manner to deal with a MAP process or procedural issue” and indicates that “taxpayers and tax administrations should ideally strive towards implementing these best practices”. The Discussion Draft, in comparison, describes improvements as steps that countries “could” take or consider further, refers throughout to cases that are “eligible” for MAP consideration, and otherwise signals a potential retreat from current positions on what constitute best practices. The approach of the Discussion Draft pales even beside the very recent FTA MAP Forum Strategic Plan issued by competent authorities themselves, which firmly declares that:

“The purpose of the mutual agreement procedures, and thus the central mission of the competent authorities, is to ensure that the principles embodied in our global network of tax conventions are properly applied to minimize to the fullest possible extent incidents of double taxation, unintended double non-taxation and taxation otherwise not in accordance with applicable tax conventions”.10

57. We are concerned that the too limited scope and too tentative signals sent by the Discussion Draft at this time of urgent need for improvements signals a retreat by participating countries and organizations from their prior support for effective dispute resolution. This could call into question whether they are willing and prepared to lead that change, or at least to support and join it. Participating countries should agree, at a minimum, to follow all the best practices included in the MEMAP, which has already inspired similar UN guidance.

4.3 Conclusions regarding the identification of impediments

58. While the Discussion Draft is helpful, we believe that much work remains to be done to identify impediments to effective dispute resolution. The Discussion Draft also needs to state and advocate this mission in a much more affirmative manner if it is not to be seen as signaling retreat or lack of commitment to dispute resolution.

5. Improvements to effective dispute resolution

59. The Discussion Draft helpfully identifies a number of potential improvements to promote effective dispute resolution. In particular, it identifies several useful changes that should be made to current Model Convention and Commentary text to address important issues such as the interpretation of Article 25(1), the inclusion of Article 9(2), and the bilateral operation of the MAP process. We generally agree that the Options identified by the Discussion Draft would be helpful and urge their adoption, except for the few points noted below.

9 MEMAP, Preface.

10 MAP Forum Strategic Plan, para. 11.
60. We respectfully submit, however, that the Discussion Draft does not go far enough in its efforts to identify potential improvements. As the discussion above makes clear, the volume, magnitude, and difficulty of the dispute resolution challenges faced by businesses and tax administrations are already too great to be resolved by tweaking current approaches, and they will worsen in the immediate future. Incremental measures alone simply will not suffice at this point.

61. This needs to start by revisiting both the details and the fundamental aspects of the current approach to dispute resolution that can create or permit the imposition of barriers to its effective functioning, including:

(a) Barriers to MAP access, such as –
   (i) Unstated or unreasonable deadlines for requesting consideration;
   (ii) Prohibitive documentation requirements;
   (iii) Exclusion of selected issues from MAP consideration, especially where done on a unilateral basis and where the treaty does not provide notice of this; and
   (iv) Inadequate independence of the competent authority function.

(b) Barriers to effective MAP consideration, such as –
   (i) Inadequate staffing and other resources;
   (ii) Inadequate training;
   (iii) Inadequate independence of the competent authority function; as recognized by the FTA, “competent authorities must not be unduly influenced or constrained by competing considerations derived from policies, practices, or goals associated with other offices within their administrations”;
   (iv) Use of the competent authority function to promote revenue maximization or other policy or administrative goals impeding the resolution of MAP cases consistent with “accepted multilateral principles”, which the FTA has also rejected;

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11 Resources and training have been identified as a key area of strategic focus of the new FTA MAP Forum. MAP Forum Strategic Plan, paras. 8-9.
12 MAP Forum Strategic Plan, para. 12.
13 Id., para. 13.
(v) Requirements that contested assessments be paid in order to gain access to MAP ("pay to play");

(vi) Failure to engage in good faith in MAP discussions for other reasons; and

(vii) Absence of an effective mechanism (such as arbitration) to ensure timely resolution of MAP cases.

(c) Broader systemic issues, such as –

(i) Relationships between the competent authority and examination functions that give rise to objectionable behaviors, such as pressure on taxpayers not to take cases to MAP, explicit or tacit pressure for the competent authority to defend assessments, pressure not to agree to refund amounts already collected, and barriers to implementation of MAP agreements following conclusion;¹⁴

(ii) Lack of principled approach to resolving issues, including the taking of inconsistent positions on particular issues;

(iii) Political or other external influences on the MAP process;

(iv) The current case-by-case approach on common, recurring issues, which raises concerns of equal treatment of taxpayers as well as inefficiencies and could be avoided by generally applicable guidance;¹⁵

(v) The separation between MAP and other procedures, such as examination, appeals, and even APAs, which introduces inefficiencies and gives rise to unnecessary MAP cases and limits their coverage;¹⁶

(vi) Inadequate coordination of MAP and domestic law remedies, which forces taxpayers to make choices, often without adequate information, and to forfeit otherwise available remedies;

(vii) The position that a national court judgment in a taxpayer’s case (or sometimes even in a different case on the issue) precludes the competent authorities from reaching a different resolution, which we submit is questionable as a matter of international law; and

¹⁴ Some of these issues have already been identified as priorities for work by the new FTA MAP Forum. MAP Forum Strategic Plan, para. 25.

¹⁵ The FTA MAP Forum has also identified this opportunity as a priority. MAP Forum Strategic Plan, para. 24.

¹⁶ The FTA MAP Forum has recognized the opportunities for improvements in this area as well. MAP Forum Strategic Plan, para. 22.
(viii) Lack of effective procedures for resolving disputes affecting more than two countries.

62. As shown by the above discussion, ensuring effective dispute resolution requires not only that “mechanisms” such as MAP operate properly but that many other issues of both process and substance be addressed as well.

63. Past experience shows that it will not serve much purpose to address symptoms without addressing and identifying their root causes. Political commitment alone will change nothing.

6. Additional work on dispute resolution needed

64. The BEPS work on dispute resolution needs to be expanded, refocused, and taken forward by all concerned parties. We believe that this can best be done through an integrated approach drawing upon and closely coordinating the efforts of all of the following:

(a) We believe that the primary role of the CFA, Bureau-Plus, and participants in its subsidiary bodies (including WP1 and its Focus Group on Dispute Resolution) should be to ensure that the final report on Action 14 identifies all changes to the Model Tax Convention and Commentary that are needed to make clear the obligations of all parties to the dispute resolution process and to facilitate those changes by removing legal impediments.

(b) Although the role of the Forum on Tax Administration is deemphasized by the Discussion Draft, we believe that the work of identifying, addressing, and remedying many of the institutional root causes of current dispute resolution difficulties can be advanced most effectively by the FTA, especially the competent authorities themselves. Provided that they receive the necessary support from the heads of their tax administrations, we believe the competent authority group comprising the FTA MAP Forum should be ideally suited to this task and were encouraged by their recent Statement of Vision and Commitment:

“The competent authorities participating in the FTA MAP Forum recognize that the purpose of the mutual agreement procedures, and thus the central mission of the competent authorities, is to ensure that the principles embodied in our global network of tax conventions are properly applied to minimize to the fullest possible extent incidents of double taxation, unintended double non-taxation and taxation otherwise not in accordance with the provisions of applicable tax conventions. It is the vision of all MAP Forum participants that the effectiveness of our mutual agreement procedures should be collectively improved in order to meet the needs of both governments and taxpayers and so assure the critical role of those procedures in the global tax environment, and that
this can best be accomplished through the collaborative work of the MAP Forum in accordance with this Multilateral Strategic Plan”.17

(c) We agree that it also could be helpful to obtain a political-level commitment in each participating country to ensure the proper resourcing and implementation of measures agreed under Action 14, especially where needed to address broader root causes of dispute resolution difficulties such as barriers created by institutional structures and resource constraints. However, to be effective, this commitment presumably will need to be expanded beyond the commitment expressed in connection with Action 14 upon the issuance of the BEPS Action Plan, which has not yet produced concrete results. In addition, it will be very important to ensure that dispute resolution processes are not subjected to political pressures that could cause them to produce unprincipled outcomes.

(d) Finally, to ensure that the outcomes are workable and sustainable, we believe that it is will be critical to provide for real-time business input as this work proceeds.

7. **Prompt implementation must be assured**

65. If the BEPS work is to be successful and sustainable, it must affirmatively recommend and ensure the prompt implementation of specific changes to ensure effective dispute resolution.

66. Even earnest promises to engage in good faith in MAP will prove inadequate if, as now appears likely, the BEPS project yields a spectrum of potential interpretations that are inconsistent.

67. Therefore, while welcome, another political-level or working party-level commitment to improve dispute resolution will not be sufficient.

68. All participating countries must commit to make all agreed changes without delay and be held accountable for doing so. As the FTA MAP Forum recently acknowledged, “[t]he degree to which each competent authority is able to realize success, however, is closely dependent on the efforts of competent authority colleagues in all other jurisdictions”.18

69. This process has three important elements:

(a) The changes must be agreed by participating countries.

(b) The changes must be implemented by participating countries without delay.

(c) Accountability mechanisms must be provided to ensure implementation.

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17 MAP Forum Strategic Plan, para. 5.

18 MAP Forum Strategic Plan, para. 4.
70. Several potential implementation options are discussed below, but IAPT members have a strong preference for a properly designed mandatory, binding arbitration measure, as it is the only one that has been tested and proven reliable.

8. **Mandatory, binding arbitration**

71. The absence of mandatory, binding arbitration provisions in most tax treaties was correctly identified in the BEPS Action Plan as one of the “obstacles that prevent countries from solving treaty-related disputes under MAP”. The same conclusion had already been reached by the OECD as early as 2006 when it published a proposal to include mandatory, binding arbitration in the OECD Model Tax Convention.\(^{19}\) The BEPS Action Plan approved in February 2013 by the heads of state of all OECD member countries and other G20 countries promised serious consideration of mandatory, binding arbitration as a solution to dispute resolution issues. Against this background, businesses were surprised and deeply troubled to see that the Discussion Draft on Action 14 does not seriously consider arbitration as a solution and even entertains proposals for limiting access to arbitration. Arbitration should not have been so quickly cast aside by the Action 14 focus group in their work to date, and it needs to be further considered.

72. A properly designed provision for mandatory, binding arbitration is the only tool proven so far to significantly address current dispute resolution issues. The recent U.S. experience in this regard is particularly informative. The United States has had mandatory, binding arbitration provisions in effect now for up to seven years with four countries (Belgium, Canada, France, and Germany).\(^{20}\) The number of cases that have gone to arbitration remains in the single digits. Meanwhile, hundreds of MAP cases with

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\(^{19}\) The 2006 proposal proceeded from the recognition that:

“The inability of the current MAP process to provide for all steps possible to facilitate a final resolution of issues arising under treaties … causes taxpayers to hesitate in making the resource commitment to enter into the MAP and likewise provides no incentive to competent authorities to take all steps necessary to ensure a speedy resolution of the issues involved. The MAP process can thus be improved by supplementing it with additional dispute resolution techniques which can help to ensure that international tax disputes will to the greatest extent possible be resolved in a final, principled, fair and objective manner for both the countries and the taxpayers concerned.”


\(^{20}\) The United States has agreed to similar arbitration provisions with Japan, Spain, and Switzerland that have not yet been ratified.
these countries are resolved each year, at the same time that MAP proceedings under those treaties have effectively become subject to deadlines of two years.\textsuperscript{21}

73. The arbitration experience to date under the U.S.-Canada treaty is perhaps most informative. Both competent authorities have confirmed that the process is working well and improving MAP operations.\textsuperscript{22} Statistics confirming the beneficial effects of the arbitration experience are even publicly available. While neither country publishes country-specific MAP case statistics, the statistics published annually by the Canada Revenue Agency are informative because almost all of the CRA’s bilateral inventory is comprised of cases with the United States. These CRA statistics show a clear improvement in dispute resolution since the arbitration provisions of the treaty became effective, with the level of full relief from double taxation rising from prior averages in the vicinity of 80 - 85 percent to 98 percent of cases resolved.\textsuperscript{23}

74. In contrast, the “voluntary” arbitration provisions included in some earlier U.S. treaties, such as those with Germany, France, Italy, Mexico, and the Netherlands, had no perceptible effect on the effectiveness of dispute resolution. They did not operate to set an effective deadline for conclusion of the MAP process or to prevent the unilateral termination of MAP cases. There are no known cases in which arbitration was invoked under these provisions, presumably because they effectively gave each competent authority a private, case-by-case veto over proceeding to arbitration, and some were never even put into effect.

75. The limited success of the EU’s Multilateral Convention on Arbitration is widely thought to be due to widely acknowledged design flaws, such as the absence of a clearly-defined trigger point for moving cases from MAP to arbitration, the non-automatic nature of the process, and the quasi-judicial nature of the proceeding, that have prevented its provisions from operating as intended.

76. Those flaws were all identified in the course of the OECD’s work on dispute resolution leading up to the 2007 OECD report on dispute resolution, and they were all remedied in the OECD version of

\footnotesize{\textsuperscript{21} In ratifying the first U.S. treaties with mandatory, binding arbitration provisions, the U.S. Senate required the U.S. Treasury Department to prepare a report on the operation of those provisions after ten cases have been arbitrated thereunder. This point has not yet been reached.}

\footnotesize{\textsuperscript{22} See, e.g., “Competent Authorities Debate Sovereignty and Arbitration”, Tax Analysts Tax Notes Today, December 12, 2014 (quoting statement by Canadian Competent Authority Sue Murray that “I think [the arbitration provision] has served its purpose because we don’t have to go to that point very often, and it forces a kind of diligence into the process that enables resolution,” Murray said. “And if our perspective is more compelling than the opposing perspective, we will get to the place that we need to get.”).}

\footnotesize{\textsuperscript{23} See, e.g., http://www.cra-arc.gc.ca/tx/nrrsdnts/cmp/mp_rprt_2013-2014-eng.html.}
mandatory, binding arbitration agreed upon as part of that report. The UN version of mandatory, binding arbitration, included as an option in the UN Model Tax Convention, likewise benefitted from this experience.

77. In fact, the arbitration guidance already developed by the OECD and, more recently, by the UN allows treaty negotiators broad latitude to tailor the design of arbitration proceedings to their particular systems and policies. This guidance leaves no doubt that the proposed tax treaty arbitration process is quite different from commercial arbitration and can be greatly streamlined for cost savings and speed if the parties so desire.

78. Notwithstanding this good work and the support or openness in principle of many countries to mandatory, binding arbitration measures, there has been very limited uptake of the arbitration provisions added to the OECD Model in 2008 and the UN Model in 2011.

79. Public objections to arbitration have been rare, but telling. For example, one senior minister argued in a statement at last autumn’s G20 summit that mandatory, binding arbitration is objectionable because it would “limit the ability of the developing countries to apply their domestic laws for taxing non-residents and foreign companies”. Similar concerns have been expressed by some other countries in the deliberations of the UN Committee of Experts on International Cooperation in Tax Matters.

80. The resistance to arbitration does not appear to be limited to these countries, however. The Article 14 Discussion Draft and the Focus Group’s abandonment of the strong arbitration measures contemplated by the BEPS Action Plan indicate that the resistance to arbitration is both widespread and deliberate.

81. Objections to arbitration can take many forms. Where they attempt to preserve an unfettered ability to apply domestic law or otherwise take positions in disregard of treaty obligations, they are tantamount to statements of intent to override treaties. This is contrary to the fundamental international law principle of *pacta sunt servanda* and should be rejected out of hand by the international tax community. BEPS should not provide cover for such positions, even if they are presented as “sovereignty” concerns.

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24 Statement by Indian Minister of State for Finance Nirmala Sitharaman, G20 Summit, Cairns, September 2014 (emphasis added).

25 See Commentary to Article 25 of UN Model Tax Convention.

82. Other objections to arbitration may reflect an attempt to retain unilateral control over the interpretation and application of treaty provisions. They are also objectionable, because they are fundamentally inconsistent with the bilateral nature of treaty provisions and with the inclusion of MAP procedures to provide agreed interpretations. This is not a legitimate “sovereignty” concern. Rather, such positions reflect a lack of commitment to treaty obligations and should be rejected on that ground.

83. In our experience, tax administrations are sometimes also averse to arbitration because they are not comfortable having the technical strength of their positions evaluated by independent parties. In fact, where properly designed arbitration procedures are in place, experience indicates that aversion to even such limited transparency usually inspires competent authorities to reach mutual agreements; this is why mandatory, binding arbitration is so effective in improving dispute resolution. We submit that any tax administration that believes it is interpreting and applying its treaties in good faith should be prepared to have its positions evaluated by independent parties on occasion where necessary to ensure that disputes are resolved. Tax administrations should not advance positions in the technical merits of which they have no confidence.

84. Although objections such as these should not be given credence, there is much useful and constructive work that could and should be done on arbitration. Rather than acquiescing to (or taking cover behind) the stated objections of a handful of countries, the work on Action 14 should proceed by identifying and analyzing potentially legitimate concerns and systematically identifying solutions to those concerns. Our views and recommendations on each of these potential concerns – sovereignty, constitutionality, and resources – are summarized below.

(a) **Sovereignty**: As distinguished from the unacceptable sovereignty arguments noted above, there might be concerns that the ultimate decision should be reserved if arbitration would operate in a procedurally inappropriate manner. We submit that such concerns can be addressed by designing the arbitration procedures appropriately.

   (i) For example, the arbitration of tax treaty disputes can be designed to operate as an integral part of the MAP process itself and, thus, work as a tie-breaker rule for unagreed cases that have been fully considered and developed by the competent authorities. The fact that the contracting states have already agreed by treaty to submit disputes to the MAP process, and that any new treaty arbitration provisions would be similarly subject to ratification in each contracting state, should alleviate any concerns.

   (ii) To avoid any inherent bias in the arbitration process, each competent authority can be permitted to select an arbitrator, and those two arbitrators can agree on a chair.

   (iii) All arbitrators should be required to be free of conflicts of interest.

   (iv) Arbitral decisions can be made non-precedential and remain unpublished, to avoid any appearance that arbitration plays a quasi-judicial role.
(v) The discretion afforded to arbitrators can be limited by requiring them to choose between the “final offers” developed by the competent authorities themselves.

All of these features have already been evaluated and developed in the OECD and UN work on tax treaty arbitration, or in bilateral treaty agreements already in force, and could be further discussed and developed as needed. More fundamentally, a deeper understanding of sovereignty can and does lead States to the conclusion that it is an exercise of sovereignty to enter into treaties with other States, and to join with those States in agreeing upon mechanisms designed to ensure the effective implementation of the agreed upon treaty bargain.

(b) **Constitutionality:** It seems inconceivable that tax treaty arbitration could be truly unconstitutional, other than perhaps in rare and peculiar cases.

(i) International arbitration provisions are already in force under international trade agreements, including in the 160 member countries of the World Trade Organization (WTO). Even more countries have agreed to subject themselves to judicial review at the International Court of Justice and other multilateral proceedings conducted by the United Nations with its 193 member countries. These proceedings clearly are not seen as unconstitutional by participating countries, so it is not clear how the inclusion of much more limited arbitration provisions in tax treaties could raise constitutional objections. Countries with contrary views should be invited to explain the legal basis for their positions so that they can be evaluated.

(ii) Dozens of tax treaties already contain arbitration provisions, and EU Member States agreed unanimously to subject themselves to arbitration on tax matters beginning two decades ago. We note that several countries that had previously had concerns regarding the constitutionality of tax treaty arbitration, including Japan, Spain, and the United States, have been able to resolve those concerns and move forward to adopt arbitration provisions in their tax treaties. The analysis of these countries could be shared with others.

(iii) The arbitration of tax treaty disputes involves the application of treaty provisions that have been negotiated and ratified by the contracting states, including the arbitration provisions themselves. Challenges to the constitutionality of tax treaty provisions have been very few and far between, so it is not clear what the basis would be for presuming that tax treaty arbitration provisions are *per se* constitutionally defective.

(iv) If desired, the potential outcomes of an arbitration proceeding can be further limited to a choice between the positions of the competent authorities concerned. The competent authorities would have had full authority under the treaty to agree to either of these positions in a MAP procedure, so it is difficult to see how either outcome could be constitutionally objectionable.
(v) If the concern relates to taxpayer rights, we note that treaties are designed to provide relief from taxation, not to impose additional taxation. In addition, the arbitration procedures can be designed to allow the taxpayer an opportunity to opt out of arbitration, or even reject the arbitral decision at the end of the process, and pursue domestic law remedies instead.

(c) **Resources**: Tax administrations sometimes argue that arbitration would require the investment of too many resources. However, a properly designed arbitration procedure should yield a net savings in tax administration resources.

(i) Arbitration sets an effective deadline for the competent authorities to agree and thus avoids multiple rounds of indefinite, unproductive discussions.

(ii) Arbitration also minimizes the need for litigation following failed MAP proceedings.

(iii) Arbitration could even produce savings at the examination level, by discouraging the pursuit of positions that have not prevailed when tested in arbitration proceedings.

(iv) If resources are a concern, the arbitration process can be designed with a focus on efficiency, as in the case of “last offer” arbitration.

(v) The ability to refer difficult cases to an independent and objective panel of experts selected by the countries themselves can also serve to alleviate concerns on the part of some relatively less experienced tax administrations that their officials are “outgunned” by their treaty partner counterparts or by the taxpayers.

85. We submit that all OECD member countries, at a minimum, should be in a position to adopt mandatory, binding arbitration provisions now. They should be expected to do so as part of the BEPS project.

86. In the interest of transparency, the arbitration provisions of Article 25 of the OECD Model should be amended to remove the current footnote 1 to paragraph 5 and corresponding Commentary. This would have the effect of requiring countries that are not presently prepared to agree to arbitration to identify themselves publicly to treaty partners and potential investors by filing a reservation (or a non-member economy “position”). That reservation or position should make clear the constitutional provision or other impediment to arbitration.

9. **Other potential implementation measures**

87. There is no proven substitute for mandatory, binding arbitration and there is little time to find one if dispute resolution is to be improved in time to ensure the viability of the BEPS outcomes. Countries that are in a position to add such arbitration provisions to their treaties should do so without delay, and the multilateral instrument to be developed under Action 15 should include an arbitration provision.
However, it would also be useful to develop alternative measures that countries with current constitutional or other issues precluding arbitration could implement as an interim matter to demonstrate a similar commitment to treaty partners and investors while their issues regarding arbitration are being addressed.

88. The arbitration experience indicates that the key impetus for improvements to dispute resolution may be the prospect of some degree of transparency. We believe that alternative measures may be more likely to succeed if they include such a transparency feature.

89. One form of transparency might be a modified peer monitoring process applied in targeted circumstances. For example, countries that have not added mandatory, binding arbitration procedures to their treaties by a prescribed date could become subject to peer monitoring of the operation of their MAP procedures. Peer monitoring is already successfully used by over a hundred jurisdictions in the Global Forum context and in most, if not all, other OECD programs, so the use of such a process can be presumed not to raise any legal or policy issues. The monitoring could be designed to avoid creating excessive burdens. For example,

(a) Monitoring could apply only to MAP procedures under treaties lacking appropriate arbitration provisions.

(b) Monitoring could apply only after more than one complaint regarding that country’s MAP program is filed with an appropriate clearinghouse function.

(c) Monitoring could focus initially on key metrics and procedures, such as case acceptance and rejection rates, case cycle times, percentage of relief from double taxation, percentage of unagreed cases, number of unilateral withdrawals from MAP proceedings with treaty partners, number of taxpayer-initiated withdrawals, “pay-to-play” requirements, and the like.

(d) Treaty partners and business could be surveyed for anonymous input regarding the peer-monitored program, and a more in-depth review of the program could follow only if a need is indicated. This step is important, however, because peer monitoring that is limited to statistical information or written procedures is unlikely to reveal either inappropriate processes, such as examination settlements contingent on an agreement not to pursue MAP relief or tactical use of press leaks, or qualitative issues such as the use of unprincipled or unfounded negotiating positions.

90. Although by no means sufficient in itself, another potentially useful transparency measure could be to require the disclosure of MAP case statistics on a country-by-country basis instead of the current aggregate basis. This would help identify particularly problematic jurisdictions for the benefit of both treaty partners and prospective investors and could help encourage the implementation of remedial measures.
10. **Discussion of options presented by Discussion Draft**

91. IAPT members support many of the options presented by the Discussion Draft to improve MAP dispute resolution as potentially helpful, although, as noted above, insufficient. As noted above, we are concerned both by the limited scope of these options and by the very tentative manner in which they are presented, with weak statements that participating countries “could” take actions that recent OECD and UN guidance says they “should” take. That said, we believe that the actions identified in the following options would be helpful and should be implemented without delay:

(a) Option 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

(b) Option 3 – Ensure the independence of a competent authority

(c) Option 4 – Provide sufficient resources to a competent authority

(d) Option 5 – Use of appropriate performance indicators

(e) Option 6 – Better use of paragraph 3 of Article 25

(f) Option 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

(g) Option 8 – Implement bilateral APA programmes

(h) Option 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

(i) Option 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

(j) Option 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

(k) Option 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities

(l) Option 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”

(m) Option 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State

(n) Option 16 – Clarify the relationship between the MAP and domestic law remedies

(o) Option 18 – Clarify issues connected with time limits to access the mutual agreement procedure

(p) Option 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure
(q) Option 20 – Ensure a principled approach to the resolution of MAP cases

(r) Option 21 – Improve competent authority co-operation, transparency and working relationships

(s) Option 22 – Policy issues: Increase transparency with respect to MAP arbitration

(t) Option 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy

(u) Option 25 – Policy issues: Clarify the coordination of MAP arbitration and domestic legal remedies

(v) Option 27 – Practical issues: Appointment of arbitrators

(w) Option 28 – Practical issues: Confidentiality and communications

(x) Option 29 – Practical issues: Default form of decision-making in MAP arbitration – IAPT members have a strong preference for the Final Offer form, but either would be preferable to none.

(y) Option 30 – Practical issues: Evidence

(z) Option 31 – Practical issues: Multiple, contingent and integrated issues

(aa) Option 32 – Practical issues: Costs and administration

(bb) Option 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

(cc) Option 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedures

92. We also support the goals of the following options but have concerns that they may create confusion if not further clarified:

(a) Option 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

(i) All participating countries should commit to include the correlative adjustment provisions of paragraph 2 in Article 9 of their treaties, and the multilateral instrument to be developed under Action 15 should include a provision adding paragraph 2 to all treaties that lack it.

(ii) In the interim, the current OECD Commentary stating that correlative adjustments should be required under Article 9 even in the absence of paragraph 2 should remain in effect, and it should be confirmed that Option 2 is not intended to give rise to a negative inference.

(b) Option 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances
(i) While we appreciate that there may be appropriate cases to defer the commencement of arbitration, we are concerned that an open-ended exception could result in a general deferral of arbitration start dates. Since the efficacy of arbitration depends in large part on the creation of a deadline for competent authority agreement, exceptions should be rare and narrowly defined.

93. We respectfully disagree with the recommendations of the following Options:

(a) Option 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

(ii) We agree that clarity on this point is important, but are concerned by the suggestion that additional guidance needs to be provided at this point. The current Commentary on Article 25 provides detailed guidance that is clear and widely accepted and it should continue to apply.

(iii) If there is any doubt regarding the application of the current Commentary, it could be expanded to confirm explicitly that a competent authority cannot unilaterally determine that there was “abuse” that prevents a taxpayer’s objection from being “justified”.

(b) Option 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

(i) We strongly support measures to suspend collection during MAP consideration, but believe that this Option sends an unduly negative message in this connection, especially compared to the affirmative recommendation of the MEMAP on this point.

(ii) We are particularly concerned about the suggestion that the relief available under domestic procedures could provide an appropriate limitation on MAP collection suspension, because there are special considerations in the cross-border context that call for broader relief, such as the cash flow issues resulting from the fact that tax will ordinarily have already been paid in the other contracting state.

(c) Option 23 – Policy issues: Tailor the scope of MAP arbitration

(i) We are concerned by the suggestion that an alternative MAP arbitration provision with a narrower scope be added to the Commentary on Article 25 to encourage the adoption of MAP arbitration. This would send an unfortunate message that it is legitimate to deny effective dispute resolution to cases involving the application of treaty or domestic law anti-abuse rules or cases not involving
“actual double taxation”.\textsuperscript{27} We disagree strongly with this. Countries that wish to limit the scope of their arbitration provisions in certain respects are already free to do so, but such limitations should not be granted the status of a Model approach.

\textsuperscript{27} This is not a theoretical concern. Netherlands Competent Authority Arno Oudijn expressed concern in a panel discussion at the Institute on Current International Taxation in Washington, DC on December 12, 2014 that other EU Member States took this position in connection with the approval of the new general anti-avoidance rule approved by the ECOFIN Council on December 9, 2014 for application to the Parent-Subsidiary Directive (http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/146136.pdf).
16 January 2015

OECD
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Sent via e-mail: taxtreaties@oecd.org

Re: Public Discussion Draft- BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Messieurs & Mesdames,

The Taxes Committee of The International Bar Association would like to take this opportunity to comment on the Public Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, released on 18 December 2014.

As a committee, with over 1000 members worldwide, we have formed a Working Group to respond to the OECD BEPS Action Plan initiatives and members of this Working Group, under the IBA Taxes Committee, have developed the enclosed draft.

We submit our comments on behalf of the International Bar Association Taxes Committee. The comments made in this report are the personal opinions of the Working Group participants, and should not be taken as representing the views or opinions of the IBA as an association, nor the participants' firms, employers/employees or any other person or body of person apart from the individuals who have formed the Working Group.

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with OECD with number 1037 55828722666-53.

Sincerely

Simon Yates, and
Ricardo Leon Santacruz
Co-chairs, IBA Taxes Committee Working Group
IBA Taxes Committee Comments on the OECD Public Discussion Draft

BEPS ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

18 December 2014 – 16 January 2015

The IBA Taxes Committee Working Group (“the Group”) includes:

- Simon Yates, Travers Smith LLP, UK
- Albert Collado, Garrigues, Spain
- Stuart Chessman, Vivendi, US
- Ricardo Leon Santacruz, Sanchez DeVanny Esseverri, SC, Mexico
- Wolf-Georg von Rechenberg, CMS Hasche Sigle, Germany

1. Introduction

We are grateful for the opportunity to provide comments on the public discussion draft on BEPS Action 14. We have prepared our comments as a general discussion of the issues raised by the draft.

2. Overall

We agree with the suggestion which is implicit in the Discussion Draft that MAPs are on the whole not working well at present. As such we very much agree that improving the position should form part of the overall BEPS project.

The key problems with existing MAPs are referred to in the document. As austerity policies continue, revenue authorities are finding their resources cut back even in tax-raising areas. Justifying the additional spending required to resource an effective MAP function – which is as likely to lead to tax being ceded by any given country as collected – is politically extremely challenging. Indeed our view would be that it is unrealistic to expect resourcing to increase in the great majority of jurisdictions.

It is extremely difficult for a team involved in running a country’s MAP to be independent. The Discussion Draft acknowledges this, but goes on to emphasise the importance of ensuring independence. In our view, this is also unrealistic. MAPs will inevitably be run by employees of a country's revenue authority (or at least government in the wider sense). Governments are bound to review the performance of their tax collection agencies, and if they are unhappy with it are equally bound to take action. Individuals involved in the MAP process will inevitably take their lead from their employing governments to some degree.
Governments will not always act in the best faith. We see today many governments passing domestic legislation which either expressly or implicitly overrides tax treaties. Less openly, a MAP procedure can readily be abused by a government seeking to delay or avoid altogether a resolution. Sadly, these features of governmental behaviour are also in our view inevitable unless there are objective standards required of governments which can be enforced against them by taxpayers and/or other governments in either domestic or international courts.

In conclusion, our view is that the MAP process is unavoidably always going to be subject to very serious practical limitations unless it can be backed by an accessible arbitration system. From this, it follows that our view is that if no such system is deliverable, where the BEPS process considers MAPs, the aim should be to minimise the cases where MAPs are necessary. Where even following such change, resorting to MAP is unavoidable, there needs to be a hard legal framework binding on governments, and enforceable by aggrieved taxpayers in their domestic courts. If such an enforcement procedure is absent, in our view MAPs will continue to fail with taxpayers being rightly unprepared to place any trust in them.

It will be apparent from the above that we would strongly favour a binding system of international arbitration to deal with MAP issues (indeed to deal with treaty related disputes generally to the extent they could not be resolved in domestic courts).

In the light of this overall approach, we now comment on each of the sections of the Discussion Draft.

3. Ensuring that treaty obligations related to the MAP are fully implemented in good faith

We think that the proposed additional wording for a new paragraph 5.1 of the Commentary would be harmless, but ineffective. It contains no objective measures to which revenue authorities can be held. A taxpayer considering that its revenue authority had not complied with paragraph 5.1 would in practice be powerless to force any progress.

At the heart of the problem is that, by definition, a MAP requires an agreement. It is not something which it is in the power of either treaty state to deliver alone. In turn it is therefore in practice frequently impossible to determine which party is causing a problem (if indeed either party is behaving problematically: it may be that even where both sides are acting in utmost good faith, they simply cannot agree).

In order for provisions such as the proposed paragraph 5.1 to be of practical benefit, there would need to be a binding arbitration process to resolve MAP issues. However, if there was such a process, then paragraph 5.1 would arguably be redundant in any event since the arbitration process would determine the issues for itself.
In contrast we think the wider use of paragraph 2 of article 9 would be an excellent development. This would be entirely consistent with our wider preferred approach: it would sidestep the need for a MAP, instead obliging a government to make transfer pricing adjustments in a way which a taxpayer could enforce in a domestic court. This contrasts with the recommendation made elsewhere in the BEPS process that residence tie-breaker clauses in treaties should cease to use the objective “effective management” test, and instead invoke MAP: we strongly disagree with this for reasons which we hope we have made clear.

4. Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

As noted in our preamble, our view is that this is the key problem. Unfortunately our view is that in the absence of binding arbitration it is also likely to be insoluble, particularly if (as is presumably the case) it is hoped that any solution will be robust going forwards, and capable of surviving changes in the overall politics of international tax, the different phases of the economic cycle and the election of governments around the world with differing priorities.

It is difficult to disagree with any of the suggestions in the Discussion Draft from a theoretical perspective.

Of course the competent authority should be independent of other parts of the revenue authority and indeed Government if it is to be fully effective. But this is not practical. Citizens and media bodies (not to say politicians) will see competent authorities as part of revenue authorities and will therefore not expect to see them, potentially, handing tax away, however correct the decision to do so might be. This is regrettable but it is the world we live in.

Equally, of course the competent authority should be adequately resourced. However, inadequate resource is an enormous problem throughout many revenue authorities, and prioritising this area (where considerable technical expertise in a variety of disciplines will be required) over simple tax collection, or improving the interface between citizens and revenue authorities, is realistically very unlikely to happen.

Again in considering the likelihood of steps being taken to improve these areas we must look beyond the short term. At present there is at least a degree of political will to do something about international tax norms through the BEPS project, and although it remains to be seen if governments will truly be willing to take measures which operate to their detriment in order to support the project as a whole, some popular pressure in that direction can be anticipated. However, over time, international tax will inevitably fall back down the political agenda and once that happens it will be easy for governments to fall back from any commitments made in this area (which, by their nature, will not be enforceable).
5. Ensuring that taxpayers can access the MAP when available

In a similar way to the previous section, it is very difficult to disagree with anything in the Discussion Draft on a theoretical level. Naturally one would want to see clarity of process, reasonable documentation requirements, sensible time limits and so on. But these standards are only of use if they are in terms that are capable of objective verification and, hence, enforcement.

Our view is therefore that these suggestions are useful as far as they go, but lacking in teeth. Ideally it should be open to taxpayers to enforce against states when those states are not complying with the stated standards, either via domestic courts or an international tribunal.

6. Ensuring that cases are resolved once they are in the MAP

We do not consider that this objective can be met without a procedure for binding arbitration. As already noted, because, by definition, MAP involves the necessity of agreement, a resolution of a dispute cannot be enforced in any other way where agreement is not reached. It is not useful to seek to oblige states to complete MAP procedures in given timetables: if they cannot (or will not) agree, then they will not meet the timetable.

We suspect that if binding arbitration were available then in practice states would determine quickly whether it was needed and either reach agreement without it or refer cases to it swiftly. There would be no incentive to drag out the MAP – in contrast to the current position – if it was open to the taxpayer to force arbitration when faced with lack of progress.

Incidentally it is also our view that having an arbitration procedure in place would greatly assist with many of the other issues identified in this paper. States which did not adequately resource their competent authorities would tend to find themselves losing arbitrations and possibly being publicly criticised in the process. Likewise any lack of independence on the part of the competent authority would be effectively countered by an independent arbiter.

7. Conclusion

We do not regard independent arbitration as a panacea for all ills in this area, not least as issues of wider politics; independence and so on would come into play in the arbitration process. However, we are firmly of the view that independent arbitration is an essentially feature of any effective MAP regime.

The nature of the problems arising from the MAP regime as it stands is such that in our view they are not soluble without a mechanism for taxpayers to force the issue and hold states to account. Accordingly if such a mechanism cannot be delivered – and we do not see an alternative to independent arbitration which might be workable – our view is that the focus of work on MAP should be redirected from reforming it to ensuring that more objective standards are written into treaties such that the need for MAP is significantly reduced.
BEPS ACTION 14: MAKE DISPUTE RESOLUTION MORE EFFECTIVE

ICAEW welcomes the opportunity to comment on the Public Discussion Draft BEPS Action 14: Make dispute resolution more effective published by OECD on 18 December 2014.

This response of 16 January 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the Faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world. Appendix 1 sets out the ICAEW Tax Faculty’s Ten Tenets for a Better Tax System, by which we benchmark proposals for changes to the tax system.
ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW’s regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 142,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
Some background
1. OECD has been producing statistics on new MAP cases, and the time-frame during which they are resolved, for nearly ten years and with the exception of 2010 the number of new cases has increased each year. In 2013 new cases were nearly twice as numerous as in the earliest year, 2006: there were nearly 2,000 new cases in that most recent year. The statistics also show that for the OECD member countries about 90% of their outstanding MAP cases are with other OECD member countries.

2. The current OECD Discussion Draft also makes it clear, paragraph 36, that MAP process issues are likely to become more significant as a result of the current work on BEPS.

3. So it does seem to us that the OECD member countries really do need to show a lead in taking the necessary steps to ensure that the MAP process can work, in the future, and that it can be made more robust than it has sometimes been in the past.

4. The OECD Forum on Tax Administration (FTA) launched the MAP Forum in Moscow in May 2013 and this was further endorsed in October 2014, at the latest FTA meeting in Dublin, with the MAP Forum designed to “work in accordance with a multilateral strategic plan to collectively improve the effectiveness of [the OECD] mutual agreement procedures in order to meet the needs of both governments and taxpayers and so assure the critical role of those procedures in the global tax environment.” Details are available at http://www.oecd.org/site/ctpfta/map-strategic-plan.pdf and this work is referred to at, for instance, paragraphs 13, 14, 20 and 39 of the current Discussion Draft. We fully support this new MAP Forum and we hope that it will be able to play a fundamental role to ensure that the work on Action 14 brings real change to the MAP process.

5. We are also convinced that a strong push to bring in mandatory arbitration will have an enormous beneficial impact on the working of MAP cases. Even if the number of actual arbitrations does not increase significantly, the threat of arbitration will, we believe, have a positive impact on the working of MAP cases and concentrate the minds of those involved to resolve the issues under discussion.

6. The BEPS Action 14 Discussion Draft identifies four key principles and sets out various obstacles and options in relation to those principles

Ensuring that Treaty obligations related to MAP are fully implemented in good faith
7. We support the introduction of a, new, paragraph 5.1 to the Commentary on Article 25 to emphasise that MAP is an integral part of the obligations that follow from concluding any particular tax treaty.

Improving Administrative Processes for the Prevention and Resolution of Treaty-related disputes
8. We fully endorse the various options set out in the discussion draft designed to ensure that administrative processes promote the prevention and resolution of treaty-related disputes.

Ensuring that taxpayers can access the MAP when eligible
9. We endorse Options 10 and 11 in the discussion draft for best practices currently included in the MEMAP to make sure access to MAP is made more straightforward and it is made explicit what specific information and documentation is required.
Ensuring that cases are resolved once they are in MAP

10. We think it would be enormously beneficial if OECD were to recommend mandatory and binding arbitration and to provide information to those countries that are currently not convinced of the benefits of such arbitration so that those concerns can be addressed.
ICAEW TAX FACULTY’S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.

2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.

3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.

4. Easy to collect and to calculate: a person’s tax liability should be easy to calculate and straightforward and cheap to collect.

5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.

6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.

7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.

8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.

9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.

10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see icaew.com/en/technical/tax-tax-faculty/~/media/Files/Tech%20news/TaxGuides/TAXGUIDE-4-99-Towards-a-Better-tax-system.ashx)
Comments to the OECD Discussion Draft on BEPS Action 14: “Make dispute resolution mechanisms more effective”

General Comment

The International Chamber of Commerce (ICC) speaks with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR.

ICC appreciates the time and effort invested by the OECD in developing potential options to address deficiencies in existing dispute resolution mechanisms, including the failure of member and non-member countries alike to broadly endorse utilization of binding mandatory arbitration in the Mutual Agreement Procedure (MAP) context. ICC encourages the OECD to honor its objective to contribute to the expansion of world trade by eliminating double taxation as a major obstacle to cross border trade. In this context, ICC is concerned that while the released Discussion Draft on Action 14 provides a number of options for improving the dispute resolution process, it misses the opportunity of taking mandatory and binding arbitration1 and certain other measures further forward to eliminate double taxation. Furthermore, ICC is troubled that – taking into consideration that a strong deliverable on Action 14 is fundamental for the successful outcome of the OECD/BEPS project and the buy-in of stakeholders – a consultation of less than a month over the holiday season is unconstructive for the “inclusive consultation process” the OECD aims to value.

ICC strongly believes that more effective dispute resolution – providing much needed increased legal certainty and predictability for companies – is of utmost importance for enhancing cross-border trade, foreign direct investment and economic growth. The business community is confronted with increasing instances of dispute and a greater risk of double taxation. Improved dispute resolution mechanisms are, therefore, more pressing than ever. This reality is underscored by the many changes in process as a result of the Base Erosion and Profit Shifting (BEPS) process itself.2

As noted by the OECD, actions to counter BEPS are likely to give rise to new rules. The interpretation and implementation of which will introduce further uncertainty and inevitably lead to a higher risk of double taxation and consequently an increasing number of taxation disputes. A solid dispute resolution mechanism with mandatory agreements should remain a cornerstone of the BEPS outcome. If the G20 and OECD fail to establish such a mechanism, this should be acknowledged in the outcome of the BEPS-project by avoiding such tax rules that foreseeably lead to increased double taxation and consequently stifle international trade.

ICC finds that while the Discussion Draft addresses a number of obstacles contributing to the cumbersome nature of the dispute resolution process, it does not fully take advantage of the capacity of the OECD/BEPS forum to identify foundational obstacles preventing the resolution of disputes and propose game changing measures that could serve to fundamentally safeguard

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1 From here forward referred to as ‘arbitration’.
2 ICC notes the OECD Statistics on Mutual Agreement Procedures for 2013 (released on 25 Nov 2014) that the inventory of pending MAP cases has almost doubled since 2006 through 2013. This does not include data of non-OECD Member countries.

Submitted to the OECD on 16 January 2015
enhanced cross-border trade, increased foreign direct investment and continued economic
growth. The Discussion Draft states that it reflects the results of preliminary work done to
identify “the obstacles that prevent” from resolving disputes through the MAP and develops
possible measures to address these obstacles. ICC is disappointed that the Discussion Draft
merely lists 34 potential incremental revisions that could be made to the Model Treaty MAP
procedures. More ambitious progress on this critical issue was expected.

While the Discussion Draft reflects little support from a political perspective for a mandatory
arbitration clause, ICC believes that the OECD should strongly recommend the arbitration
solution already implemented by several of its Members. For example, Canada, France,
Germany, Switzerland, the United Kingdom and the United States have all accepted arbitration
in their taxation treaties, which has been implemented in certain cases. This underlines
arbitration clauses are possible. Accordingly, it is difficult to understand why the OECD refrains
from recommending arbitration. OECD Member states should be obliged to suggest solutions
for arbitration that meet constitutional requirements in specific countries.

ICC strongly believes that if the obstacles to develop a broadly embraced arbitration mechanism
are to be overcome, there needs to be frank recognition of their nature followed by a process to
identify means of eliminating them. For example, the most common objection to arbitration is the
perceived loss of “sovereignty” of the country in question. This term can have different
connotations, though in the present context it most likely means that countries would surrender
their ability to say “no” to a potential resolution.

International arbitration in a variety of contexts has grown significantly since it was initially
addressed in 1923 with the establishment of the ICC International Court of Arbitration. ICC
notes that many of the same obstacles cited in the taxation context have existed with respect to
arbitration in non-taxation areas.

ICC proposes to undertake a comprehensive study as to how the hurdles facing arbitration in
the tax field can be overcome taking into account ICC’s vast experience as the world’s leading
arbitral institution in non-tax areas (also involving state and state entities). The consideration of
lessons learned may provide useful guidance for forging a path by which countries embrace
international taxation arbitration, as well as establishing and administering other dispute
resolution mechanisms such as mediation and the administration of expert proceedings.

Based on ICC’s experience in arbitration in non-taxation areas, ICC identifies the following
elements as key for developing successful arbitration programmes:

- Develop a thorough understanding of the obstacles to be overcome;
- Identify the common objectives of the parties involved;
- Study the experience of successful alternative dispute resolution mechanisms in other
  areas;
- Outline a proposed approach that deals with the obstacles to the use of arbitration for
  the resolution of tax disputes, e.g. transparency versus confidentiality.
- Develop an approach that supports and strengthens broader accessible, effective and
  efficient dispute resolution mechanisms in which countries are encouraged to reach a
  mutually acceptable agreement where arbitration is the exception rather than the rule;
Specific Comments

A. Identification of obstacles to more effective dispute resolution

ICC observes that several countries have raised concerns with regards to mandatory arbitration for international taxation disputes and that the options listed in the OECD Discussion Draft attempt to address them to a certain extent. The obstacles raised by those countries include:

1) The perception of a loss of sovereignty, i.e. the ability of a tax authority to say “no” to a proposed resolution;
2) The expectation that independent arbitrators, perceived by all countries as being acknowledged experts and truly independent, may be difficult to identify;
3) Possible high and unforeseen cost;
4) Loss of control to participate in crafting solutions for cases deemed important to specific countries;
5) Additional time for cases to achieve resolution;
6) Expansion of the scope of the process (“scope creep”);
7) Confidentiality of results of the process;
8) Skepticism of viability of the process in the absence of broad embrace of such procedures.

The listing above is intended to be merely illustrative. ICC underlines that such obstacles have existed in all non-tax contexts in which effective, and broadly embraced alternative dispute resolutions (including mandatory arbitration) have been developed by ICC and other arbitration bodies. Everything suggests that this can be done in the area of taxation.

A. Comments on the options as identified in the Discussion Draft

OPTION 1 – Clarify in the commentary the importance of resolving cases presented under Article 25(1)

Comment: ICC observes that with respect to the importance of resolving MAP cases, it is not evident that the mere substitution of the phrase “obliged to seek to resolve” for “shall endeavor” will effectively address the circumstances in which a resolution may not be reached. Would it not be more demonstrative of the need of all parties, tax authorities and multinational enterprises ("MNEs") alike to use the declarative “shall resolve?”. In the latter, countries could further clarify instances in which states “shall not endeavor”, for example in the instance of willful neglect or perhaps in the instance in which the determination of the court cannot be further varied.

ICC further believes the OECD should at least combine adoption of those BEPS initiatives where interpretation is subjective and outcomes are potentially highly divergent, with an obligation for the participating country to adopt rules that ensure effective dispute resolution. Several of the BEPS deliverables may also imply a legal
obligation to adopt new local legislation (e.g., country-by-country reporting). Such requirements are likely to expand the level of tax disputes. Accordingly, it is crucial that action be taken to ensure more effective dispute resolution. In a multilateral instrument, states could be committed to combine certain BEPS actions items with an obligation to adopt rules that ensure an effective dispute resolution, such as arbitration or the use of language such as “shall resolve”.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

Comment: If the intention is to eliminate the ambiguity of not having Art. 9.2 in specific treaties, which is to be implemented by a multilateral agreement, it seems preferable to mandate the inclusion of Art. 9.2 in all treaties. This would remove an apparent obstacle to effective resolution.

OPTION 3 – Ensure the independence of a competent authority

Comment: ICC agrees with this option but raises the question – which applies to all of the options – why the option is framed in the permissive “could” as opposed to making the language an element of the model? In any event, in a multilateral instrument ICC presumes that the Manual on Effective Mutual Agreement Procedures (MEMAP) would be included and independence would be an agreed upon requirement (“independence” is identified above as obstacle 2).

OPTION 4 – Provide sufficient resources to a competent authority

Comment: Same as comment to option 3 above. If there are not adequate resources provided, then the process will not function (“cost” is identified above as obstacle 3 above). ICC believes that the development of OECD MAP trainings may be helpful.

OPTION 5 – Use of appropriate performance indicators

Comment: Same as comment to option 3 above. ICC believes that performance indicators may prejudice the impartiality of competent authorities and should be used carefully if they are set. ICC notes that a number of the options include monitoring performance/ behavior of contracting states as it pertains to various aspects of the dispute resolution process. However, no measures are proposed to remedy the circumstance in the advent of suboptimal outcomes. In the case of information exchange, OECD implemented peer reviews. A similar peer or independent review process could be mandated, perhaps in the context of the multilateral instrument, in appropriate circumstances as a first measure to affect change.

OPTION 6 – Better use of paragraph 3 of Article 25

Comment: ICC welcomes the suggestion that agreement between competent authorities on general matters of interpretation and application of treaty matters be made available publically. ICC would also suggest that such matters of interpretation and
application are incorporated in any best practice audit guidance developed under the Forum on Tax Administration (FTA) MAP Forum Strategic Plan.

Same comment as option 3 above regarding MEMAP reference.

OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

**Comment:** ICC believes that more direct language to discourage this practice should be considered, such as replacing ‘could commit to take appropriate steps’ with ‘are obligated to take appropriate steps’.

Similarly ICC believes that there should be a mandatory requirement to notify the competent authority of the other contracting state where details of such an audit settlement are discovered and there is a pending MAP matter.

OPTION 8 – Implement bilateral APA programs

**Comment:** ICC fully supports the commitment that participating countries implement bilateral Advance Pricing Agreement (APA) programmes. ICC further suggests that as part of the political monitoring mechanism commitment envisaged within Action 14 that data on the number of implemented bilateral or multilateral APAs be shared publically by participating countries (as is done in the OECD MAP statistics).

Beyond bilateral or multilateral processes, ICC recommends that as an important means of reducing disputes and increasing efficiency, an effective dispute resolution mechanism would include the adoption of effective unilateral processes enabling taxpayers to obtain different types of unilateral rulings from its tax authorities to clarify the tax consequences of a specific transaction where the uncertainty is primarily singular in nature (e.g. binding ruling, APA or similar procedures with respect to a specific cross-border transaction).

ICC believes that the OECD should also encourage countries to implement other alternative dispute resolution mechanisms (e.g. domestic arbitration, ombudsman, advanced tax agreements).

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

**Comment:** ICC supports the implementation of an appropriate procedure in these cases. It is important for the procedure to be simple and quick in order to be effective. The procedure could be based on the grouping together of disputes; for example, in cases of multi-year depreciation or amortization of an asset. It is also positive that the countries commit to provide the roll-back of APA in appropriate cases. It could be useful to have consensus guidance with respect to when roll-back is possible.
OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

Comment: ICC supports this option but raises again the question why this option is also preceded by the verb “could”. ICC considers that the transparency and simplicity of the procedure must be improved in order for it to work.

OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

Comment: ICC supports this option and strongly believes that countries “should” commit to adopt the best practices included in the MEMAP. Commentators are requested to point out other obstacles related to the documentation and information requirements. The business community has experienced that critical issues can often be identified with relative succinctness. On the other hand, MAP processes often seem to generate an excessive amount of documentation which requires time to analyse and resource commitments of both taxpayers and tax administrations. In ICC’s understanding, there should be two different approaches in terms of documentation: (i) “basic” information and documentation provided by the taxpayer or the administration to assess access to MAP; and (ii) “comprehensive” information requested by both tax administrations when the procedure is ongoing. The information should focus on the specific problem to be resolved.

Another obstacle is the language in which the information or documentation is provided. Therefore, there should be mechanisms to minimize the burden of translation. It is a good practice to have clear guidelines as to the relevant information and documentation in the language the administration is familiar with.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

Comment: ICC welcomes this option, especially considering that as a result of the BEPS discussion the notion of what is perceived to be abusive appears likely to be very much broadened. In ICC’s view, a preliminary assessment by the resident state of perceived abuse should not mean denial of MAP-access as an immediate consequence. On the contrary, a taxpayer should be enabled, via MAP, to involve the other contracting state because the abuse assessment in itself can be ‘not in accordance with the provisions of the Convention’ and lead to double taxation issues. According to ICC, therefore, the default should be that there is MAP access in cases of alleged abuse. In order to ensure effective MAP access in such cases, ICC would welcome amendment of article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).
OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities

Comment: ICC sincerely doubts that this would be an efficient way to address the issue at hand, i.e. unilateral power in both contracting states to deny access to the MAP. It seems difficult from a procedural point of view and the power to deny MAP access still seems to fully remain with the resident country. Also, there can be debate with the other contracting state whether a taxpayer’s objection appears to be justified without entering into discussions about the case and its merits and, thus, how to potentially resolve the case.

OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”

Comment: A clarification would be welcomed as it may curb the power of the resident state to unilaterally deny MAP access. However, ICC feels that a better way to address the issue at hand, i.e. unilateral power to deny access to the MAP, would be to amend Article 25.1 to permit a request for MAP assistance to be made to the competent authority of either contracting state (see option 15).

OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either contracting state

Comment: ICC welcomes this option because the possibility to permit a request for MAP to the competent authority of either contracting state increases the flexibility for the taxpayer. Most notably in cases in which one of the two competent authorities is more experienced and has access to more qualified staff than the other. Nevertheless, the crucial point is to obligate all contracting states to ensure that their competent authorities have sufficient resources and that access to them is adequate and well-functioning.

Furthermore, the comments above with regards to options 12-14 also apply.

OPTION 16 – Clarify the relationship between the MAP and domestic law remedies

Comment: ICC strongly believes that MAP and domestic law remedies should not exclude each other and it should be made clear that the taxpayer is free to choose either of them or proceed with both alternatives simultaneously. If a cross border issue is assessed by one contracting state, it is inherent that either: (i) the assessment (or portion thereof) is correct and, therefore, a counter adjustment in the other contracting state needs to follow, or (ii) the assessment itself is incorrect and no counter adjustment applies. It should not be burdened onto the taxpayers to limit themselves to only one of the applicable remedies and risk losing access to the other or risk a delay in effective relief.

Furthermore, the comments above with regards to option 7 also apply.
OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

**Comment:** In the case of local remedies, often the payment of the tax assessed can be deferred until a decision upon the remedy is reached. In ICC’s view, such a deferral should also be available in the case of a MAP. Taxpayers are often forced to settle cross border related disputes since a settlement offers a reduction in the tax payable and thus this might for many taxpayers be the only chance to afford the payment of any additional tax due. ICC thinks it is peculiar that in cross border related cases – which should safeguard a counter adjustment and therefore related relief if the assessment is correct – often no such deferral is available. ICC recommends each contracting state to provide for a deferral of the amount of double taxation until such time as resolution is achieved (except in circumstances of jeopardy).

OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure

**Comment:** ICC supports this option as improvement to MAP access is provided by removing obstacles due to timing issues. It is in the interest of all parties to have clarity on time limits (“time” is identified above as obstacle 5 above).

ICC particularly supports the second bullet point as it ensures access to MAP relief even though domestic law might prevent it according to time limits.

ICC recommends, ensuring better implementation of the whole option, strengthening the wording of “could commit” to “should commit”.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

**Comment:** ICC supports this option. Self-initiated adjustments seem to inevitably make bilateral disputes more difficult to resolve. Today, most countries resist self-initiated adjustments that are negative to their own revenue results. Accordingly, such clarification would be a materially positive element, including coordination with the MEMAP.

Unfortunately, no indication is given on how clarification to articles 7, 9 and 25 could be made. One possibility would be to extend Art.25.1 (which provides for the resolution of double tax issues following action of one or both States; but excluding the action of the taxpayer such as by self-initiated adjustment) to the action of the taxpayer in specified circumstances. An example of such a circumstance could be “if the action is made in accordance, in the taxpayer’s opinion, with the arm’s length principle”.
OPTION 20 – Ensure a principled approach to the resolution of MAP cases

Comment: ICC supports this option. Fair and objective negotiations should be the cornerstone of MAP. ICC recommends that the wording be strengthened from “could commit” to “should commit.”

The second bullet point suggests using Art. 25.3 to resolve interpretive issues: in this case, Art. 25.3 should be reworded, as “shall endeavour” is simply not strong enough to achieve the goal mentioned in this option.

ICC notes that many complex MAP proceedings are resolved via profit split methodologies that are, often, much simpler in approach than the literal provisions of the guidelines. Accordingly, the work being done in other BEPS Actions can facilitate achieving this option.

OPTION 21 – Improve competent authority co-operation, transparency and working relationships

Comment: ICC supports the proposals set forth in option 21. However, ICC again highlights that countries “should” commit to these obligations. In particular, ICC very strongly supports the notion that taxpayers be permitted to make presentations to competent authorities to clarify and facilitate the shared understanding of the relevant facts and issues. Taxpayers are uniquely positioned to provide this information and taking advantage of their expertise should improve dispute resolution. Presentations to the competent authorities may also speed up the resolution of disputes. As noted in the Discussion Draft, face-to-face meetings may allow for more open discussion to trigger bilateral focus and preparation. These advantages would also result from taxpayer presentations to competent authorities.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration

Comment: ICC supports this option which proposes deleting footnote 1 in Art. 25 and modifying paragraph 65 of the corresponding commentary. It is useful for countries to set forth their positions on such an important topic. Eliminating the footnote would require countries to enter an explicit reservation (or observation) which would explain their views more clearly.

The experiences in arbitration in other areas would provide useful guidance on how this can best be achieved.

OPTION 23 – Policy issues: Tailor the scope of MAP arbitration

Comment: ICC strongly supports arbitration while understanding that some countries are not willing to accept this at this time (due in part to the obstacles). In the absence of broadly applicable arbitration, ICC encourages countries to take incremental steps to move in the direction of arbitration. Therefore, ICC would support all of the options mentioned as possible steps towards broader mandatory dispute resolution. ICC agrees
that it would be especially important that any limits on arbitration should be expressly defined in the ratified treaty document.

**OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy**

**Comment:** ICC strongly supports the rapid proliferation of MAP arbitration. Therefore the use of most favored nation clauses would be highly appreciated.

**OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies**

**Comment:** ICC supports the idea of clarifying the co-ordination between MAP arbitration and national legal remedies. For taxpayers it is crucial to have legal certainty. Therefore it must be predictable under which precise circumstances the decision of an arbitration tribunal can or cannot be enforced in national law. In international arbitration, such certainty is achieved through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), behind which ICC was a key driving force.

Similar arguments apply as to our comments regarding option 16.

**OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances**

**Comment:** ICC believes that the period of two years determined in Art.25.5 of the OECD-MA is a sufficient period to give the contracting states a possibility for reaching consensus (reflecting the most recent OECD statistics on time for resolution of MAP proceedings). If in some specific cases, the contracting states desire an extension of this period, they already have the possibility to approach the taxpayer and explain why this extension is necessary or reasonable. Once the taxpayer is convinced of the reasons, it might refrain from initiating the arbitration procedure. In any case, this decision should remain with the taxpayer who is being taxed twice (absent the deferral proposed in the Comment to option 17).

**OPTION 27 – Practical issues: Appointment of arbitrators**

**Comment:** ICC believes that more direct language to deal with the practical issues is required and suggests replacing ‘could agree to develop’ with ‘should agree to develop’. ICC agrees that arbitrators’ independence is critical from the standpoint of all parties – public and private – and such independence has been safeguarded by arbitration institutions.
For example, ICC has developed institutional safeguards through the supervision of the International Court of Arbitration as well as working standards on arbitrator’s independence. The ICC International Court of Arbitration’s vast experience with ensuring such independence, will be a reliable source for the research to be conducted in the area of taxation.

ICC underlines that a well-established and worldwide network of experts in developed and developing countries is crucial and notes that it has such a network in place to propose and nominate experts as potential arbitrators through its International Centre for ADR.

OPTION 28 – Practical issues: Confidentiality and communications

Comment: ICC reiterates the comment to option 27 above with respect to the use of direct rather than permissive language. Furthermore, the experience of ICC as the world’s leading arbitral institution - routinely addressing issues of confidentiality and transparency – may provide helpful guidance in this regard.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

Comment: ICC notes that in its initial treaty formulation of dispute resolution issued in 1924 (prior to the process being taken over by the League of Nations), it suggested that in the absence of bilateral agreement, the taxable income should simply be split – leaving both disputing countries with half of it to tax – if no other settlement could be achieved. Certainly this suggestion has to be viewed in the light of the process it was made in but it still illustrates very well the existing potential for alternative solutions. Other potential alternative dispute resolution should be studied, taking into account the experience and lessons learned in non-taxation areas.

OPTION 30 – Practical issues: Evidence

Comment: ICC agrees with these comments, which it also contemplates analysing as an element of the comprehensive study in the general comment above.

OPTION 31 – Practical issues: Multiple, contingent and integrated issues

Comment: ICC concurs.

OPTION 32 – Practical issues: Costs and administration

Comment: ICC notes that arbitration is not necessarily more expensive than a MAP procedure. Having an arbitration administered by a recognized arbitral institution does not only provide guarantees for a due process and fair trial, it can save costs considering the costs are predictable and manageable (e.g. cost schedules are applied and

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available). ICC concurs that the fees paid to the legal representatives followed by the arbitrators tend to be the most significant share of the costs of the arbitration.

**OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)**

**Comment:** ICC concurs.

**OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure**

**Comment:** ICC concurs.
The International Chamber of Commerce (ICC) Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy. Founded in 1919, and with interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments. ICC also provides essential dispute resolution services, foremost among them the ICC International Court of Arbitration, the world’s leading arbitral institution, and through its International Center for ADR.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.
By Electronic Delivery

15 January 2015

Marlies de Ruiter
Head of Division
Tax Treaties, Transfer Pricing and Financial Transactions
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development
2, rue André Pascal - 75775 Paris Cedex 16

RE: The CIV Industry and BEPS Action 14

Dear Ms. de Ruiter:

ICI Global,¹ on behalf of our collective investment vehicle (CIV)² industry members, supports fully the OECD’s effort to make dispute resolution mechanisms more effective. Accelerating globalization, increasingly aggressive assertions of tax liability by certain governments, and the increasing difficulties (including extensive delays) in resolving tax disputes and eliminating double taxation are among the factors necessitating the extensive work required on Base Erosion and Profit Shifting (BEPS) Action 14.

For BEPS Action 14 to truly succeed, the final Report must call upon all governments to adopt mandatory binding arbitration for resolving tax disputes. The other currently available dispute resolution mechanisms (as enhanced by the options included in the discussion draft) will be even more effective if all parties know that mandatory binding arbitration always is available as a last resort for resolving issues. Importantly, governments and business both will benefit greatly from dispute resolution efficiencies – including those arising from mandatory binding arbitration.

Cross-Border Tax Controversies are Becoming More Common and More Difficult to Resolve Efficiently

¹ The international arm of the Investment Company Institute, ICI Global serves a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US$19.2 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

² A CIV is defined for this purpose consistently with the OECD’s Report entitled “The Granting of Treaty Benefits with Respect to the Income of Collective Investment Vehicles” (the “CIV Report”). Specifically, paragraph 4, page 3 of the CIV Report defines CIVs as “funds that are widely-held, hold a diversified portfolio of securities and are subject to investor-protection regulation in the country in which they are established.” Funds that are not treated as CIVs in the CIV Report (and are not addressed in our comments) include “investments through private equity funds, hedge funds or trust or other entities that do not fall within the [Report’s] definition of CIV.” Id.
The frequency and complexity of cross-border tax controversies has increased as globalization has accelerated. These controversies become more difficult to resolve if issues are selected for audit with increased emphasis on the amount potentially at issue and less concern for a position’s merits. Overly aggressive interpretations of relevant legal standards are particularly difficult to resolve when little, if any, attention is given to the relative costs and benefits of continuing to pursue an issue.

Tax certainty is critical for CIVs and important for CIV managers. Our comments on BEPS Action 14 are designed to promote tax certainty. The many benefits that tax certainty provides include cost savings for governments and business, improved investor confidence, additional cross-border investment, and enhanced economic growth.

Essential components of tax certainty include: well-reasoned, published interpretations of law; opportunities to resolve issues through advance ruling processes and advance pricing agreements; clear audit rules and procedures that are disseminated to, and understood by, assessing officers; adherence by assessing officers to those rules and to judicial precedent; audit resources that are sufficient to allow assessing officers to understand issues fully and settle them fairly; and effective mechanisms for resolving issues expeditiously.

Comments on BEPS Action 14 Options

We generally support the options included in this discussion draft for improving dispute resolution processes such as those provided in mutual agreement procedure (MAP) cases. For the dispute resolution process to become truly effective, however, governments must commit to adopting the options. Moreover, as noted above, these options will be much more effective if countries also commit to adopting mandatory binding arbitration.

We recommend that the final BEPS Action 14 Report support mandatory binding arbitration and explain clearly the many benefits that broadly-applicable mandatory binding arbitration will provide to taxpayers and governments.

Ensuring that treaty obligations related to the MAP are fully implemented in good faith

MAP can be a very important mechanism for resolving tax disputes. Clarifying the obligation created by the phrase “shall endeavor” will remind certain governments of the importance of bringing MAP cases to successful conclusion.

Addressing effectively the economic double taxation that can arise with associated enterprises is becoming increasingly important. Paragraph 2 of Article 9 provides an effective mechanism for addressing economic double taxation.

Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

The competent authority process will be more effective if, among other things, the independence of the competent authority is ensured, if sufficient resources are made available, and if a substantial number of cases are resolved through mutual agreement procedures.

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3 This certainty is necessary because CIVs generally price each day the per-unit value of their interests (taking into account all assets and liabilities, including tax liabilities).
available to the competent authority for resolving issues, and if the best practices for evaluating performance are adopted.

The other options presented in this section, including providing MAP access following audit settlements, using MAP to resolve recurring (multi-year) issues, and adopting advance pricing agreement (APA) procedures, also will help prevent and/or resolve treaty-related disputes.

**Ensuring that taxpayers can access the MAP when eligible**

The options presented in this section are sensible approaches for clarifying generally-applicable MAP procedures, for improving access to (and the effectiveness of) MAP, and for clarifying the relationship between different remedies. We must stress, based upon our members’ experiences, that taxpayer involvement in MAP can improve significantly government access to, and appreciation of, relevant facts and positions and shorten the resolution process.

**Ensuring that cases are resolved once they are in the MAP**

MAP can be such an effective mechanism for resolving treaty disputes, and yet so often fails to yield the expected results, that we welcome the discussion draft devoting almost half of its options to ensuring that cases that are in MAP get resolved. The only option that we submit should be added to this list – and adopted widely – is mandatory binding arbitration.

We understand and appreciate the objections and/or obstacles to mandatory binding arbitration. Overcoming these objections/obstacles, however, is necessary to ensuring that MAP achieves its issue-resolution objective. Importantly, the simple presence of mandatory binding arbitration as a “final option” will encourage taxpayers and governments to resolve issues more expeditiously.

Mandatory binding arbitration will be most useful, obviously, if it is available in all cases. While we would not embrace enthusiastically approaches that limit arbitration, such as to specific treaty articles, we would expect governments to seek to expand arbitration coverage once they experience arbitration’s many issue-resolution benefits (including net cost savings).

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We appreciate greatly the OECD’s strong leadership on this critically important initiative. Double taxation is both an increasingly-important concern for the CIV industry and a potentially significant detriment to cross-border investment and economic growth.

Consequently, we recommend that the Final BEPS Action 14 Report urge governments to commit to adopting both the options advanced in the discussion draft and broadly-applicable mandatory binding arbitration. The substantial dispute resolution costs that are imposed today on both governments and taxpayers will be reduced considerably if these recommended approaches are adopted.

Please feel free to contact me (at lawson@ici.org or 001-202-326-5832) at your convenience if you would like to discuss this issue further, or if we can provide you with any additional information, in advance of or following the Public Consultation on 23
January. My colleagues Karen Gibian (at kgibian@ici.org or 001-202-371-5432) and Ryan Lovin (at ryan.lovin@ici.org or 001-202-326-5826) also may be called upon for assistance.

Sincerely,

Keith Lawson
Senior Counsel – Tax Law

cc: taxtreaties@oecd.org
Dear Mrs de Ruiter,

We welcome the opportunity to comment on the OECD’s Public Discussion Draft on BEPS Action 14: “Make dispute resolution mechanisms more effective” and the efforts undertaken by the Committee on Fiscal Affairs to seek external consultation. An effective Mutual Agreement Procedure (“MAP”) process is a key element in providing legal certainty and reliability in the objective application of tax treaties to taxpayers. Many tax authorities are increasingly focusing on international tax and transfer pricing issues in their tax inspections and tax audits. It has to be assumed that any resultant corrections relating to these issues in one country will lead to double taxation, unless corresponding adjustments are made in the other country. In practice, the other country will very often only accept such corresponding adjustments after a successful MAP. If the MAP fails, the double taxation issue will currently remain unresolved, in contravention of the basic aim of the tax treaty.

Moreover, the qualitative criteria pursuant to the drafts of the LOB rule, the PPT rule and the other anti-abuse rules in conjunction with the leeway competent tax authorities may exercise regarding the application of treaty benefits introduced by the discretionary relief rule will significantly increase the practical importance of effective, short and successful MAPs. This in turn, will require an additional arbitration mechanism. Such arbitration mechanism could serve as a means of
legal remedy for taxpayers and should apply when the competent tax authorities cannot come to a mutual agreement on the application of the tax treaty.

The discussion draft describes most of the obstacles to successful MAPs in practice and proposes “options” to improve the situation. We agree with the presentation of the obstacles and confirm that the “options” suggested seem adequate in addressing the obstacles, with the exception of those we discuss below. However, should individual obstacles fail to be addressed this would itself be an obstacle to an effective MAP. Therefore, we emphasize that it is important to implement measures to address all obstacles. Accordingly, the “options” proposed should not be optional but mandatory.

— Comment regarding item 1.B.: Absence of paragraph 2 of Article 9 in some tax treaties (public discussion draft, option 2, paragraph 11)

The rationale behind the argument in option 2 that it “is not intended to create any negative inference with respect to treaties that do not currently contain a provision based on paragraph 2 of Article 9” is unclear. If a Contracting State is ready to introduce LOB clauses and a PPT rule into all its existing tax treaties by a multilateral instrument, it is logical to introduce an effective MAP into all its tax treaties at the same time to mitigate the obvious downsides of these rules for taxpayers.

— Comment regarding item 2.D.: Lack of resources of a competent authority (public discussion draft, option 4, paragraph 16)

According to the latest OECD-MAP-statistics “the total number of open MAP cases reported by OECD member countries was 4566, a 12.1% increase as compared to the 2012 reporting period and a 94.1% increase as compared to the 2006 reporting period”. Thus, the number of open cases is steadily increasing. Even if the average time for completion of MAP cases of 23.57 months in 2013 has decreased compared to the year 2012, it has to be assumed that the competent authorities will encounter capacity issues once BEPS-induced applications for MAPs are filed.

In Germany, the competent tax authority currently lacks the necessary staff resources to negotiate MAP cases. It seems that the number of successfully completed MAP cases is significantly smaller than the number of new applications. Thus, the processing time is continuously increasing.

MAP resources would have to be increased significantly to keep up with the expected growing demand for MAPs. Therefore, MAP processes should at the same time become more efficient. This could e.g. be supported as follows:
Classification of MAPs in terms monetary amounts of double taxation to be mitigated and complexity of the case: MAPs in which low double taxation amounts and/or limited complexity might enter into an accelerated MAP process where competent authority negotiation is reduced to a minimum and potentially a supervisory board is used to come to a solution in a short period of time. This would free competent authority resources that could then be used to discuss more complex cases in a level of detail necessary to come to a reasonable solution.

Enhance the mutual understanding of what the outcome of an MAP shall be: MAPs are supposed to resolve double taxation. This means that competent authorities should focus their efforts on the arm’s length allocation of actual profits in the case at hand. Discussions on principles, formalities, methods and other aspects of transfer pricing should only support the main goal of the negotiation and not become the main focus of the discussion itself. Political issues beyond the case at hand should not be content of MAPs (see also option 20).

Make MAPs more transparent: Regular updates of the taxpayer on the status of negotiations are desirable. This might help taxpayers to provide information to speed up the process (see also proposed option 21).

Comment regarding item 2.E.: Performance indicators for the competent authority function and staff (public discussion draft, option 5, paragraph 17)

This obstacle needs to be described more precisely. There is a natural incentive for tax authorities to maximize the tax revenue in their country. Thus, it is reasonable to expect that tax officers of a Contracting State will negotiate a number of MAP cases under a tax treaty with the same Other Contracting State at the same meeting with tax officers of this Other Contracting State. Further, it is reasonable to assume that the same officers for each pair of Contracting States meet regularly and know one another well. Consequently, tax officers might be more ready to bargain tax revenue gains in one case against tax revenue losses in another case, instead of considering each case individually. Finally, in the absence of external supervision or control, it is logical to assume that tax authorities will actually base their decisions on performance indicators that are tax revenue oriented.

Therefore, we propose that anonymized facts, decision and the reasons for the decision of all MAPs be published in a public database. Further, an arbitration body comprised of tax officers from neutral countries or other competent persons should serve as a body of legal remedy. Such body of appeal should base
its decisions on the afore-mentioned published reference decisions as this would minimize any incentive to trade tax revenue.

— Comment regarding item 2.G.: Audit settlements as an obstacle to MAP access (public discussion draft, option 7, paragraph 19)

Our members tell us that in their experience German tax authorities in charge of tax inspections/audits try to avoid MAP’s wherever possible. They have also experienced cases of trading fines against waiving an MAP, as described in the discussion draft. Sometimes it seems that tax authorities have used the perceived ineffectiveness of MAPs (i.e. long time until the case is decided while the taxes have been collected by both countries, low likelihood of a successful MAP, etc.) as an argument to persuade taxpayers to waive their right to apply for a MAP.

— Comment regarding item 3.M.: Cases where a competent authority considers unilaterally that a taxpayer’s objection is not justified (public discussion draft, option 13-15, paragraph 30-31)

A unilateral decision must be made transparent and thus must be published in anonymous form in a public database. Further, taxpayers must be guaranteed the right to a legal remedy against any unilateral decision. Ideally, such legal remedy will include the right to involve the tax authorities of the other Contracting State and grant access to a neutral arbitration panel.

— Comment regarding item 3.O.: Issues connected to the collection of taxes (public discussion draft, option 17, paragraph 33)

In most cases the situation governing any decision made in the MAP will be that a loss of tax revenue in the one Contracting State is linked to a gain of tax revenue in the Other Contracting State, because both States will ultimately have to accept i.e. the same transfer price or other value. In such cases the a priori assessments before the MAP form a price or value interval within which the final value would generally be determined. The a priori taxes of both Contracting States taken in total are likely to constitute the highest tax outcome, because at that point in time double taxation issues have not been resolved. Double taxation resolution should be mandatory. Thus, not coming to an agreement should not be a possible result of the MAP. To provide an incentive for every Contracting State to reach a mutual agreement quickly, each Contracting State should have the right to collect the tax that it would collect if the other Contracting State realized its preferred end of the interval. The maximum total tax that would become due – regardless of its allocation between the Contracting States, assuming the double taxation were resolved – less taxes collected should be paid to a
neutral trustee, e.g. an arbitration panel, as an advance payment by the taxpayer. Following a decision, the trustee would forward the share as mutually agreed in the decision and would further forward the actual interest earned on the advance payment to each of the Contracting States. The rest would be refunded to the taxpayer plus the proportionate share of the actual interest earned.

In cases where there is no such link, the taxpayer should be permitted to apply for the two Contracting States to decide on a monetary deposit to be made with the trustee, in the amount of the likely total tax revenue that will ultimately be allocated between them. Effective legal remedy is needed for such decisions. We propose that a neutral arbitration panel decide on such appeals within a very short period of time.

Comment regarding item 3.P.: Time limits to access the MAP (public discussion draft, option 18, paragraph 34)

If tax inspections/audits take place in a Contracting State several years after the end of the fiscal year, procedural law could preclude adjustments being made in the Other Contracting State. Therefore, the Contracting States should either engage in coordinated bi- or multilateral tax inspections/audits and/or should align their respective laws or procedural standards such that in both of the Contracting States changes to tax assessments are either possible in or are precluded at any given point in time.

Comment regarding item U.: Issues related to multilateral MAPs and advance pricing arrangements (APAs) (public discussion draft, paragraphs 58-59)

A triangular case that often occurs in practice especially in the consumer goods or automotive sector is that e.g. an Asian enterprise of State A exports goods to Europe via a European hub (enterprise of State B) which subsequently sells the goods to a distribution company of State C. If the European hub enterprise receives an arm’s length remuneration any adjustment to the transfer price between the distribution enterprise of State C and the European hub enterprise of State B by the tax administration of State C could where necessary be passed through to the enterprise of State A.
Should you have any questions regarding our comments please do not hesitate to contact Jörg Peter Müller from the IDW Team on +49 (0)211 4561 403 or via e-mail at mueller@idw.de.

Yours sincerely,

Manfred Hamannt

Marita Rindermann

Technical Director Taxes and Law
Mexico City, January 16, 2015

Via e-mail
taxtreaties@oecd.org
Ms. Marlies de Ruiter
Head of Tax Treaties, Transfer Pricing
and Financial Transactions Division OECD/CTPA

Dear Ms. De Ruiter,

On behalf of IFA Grupo Mexicano, A.C. (Mexican Branch of the International Fiscal Association), kindly find below the comments on the Public Discussion Draft “BEPS Action 14: Make Dispute Resolution Mechanisms More Effective” (the “Draft”).

“1. Ensuring that Treaty Obligations Related to the Mutual Agreement Procedure Are Fully Implemented in Good Faith

[...]

A. Absence of an obligation to resolve MAP cases presented under Article 25(1)

Description of the obstacle

10. Paragraph 2 of Article 25 provides that competent authorities “shall endeavour” to resolve a MAP case by mutual agreement. It has been argued that the absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP (although it is important to note that Article 25(2) entails an obligation to effectively attempt to resolve the case).”

The previous transcription describes as an obstacle the absence of an obligation to resolve a MAP case, due to the fact that paragraph 2 of Article 25 of the OECD Model Convention establishes that competent authorities “shall endeavor” to resolve a MAP case by mutual agreement.

We consider that the absence of an obligation to resolve a MAP case translates into an issue for taxpayers because the competent authority, in order to avoid the resolution of cases could argue an explicit prohibition by domestic legislation (i.e. Cost sharing agreements or pro-rata expenses).

In addition, when the competent authorities do not reach a resolution by a mutual agreement procedure, the taxpayer may only be informed that “it was not possible to reach a resolution with the competent authority of the other Contracting State” excluding the reasons or circumstances why the agreement was not reached, leaving the taxpayer in a state of uncertainty and with a double taxation case unsolved.
Therefore, our recommendation is that the competent authorities should issue guidelines aimed at the taxpayers through which position of specific topics are expressed. This may provide taxpayers with an interpretation of the position that competent authorities along countries maintain regarding specific topics, and with that provide certainty to taxpayers about the effectiveness of this procedure.

Additionally to the previously mentioned, it is important to recall that for any country where foreign investment is a relevant topic, the existence of procedures that provide taxpayers (mainly Multinationals) with certainty about the resolution of MAP cases will promote the arrival of new investments to the country.

“2. Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes

[...]

C. Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes

Description of the obstacle

14. In the context of the mutual agreement procedure, the role of the competent authority is to take an objective view of the provisions of the applicable treaty and apply it to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty. Objectivity may be compromised where the competent authority function is not sufficiently independent from a tax administration’s audit or examination function (i.e. from the field personnel who were directly or indirectly involved in the initial adjustment).

[...]

D. Lack of resources of a competent authority

Description of the obstacle

16. The lack of sufficient resources (personnel, funding, training, etc.) allocated to a competent authority in order to deal with its inventory of MAP cases is likely to result in an increasing inventory of such cases and in increased delays in processing these cases. This will have a fundamental impact on a Contracting State’s ability to operate an effective MAP programme.

[...]
**E. Performance indicators for the competent authority function and staff**

*Description of the obstacle*

17. *The evaluation of the competent authority function or staff based on criteria such as sustained audit adjustments or tax revenue may be expected to create disincentives to the competent authority’s objective consideration of MAP cases and to present obstacles to good faith bilateral MAP negotiations.***

The previous transcriptions describe as obstacles the lack of independence of the competent authority in charge of resolving MAP cases from the administration with examination or audit functions, the lack of sufficient resources allocated to a competent authority in order to deal with its inventory of MAP cases, and the lack of proper performance indicators.

We do agree with these concerns, especially when the competent authority in charge of resolving MAP cases is the same competent authority with examination and audit functions. In this sense, by depending from the same department, only one budget of resources is given, thus, the competent authority has to obtain its resources from a budget where the inspection functions have priority.

Consequently, the lack of budgetary and administrative independence leaves the competent authority at the full disposal of the audit administration, whereby not enough MAP cases are resolved.

Additionally to the abovementioned, the lack of proper performance indicators represents another main obstacle that MAP cases resolution has to face, because the main functions of the department are the inspection powers; consequently, the competent authority in charge of resolving MAP cases may not be evaluated based on the functions it really performs but only based on the collected taxes according to the primary adjustment realized in the audits and not from solved MAP cases.

In order to overcome such obstacles, our recommendation is that Governments shall assure the autonomy of the competent authorities in charge of resolving MAP cases from the audit and inspection functions or similar, such as it is included in the OECD Manual on Effective Mutual Agreement Procedures (“MEMAP”).

With the autonomy of the competent authorities, other obstacles mentioned in the Action Plan here commented should also be in part solved or at least minimized (i.e. Transparency and simplicity of procedures).

Also, by ensuring the independence of the competent authority, a better perspective of the resources needed and incentives alignment are possible. Such solutions will allow a better allocation of resources to the competent authority, establishment of proper performance indicators and consequently build confidence in the taxpayers regarding the effectiveness of these procedures.
“F. Insufficient use of paragraph 3 of Article 25

Description of the obstacle

18. Paragraph 3 of Article 25 authorises competent authorities “to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”. The question may arise, however, whether competent authorities make use of this authority. The second sentence of paragraph 3 provides in addition that competent authorities “may also consult together for the elimination of double taxation not provided for in the Convention”, although the competent authorities of some countries consider that they may lack the legal authority to resolve issues under that sentence.

[…]

The previous transcription describes as an obstacle the scarce use of paragraph 3 of Article 25 of the OECD Model Convention, which is related to the resolution by mutual agreement of any difficulties or doubts arising as to the interpretation or application of the Convention and consultation for the elimination of double taxation not provided for in the Convention.

The lack of guidelines issued by the States related to the topics that could be solved according to paragraph 3 of Article 25 of the OECD Model Convention causes that taxpayers do not have access to these procedures, because the taxpayers do not have knowledge that they can access these procedures.

Our recommendation is that the Contracting States that have included paragraph 3 of Article 25 of the OECD Model Convention into the treaties they have executed, should issue guidelines that might help taxpayers to know the cases for which MAPs could also be entered according to this paragraph.

“3. Ensuring that taxpayers can access the mutual agreement procedure when eligible

[…]

J. Complexity and lack of transparency of the procedures to access and use the MAP

Description of the obstacle

25. Where procedures to access and use the MAP are not transparent or are unduly complex, taxpayers may not seek MAP assistance and, as a result, may face unrelieved double taxation or otherwise improperly be denied treaty benefits.

[…]

4
K. Excessive or unduly onerous documentation requirements

Description of the obstacle

26. Article 25(2) MAP cases are generally initiated by a taxpayer’s request for competent authority assistance under Article 25(1). Through such a request, the taxpayer notifies the competent authority that it considers that the actions of one or both of the Contracting States have resulted or will result in taxation not in accordance with the provisions of a treaty. Such a request must be accompanied by complete and accurate information to enable the competent authority to understand and evaluate the taxpayer’s objection. Excessive or unduly onerous documentation requirements may, however, discourage requests for MAP assistance and be an obstacle to an effective mutual agreement procedure.

[...]"

The previous transcriptions describe obstacles related with the lack of transparency of procedures in order to access a MAP and the excessive or unduly onerous documentation required to the taxpayer in order to access a MAP.

In this respect, the practical experience is not away from such obstacles. Taxpayers trying to initiate a MAP face excessive and onerous documentation requirements. This is, the documentation or information requested might not be directly related with the case, which translates into a waste of resources (i.e. Translations from the original language (English) to the official language of the State).

Also, as it has been mentioned, the lack of transparency and complexity of the procedures followed may represent important obstacles that difficult the resolution of MAP cases. In this sense, based on the practical experience, the lack of transparency, the complexity of procedures followed, and the excessive and unduly onerous documentation requirements by the competent authorities leave the taxpayer in a state of uncertainty about the progress of the MAP case entered.

Regarding the aforementioned, our recommendation is that Contracting States participating into a MAP case simplify the documentation requirements and procedures by only requiring the documentation or information strictly necessary to reach a solution. An example of the previous is that if the MAP is started in a country where a different language is spoken, the other competent authority does not impose the taxpayer with the costs related with the translation of documentation if the documentation is not strictly necessary or if the documentation is in the English language (official language of most of the treaties executed). Also the Contracting States may consider if the MAP case derives from an extension or renovation of a previous solved case, the competent authority should not require all the historic documentation because it already has it in its files and it should only require the necessary documentation in order to renovate or extend the original resolution.
Regarding transparency and simplicity of the procedures to access MAPs a general recommendation that could be useful is that taxpayers participate, or at least be present, during the competent authorities’ negotiations. Such mechanism will imply that the taxpayers have certainty of the progress that the MAP case has, as well as certainty that all the information provided during the MAP is properly taken into account.

Finally, in order to inform the taxpayers, the competent authorities should promote through their communication channels (programs, forums, professional associations, tax ombudsman) the access to MAPs as mechanisms to resolve double taxation cases. Nowadays, the access to MAPs is reduced due to the lack of knowledge from the taxpayers of this kind of procedures.

“P. Time limits to access the MAP

Description of the obstacle

34. Time limits connected with the mutual agreement procedure present particular obstacles to an effective MAP. In some cases, uncertainty regarding the “first notification of the action resulting in taxation not in accordance with the provisions of the Convention” may present interpretive difficulties. More importantly, some countries may be reluctant to accept “late” cases – i.e. cases initiated by a taxpayer within the deadline provided by Article 25(1) but long after the taxable year at issue. Countries have adopted various mechanisms to protect their competent authorities against late objections, which include requirements to present a MAP case to the “other” competent authority within an agreed-upon period in order for MAP relief to be implemented and treaty provisions limiting the period during which transfer pricing adjustments may be made. In practice, competent authorities have found that the early discussion of MAP cases may contribute to a more effective and timely MAP process (recognising that competent authority consultation prior to the conclusion of the audit should respect the principle of the independence of the competent authority and audit functions).”

The previous transcription describes as an obstacle the difference in time limits to access a MAP among different Contracting States. Specifically, the obstacle is related with the uncertainty regarding the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

In Mexico’s experience, there are some practical issues derived of the absence of regulation in this matter. As an example, the transfer pricing audits in Mexico can be started by the tax authorities at the end of the period; this is, nearly 5 years after the filing of the annual tax return (statute of limitations). Therefore, in the case of the tax treaty between Mexico and the United States, the period established under Article 26 of said treaty is of 4.5 years after the filing of the annual tax return that could also end leaving the taxpayer without the possibility of requesting a MAP.
Notwithstanding there are different interpretations that could allow considering the period of time as restarted in order to request a MAP (filing an amended tax return) and also there is the flexible position assumed by the Mexican tax authorities, it is important that such authorities issue detailed guidelines regarding this type of procedure in order to prevent taxpayers from having access to the procedure, because of formal issues.

“4. Ensuring that cases are resolved once they are in the Mutual Agreement Procedure”

[...]  

R. Lack of a principled approach to the resolution of MAP cases

Description of the obstacle

37. As already noted, the role of the competent authority is to take an objective view of the provisions of the applicable treaty and apply it in good faith to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty. Where one or both competent authorities do not follow that approach, the resolution of MAP cases becomes very difficult and there are risks of inappropriate results.

38. [...] A principled approach also requires that competent authorities take a consistent approach to the same or similar issues and not change positions from case to case, based, for example, on considerations such as revenue that are irrelevant to the legal or factual issues that the competent authorities are called upon to resolve.

[...]  

S. Lack of co-operation, transparency or good competent authority working relationships

Description of the obstacle

39. A lack of co-operation, transparency or of a good working relationship between competent authorities also creates difficulties for the resolution of MAP cases. A good competent authority working relationship is a fundamental part of an effective mutual agreement procedure and is another strategic focus of the FTA MAP Forum. The FTA MAP Forum Strategic Plan notes that the success of mutual agreement procedures “critically depends on strong, collegial relationships, grounded in mutual trust, between and among competent authorities around the world. [...]”

[...]

216
T. Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases

Description of the obstacle

41. Mandatory binding MAP arbitration has been included in a number of bilateral treaties following its introduction in paragraph 5 of Article 25 of the OECD Model in 2008. Action 14 of the BEPS Action Plan recognises, however, that the adoption of MAP arbitration has not been as broad as expected and acknowledges that “the absence of arbitration provisions in most treaties and the fact that access to...arbitration may be denied in certain cases” are obstacles that prevent countries from resolving disputes through the MAP. […]”

The previous transcriptions describe as obstacles the lack of a principled approach to resolve MAP cases, the lack of co-operation, transparency or good competent authority working relationships and the absence of an alternative mechanism, such as arbitration, that may ensure that even when competent authorities do not reach a solution, a third party (arbitrator) has the power to issue a resolution.

Regarding the lack of a principled approach to resolve MAP cases, Mexico has important issues that could be improved. In this sense, neither a domestic law nor any other regulations impose an approach that should be followed to resolve a MAP case.

The only reference to a MAP within the Mexican Income Tax Law is article 184, which establishes the mechanism through which taxpayers could perform the corresponding adjustment derived of a transfer pricing primary adjustment determined to a foreign-based related party. Such mechanism consists in filing an amended tax return that reflects the corresponding adjustment.

According to article 184 of the Mexican Income Tax Law, it is only possible to perform corresponding adjustments if they are derived of primary adjustments performed by tax authorities of countries with which Mexico has signed international tax treaties. In addition, said article establishes that the Mexican tax authorities must agree with the primary adjustment performed and it could be understood that said agreement should be obtained through a MAP.

As it can be observed, the Mexican Income Tax Law only recognizes the application of corresponding adjustments when such adjustments derived from a primary adjustment determined by a foreign-based tax authority. Notwithstanding, said provision does not limit the taxpayers’ right to perform self-initiated adjustments, the competent authorities may or may not agree with the used criteria.
In addition, competent authorities may have assumed the commitments made by several countries in order to adopt the “MEMAP” guidelines which seek to improve the MAPs. Notwithstanding, the adoption of these measures is not reflected in the tax authorities practices, since time limits established by such guidelines are not followed, like to issue an answer to taxpayers no later than three months after the MAP request regarding the acceptance or rejection of the request, the time limit of 4 to 6 months to start the communication with the other competent authority and the resolution of the MAP within a deadline of two years.

Certainly, the lack of co-operation, transparency or good competent authority working relationship may also difficult the resolution by mutual agreement of a MAP case. A recurrent case that is closely related with this obstacle is the fact that the competent authority does not have regulations that establish guidelines for the competent authority to be followed for the mutual agreement negotiations. An example of this is that competent authorities hold communications with other competent authorities until they are contacted by such authorities when the MAP was initiated abroad.

Another important obstacle present in Mexico is the absence of arbitration clauses. It is important to mention that even if Mexico has permitted arbitration in several matters (international trade, environment, among others), the tax matters are out of reach for this dispute resolution mechanism. Recently in Mexico, an alternative resolution mechanism has been approved which consists in a conclusive settlement issued by a third party (tax ombudsman) having analyzed both positions (the taxpayer’s and the tax authority’s) creating a precedent of the use of this mechanism that, notwithstanding it is not equal to arbitration, could be used for tax purposes and incentive Mexican tax authorities to include an effective arbitration clause in tax treaties.

Therefore, based on the examples previously mentioned, our general recommendation is that approaches contained in guidelines, provisions or any other means should be issued in order to force competent authorities to resolve MAP cases based on the approaches provided and within the time limits established (for example, the “MEMAP” establishes a 2-year limit for competent authorities to resolve a MAP case).

Also, the acceptance of arbitration clauses as a dispute resolution mechanism in the treaties executed could be useful to provide taxpayers with certainty that a MAP case will be also resolved, even if the involved competent authorities do not reach a mutual agreement.

*   *   *

The participation of IFA Grupo Mexicano, A.C. is made on its own behalf exclusively as an IFA Branch, and in no case in the name or on behalf of Central IFA or IFA as a whole.
IFA Grupo Mexicano, A.C.

We hope you find these comments interesting and useful. We remain yours for any questions or comments you may have.

Sincerely,

IFA Grupo Mexicano, A.C.
Irish Tax Institute

Response to OECD Discussion Draft: Make Dispute Resolution Mechanisms More Effective

January 2015
About the Irish Tax Institute

The Irish Tax Institute is the leading representative and educational body for Ireland’s AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.
Introduction

The Irish Tax Institute welcomes the recognition in the Discussion Draft on BEPS Action 14 that work is required to make international tax dispute resolution mechanisms more effective. This is especially important as the number of international tax disputes worldwide has increased as is evidenced from recently published OECD statistics on the number of outstanding MAP cases\(^1\).

The eventual implementation of the various BEPS recommendations will put significantly greater pressure on dispute resolution systems worldwide for a number of reasons including:

- Significantly greater uncertainty due to the introduction of a wide range of new clauses into tax treaties which, in many cases, are relatively complex and require a relatively high level of subjective judgement.
- Significant changes to transfer pricing guidelines which may be interpreted differently by tax authorities.

In particular, the OECD’s current proposals on BEPS Action 6 have the potential to create huge uncertainty as to whether tax treaty access is available in many cases. This is of particular concern for businesses operating in smaller economies due to the nature of changes currently proposed.

Similarly, there are concerns that unilateral measures by countries to introduce new tax measures which fall outside of the treaty dispute resolution process exacerbate concerns and the risk of double taxation arising. Therefore, dispute resolution mechanisms will need to be extended to recognise the existence of new taxes such as the UK’s Diverted Profits Tax.

Making dispute resolution mechanisms more effective

The Irish Tax Institute fully supports the four key principles identified by the Discussion Draft as guiding attempts to improve dispute resolution mechanisms:

- Ensure treaty obligations related to MAP are fully implemented in good faith.
- Ensure administrative processes promote prevention and resolution of treaty-related disputes.
- Ensure taxpayers can access MAP when eligible.
- Ensure cases are resolved once they are in MAP.

However, the Institute believes that the options outlined in the Discussion Draft do not go far enough to ensure that dispute resolution mechanisms will adequately deal with the increasing number of tax disputes. This submission focuses on the key recommendations which the Institute believes would improve the dispute resolution process and best protect taxpayers.

1. **All BEPS recommendations across the 15 Actions should seek to minimise tax disputes**

As outlined above, there is substantial risk that an unintended outcome of the BEPS process will be to increase significantly the number of tax disputes arising worldwide. It is therefore vital that each of the 15 BEPS Actions should contain (as a key consideration), the potential impact on the volume of tax disputes that arise from the OECD’s recommendations under that Action.

All of the OECD’s work on BEPS should adopt a preventive approach and seek to reduce the likelihood of disputes arising where possible. Ensuring that sufficient commentary and guidance is provided on the various changes being proposed to tax treaties would help to reduce some of the inevitable uncertainty. Additionally, this could be supported by the adoption of safe harbours to avoid less material amounts being subject to double tax and excluding these from the dispute resolution processes.

2. **Taxpayer involvement in the MAP process should be facilitated**

Once the MAP process is undertaken, the role of the taxpayer concerned is effectively limited to providing information upon request. The Institute believes that consideration should be given to reforming the MAP process to enable meaningful taxpayer participation in the process. At a minimum, regular updates to taxpayers in connection with MAP cases should be provided.

3. **The right for a taxpayer to compel arbitration should be provided for**

Where a MAP dispute is not resolved within a reasonable timeframe, the right for a taxpayer to compel arbitration should be provided for. Currently arbitration is only available where specifically provided for in tax treaties or other international agreements (such as the EU Arbitration Convention). We note that there is no consensus within OECD on moving towards universal mandatory binding arbitration. Nevertheless, the Institute believes that a taxpayer should be entitled to compel the competent authorities to engage in binding arbitration, should the parties not be able to reach an agreement within a reasonable time,

The right to arbitration should also extend to cover new tax measures introduced unilaterally by countries, such as the UK’s Deferred Profit Tax, to the extent that they result in double taxation.

The Institute has concerns about the proposal in Option 26 to allow competent authorities to mutually agree to defer the initiation of MAP arbitration. We do not support its adoption as it may result in the frustration of a taxpayer’s right to seek arbitration.

4. **An independent arbitration tribunal should be established**

An independent, international, speedy and binding arbitration tribunal to resolve disputes over tax treaty issues should be established. This would substantially reduce the risk of unjust treatment of taxpayers generally and of those based in small countries in particular.
A right of appeal to a qualified and genuinely independent body is a basic principle of justice.

This tribunal may not only facilitate the arbitration process but may provide support to countries in the pre-arbitration phase as well. Once this arbitration tribunal is established it should seek to provide for clear rules on how arbitration fees and other costs are to be determined as well as provide for time limits for reaching a resolution.

5. **Obligation to resolve MAP cases**

Option 1 outlined in the Discussion Draft suggests adding to the Commentary on Article 25 of the Model Tax Convention to emphasise that the mutual agreement procedure is an integral part of the obligations that follow from concluding a tax treaty. While welcome, this is unlikely to go far enough in reaching the goals set by the Discussion Draft.

Instead, Article 25 should be amended to expressly include a **requirement** for competent authorities to actually resolve cases by mutual agreement. The words “shall endeavour” as stated in Article 25 currently, do not provide a legally binding undertaking to resolve the dispute and the implications of this are evident from the delays in cases actually being resolved.

The Institute also welcomes the suggestion in Option 2 that countries should include Article 9(2) of the Model Tax Convention in treaties. As suggested, it should also be made clear in the Commentary that the absence of Article 9(2) in a treaty should not be used as grounds for denying MAP in transfer pricing cases and that Article 25(3), which allows for discussions between the competent authorities in cases of double taxation not provided for in the tax treaty, can be applied in cases where the provision of Article 9(2) is not included.

6. **Adequately resourced and independent competent authorities**

As the Discussion Draft notes “**appropriate tax administration practices are important to ensure an environment in which competent authorities are able to fully and effectively carry out their mandate**”.

Option 3 and Option 4 suggest that countries should adopt best practice concerning the independence of a competent authority and concerning the provision of sufficient resources to their competent authorities. The Institute supports these options. A commitment by countries to ensure they have an adequately resourced, transparent and independent competent authority would be an important step in ensuring appropriate tax administration practices.

7. **Increased use of Advanced Pricing Arrangements**

Option 8 suggests that countries could commit to implement bilateral Advance Pricing Arrangement (APA) programmes. As noted by the Discussion Draft, bilateral APAs provide an increased level of tax certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
The Institute supports this option and further suggests that a commitment should be made by countries to minimise the timeframe to agree an APA between the relevant parties.

8. **Clear guidance should be given on timelines and operation of MAP/CA processes**

It is important that taxpayers’ access to the MAP is not effectively prevented through complex or unclear procedures. The Institute supports Option 10 which suggests that countries should ensure best practice is adopted concerning the transparency and simplicity of the procedures to access and use MAP. This should include a commitment to provide clear guidance to taxpayers on the operation of the process.

Similarly the Institute supports the intention of Option 18 to require countries to provide clear guidance to taxpayers on the timelines for accessing MAP.
16th January 2015

Marlies de Ruiter
Head,
Tax Treaties, Transfer Pricing and Financial Transactions Division,
OECD/CTPA,
Paris

For e-mail transmission to:  taxtreaties@oecd.org

Dear Ms de Ruiter

BEPS Action 14: Make dispute resolution mechanisms more effective

Thank you for inviting comments on the above Discussion Draft, issued on 18th December 2014.

The International Underwriting Association of London (IUA) represents international and wholesale insurance and reinsurance companies operating in or through London. Its purpose is to promote and enhance the business environment for its members. We estimate that premium income for the London company market in 2013 was some £24bn.

We are grateful for the opportunity to comment on proposals intended to ensure certainty and predictability for business. As insurers and reinsurers, our members have a particular interest in access to Mutual Agreement Procedures (MAP) and we discuss that in more detail at paragraph 7 below.

1. We welcome the recognition that more progress is required to make dispute resolution mechanisms work better. We note that the number of MAP cases reported by OECD members has increased in recent years. With the proposed implantation of BEPS measures we expect a further significant increase in the number of cross-border disputes and welcome measures to improve the timeliness of settlement. We fully support the objective of Action 14 to make dispute resolution mechanisms more effective.

2. While BEPS has focused on double non-taxation, the experience of many MNEs is that, in reality, they face double taxation as a result of the slow pace of MAP resolution. In many countries tax must be paid upfront and may be tied up in dispute for several years.

3. It is critical for MNEs, when reporting to the market and to their investors and when dealing with their statutory auditors, that they have certainty in their tax affairs. Prolonged disputes that lack of clarity about the possible outcome add to uncertainty and take up scarce resources for both tax administrations and taxpayers alike.
4. The insurance industry is particularly concerned about the number of disputes that could arise if some of the proposals on Action 7 around the extension of the PE principle are implemented, which is one example of the need for a more robust dispute resolution process going forward.

5. We support the Discussion Draft’s approach of identifying the 21 specific obstacles that hinder dispute resolution. While it is helpful to analyse these issues in detail, we feel that the Discussion Draft does not propose sufficiently concrete improvement plans and where options are proposed, the Draft acknowledges significant issues in implementing them. Given the increased amount of dispute that will arise as a result of the other BEPS actions, it is a cause for concern that the Draft is not able to be more explicit in its proposals. For example, Option 3, rather than proposing a new solution, suggests that countries could commit themselves to best practices already set out in the OECD Manual on Effective Mutual Agreement Procedures. That suggests to us that the existing manual is not adhered to. It is not clear how tax authorities that do not currently follow those practices will be required to change behaviour. It also implies that there is a significant underlying lack of agreement amongst tax administrations.

6. We understand from Paragraphs 6 and 41 to 56 that not all countries accept the need for mandatory and binding arbitration. While we understand certain countries have concerns around sovereignty, we are convinced that resolving double taxation disputes through arbitration is the most effective remedy. We believe that it will also benefit governments, including developing countries, to obtain a neutral view towards the issues in dispute. We therefore call on the G20/OECD Members to recognise that adopting a binding and universal arbitration framework should be an integral and inseparable part of the BEPS deliverables. If the G20/OECD does not succeed in establishing such a framework, further consideration must be given to how to mitigate the risks of double taxation caused by proposals under the other BEPS Actions and, if necessary, reconsider the results of those deliverables.

7. We welcome the discussion in Paragraph 19 concerning tax administrations which conclude audit settlements which preclude the taxpayer’s access to MAP. Our experience is that this practice has increased in recent years and we agree that it is not appropriate. The proposal of spontaneous notification to the competent authorities of both Contracting States would be helpful, provided it was made before the attempt to deny access to MAP.

8. In the light of the BEPS Discussion Draft on Risk, Recharacterisation and Special Measures Paragraph 28 on access to MAP when anti-abuse rules have been applied is of enhanced importance. If Special Measures are to exist, then a clear mechanism must be put in place to deal with disputes arising. In the absence of such a mechanism, the taxpayer faces double taxation.

9. Paragraphs 16, on lack of competent authority resources, and Paragraph 39, on lack of good competent authority working relationships, are inter-related. As the volume of cross-border trade has increased over the last decade, we have not seen a proportionate increase, in most countries, in the resources made available to competent authorities. Additional resources are vital as global trade increases and the advent of BEPS creates more potential for disputes. Paragraph 4 talks about political commitment to improving dispute resolution and it would be helpful to see some public statement by OECD governments acknowledging an obligation to increase competent authority resources, to encourage cross-border trade further and assist in the growth of their own and other economies.

10. With regard to the question in Paragraph 46 on potential limitations in the scope of MAP arbitration, we are concerned that the possible exclusions listed under Option 23 are precisely some of the most contentious issues that taxpayers face. Excluding them from arbitration, therefore, would not improve the taxpayer’s experience of MAP.
In summary, we support the Discussion Draft’s approach to identifying issues, but do not consider that the current proposals for dispute resolution mechanisms go far enough. It is vital to have robust and clear mechanisms as a direct outcome of the BEPs process, and having a binding arbitration framework is an important part of that. We hope you will find this submission helpful and would be keen to engage further with you in this area.

Yours sincerely

N. J. Lowe
Director of Government Affairs
Comments on Discussion draft on Action 14 (Make Dispute Resolution Mechanisms More Effective) of the BEPS Action Plan

The following are the comments of the Accounting & Tax Committee of the Japan Foreign Trade Council, Inc. (JFTC) in response to the invitation to public comments by the OECD regarding the “Discussion draft on Making Dispute Resolution Mechanisms More Effective”.

The JFTC is a trade-industry association with Japanese trading companies and trading organizations as its core members. One of the main activities of JFTC’s Accounting & Tax Committee is to submit specific policy proposals and requests concerning tax matters. Member companies of the JFTC Accounting & Tax Committee are listed at the end of this document.

General Comments

International double taxation imposes significant economic burdens on taxpayers and must be eliminated in a prompt and sufficient manner. Fundamentally, double taxation resulting from transfer pricing legislations or ineffective bilateral mutual agreement procedures (hereinafter “MAP”) should not occur. However, many taxpayers are in fact facing such issues and are at times forced to seek resolution by way of prolonged domestic litigations. Thus, we fully support Action Plan 14 and the ongoing effort of OECD to remove the various obstacles surrounding the MAP and to improve its effectiveness.

Paragraph 56 invites commentators to identify other alternative dispute resolution mechanisms that could contribute to a more effective MAP. In this
regard, we propose the development and introduction of a regime that obligates tax authorities to consult and mutually agree with the tax authority of the other state prior to raising any tax demands which are not in accordance with tax treaties and thus lead to international double taxation.

Even if the above proposal is found to be difficult, rules to eliminate double taxation should nevertheless be strengthened. The conclusion (or revision) of tax treaties between countries should be promoted, and even if it is difficult to reach an agreement on the whole provisions in concluding (or amending) the tax treaty, priority should especially be given to an agreement on provisions relating to the elimination of double taxation arising from transfer pricing legislations.

Lastly we request for strong political commitment by all contracting states including non-OECD members, and also for the improvement of administrative processes in each state in order to ensure the effectiveness of the MAP. Below are specific comments to the options discussed in the draft.

**Specific Comments**

**Regarding option 1**

- The proposed paragraph should directly be added to the OECD Model Convention itself (Article 25(2)), since its mere addition to the Commentary may only have limited impact.

- Also, an obligation to initiate MAP arbitration should be imposed on the competent authorities, in case an agreement could not be reached through the MAP within a set period of time. Therefore, participating countries should commit to amend tax treaties which currently do not include the arbitration clause prescribed by Article 25(5) of the Model Convention, and add the arbitration clause thereto.

**Regarding option 2**

In addition to introducing paragraph 2 of Article 9 in tax treaties, political commitment is required that the common understanding of the Arm’s Length Price between the two contracting states is essential in order to eliminate double
Regarding option 3

- In some countries, the absence of a “firewall” provision between the competent authority handling MAP cases and the field tax officers handling Transfer Pricing assessments may cause taxpayers to be reluctant to exchange information with the competent authorities. Therefore, there is a need to implement an efficient firewall between the two, and thereby information provided by the taxpayers must be kept confidential and should not be utilized for Transfer Pricing assessment purposes.

- Also, in some countries, there are cases where the competent authority displays reluctance to withdraw the whole or a part of the tax demand raised in their country due to excessive precautions to the possible scrutiny from the board of audit responsible for bureaucratic corruption. Therefore, participating countries should commit to clarify the competent authorities’ autonomy from such board of audit, and guarantee that the competent authorities shall not be wrongfully penalized for an appropriate adjustment they have made as a result of a MAP agreement.

Regarding option 4

When a competent authority lacks resources such as personnel and training to effectively handle MAP cases, it is expected that OECD will give full support such as through monitoring to ensure the process is stabilized promptly in each state.

Regarding option 5

It should be noted that an excessive emphasis on time to resolve cases as the performance indicator may encourage competent authorities to reject complicated MAP cases presumed to be time-consuming. Such situations will undermine taxpayers’ benefit and should be avoided.

Regarding option 6

Since the foreseeability of treaty entitlement is likely to diminish for taxpayers if the anti-abuse provisions discussed in Action Plan 6 are introduced, advance
confirmation system through bilateral MAP as to whether treaty benefits are granted should be established. As had been mentioned in our previous comments on Action Plan 6, a decision to limit treaty benefits should not solely be made by the tax authorities of the state of source. In case the tax authorities of the state of residency grant treaty benefits through an advance ruling or a certificate of domicile, it should also be accepted by the state of source.

Regarding option 8

Since bilateral APAs are applicable only where a tax treaty is concluded between the states, treaty negotiations need to be initiated in the first place if there has yet to be a tax treaty. In this regard, if it is found to be difficult to reach a prompt agreement on the whole provision of the tax treaty, a partial convention including only Article 9 (Associated Enterprises) and Article 25 (Mutual Agreement Procedure) prescribed by the Model Convention may be concluded as an alternative and thereby the bilateral APA should be made available promptly. Such a partial convention may also be addressed within the framework of multilateral instrument discussed in Action Plan 15.

Regarding option 9

With regard to the “roll-back” of the APA mentioned in the proposed option, it should be noted that some countries define “roll-back” as the coverage of the period between the APA application and the agreement thereof. The proposal, thus, should clearly state that the “roll-back” mentioned in the option intends to apply the condition of the APA to the period prior to the year of the APA application.

Regarding option 14

- This issue should be addressed by the OECD by amending the Commentary by providing some examples, rather than by requesting participating states to make commitments.

- Also, in some countries, application for MAP is in practice not accepted until after a tax demand has actually been raised. In this regard, it should be clarified that even if a tax demand is yet to be raised, competent authorities need to accept MAP applications when taxation not in accordance with tax
treaties is reasonably foreseeable.

**Regarding option 16**

In some countries, it is prescribed that MAP cases close upon completion of the corresponding litigations under domestic law. By contrast, some competent authorities refrain from proceeding to MAP until domestic litigations close so they can refer to the results. Having regard to the above circumstances, participating countries should commit to hold the objection and litigation process under domestic law in abeyance once the MAP is applied, and also to proceed with the MAP case in priority.

**Regarding option 17**

- In some countries, interest on tax demands accumulates even while the MAP case is pending. Small and medium enterprises which do not have sufficient financial capabilities may refrain from applying for MAP due to the burden of such interest accumulation. In order to ensure the effectiveness of MAP, participating countries should commit to legitimate the suspension of tax collection and interest accumulation while the MAP case is in process.

- Participating countries should also implement adequate administrative processes to ensure timely refunds of taxes based on MAP agreements.

**Regarding option 19**

- In case a tax demand is proposed by a tax authority as a result of tax assessment, taxpayers may occasionally agree with the authority to accept such demand, amend their tax return, or make self-adjustments to subsequent returns in exchange for benefits such as improved tax predictability, and avoidance of prolonged litigations or accumulated penalties. However, there are cases where the tax authorities do not abide by such agreements and raise further tax demands subsequently. In such cases, taxpayers should be allowed to access MAP even if they have already made amendments or self-adjustments in their tax returns based on previous agreements with tax authorities.

- In fact, in some countries, there are practices that force taxpayers to make self-adjustments or accept proposals by tax authorities without reasonable
rationale being given, even before the assessment is completed or at the stage of pre-assessment carried out before the substantial assessment. It should be clarified that MAP access will be granted in such cases, as it can be assumed that the tax demand has virtually been raised.

**Regarding option 23**

- Although the limitation of scope of MAP arbitration is proposed in Option 23, as long as actual double taxation exists, regardless of the articles concerned, such case should still be subject to MAP arbitration.

- Also, in case it is concluded that MAP arbitration is not appropriate, competent authorities should at least disclose to taxpayers the reason thereof.

**Regarding option 26**

If the proposal in Option 26 is adopted, the deferment of initiation of MAP arbitration should be subject to an acceptance of taxpayers, and the period of deferment should be limited (e.g. 6 months) in order to prevent easy deferrals.

**Regarding option 29**

- The “Independent Opinion” approach is preferred over the “Final Offer” approach for decision-making in the arbitration process. This is because the latter approach may lead to a choice between two extreme propositions.

- If the “Independent Opinion” approach is adopted, it is essential that facts are adequately and sufficiently provided to the arbitrators from the parties before reaching independent decisions.
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Comments on the Public Discussion Draft on BEPS Action 14  
(Make Dispute Resolution Mechanisms More Effective)


Introduction

Keidanren welcomes the OECD's work to "make dispute resolution mechanisms more effective".

International double taxation puts a huge economic burden on taxpayers and therefore should be resolved promptly. Especially, taxation not in accordance with tax treaties in Transfer Pricing happens and bilateral mutual agreement procedures (hereinafter “MAP”) under tax treaties, which should contribute to eliminate such taxation, are not virtually working in many countries, and thus, a lot of taxpayers are forced to seek to resolve by way of prolonged domestic litigations. We totally endorse these options raised by the OECD in this Discussion Draft, as it intends to make a MAP working more effectively by removing various obstacles which have been preventing utilization of a MAP. Especially, as other BEPS Actions except for Action 14 are expected to increase disputes and associated double taxation, it is imperative that, prior to those Actions being implemented, a more efficient MAP will be achieved as envisaged by Action 14 by securing strong political commitment. For example, it would be considered that the Transfer Pricing Documentation requested in Action 13 should not be implemented unless the improvement to the MAP processes, which include the introduction of a mandatory and binding arbitration provision, are achieved.

The introduction of a mandatory and binding arbitration provision into the existing MAP provisions in all tax treaties is the most important to resolve the double taxation and it should make significant strides toward facilitating effective MAP and resolving disputes. We believe that resolving double taxation disputes through arbitration will benefit governments, including developing countries, to obtain a neutral view towards the issues disputed and reduce competent authority resources for dispute resolution by use of an arbitrator, and also benefit taxpayers to increase predictability through the accumulation of cases disclosed. We also hope that the OECD overcome the challenge that there is no consensus among the countries participating in the Base Erosion and Profit Shifting (“BEPS”) Project on the introduction of a mandatory and binding
arbitration provision due to a matter of national sovereignty to which treaty provisions relate.

The public discussion draft aims as a first step to set a non-binding minimum standard to which all the participating countries are able to commit, by presenting options to address obstacles to the effective functioning of the MAP. We consider this an important step toward making dispute resolution mechanisms more effective and appreciate the approach taken by the OECD. We hope the final proposal under Action 14 would also include more effective measures (such as a mandatory and binding arbitration).

Ultimately, it will be necessary to go beyond incorporating an arbitration provision of the OECD’s Model Convention with Respect to Taxes on Income and on Capital (“OECD Model”) into bilateral tax treaties to establish an international arbitration organization, one similar to that of the World Trade Organization. By rendering an arbitration decision on specific issues of a MAP case, such an organization is expected to expedite case resolution and to increase predictability, as well as the stability of judicial decisions, through the accumulation of cases resolved.

The public discussion draft presents a total of 34 options. Although we support the principles underlying these options in general, we have the following views on some specific options.

Views on the Issues on Which Comments Are Sought

1. Paragraph 20: Best audit practices

   Re: Best audit practices that reflect an appropriate global awareness and that facilitate an effective mutual agreement procedure

   ➢ Ensuring that audit settlements do not block access to the MAP is crucial to its effective operation. Accordingly, current practices such as imposing additional penalties on taxpayers seeking MAP assistance, implying a reduction of the amount of corrections in a return for the taxpayer’s waiver of its right to seek MAP assistance, and urging restraint for a taxpayer's MAP request on the grounds of the prevention of a MAP case with low priority in both competent authority must be discontinued immediately. Option 7 also refers to taking appropriate steps, including voluntarily notifying the competent authorities of both contracting states of the details of audit settlements. In connection with this point, we propose that, when a notification has been made and the transaction in question is ongoing during a certain year in which both competent authorities conclude an agreement, the competent authority of one contracting state should promptly accept the corresponding adjustments made by the competent authority of the other contracting state based on its audit settlements, for and after the tax year at issue. This treatment is expected to help eliminate double taxation and facilitate adjustments.
2. Paragraph 27: Information required to be submitted with a request for MAP assistance

Re: Whether existing country guidance or practices with respect to the information required to be submitted with a request for MAP assistance create other obstacles to the proper functioning of the mutual agreement procedure and, where this is the case, to provide suggestions on ways to address these obstacles

➢ We agree to the proposal made in Option 11. Despite advice being often sought from professional tax corporations when submitting a request for MAP assistance, in some cases, transfer pricing documentation is filled with economic analyses. Given that situation, guidance should be issued to clarify the minimum necessary contents of a request. We also propose the rule that information and documents other than clearly specified in guidance are submitted discretionally, and are not a necessary requirement for MAP.

3. Paragraph 40: Additional measures other than arbitration adopted in order to facilitate the resolution of a MAP case

Re: What additional measures (other than arbitration) could be adopted in order to facilitate the resolution of a MAP case that competent authorities have been unable to resolve within two years of the MAP case being accepted (or some other reasonable target timeframe)

➢ Comments are sought on what additional measures other than arbitration could be adopted to facilitate the resolution of a MAP case that has not been resolved within two years of being accepted. Creating a framework whereby consent is obtained from the three parties—the competent authorities of both contracting states and the taxpayer—may help the final agreement to be reached in a shorter period of time.

4. Paragraph 46: Advantages and disadvantages of potential limits to the scope of MAP arbitration

Re: Advantages and disadvantages of potential limits to the scope of MAP arbitration

➢ Limitations to the scope of MAP arbitration under specific conditions would be considered, such as exclusion from the scope of arbitration cases involving the application of treaty or domestic law anti-abuse rules. But we also consider that a certain rule is necessary not to limit the scope of arbitration which would be contrary to the intended objective (e.g. competent authority should disclose the reason to a taxpayer where he deems it a case that is unsuitable to adopt arbitration.).

5. Options 29 and 30: Default form of decision-making in MAP arbitration, and
evidence

Re: Preferred default form of decision-making in MAP arbitration, and approaches to evidentiary issues in the MAP arbitration process

- The application of the “conventional” or “independent opinion” approach should be conditional on the arbitrators, before reaching an independent decision, being properly and sufficiently presented with the objective facts in the course of the competent authorities’ arguments and explanations. Similarly, the adoption of the “last best offer” or “final offer” approach should be permitted only when the competent authorities of both contracting states gain a full and objective understanding of the taxpayer’s business model.

- Furthermore, as all of these approaches call for the arbitrators to fully understand the facts, the taxpayer should be given the opportunity to provide an explanation as needed.

6. Option 33: Address issues related to multilateral MAPs and advance pricing arrangements (“APAs”)

Re: Other examples of multilateral situations that raise issues for the mutual agreement procedure

- An example of multilateral transactions that raise issues for the MAP is as follows: suppose the transactions of an entity (domiciled in Country A) that are subject to transfer pricing taxation involve two other countries (Countries B and C). In this case, if MAP negotiations between Countries A and B start but those between Countries A and C do not due to the absence of corresponding adjustment, any MAP agreement reached between Countries A and B may be applied, as it is, to transactions between Countries A and C without giving the opportunity to rebut separately. For that reason, the taxpayer can not request MAP between Countries A and B. Developing a multilateral instrument as envisaged by BEPS Action 15 is important.

Comments on Other Issues

1. Option 1: Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

- Though we agree with the proposed concept, the paragraph should be directly added to the OECD Model Convention itself (Article 25(2)), since its mere addition to the Commentary would only have limited impact.

2. Option 2: Ensure that paragraph 2 of Article 9 is included in tax treaties

- There exist tax treaties that do not have a corresponding adjustment provision as stipulated in paragraph 2 of Article 9 of the OECD Model. In some countries, the
competent authority makes it a policy not to enter into MAP discussions with a nation with which a tax treaty containing a corresponding adjustment provision has not been concluded. This means that the MAP may depend on the highly technical matter of whether or not a corresponding adjustment provision is contained in tax treaties. In order to enable the MAP to function more effectively, a corresponding adjustment provision should be included in tax treaties as soon as possible.

However, the inclusion of paragraph 2 of Article 9 of the OECD Model alone will not suffice to eliminate double taxation if treaty partner competent authorities differ in their views on arm’s length pricing and other matters. To achieve the elimination of double taxation, which every tax treaty aims at, the competent authorities need to have the same view on arm’s length pricing-related matters, including the definition of a related party, the application of the transfer pricing method by segment according to the taxpayer’s functional and risk analysis, and the provisions of paragraph 1 of Article 9 of the OECD Model. Political commitment is required to ensure competent authorities recognize this need.

3. **Option 3: Ensure the independence of a competent authority**

- We agree with the proposed option.
- In some countries, an absence of the “firewall” provisions between the competent authorities handling MAP cases and the field tax officers handling the Transfer Pricing assessment often raises concerns that it may undermine the effectiveness and promptness of the exchange of information between taxpayers and competent authorities. Therefore, it should be clarified in the domestic law or rules of each country that the competent authorities handling MAP cases and the field tax officers handling the Transfer Pricing assessment are independent, there is a need to implement an efficient firewall between the two, and thereby the information provided by taxpayers is kept confidential and should not be utilized for the purpose of the Transfer Pricing assessment.
- Also, in some countries, there are cases where the competent authorities display reluctance to withdraw the whole or a part of the tax demand raised in their country due to excessive precautions to the possible scrutiny from the board of audit responsible for bureaucratic corruption. Therefore, participating countries should commit to clarify the competent authorities’ autonomy from such board of audit, and guarantee that the competent authorities shall not be wrongfully penalized for an appropriate adjustment it has made as a result of the MAP agreement.

4. **Option 4: Provide sufficient resources to a competent authority**

- In some countries, the lack of sufficient resources allocated to competent authorities to deal with its existing inventory of MAP cases is resulting in increased delays in processing the cases and obstructing an efficient admission of new MAP cases. Therefore, we agree with the proposed option. The OECD should
fully support participating countries to provide competent authorities with sufficient resources and proactively monitor such system to make it stable.

5. **Option 5: Use of appropriate performance indicators**

- Though we agree with the proposed concept, it should be noted that an excessive emphasis on time to resolve cases as the performance indicator may result in competent authorities rejecting the applications itself of complicated MAP cases which are expected to be time-consuming. Such a situation will undermine the taxpayers’ benefit.

6. **Option 8: Implement bilateral APA programs**

- The public discussion draft encourages the use of bilateral APAs as a means to resolve disputes. We strongly support the OECD proposal that all the countries participating in the BEPS Project commit to implement bilateral APA programs.
- Since bilateral APAs are applicable only where a tax treaty is concluded between the states and the tax treaty network to eliminate double taxation is not sufficient, participating countries should facilitate to conclude tax treaties.
- In the light of these circumstances, a partial convention may also be addressed within the framework of the multilateral instrument discussed in Action Plan 15.
- Furthermore, since the foreseeability of treaty entitlement is likely to diminish for taxpayers if the anti-abuse provisions discussed in Action Plan 6 are introduced, advance confirmation through bilateral MAP as to whether treaty benefits is granted should be established.

7. **Option 9: Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multiyear) issues and the rollback of APAs**

- We agree with the proposed option and consider that competent authorities should take flexible approaches so as to resolve the uncertainty about transfer pricing management and reduce the complexity of administrative processes required for reaching an agreement through the MAP. Such approaches tailored to the taxpayer’s business cycle include the verification of facts for a certain long period (for multiple tax years, not for variable single year) in verifying the validity of the Arm’s Length Pricing (“ALP”) of transactions between associated enterprises and adjustments for taxable income for the tax year at issue.
- Furthermore, a mechanism should be introduced whereby a MAP or APA can be rolled back according to the statute of limitations for transfer pricing tax assessments. This will prevent competent authorities from holding separate discussions on cases of the same nature for each tax year, thereby helping them reduce resources.
- The proposal should clearly state that the “roll-back” mentioned in the option is
intended to apply the conditions of the APA to the period prior to the year of APA application.

8. **Option 14: Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”**

- We hope that the OECD addresses this issue by amending the Commentary by providing some examples.
- Also, in some countries, there is a practice where the application for the MAP is not accepted until after a tax demand has been actually raised despite the mention in Article 25(1) of the Model Convention that “where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention...”. In this regard, we hope that the competent authorities commit to observe Article 25(1) and related commentary of the Model Convention and accept the MAP application when taxation not in accordance with the tax treaty is reasonably foreseeable even if a tax demand is yet to be raised.

9. **Option 16: Clarify the relationship between the MAP and domestic law remedies**

- We agree with the proposed option.
- In some countries, it is prescribed that the MAP process stops when a litigation under domestic law is completed, which results in a situation where a MAP virtually does not work at all as the MAP takes quite a long time and litigation under domestic law always completed is earlier.
- Also, in some countries, though both options of litigation under domestic law and a MAP are provided to taxpayers in formality, the competent authorities tend to refrain from proceeding with the MAP until the litigation is completed so that they can review the result of the litigation under domestic law. This is also one of the reasons why the MAP virtually does not work.
- Though taxpayers have no choice but to make an objection under domestic law as there is a prescribed deadline thereof, having regard to the above circumstances, it is one idea that participating countries keep the objection and litigation process under domestic law in abeyance in case the MAP is applied and to proceed with the MAP in priority. Thereby it will also be possible for tax authorities to save their costs for dispute resolution as there would be no need to proceed with both the litigation and the MAP simultaneously.

10. **Option 17: Clarify issues connected with the collection of taxes and the mutual agreement procedure**

- Even with effective administrative processes for the MAP in place, there are cases where obtaining a refund of the corporation tax already collected entails procedural
or political difficulties. In those cases, even if an agreement has been reached through the MAP, the ensuing refund procedure delays the issuance of the refund, with the result of failing to ensure the effectiveness of the MAP. Therefore, the introduction of an administrative process must also be guaranteed that enables refunds following an agreement through the MAP to be implemented in a timely and appropriate manner.

- In some countries, interest accumulates while the MAP is pending. Taxpayers may give up applying MAP due to the burden of such interest accumulation. Therefore, in order to make the MAP work more effectively, participating countries should commit to legislate to the effect that the collection of tax and the accumulation of interest are kept in abeyance until the MAP process is completed.

11. Option 18: Clarify issues connected with time limits to access the mutual agreement procedure

- Taxpayers spend a lot of time and incur the cost of labour at the stage of the examination from the application through the start of the negotiation.
- Especially, where the examination is lengthened, the authority’s person in charge is changed, and a redundant explanation is necessary, this results in a further examination period being needed. Additionally, where the successor takes up the directionality that is different from the interpretation of the predecessor and an argument is restored, there is the case of this being highly burdening to the taxpayer. Participating countries should establish the time frame of the examination from the application through the start of negotiation in light of the prompt tax practice execution.

12. Option 19: Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

- We agree with the proposed option.
- In case a tax demand is proposed to be raised as a result of a tax assessment in foreign countries, taxpayers may sometimes accept such a tax demand, amendment of the tax return, and self-adjustment in subsequent years under a certain agreement with the tax authorities in order to avoid prolonged litigations and a huge amount of penalty, to achieve stability in taxation in the future years. However, taxpayers may subsequently decide to request for removal of the initial tax demand in a situation where the tax authorities do not abide by such an agreement and raise further tax demands in subsequent years. In such a case, even if taxpayers have made an amendment of their tax return or self-adjustment, the application of MAP should be allowed.
- In fact, in some countries, there is a practice that taxpayers are forced to make self-adjustment or accept the proposal made by the tax authorities without reasonable rationale being given, even before the assessment is completed or at the stage of pre-assessment which is carried out before the substantial assessment. It
should be clarified that in such a case, the application of MAP is allowed as it can be said that the tax demand has virtually been raised.

13. **Option 24: Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy**

- We agree with the proposed option.
- We consider that such most favored nation provisions more effectively work if they are introduced under a multilateral instrument taken up under Action Plan 15.

14. **Option 25: Clarify the coordination of MAP arbitration and domestic legal remedies**

- When an arbitration decision has been rendered, the resolution of the case itself can be expected because the competent authorities are required to have the details of the decision incorporated into MAP discussions and reflected in a mutual agreement. However, if a mutual agreement is not reached owing for example to inconsistency with domestic law, taxation not in accordance with the tax treaty remains, with the result that the taxpayer has to seek a domestic legal remedy (filing a lawsuit). The problem in this case is that, when the arbitration decision was rendered, the taxpayer probably had to waive its right to file a lawsuit in exchange for accepting the decision. It is noted that as a consequence, the availability of domestic legal remedies may be limited in reality.

15. **Option 26: Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances**

- The proposed option raises concerns that the competent authorities easily defer the initiation of MAP arbitration and the MAP does not effectively work. Therefore, the deferment of the initiation of MAP arbitration should be subject to an acceptance of taxpayers and the period of deferment should be limited (e.g. 6 months).

Sincerely,

Subcommittee on Taxation
KEIDANREN
Comments on Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

KPMG’s Global Transfer Pricing and Controversy Professionals (“KPMG”) welcome the opportunity to provide comments on the OECD’s Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective (hereinafter, the “Action 14 Discussion Draft”).

When the OECD published its Action Plan on Base Erosion and Profit Shifting (“BEPS Action Plan”) in 2013, it acknowledged that the actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business. The Action 14 Discussion Draft was released for public comment on December 18, 2014 to address the need to make the mutual agreement procedure (“MAP”) more effective at resolving treaty-related disputes.

Introduction

The BEPS Action Plan contains 15 actions that counter the ability of business to engage in base erosion and profit shifting. Those actions include a combination of strengthened restrictions on taxpayer access to treaty benefits, more restrictive interpretation of language to prevent BEPS, and substantial additional taxpayer compliance efforts and disclosure. By all accounts, the OECD has moved swiftly and decisively to address the perceived weaknesses in international rules that could potentially allow business to exploit those weaknesses and engage in BEPS. Action 14 is as important to business and tax administrators alike because it promises to improve the efficiency with which treaty-related disputes are resolved. Given the substantial additional compliance burdens that will be placed on business by the BEPS Action Plan and the potential for increased disputes, the OECD and participating countries should take great pains to demonstrate a genuine commitment to Action 14 that is commensurate with the OECD’s commitment to the other 14 actions. In fact, without an efficient dispute resolution mechanism, enforcement of the other 14 steps of the BEPS Action Plan could be significantly compromised.

Action 14 is summarized as follows:
ACTION 14
Make dispute resolution mechanisms more effective
Develop solutions to address obstacles that prevent countries from [re]solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.

The OECD has acknowledged that the number of treaty-related disputes has already been increasing even before the BEPS Project, and that the BEPS Action Plan, particularly the Action 13 country-by-country reporting, could exacerbate the problem. While Action 14 is seen as an important complement to the work on the BEPS issues, the backing away from achieving a commitment to work towards achieving some consensus on mandatory binding MAP arbitration (even over the long term) is a departure from the objectives originally articulated for this action item and raises concerns that not all participating countries are committed to dealing with the high levels of treaty-related disputes that are expected to be triggered by the BEPS Action Plan.

Action 14 is expected to produce political commitment to substantially improve the MAP process through the adoption of specific measures to address obstacles to resolution of treaty-related disputes. Further, Action 14 is expected to generate specific minimum measures to which participating countries will commit, including a monitoring process to evaluate the overall functioning of the mutual agreement procedure.

The Action 14 Discussion Draft provides that the political commitment and specific measures will be guided by the following four principles:

1. Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith.
2. Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes.
3. Ensuring that taxpayers can access the mutual agreement procedure when eligible.
4. Ensuring that cases are resolved once they are in the mutual agreement procedure.

We will begin with some general comments about aspects of the Action 14 Discussion Draft, then we will address the listed obstacles to resolution of treaty-related disputes and the alternative ways to address those obstacles.

General Comments
The OECD has done a commendable job of listing the obstacles to efficient dispute resolution procedure and the options to address those obstacles. KPMG believes that the OECD should explicitly endorse measures that have been proven to be successful in encouraging the effective
resolution of MAP cases (e.g., arbitration), and should be critical of and propose solutions to address measures that have been shown to prevent taxpayer access to the MAP process (e.g., insufficient MAP resources, audit settlements requiring waiver of MAP rights, collection of tax before MAP is considered). We would like to take the opportunity to comment generally on the obstacles contained in the administrative processes, obstacles to access the mutual agreement procedure, and obstacles to resolution of cases in the mutual agreement procedure. Further, we would like to comment on the OECD’s expressed goal to create a minimum standard for participating countries and to monitor adherence to that minimum standard.

Administrative Obstacles to Effective MAP. The two main administrative obstacles to an effective MAP process are inadequate funding and audit settlements that require a taxpayer to waive its right to MAP.

- Adequate funding by a country means enough funding for necessary personnel, training, and travel to actively negotiate a growing inventory of MAP and APA cases. Recent examples of inadequate funding of MAP and APA programs have resulted in case delays and strained treaty relationships. In light of the desire for voluntary tax compliance, countries should be willing to adequately fund tax dispute resolution.

- Audit settlements that require taxpayers to waive their rights to MAP also are an administrative obstacle to the MAP process and represent an improper usage of influence over taxpayers that harm taxpayer-to-government and government-to-government relationships. In this situation, the OECD should explicitly discourage these practices, and participating governments should agree to provide spontaneous notification to the other involved governments when such practices occur. Further, the participating governments should have policies in place to prevent field auditors from engaging in such practices and disciplinary action for field auditors that violate those policies.

Access to MAP. Measures that limit or effectively deny access to MAP are also a serious concern and prevent fair and effective resolution of treaty-related issues.

- Treatment by some countries of MAP as a post-payment forum—meaning that the taxpayer must pay some or all of the disputed amount (causing the taxpayer to bear the burden of double taxation) before the case can be considered at MAP—is an obstacle to MAP as a fair and efficient process. Allowing countries to treat MAP as a post-payment forum imposes hardship on the taxpayer, changes the negotiation dynamic between the involved countries, and reduces the incentive for the competent authorities to compromise and resolve cases quickly and fairly. Accordingly, the OECD should endorse MAP as a pre-payment process.

- Another practice that denies MAP access is the ability of one of the competent authorities to unilaterally determine that a case is not appropriate for MAP. The purpose of MAP is to get the input of both involved countries to eliminate double tax. Both competent authorities should
have the opportunity to engage on the issue of whether the case is appropriate for MAP. Further, the OECD should develop rules whereby taxpayer self-initiated adjustments and disputes involving more than two countries can be considered in MAP.

Mandatory Binding Arbitration. The most important contribution Action 14 could make to the efficiency and effectiveness of MAP is to support the adoption of mandatory binding arbitration in some form. In the US, binding arbitration is fairly new and a relatively small number of cases has actually proceeded through arbitration. The main contribution of arbitration has been the strong encouragement that arbitration gives to treaty partners to resolve the cases prior to the cases proceeding to arbitration. Countries with binding arbitration have seen drastic improvement in MAP settlements upon the adoption of arbitration. Arbitration also addresses a number of obstacles described below: lack of express obligation to resolve MAP cases, lack of independence, lack of principled approach, and lack of cooperation. While arbitration is not without implementation problems, especially in countries which have legal obstacles, its potential to deal with unilateral, unprincipled behavior is too important to ignore. It should be viewed as the gold standard and promoted as a best practice among jurisdictions.

Other Best Practices.

- Minimum standards for the participating countries should also include publication of MAP and APA results—Action 14 discusses measureable minimum standards and monitoring. Part of the information that should be publicized is the cases filed, closures and inventory of MAP and APA. Further, personnel headcount, budgets and training costs should also be reported.

- In light of the increasing burden of MAP cases, the participating countries should be eager to adopt options to increase the efficiency of treaty-related dispute resolution. The following are specific actions that we would recommend to address current inefficiencies in the treaty-related dispute resolution process:

SPECIFIC COMMENTS

Following are KPMG’s comments with respect to specific issues and options identified in the OECD discussion draft.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Absence of an obligation to resolve MAP cases presented under Article 25(1) -- Paragraph 2 of Article 25 provides that competent authorities “shall endeavor” to resolve a MAP case by mutual agreement. It has been argued that the absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option 1</td>
<td>The Action 14 Discussion Draft suggests the addition a to paragraph 5.1 of the Commentary on Article 25 to emphasize that the MAP is an integral part of the obligations that follow from concluding a tax treaty.</td>
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<tr>
<td>Comment</td>
<td>The absence of an express obligation to resolve MAP cases is clearly an obstacle to effective MAP negotiation, and one which can be expected to worsen in the aftermath of the BEPS Action Plan. The proposed clarification in the Commentary, while helpful, does not seem to go far enough, even as a minimum standard. While good faith in resolving disputes should be expected, the difficulty is that in many cases each competent authority believes it is acting in good faith relative to its interpretation of the treaty. The ability of either party to MAP to unilaterally act or refuse to act is a problem whether based on a good faith belief or self-interested intentions and stands in the way of certainty and effective resolution of a treaty-related dispute. There needs to exist a reliable mechanism for breaking a stalemate, however it arises. Certainly, binding MAP arbitration would be such a mechanism that would discourage if not eliminate bad faith behaviors and provide an objective means for resolving good faith differences in opinion. Absent a consensus on that approach, mediation, which leaves decision-making authority with the treaty partners yet involves a neutral third party to assist in reaching a common understanding so that a principled resolution between the two countries can more easily be reached, should also be considered. Further, mediation-arbitration, an escalation process which also involves a neutral party, also warrants consideration.</td>
</tr>
<tr>
<td>Issue</td>
<td>Absence of paragraph 2 of Article 9 in some tax treaties—Some countries take the position that, in the absence of a treaty provision based on paragraph 2 of Article 9, they are not obliged to make corresponding adjustments or to grant access to the MAP with respect to the economic double taxation that may otherwise result from a primary transfer pricing adjustment by a treaty partner. Such a position may frustrate a primary objective of tax treaties— the elimination of double taxation—and prevent bilateral consultation to determine appropriate transfer pricing adjustments.</td>
</tr>
<tr>
<td>Option 2</td>
<td>Ensure that paragraph 2 of Article 9 is included in tax treaties.</td>
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<tr>
<td>Comment</td>
<td>The absence of paragraph 2 of Article 9 is an obstacle and should be remedied and required as a minimum standard of participating countries.</td>
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<tr>
<td>Issue</td>
<td>Lack of independence of a competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes.</td>
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<tr>
<td>Option 3</td>
<td>Ensure the independence of a competent authority.</td>
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<tr>
<td>Comment</td>
<td>Given the importance of independence by the competent authorities, a commitment by participating countries to this minimum standard does not appear to be too much to ask.</td>
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<tr>
<td>Issue</td>
<td>Lack of resources of a competent authority.</td>
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<tr>
<td>Option 4</td>
<td>Provide sufficient resources to a competent authority.</td>
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<tr>
<td>Comment</td>
<td>The lack of resources is clearly an obstacle to the efficient resolution of MAP, and many countries have recently demonstrated that the failure to commit adequate resources renders that country unable to deliver on its obligations in MAP and APA resolution. However, countries display varying levels of efficiency with the resources allotted to MAP and APA. The BEPS Action Plan imposes substantial additional recordkeeping burdens on taxpayers and greatly increases the likelihood of treaty-related disputes. Given recent increases in treaty-related disputes and anticipated increases resulting from country-by-country reporting, the participating countries must commit in some concrete fashion to responsibly allocate resources to treaty-related dispute resolution. Given already-existing problems with inadequate staffing, resources, and training, the adoption of best practices is not adequate assurance that resources will be made available. Further, development of policies of some joint training could contribute to shared understanding while reducing costs. We urge commitment to best practices in this area, we suggest that APA and MAP statistics be reported and viewed as an indicator whether additional resources are needed. Budget pressures dictate the adoption of all reasonable practices that improve the efficiency of the dispute resolution process. Arbitration is a proven process that improves efficiency in two ways: 1) it encourages countries to settle cases reasonably before losing control of that issue to an arbitration panel; 2) cases submitted to arbitration are settled reasonably within a set time frame.</td>
</tr>
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</table>
### Issue

Performance indicators for the competent authority function and staff. The evaluation of the competent authority function or staff based on criteria such as sustained audit adjustments or tax revenue may be expected to create disincentives to the competent authority’s main goal—the objective consideration of MAP cases—and may present obstacles to good faith bilateral MAP negotiations.

### Option 5

Use of appropriate performance indicators—

**Comment**

Governments should have some freedom to set internal performance indicators. Nevertheless, it is appropriate to identify certain best practices and discourage performance measures that frustrate the objectives of MAP. For example, it is vital that governments not evaluate competent authority personnel based on metrics associated with net revenue generated for the national fisc. In addition, transparency regarding the internal performance in the competent authority function would also ensure that countries are abiding by agreed best practices.

### Issue

Insufficient use of paragraph 3 of Article 25.

### Option 6

Better use of paragraph 3 of Article 25.

**Comment**

Article 25, paragraph 3 allows broader discretion to countries to grant access to MAP in situations where double taxation would otherwise occur. More clear guidance when access is warranted, but access should be liberally available when double tax can be proven.

### Issue

Audit settlements as an obstacle to MAP access. Field auditors in some countries may, on occasion, seek to influence taxpayers not to utilize their right to initiate a mutual agreement procedure in relation to audit adjustments that result in taxation not in accordance with an applicable tax treaty (e.g. by entering into a settlement with the taxpayer under which the tax authorities will agree not to apply penalties in return for the taxpayer’s waiver of its right to seek MAP assistance under the applicable treaty). Taxpayers may feel pressured into giving up access to the mutual agreement procedure if they are given the choice between a high assessment without any suspension of collection, but with access to MAP, or a relatively moderate assessment without access to MAP. Taxpayers may additionally accept such settlements based on broader concerns for their future relationship with the tax administration involved.
<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
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<tbody>
<tr>
<td>Option 7</td>
<td>Ensure that audit settlements do not block access to the mutual agreement procedure. Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer’s access to the mutual agreement procedure could commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements. Changes to the Commentary on Article 25 could also address the obstacles to an effective mutual agreement procedure created by audit settlements.</td>
</tr>
<tr>
<td>Comment</td>
<td>The coercion of taxpayers to give up their rights to MAP is unprincipled and completely unacceptable behavior by field auditors and countries. Any participating country should commit to implement procedures for spontaneous notification of any other affected treaty partners to remedy the situation and to discipline any field auditor who improperly attempts to influence taxpayers in this manner. Further, some countries will not allow administrative remedies (e.g., Appeals) to be held in suspension while MAP proceeds.</td>
</tr>
<tr>
<td>Issue</td>
<td>Lack of advance pricing arrangement (APA) programs.</td>
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<tr>
<td>Option 8</td>
<td>Implement bilateral APA programs.</td>
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<tr>
<td>Comment</td>
<td>APA programs are a proven procedure for transfer pricing compliance for both taxpayers and governments. Participating countries should commit to offering APAs. It is worth mentioning that countries with substantial APA experience have a vested interest in helping countries with less experience to avoid some of the common pitfalls and administrative problems of an APA process.</td>
</tr>
<tr>
<td>Issue</td>
<td>Failure to consider the implications of taxpayer’s MAP or APA case for other tax years</td>
</tr>
<tr>
<td>Option 9</td>
<td>Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs. Participating countries could commit, in certain cases and after an initial tax assessment, to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances. Participating countries that have implemented APA programs could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the applicable time limits provided by domestic law (such as statutes of limitation.</td>
</tr>
<tr>
<td>Issue</td>
<td>Complexity and lack of transparency of the procedures to access and use the MAP. Where procedures to access and use the MAP are unduly complex, taxpayers may not seek MAP assistance and, as a result, may face unrelieved double taxation or otherwise improperly be denied treaty benefits.</td>
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<tr>
<td><strong>Option 10</strong></td>
<td>Improve the transparency and simplicity of the procedures to access and use the MAP.</td>
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<tr>
<td><strong>Comment</strong></td>
<td>In addition to improving transparency and simplicity, participating countries should commit to the provision of written guidance regarding MAP procedures.</td>
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<tr>
<td><strong>Issue</strong></td>
<td>Excessive or unduly onerous documentation requirements.</td>
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<tr>
<td><strong>Option 11</strong></td>
<td>Provide additional guidance on the minimum contents of a request for MAP assistance.</td>
</tr>
<tr>
<td><strong>Comment</strong></td>
<td>In addition to improving transparency and simplicity, participating countries should commit to the provision of written guidance regarding MAP procedures.</td>
</tr>
<tr>
<td>Issue</td>
<td>Right to access MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied.</td>
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<tr>
<td>Option 12</td>
<td>Clarify the availability of MAP access where an anti-abuse provision is applied. Where there is a disagreement between the taxpayer and the competent authority to which its MAP case is presented as to whether the conditions for the application of a treaty anti-abuse rule (e.g. a treaty-based rule such as the PPT rule) have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of Article 25(1) are met.</td>
</tr>
<tr>
<td>Comment</td>
<td>Participating countries should provide written guidance regarding situations in which an anti-abuse mechanisms apply. Descriptions should be as objective as possible to avoid uncertainty and undue government discretion. When a dispute remains between the taxpayer and the government, the issue should be able to be presented to the other involved country for consideration of access to MAP.</td>
</tr>
<tr>
<td>Issue</td>
<td>Cases where a competent authority considers unilaterally that a taxpayer’s objection is not justified.</td>
</tr>
<tr>
<td>Option 13</td>
<td>Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities.</td>
</tr>
<tr>
<td>Option 14</td>
<td>Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”. Participating countries could commit to clarify, in the Commentary on Article 25, the meaning of the phrase “if the taxpayer’s objection appears to it to be justified”.</td>
</tr>
<tr>
<td>Option 15</td>
<td>Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State.</td>
</tr>
<tr>
<td>Comment</td>
<td>This is not a common obstacle; however, it has produced substantial double taxation and harmed treaty relationships. A common way in which this “unilateral rejection” obstacle is encountered involves differing definitions of “control.” Given that countries have widely varying definitions of “control”, taxpayers should have access to MAP on the issue of whether or not a transaction is controlled. Once one tax authority has concluded that the transaction is controlled and has made an adjustment, the taxpayer is subject to double tax and should be entitled to access to mechanisms to relieve double taxation.</td>
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</table>
tax. Among the proffered options, Option 13 appears to raise this issue in the most efficient manner. Other issues susceptible to unilateral rejection include whether there is a transaction at all (e.g., implicit license) or whether a disallowance of an expense is a “domestic” issue not subject to treaty coverage.

<table>
<thead>
<tr>
<th>Issue</th>
<th>The use of domestic law remedies may have an impact on the use of MAP.</th>
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<tbody>
<tr>
<td>Option 16</td>
<td>Clarify the relationship between MAP and domestic law remedies. Participating countries could commit to clarify the relationship between the mutual agreement procedure and domestic law remedies.</td>
</tr>
<tr>
<td>Comment</td>
<td>Clarification is a good beginning. If the countries were to dispute the “domestic” aspect of the law, the dispute should, nonetheless, be capable of submission to MAP. More clearly, the participating countries should commit that if an issue results in the potential for double tax, the involved countries will have at least a preliminary discussion to consider access to MAP.</td>
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<tr>
<td>Issue</td>
<td>Issues connected with the collection of taxes. Where the payment of tax is a requirement for MAP access, the taxpayer concerned may face significant financial difficulties: if both Contracting States collect the disputed taxes, double taxation will in fact occur and the resultant cash flow problems may have a substantial impact on a taxpayer’s business, at least for as long as it takes to resolve the MAP case. A competent authority may also find it more difficult to enter into good faith MAP discussions when it considers that it may likely have to refund taxes already collected.</td>
</tr>
<tr>
<td>Option 17</td>
<td>Clarify issues connected with the collection of taxes and the mutual agreement procedure. Participating countries could commit to further clarify issues connected with the collection of taxes and the mutual agreement procedure, which could include a commitment to examine, in the context of treaty negotiations, each Contracting State’s domestic law and procedures for the collection of taxes, with a view to a clear shared understanding of such law and procedures and to address directly any obstacles to MAP access that they may effectively create. Changes to the Commentary on Article 25 could also address the suspension of collection procedures pending resolution of a MAP case; these amendments could further clarify, in particular, the policy considerations supporting a suspension of collection procedures during the period that any mutual agreement proceeding is pending and provide that such suspension should be available under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.</td>
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<tr>
<td>Comment</td>
<td>As a practical matter, this obstacle may undermine the MAP process more often than any other obstacle. In recent cases, taxpayers have been required to pay double tax in the hundreds of millions of dollars before treaty partners will even attempt to resolve that double tax. In addition to placing an unnecessarily heavy financial burden on taxpayers, this obstacle has two discrete adverse impacts on a taxpayer’s ability to get double tax relief: (i) it imposes significant costs, and may therefore provide tax authorities with a greater ability to reach unprincipled settlements with taxpayers. (ii) once tax authorities have received a large payment from taxpayers, they have little or no incentive to negotiate in good faith or to pursue a speedy resolution in a MAP process. This obstacle seems inconsistent with the principles embraced by all participating countries. In short, when two treaty partners are disputing a treaty-related issue, MAP must be a pre-payment forum.</td>
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<tr>
<td>Issue</td>
<td>Time limits to access the MAP. Time limits connected with the mutual agreement procedure present particular obstacles to an effective MAP. In some cases, uncertainty regarding the “first notification of the action resulting in taxation not in accordance with the provisions of the Convention” may present interpretive difficulties. More importantly, some countries may be reluctant to accept “late” cases – i.e. cases initiated by a taxpayer within the deadline provided by Article 25(1) but long after the taxable year at issue.</td>
</tr>
<tr>
<td>Option 18</td>
<td>Clarify issues connected with time limits to access the mutual agreement procedure. Participating countries could commit to different measures to clarify issues connected with time limits to access the mutual agreement procedure, including, in particular: – To adopt the best practices currently included in the Manual on Effective Mutual Agreement Procedures (“MEMAP”) concerning time limits to access the mutual agreement procedure, in particular to allow early resolution of MAP cases and to provide the benefit of the doubt to taxpayers when interpreting a tax treaty’s time limitation for MAP requests in borderline cases (e.g., where it is not clear when “first notification” has occurred).</td>
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To include in their treaties the second sentence of paragraph 2 of Article 25 ("Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States"). Where a country does not include that sentence or deviates from its wording, it could commit to ensure that its audit practices do not unduly create the risk of late adjustments for which taxpayers may not be able to obtain MAP relief.

Where there are difficulties or doubts as to what constitutes “first notification” for purposes of paragraph 1 of Article 25, to discuss and agree on the necessary clarifications with their treaty partners.

In order to provide guidance to countries that wish to use treaty provisions that require a MAP case to be presented to the other competent authority within a specified period in order for relief to be implemented, an alternative provision – and an explanation of the circumstances in which Contracting States might consider it appropriate – could be added to the Commentary on Article 25. An alternative provision could also be added to the Commentary on Article 9 to limit the time during which a Contracting State may make an adjustment pursuant to paragraph 1 of Article 9. Similarly, to provide guidance to countries that wish to use treaty provisions that deal with the length of time during which a Contracting State is obliged to make an appropriate corresponding adjustment under Article 9(2), an alternative provision could be added to the Commentary on Article 9.

Comment  This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes. Given the importance of eliminating double tax, any rules in this area should resolve uncertainty in a favor of allowing access into MAP.

Issue  Issues related to self-initiated foreign adjustments.

Option 19  Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure. Changes to the Commentaries on Articles 7, 9, and 25 could be made to clarify the circumstances where double taxation could be resolved under MAP in the case of self-initiated foreign adjustments and to emphasize the importance of bilateral competent authority consultation to determine appropriate corresponding adjustments and to ensure the relief of double taxation.

Comment  Taxpayers are currently caught between tax authorities that insist on one-way upward adjustments (under penalty exposure), yet are hesitant to engage with the taxpayer in MAP for self-initiated adjustments to alleviate the double tax
arising from the taxpayers’ required compliance. Taxpayers who become aware of incorrect transfer pricing should be allowed and encouraged to make the required correction and engage in MAP to prevent double tax. As long the OECD and tax authorities are committed to compliance over revenue goals, MAP should be readily available for self-initiated adjustments.

There are two main policy arguments against the liberal use of competent authority for self-initiated adjustments: 1) self-initiated adjustments allow taxpayers to engage in after-the-fact tax planning; and 2) tax authorities lack the resources to perform appropriate due diligence regarding self-initiated adjustments.

Although self-initiated adjustments could be the result of after-the-fact planning, for most taxpayers the burden of such after-the-fact planning, which would include amending tax returns in two countries, re-analyzing transfer pricing issues, and engaging in MAP, outweighs the possible benefits. Further, the taxpayer has the burden of proof in demonstrating that the original transfer pricing determination was outside an arm’s length range of results and that the proposed determination is within an arm’s length range. Finally, all of this cost and burden of proof must be borne by the taxpayer merely to achieve a result that the taxpayer would have been entitled to if they had only analyzed the issue correctly in the first place.

The second policy argument draws a distinction between self-initiated and government-initiated adjustments. If the government makes an adjustment, the government is already familiar with the taxpayer’s facts and analysis. The government enjoys no such familiarity when the taxpayer makes its own adjustment. Presumably, the taxpayer making his own adjustment is able to exploit the government’s ignorance. Of course, with proper time and manpower, the government could make itself familiar with each taxpayer-initiated adjustment before or while the competent authority examines the issue. The main problem with this policy argument is that the same is true with respect to foreign-initiated adjustments.

All the policy arguments that can be mustered against not encouraging self-initiated adjustments could equally well be raised against the government examining transfer prices in the first place: e.g., the government has no familiarity with the facts of the particular case, and doesn’t have the manpower to familiarize itself with those facts to ensure that the transfer price is at arm’s length. Nonetheless, taxpayers are allowed to set their own prices, with the government relying on the threat of penalty and audit to induce the taxpayer to
set prices correctly. But the threat of penalty and audit are equally present for the taxpayer who makes his own transfer pricing adjustment; once more, the reasons for allowing related taxpayers to set their transfer prices in the first place function equally well as reasons for the competent authority to assist the taxpayer with a self-initiated adjustment.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Lack of a principled approach to the resolution of MAP cases.</th>
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<tr>
<td>Option 20</td>
<td>Ensure a principled approach to the resolution of MAP cases. Participating countries could commit to different measures to ensure a principled approach to the resolution of MAP cases, including, in particular: – To adopt the best practice currently included in the MEMAP concerning fair and objective MAP negotiations, based on a good faith application of the treaty, and the resolution of MAP cases on their merits. – Where the interpretation of a treaty provision is likely to be difficult or controversial, to agree on specific interpretive guidance (e.g. in the form of a protocol or exchange of notes) proactively, ideally at the same time the treaty is negotiated. Such interpretive issues could also appropriately be resolved by the competent authorities of the Contracting States under the authority of paragraph 3 of Article 25.</td>
</tr>
<tr>
<td>Comment</td>
<td>This obstacle is of great concern. Commitment to best practices are a good start, but unprincipled behavior is difficult to overcome in a two-party, unassisted negotiation setting such as MAP. As mentioned in the comments above, the involvement of a third party neutral—either as a mediator or arbitrator—could have a meaningful positive impact on this obstacle. The involvement of a third party neutral would only be necessary after an agreed-upon period of unsuccessful negotiations, and the threat of arbitration or mediation would encourage principled behavior in MAP negotiations to resolution to avoid the incremental process.</td>
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<tr>
<th>Issue</th>
<th>Lack of co-operation, transparency or good competent authority working relationships</th>
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<tbody>
<tr>
<td>Option 21</td>
<td>Improve competent authority co-operation, transparency and working relationships. Participating countries could commit to adopt the relevant best practices currently included in the MEMAP.</td>
</tr>
<tr>
<td>Comment</td>
<td>See comment to previous issue. Further, taxpayers should attempt to provide what information and assistance that they can to minimize the impact of a lack of information-sharing between tax authorities. Face-to-face meetings to agree processes and resolve cases have proven helpful to encourage countries to work out differences. Further, agreed upon escalation clauses between the</td>
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involved countries which provide for consideration of unagreed issues at a more senior level have also been proven to be effective.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases. Mandatory binding MAP arbitration has been included in a number of bilateral treaties following its introduction in paragraph 5 of Article 25 of the OECD Model in 2008. Action 14 of the BEPS Action Plan recognizes, however, that the adoption of MAP arbitration has not been as broad as expected and acknowledges that “the absence of arbitration provisions in most treaties and the fact that access to …arbitration may be denied in certain cases” are obstacles that prevent countries from resolving disputes through the MAP. This section discusses the main policy and practical issues connected with MAP arbitration and options to address them.</th>
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<tr>
<td>Option 22</td>
<td>Policy issues: Increase transparency with respect to MAP arbitration. In order to provide transparency with respect to country positions on mandatory binding MAP arbitration, footnote 1 to Article 25(5) could be deleted (and paragraph 65 of the Commentary on Article 25 modified accordingly).</td>
</tr>
<tr>
<td>Option 23</td>
<td>Policy issues: Tailor the scope of MAP arbitration order to encourage countries to adopt a MAP arbitration provision with a limited scope (rather than no provision at all) the Commentary on Article 25 could be amended to include such an alternative MAP arbitration provision, which should also expressly provide for the possible extension of its scope of application.</td>
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<tr>
<td>Option 24</td>
<td>Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy. Because national policies with respect to MAP arbitration may be expected to evolve over time, particularly as more countries gain experience and familiarity with MAP arbitration, most favored nation (MFN) provisions could be used as an elective mechanism for the quick implementation of MAP arbitration between a country and its treaty partners where that country determines in the future that MAP arbitration should appropriately be included as part of its treaty policy.</td>
</tr>
<tr>
<td>Option 25</td>
<td>Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies.</td>
</tr>
</tbody>
</table>
Comments to the OECD
Action 14 – Dispute Resolution
January 16, 2015

| Comment | It would be important for OECD to expressly acknowledge that binding arbitration mechanisms have proven extraordinarily effective in MAP, and the OECD should clearly and unambiguously promote adoption in treaties of MAP arbitration. Many commenters have noticed that the threat of arbitration has improved timely resolution of cases. In the few cases in which the arbitration procedure has been employed, the cases have been resolved. As a weaker alternative, treaties could include mechanisms for non-binding arbitration; such approaches have been used by some tax authorities with reasonable effectiveness as part of their internal dispute resolution processes. The OECD obviously cannot compel countries to include binding arbitration in treaties. Some countries, inexperienced in transfer pricing are understandably concerned about the “contest” aspect of arbitration, especially baseball arbitration. In spite of issues of implementation, the OECD can and should, however, exercise as much moral persuasion on arbitration as is possible. Statements to the effect that “Binding arbitration clauses are a very important signal to MNEs that they will be treated fairly and in accordance with international norms” can and should be included in the OECD’s guidance on dispute resolution. |
| Issue | Article 25(5) of the OECD Model provides for the submission of unresolved issues to MAP arbitration after a fixed period of time following the initiation of the MAP case. It is, however, recognized that there may, on occasion, be circumstances in which initiating MAP arbitration may be premature and, consequently, that this automatic referral may be an obstacle to the adoption of arbitration by some countries. Where the competent authorities believe that they will be able to reach a negotiated resolution, it may be appropriate to defer the initiation of MAP arbitration for a defined (preferably short) period of time. |
| Option 26 | Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration inappropriate circumstances. Paragraph 5 of Article 25 could be amended to permit the competent authorities to defer the initiation of MAP arbitration in appropriate circumstances – e.g. to allow the competent authorities to mutually agree to defer the initiation of MAP arbitration under specific conditions. |
| Comment | Any deferral of MAP arbitration should be quite restricted. A MAP arbitration clause injects discipline into the process for MAP cases precisely because the countries wish to avoid cases going to MAP arbitration. Any expectation of deferral would lessen this favorable effect. |
| Issue | Appointment of arbitrators. There is no standard set of qualifications for prospective MAP arbitrators, although the criteria used in existing agreements and models in general appear to provide that such individuals: (i) should have significant experience in cross-border tax matters, preferably in allocation matters; (ii) should be of a judicial temperament (i.e. neutral, decisive, respectful and composed), though not necessarily have experience as a judge or arbitrator; and (iii) should be impartial and independent vis-à-vis the Contracting States and the affected taxpayer(s) at the time they accept appointment (as well as for the duration of the arbitration proceeding and a reasonable period of time thereafter). Limited guidance and lack of experience with the appointment of arbitrators may make some countries hesitant to adopt MAP arbitration. |
| Option 27 | Practical issues: Appointment of arbitrators. In order to avoid potential differences, participating countries could agree to develop mutually agreed criteria for the appointment and qualifications of arbitrators, to be included in the text of the arbitration provision itself and/or in competent authority agreements concluded for purposes of the implementation of MAP arbitration, in advance of any MAP arbitration procedure. To ensure that prospective arbitrators are impartial and independent, participating countries may also wish to develop a standardized declaration that would be executed by arbitrators to attest to their fitness to serve as arbitrators and to disclose any potential conflicts of interest. |
| Comment | This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes. Further a list of approved arbitrators could be developed and maintained. |
### Issue
Confidentiality and communications. The security of taxpayer and competent authority information and communications are critical to public confidence in tax administration, including the mutual agreement procedure. There may be an even greater sensitivity in connection with MAP arbitration, as independent arbitrators who are not formally employees of the tax administrations of the Contracting States are brought into the mutual agreement process. Arbitrators must be allowed full access to the information necessary to make an informed decision on the issues submitted to them for resolution and, at the same time, must be held to the same strict confidentiality requirements regarding that information as apply to the competent authorities themselves under paragraph 2 of Article 26 and domestic laws protecting the confidentiality of taxpayer information.

### Option 28
Practical issues: Confidentiality and communications. In order to protect the confidentiality of taxpayer information in the context of MAP arbitration (and the overall integrity of the MAP arbitration process), the Article 25 arbitration provision could be amended as follows:

- To ensure the proper consideration of the relevant information in the MAP arbitration process, any disclosure of taxpayer information by a competent authority to the members of the arbitration panel would be made pursuant to the authority of the Convention and subject to confidentiality requirements that are at least as strong as those applicable to the competent authorities. An express provision in the text of the Convention itself, with a cross-reference to Article 26, would ensure the legal status of the arbitrators.
- The Commentary on Article 25 could provide additional relevant guidance, noting the practice of some competent authorities (i) to request that taxpayers authorize the disclosure of relevant information to
the arbitrators and (ii) to require that the arbitrators and their staffs agree in writing to maintain the confidentiality of the information they receive in the course of the arbitration process (subject only to further disclosure in accordance with the requirements and further authorization of the competent authorities and the affected taxpayers). • The Commentary on Article 25 could also note the practice of some countries to oblige taxpayers and their representatives to maintain confidentiality regarding arbitration in a MAP case, subject to any necessary disclosures such as for financial reporting purposes, with a view to avoiding potential taxpayer manipulation of the MAP arbitration process.

<table>
<thead>
<tr>
<th>Comment</th>
<th>This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes.</th>
</tr>
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<tbody>
<tr>
<td>Issue</td>
<td>Form of process for decision. There are two principal approaches to decision-making in the arbitration process. The format most commonly used in commercial matters is the “conventional” or “independent opinion” approach, in which the arbitrators are presented with the facts and arguments of the parties based on applicable law and then reach an independent decision, typically in the form of a written, reasoned analysis. This approach strongly resembles a judicial proceeding and is the model for the EU Arbitration Convention as well as the default approach reflected in the Sample Mutual Agreement on Arbitration (the Sample Agreement) included in the Commentary on Article 25 of the OECD Model. The other main format is the “last best offer” or “Final Offer” approach (often informally referred to as “baseball arbitration”). This approach is reflected in a number of bilateral tax treaties signed by OECD member countries. Under this approach, in general, each of the competent authorities submits to the arbitration panel a proposed resolution (i.e. its proposed disposition of the specific amounts of income, expense or taxation at issue in the MAP case), together with a position paper that explains the rationale for the proposed resolution. The arbitration panel is required to adopt as its determination one of the proposed resolutions submitted by the competent authorities. The determination by the arbitration panel does not state a rationale and has no precedential value.</td>
</tr>
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</table>
**Option 29**

Practical issues: Default form of decision-making in MAP arbitration. In light of experience with MAP arbitration, participating countries could develop additional guidance under Article 25 of the OECD Model on the use of different decision-making mechanisms as default approaches in MAP arbitration, with an explanation of the respective advantages and disadvantages of the independent opinion and Final Offer approaches.

**Comment**

Baseball arbitration is particularly effective at eliminating unprincipled behavior, as the arbitrator is charged with accepting the most reasonable position, without compromise. This charge to the neutral arbitrator leaves less “gamesmanship” to the parties to the dispute. On the other hand, baseball arbitration could create concern among countries with limited transfer pricing experience and resources that a more experienced country would have the advantage.

**Issue**

Evidence. The evidence considered by the arbitration panel may largely be determined by the form of the decision-making process. The independent opinion approach ordinarily envisions a formal evidentiary process involving testimony, the de novo presentation of evidence to the arbitration panel and (potentially) taxpayer presentations. The Final Offer approach, on the other hand, generally contemplates that the arbitration panel will make a decision based on the facts and arguments as presented in the competent authorities’ submissions to the arbitration panel (a so-called “on the record” approach). The most important principle relating to evidence is that there be no opportunity or incentive for the taxpayer to undermine the MAP negotiation process (e.g. by seeking to have the arbitration panel consider information which had been withheld or otherwise not provided to the competent authorities).

Role of the taxpayer. Consistent with the nature of the mutual agreement procedure as a government-to-government activity in which taxpayers play no direct role, MAP arbitration processes do not require direct taxpayer input to, or appearance before, the arbitration panel (although such taxpayer participation is not precluded). Whilst it is sometimes asserted that the arbitration panel might benefit from direct interaction with taxpayers, there is a concern that taxpayer involvement in the MAP arbitration procedure could result in a lengthier, more expensive and more complicated process, and thus undermine the effectiveness of MAP arbitration.
<p>| Option 30 | Practical issues: Evidence. In light of experience with MAP arbitration, guidance in the Commentary on Article 25 of the OECD Model could be developed to address particular evidentiary issues that may arise in connection with different forms of arbitral decision-making. Such guidance could provide, for example, that where the format for arbitral decision-making is the Final Offer approach, an “on the record” evidentiary format should be used. This guidance could also provide, for example, that where the format for arbitral decision-making is the independent opinion approach, it may be appropriate in some cases for the competent authorities to permit the taxpayer to present its position orally during the arbitration procedure, at the request, or with the permission, of the arbitrators. Stakeholder comments are invited on approaches to evidentiary issues in the MAP arbitration process. In addition, in order to ensure that the taxpayer’s position is clearly communicated to the arbitration panel, guidance under Article 25 could allow for the taxpayer’s submission of some form of brief for consideration by the panel (subject to review and comment by the competent authorities); such a brief should not, however, contain new facts which have not previously been considered by the competent authorities. |
| Comment | This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes. |
| Issue | Multiple, contingent and integrated issues. Many MAP cases may require competent authority consideration of more than one assessment or adjustment to a taxpayer’s reported income, expense or liability. The simplest of such cases may require the resolution of multiple unconnected issues (e.g. the audit of a member of a MNE group could result in an adjustment to the transfer pricing of a tangible good as well as adjustments to other amounts paid to associated enterprises, such as a management fee or royalty). Two other, more complex types of MAP cases involve multiple issues: MAP cases involving contingent issues and MAP cases involving integrated operations. Contingent issues may be presented in MAP cases involving the application of Articles 5 and 7, which require the competent authorities to resolve a threshold question (is there a permanent establishment?) before considering other issues (in the PE case, the attribution of profits). Integrated operations may be presented in a MAP case involving “bundled intangibles”. Such a case could involve, for example, a large retail organization that has formed affiliates to which a variety of intangibles are licensed, and to which a variety of branded goods are sold, and there is potential for overlap between the two sets of transactions. |</p>
<table>
<thead>
<tr>
<th>Option 31</th>
<th>Practical issues: Multiple, contingent and integrated issues. Participating countries could establish mutually-agreed guidance for arbitrators on how to deal with multiple, contingent and integrated issues.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comment</td>
<td>This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes.</td>
</tr>
<tr>
<td>Issue</td>
<td>Costs and administration. In light of the significant resource constraints experienced by many countries in recent years, concerns about the potential costs of MAP arbitration are an important consideration in designing the format of the arbitration process. The costs associated with arbitration fall into three categories: (i) costs related to engaging the arbitration panel, consisting principally of the fees paid to the arbitrators; (ii) costs related to each competent authority’s participation in the arbitration procedure, which include, for example, costs related to the preparation and presentation of proposed resolutions and position papers; and (iii) administrative costs, such as telecommunications and secretarial expenses, miscellaneous expenses (e.g. translation or interpretation) and, possibly, travel costs (airfare, lodging, etc.).</td>
</tr>
<tr>
<td>Option 32</td>
<td>Practical issues: Costs and administration. In order to address the particular concerns that costs may present an obstacle to the adoption of MAP arbitration, participating countries could consider ways to reduce the costs of MAP arbitration procedures, with a view to developing guidance in the Commentary on Article 25 on these issues and approaches to address them.</td>
</tr>
<tr>
<td>Comment</td>
<td>The issues presented for arbitration could be narrowed in an effort to reduce arbitration costs. Further, taxpayers could be responsible for some or all of the incremental cost of arbitration.</td>
</tr>
<tr>
<td>Issue</td>
<td>Issues related to multilateral MAPs and advance pricing arrangements (APAs). In recent years, the substantial increase in the pace of globalization has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global business models and the accelerated integration of national economies and markets have emphasized the need for effective mechanisms to resolve multijurisdictional international tax disputes.</td>
</tr>
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</table>
### Option 33

Address issues related to multilateral MAPs and advance pricing arrangements (APAs). Changes to Article 25 and/or its Commentary could also be made in order to address directly the interpretation and application of Article 25 with respect to multilateral MAPs and APAs, in particular to address the issue of how the arbitration process could be used in a multilateral MAP and to address legal, practical and/or procedural issues, including issues connected with time limits (e.g. domestic statutes of limitation for assessment) and issues connected with ensuring that third-State competent authorities are made aware of cases with multilateral implications. The possibility of developing a specific provision that would address mutual agreement procedure issues that arise in multilateral situations, including how the arbitration process could be used in such situations, could be considered by the interested parties that will participate in the development of the multilateral instrument contemplated by Action 15 (Develop a multilateral instrument) of the BEPS Action Plan.

### Comment

The OECD has stressed the importance and need for tax authorities to understand the entire value chain of an MNE in auditing transfer pricing. This is logically likely to lead to transfer pricing adjustments that are based not only on a specific bilateral transaction, but rather that a transaction’s relationship to other parts of the supply chain. Such adjustments may implicate multiple different tax jurisdictions, and the OECD Guidance should address the need for more multilateral cooperation in the MAP process. Possible issues:

- **a. “triangular” MAP cases** where there is a transaction from A to B to C, but where B has only a very limited role in the transaction and profits from the transaction. The real issue is therefore between A and B.

- **b. Profit split analyses** involving countries A, B and C. D and E. If these countries cooperate in a joint audit and propose adjustments based on common assumptions/analyses, this may lead to five discrete adjustments against a common supplier in country F, all of which are based on similar reasoning. The tax authorities in countries A, B, C, D and E should be encouraged to have a cooperative approach to MAP negotiations that matches their cooperative approach to audits.

- **c. Joint audits**

  With the greater incidence of multilateral treaty-related issues, some effort should be expended to make it clear that MAP applies beyond just bilateral issues and to develop some specific procedures to
address multilateral situations. For example, in “triangular” cases, the
active negotiation of the case and the economic impact of the case
rests on two parties. Assuming appropriate treaty relationships
between all involved countries, the two countries with the largest
economic interest in the disputed transactions could interact directly,
copying any additional involved countries on correspondence. Only
if the negotiations between to primary two countries were to affect
the taxable income in the copied countries would the copied countries
take an active part in negotiations. Similar “common sense”
approaches could be developed with regard to other multilateral
scenarios.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Issues related to consideration of interest and penalties in the mutual agreement procedure. Issues related to the consideration of interest and penalties in the mutual agreement procedure are of significant importance, particularly in light of the potential for the work on BEPS to increase pressure on the mutual agreement procedure. In the context of the MAP, there appear to be three main practical issues related to interest and penalties: a) Suspension: Can interest and/or penalties be suspended while the case is considered in the MAP, so that their proper application/imposition can be determined following the resolution of the primary substantive issues? b) Negotiation: Can the application and/or computation of interest or penalties be considered primary substantive issues that may be negotiated by the competent authorities? c) Waiver: Can a competent authority waive the collection of interest on a deficiency if the treaty partner does not pay interest on a corresponding refund of tax (or pays interest at a lesser rate)? Can a competent authority waive the payment of interest on a refund if the treaty partner is willing to waive collection of interest on the deficiency (or collects interest at a lesser rate)?</th>
</tr>
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<tr>
<td>Option 34</td>
<td>Provide guidance on consideration of interest and penalties in the mutual agreement. Changes to Article 25 or its Commentary could be made to address the treatment of interest and penalties in the MAP, in particular to explain that whilst it is not appropriate to consider interest and penalties as “taxes” in order to apply limitations on source State taxation or for purposes of the obligation of the State of residence to relieve double taxation, interest and administrative penalties that are directly connected to the taxes to which they are related should be treated in the same way as taxes to which they are directly connected (in particular where interest and penalties are computed with reference to the amount of the underlying tax and the underlying tax is found not to have been levied in accordance with the provisions of the Convention.</td>
</tr>
</tbody>
</table>
Comment

This proposed option appears to be a sensible and efficient answer to a common obstacle to efficient resolution of treaty-related disputes. Further, it appears consistent with the approach taken by MEMAP.

Conclusion

There is a strong connection between the technical guidance in the BEPS Action Plan and the number and magnitude of transfer pricing disputes. Any changes in technical rules will increase the likelihood that tax authorities will take fundamentally inconsistent positions that will increase transfer pricing disputes and double taxation. Trusting in the good faith of governments to consistently put forth the effort and make the compromises needed to eliminate double tax is not realistic. Even in cases where governments have made this a priority and have a long history of MAP successes, the process breaks down, even when the stakes are highest.

Although the OECD has identified most of the obstacles to taxpayers’ ability to obtain double tax relief, the OECD has stopped short of making the concrete recommendations required to surmount these obstacles. The OECD should recommend specific rules to eliminate obstacles to the MAP process and improvements to the process itself, including the adoption of MAP arbitration. Finally, the OECD should advocate the implementation of a specific mechanism to require the reporting of MAP and APA results and to monitor the effectiveness of dispute resolution processes.

About KPMG

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By letter and by email: taxtreaties@oecd.org

Organization for Economic Co-operation and Development (OECD)
Attn. Marlies de Ruiter
Head Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA
2, rue André Pascal
F - 75775 Paris Cedex 16
FRANCE

FROM Loyens & Loeff - Natalie Reypens / Taco Wiertsema
REFERENCE 17749157
DATE 16 January 2015
RE Discussion Draft on BEPS Action 14: “Make Dispute Resolution Mechanisms more effective”

Dear Madame,

With reference to the Discussion Draft on BEPS Action 14 dated 18 December 2015 (the MAP Discussion Draft), we appreciate the opportunity to provide you with our comments. Our response is submitted on behalf of the Dutch, Belgian, Luxembourg and Swiss transfer pricing advisors of Loyens & Loeff.

We appreciate that the OECD acknowledges that the interpretation and application of rules to counter BEPS can introduce elements of uncertainty for business. We also agree with the OECD that actions to counter BEPS need to be supplemented with actions that ensure certainty and predictability for business. This is all the more pressing considering that, during the 2013 reporting period, total number of open mutual agreement procedure (MAP) cases reported by OECD member countries increased with 94.1% compared to the 2006 reporting period.\(^1\) We expect a further increase of MAPs following the entry into force of BEPS actions.

Although we welcome the OECD’s efforts in addressing obstacles that prevent effective MAP dispute resolution and its guidance on possible measures for these obstacles, we would like to take the opportunity to provide you with our comments and potential additional measures. We first provide you with our general comments below. Subsequently, we set-out our comments to the specific sections of the MAP Discussion Draft. Lastly, we provide you with our concluding remarks.

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General comments

- It is commonly expected that the OECD’s proposed actions to prevent BEPS will result in a further increase in situations of double taxation. In order to allow taxpayers the opportunity to manage the resulting uncertainty, an efficient MAP process would need to be established preferably before (or ultimately shortly after) BEPS measures enter into force. Considering the pace at which BEPS actions are currently proposed, we urge the OECD to assign a higher priority to its MAP Discussion Draft.

- We believe certainty as regards solutions for double taxation is essential to safeguard optimal business opportunities. Countries supporting BEPS measures, which will increase the risk of double taxation, should feel compelled to support strong efforts to resolve double taxation as well. We therefore expected the OECD to have taken a firmer stand on the necessity of universal mandatory binding MAP arbitrage. In the MAP Discussion Draft, the OECD indicates that consensus among member states on the application of universal mandatory binding MAP arbitrage is absent. We understand the opposition to mandatory binding arbitrage is caused by concerns of some member countries that arbitrage could negatively affect their national sovereignty. However, practical experience with respect to the EU Arbitrage Convention\(^2\) suggests that the mere existence of binding arbitrage provides a strong incentive for countries to reach agreement in the regular MAP process. This reduces the situations of impediment to national sovereignty.

Specific Comments

- In paragraph 11 of the MAP Discussion Draft the OECD urges participating countries to include paragraph 2 of Article 9 of the OECD Model Convention in all their tax treaties. This to ensure that countries also apply corresponding adjustments with respect to economic double taxation resulting from the inclusion of profits on the basis of paragraph 1 of Article 9. The OECD proposes a multinational instrument, envisaged by BEPS Action 15, to this effect. We welcome this proposal for countries that require specific tax treaty guidance in order to apply appropriate corresponding adjustments. However, we believe it is also very useful if the OECD would further elaborate on its position that, even in the absence of Article 9 paragraph 2, economic double taxation falls in the scope of Article 25.

- We welcome the proposals of the OECD to improve the effectiveness of MAP processes as included in paragraph 36 ff. However, in addition to the proposals to that effect, the OECD

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\(^2\) Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC).
can also suggest countries to include administrative procedures that allow efficient collaboration between taxpayers and the authorities involved with the MAP. These procedures would at least need to provide the possibility for taxpayers to arrange face-to-face meetings with the respective competent authorities.

- In paragraph 24 ff, the OECD clarifies that taxpayers cannot be deprived of domestic legal remedies as a condition for MAP access. The OECD should also clarify that access to MAP arbitrage, if available, cannot be conditioned upon taxpayers waiving their rights on domestic legal remedies.

- We welcome the OECD’s guidance to the consideration of interest and penalties as ‘taxes’ within the scope of MAP in paragraph 60 of the Discussion Draft. This is all the more pressing considering that a number of countries apply high taxation interest rates (i.e. rates that far exceed current market interest rates). In addition, some countries also apply asymmetrical taxation interest policies. In a worst case scenario, the outcome of a MAP could result in a taxpayer having to pay high interest on the correction of State B, whereas no interest refund is included in the corresponding adjustment of State A. Considering that MAPs generally take more than two years to be resolved, the total interest burden (i.e. the interest on the correction in State B as well as the opportunity costs of the tax overpayment in State A) for taxpayers can represent a substantial part of the amount of the correction. As a possible additional measure, the OECD could stimulate countries to suspend accrual of taxation interest under the condition of depositing the amount of tax under dispute on an interest bearing ‘blocked account’ . Upon reaching agreement in the MAP, countries would have access to their share of tax on the funds of the blocked account (including interest). This could provide for an effective measure in transfer pricing disputes where the allocation of profit among the countries is under dispute rather than the absolute amount of that profit.

**Concluding remarks**
Including measures to increase the effectiveness of dispute resolution under MAP will certainly have positive impacts for both taxpayers and tax administrations. In this respect, we consider that the guidance included in the MAP Discussion Draft is not only very useful, but also as a necessary condition for the implementation of the other BEPS actions.

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3 In the Netherlands, for example, interest tax on underpayments is charged at a rate in excess of 8% whereas no interest refund applies in case of tax overpayments.

4 According to the OECD’s statistical data on MAPs, in the 2013 reporting period OECD member countries required on average 25 months to resolve a MAP. Reference is made to [http://www.oecd.org/ctp/dispute/map-statistics-2006-2013.htm](http://www.oecd.org/ctp/dispute/map-statistics-2006-2013.htm).
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We thank the OECD for the opportunity to comment on the MAP Discussion Draft.

Yours faithfully,

Loyens & Loeff

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To the kind attention of Ms. Marlies de Ruiter

16 January 2015

Dear Sirs,

**BEPS Action 14: Make dispute resolution mechanisms more effective – Public Consultation**

We refer to the Public Discussion Draft *BEPS Action 14: Make disputes resolution mechanisms more effective* published on 18 December 2014, on which public comments are expected by 16 January 2015.

1. It is with particular pleasure that we would like to bring to your attention our observations, comments and possible suggestions to the above-mentioned draft (the “Draft”). In the following paragraphs we would like to offer some general remarks on the Draft and point out the main obstacles that on the basis of our experience hamper the effective functioning of MAP under Article 25 of the OECD Model Convention.

A. General remarks

2. We agree with the statement that the “absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP” (par. 10 of the Draft). We are also aware that, as expressly indicated in the Draft, there is no consensus on a mandatory binding MAP arbitration.
3. Nevertheless, certainty on disputes resolutions is the key element for taxpayers operating in an international setting. In our experience the sole competent authority procedures that effectively work are those initiated on the basis of European Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of the associated enterprises ("Arbitration Convention") that provides for a mandatory binding arbitration phase. The effectiveness of the Arbitration Convention is underpinned both on the fact that it is per se the element ensuring resolution of disputes and because competent authorities are more committed to find an agreement between themselves in the initial mutual agreement procedure phase rather than leaving decisional power to arbitrators. For this reason, we believe that the OECD should make every possible effort to reach a consensus on the introduction in tax treaties of a similar mechanism of arbitration clause.

B. Specific remarks

B1. Relation between MAP and domestic litigation (par. 32 of the Draft)

4. Paragraph 32 of the Draft addresses the issue of uncertainty that can derive from the interaction between domestic law remedies and MAP. We agree that this represents one of the most significant obstacles to the effective functioning of the MAP under tax treaties.

5. With reference to the proposed actions, indicated under Option 16, we would like to stress that clear guidance on the relation between MAP and domestic law remedies can be insufficient since in some countries, specific changes to the internal legislation are necessary regardless of whether or not an arbitration provision is encompassed in the treaty.

6. For example, in some countries, above all in the lack of a binding arbitration clause, if a taxpayer decides to apply for a MAP it is nevertheless obliged to initiate domestic tax litigation. Indeed, the taxpayer cannot take the risk of remaining without remedies where an agreement is not reached between competent authorities. Furthermore, the legislative framework of some countries is such that in case a final judgment is delivered, competent authorities cannot derogate from such decision. A MAP might therefore only be effective if the case is resolved before a final decision of the judicial proceeding. As tax court decisions are delivered more rapidly compared to a decision of the two Contracting States under a MAP, there is a distinct need for the taxpayer to obtain a suspension of the court proceedings to permit the MAP to come to a conclusion prior to the delivery of a tax court decision. In some countries, domestic legislation does not provide for the taxpayer’s right to obtain a suspension of the court proceedings; equally, domestic legislation frequently does not entitle the
court to suspend the proceedings when a MAP is pending. We believe that domestic laws may increase the effectiveness of access to MAP procedures by providing for an obligation (or at the very least an option for the tax court) to suspend the proceedings at any time once the MAP is opened. In the absence of clear-cut domestic provisions governing suspension of domestic tax court proceedings in the presence of a MAP, guidance by tax authorities is unable to achieve the desired result because tax courts may disregard the view taken by the tax authorities.

7. A further issue is that notices of assessment may usually have multiple contents with different claims: only some of the tax claims raised regard the application of tax treaty law while others regard purely domestic issues and do not trigger double taxation. Domestic provisions of several countries do not allow domestic courts to deliver a partial decision, i.e. to split the claims contained in the notice of assessment in a way that litigation goes ahead for those not affected by a MAP, while for the latter claims suspension is provided.

8. Similar issues concern the suspension of tax collection that may be granted solely at the discretion of the relevant revenue agency. In order to increase effectiveness, domestic laws should make it possible for suspension of the tax collection to be granted any time upon the request of the taxpayer throughout the period of the pending mutual agreement procedures.

9. We conclude that the changes of the domestic provisions as suggested by the Draft are of fundamental importance for the effective functioning of MAP.

B2. Audit settlements as an obstacle to MAP access (par. 19 of the Draft)

10. Paragraph 19 of the Draft properly indicates that audit settlements may sometimes prevent the application for MAP. With reference to that issue we would like to point out that quite often there is a preference for a unilateral settlement procedure, particularly considering the fact that the settlement triggers a substantial reduction of penalties whereas the same reduction of penalties does not take place in the case of MAP.

11. Given the fundamental importance of the penalty issues for the efficiency of MAP, especially in countries where the penalties are relatively high and the fact that these can also be equal to 100 per cent of the amount of the adjusted tax, it would be desirable that domestic provisions should eliminate the trade-off between a domestic settlement and a MAP in order to grant the taxpayer the possibility to choose the most effective procedure for the case at stake without being driven by the savings constituted by different penalty regimes between settlement and MAP. In brief, taxpayers enacting a MAP should have access to the same penalties reduction provided for the domestic settlement procedures.
B3. Unilateral denial to the opening of MAP (par. 33 of the Draft)

12. Paragraph 33 of the Draft invites stakeholders to provide examples where the presentation of a case to the competent authority may not have resulted in the discussion of that case with the competent authority of the other State in a situation where that other competent authority would likely have considered that there was taxation not in accordance with the provisions of the Convention.

13. A case observed in Italy is when violations of either Article 9 or 7 of tax treaties following OECD model conventions are raised on the basis of domestic provisions that are not literally governed by the treaty. In the case of intra-group services, for example, a tax claim in many cases is based on alleged violations of principles other than the arm’s length (e.g. “principle of corporate benefit”, “certainty” and “effectiveness” of the costs for which deduction is sought, etc.). In such cases tax authorities have sometimes denied access to MAP (or Arbitration Convention) taking the position that the grounds of the claim are purely domestic and disallowance of costs does not rely on the domestic transfer pricing provision that might be in conflict with treaty provisions (such as Article 9 or 7 of the tax treaty). Therefore, excluding, for example, that an issue connected to the identification of shareholder activity is outside the scope of Article 25 only because the claim has been raised on the basis of a domestic provision different from the transfer pricing provision, is in our opinion a violation of the treaty. We agree with the proposal that the eligibility for MAP should in any case be decided by both tax authorities and should ignore the legal basis of the claim given by one of the two States but rather refer to the substantial effect that, as indicated above, may be in contrast with the treaty provisions.

B4. Interest (par. 60 of the Draft)

14. Since the duration of MAP procedures is usually lengthy, the interest accrued on the taxes at stake is an element that should also be properly considered. For this reason, either reimbursement of the taxes paid should also include the interest accrued on that amount or the collection of the taxes claimed should not include the related interest. In addition to the indications under Option 34, a recommendation according to which competent authorities should also agree on that point would be welcome.

B5. Lack of resources (par. 16 of the Draft)

15. On the basis of our experience we confirm that the number of MAP applications has increased dramatically in recent years and there is no evidence that tax administrations have adopted appropriate measures to strengthen their MAP resources. This indeed represents a further significant impediment to an
efficient implementation of the MAP mechanisms. We would therefore like to stress the importance of the recommendation in *Option 4*. In addition, the OECD should indicate a ratio between the number of MAPs and skilled personnel that is considered appropriate.

With kind regards,

Maisto e Associati
Dear Ms de Ruiter

**BEPS Action 14: Make Dispute Resolution Mechanisms More Effective**

Matheson welcomes the opportunity to comment on the public discussion draft issued under BEPS Action 14 (the “Discussion Draft”).

Matheson is an Irish law firm and our primary focus is on serving the Irish legal and tax needs of Irish and international companies and financial institutions doing business in Ireland. Our clients include over half of the Fortune 100 companies. We also advise seven of the top ten global technology companies and over half of the world’s 50 largest banks. We are headquartered in Dublin and also have offices in London, New York and Palo Alto. More than 600 people work across our four offices, including 75 partners and tax principals and over 350 legal and tax professionals.

Comments made in this letter are made solely on our own behalf.

As an overall comment, there is a risk that when national budget deficits spiral, tax authorities, as a revenue raising measure, may be inclined to make transfer pricing adjustments that are not always aligned with the OECD transfer pricing guidelines. This trend is likely to be reflected in the cases considered under mutual agreement procedures (“MAP”). Although tackling such developments may be beyond the scope of the work under Action 14, it is something that should be considered by the Committee on Fiscal Affairs (the “CFA”) in tandem with Action 14.

1. **Good faith implementation of mutual agreement procedure**

We welcome the suggestion in **Option 1** to include new language in the Commentary on Article 25(1) confirming that countries are obliged to seek to resolve cases in a principled, fair and objective manner. We suggest that the new paragraph 5.1 of the Commentary
should also clarify that Contracting States should endeavour to be as expeditious as possible in reaching a resolution.

As a broader comment, as part of the work on Action 14, the CFA should consider whether there are consequences for competent authorities that frequently fail to engage in and / or resolve MAP in a principled, fair and objective manner. Such failure has obvious negative implications for the taxpayers involved and is likely to negatively affect the relationship with the other contracting state. We suggest that, as a starting point, the CFA should consider establishing a peer review procedure to monitor jurisdictions’ approach to MAP similar to that in place for transparency and exchange of information. Maintaining taxpayer's confidentiality should be of paramount importance under any peer review procedure and we do not suggest that third countries should be permitted to audit agreements reached by other jurisdictions under MAP. Rather, countries who have undertaken MAPs should be permitted to evaluate the participation of the other competent authority. It would be appropriate under such a review process to monitor consistency, time taken to resolve cases, principled and objective MAP outcomes and if access to MAP is denied to taxpayers.

It may also be appropriate to monitor whether MAPs are instigated following the issue by a tax authority of unreasonable tax assessments. Undertaking a peer review of MAP may identify those trends and may also act as a disincentive for tax authorities to raise unreasonable tax assessments.

We agree with the proposal in Option 2 to ensure that Article 9(2) is included in all tax treaties and welcome the clarification that such proposal should not create any negative inference for treaties that do not currently contain a provision based on Article 9(2).

Similar to the issue raised in paragraph 11 of the Discussion Draft, double taxation can also arise in cases where a transfer pricing adjustment is made in respect of payments made to a permanent establishment ("PE"). In those cases the taxpayer generally will not be entitled to an 'appropriate adjustment' in the PE jurisdiction under Article 9(2) on the basis that the taxpayer, as a PE, is not an "enterprise of a contracting state". For example, a company resident in state T has branch in state R that provides services to an affiliate, SCo, resident in state S. The tax authorities in state S consider that the service fee paid to the PE in state R, is too high and reduces the deduction available to SCo for the service fee paid to the PE in state R. Although there is a double tax treaty in place between state R and state S, as the PE is not an enterprise of state R it will not be entitled to relief under Article 9. The taxpayer may be entitled to relief under Article 25. However, we suggest that a better solution would be to amend Article 9 to specifically cover such third country situations.

2 Administrative processes

Overall, we agree with the suggestion in Option 3 that best practices included in the OECD Manual on Effective Mutual Agreement Procedures ("MEMAP") should be adopted concerning the independence of competent authorities.

We agree with the proposal in Option 4 that countries should provide sufficient resources to their competent authorities. As a general comment, the resources of tax authorities are becoming increasingly stretched. The recent introduction of FATCA and approaching introduction of the common reporting standard will further squeeze those resources. The
number of MAPs commenced has steadily increased since 2010. As acknowledged in the Discussion Draft, the number of instances of MAPs being commenced will likely increase on implementation of many of the BEPS proposals. It seems inevitable that national tax authorities will be required to significantly enhance their resources to manage those developments.

We agree with the proposal in Option 5 that staff of competent authorities should be performance reviewed based on factors such as consistency, time to resolve cases and principled and objective outcomes.

We agree with the proposals made under Option 6. Taxpayers and tax advisers would welcome publication of guidance or principles agreed by tax authorities on the application or interpretation of double tax treaties. Countries should be encouraged to adopt the best practices in MEMAP to relieve double taxation in cases not provided for in the applicable double tax treaty.

In addition, it would be useful for taxpayers and tax authorities if information on the principles agreed in MAPs were shared on an anonymous basis and without divulging confidential information. This would put taxpayers on an equal footing and would be more likely to lead to consistency in approach on the practices and principles adopted by OECD member states in the interpretation and application of treaty provisions, transfer pricing guidelines, etc. This may also result in disputes being resolved more quickly. Perhaps, the OECD when publishing annual MAP statistics could publish such information.

We agree (as proposed under Option 7) that both contracting states should be made aware of audit settlements in respect of tax on income that falls within the scope of the applicable double tax treaty. We also agree that taxpayers should not be influenced by tax authorities not to use their right to initiate a MAP under an applicable treaty. However, in some cases, and in the absence of any such influence, a taxpayer may opt to settle the dispute at local level and forgo their right to MAP. This can provide the taxpayer with immediate certainty on their tax position, compared to a MAP that can leave open tax questions for a long time. The right of a taxpayer to make that choice should also be reflected in the Commentary.

In paragraph 20 of the Discussion Draft, the CFA requested comments on best audit practices that reflect ‘global awareness’ and facilitate an effective MAP. We suggest:

- all adjustments involving cross-border transactions should be reported to the tax authority’s central administration for approval before being finally agreed (with a view to increased consistency);
- competent authorities should continually inform field auditors of principles it has agreed through MAP so that those principles can be applied consistently;
- auditors considering international tax issues and cross-border transactions should have the necessary experience and skills to consider those issues, if not, they should refer the matter to a specialist team; and
- on-going education and training is essential for such auditors.

We welcome the proposals under Options 8 and 9.
Access for Taxpayers

We welcome the proposals under Options 10 and 11. Unfairly denying a taxpayer access to MAP or making it difficult for a taxpayer to access MAP undermines the applicable double tax treaty and should be discouraged. A process should be put in place so that, at the very least, the OECD can record denial of access to MAP on a country by country basis. This should be published by the OECD with the annual MAP statistics.

We agree with the proposals under Options 12 and 13 that where a participating country denies access to MAP based on the application of domestic law or treaty anti-abuse provisions or where they consider that the taxpayer’s objection is not justified, they should notify the relevant treaty partner. In all but very limited cases, the notification requirement should also commence a consultation process to discuss whether the competent authorities agree that access to MAP should be denied. We consider that this notification requirement (and the consultation process) is extended to all cases where access to MAP is denied.

We welcome the proposals under Options 14 and 15.

We welcome the proposal under Option 16 to clarify the relationship between domestic law remedies and MAP. We would also welcome some commentary on the overlay of the European Arbitration Convention which 15 of the countries participating in BEPS have signed up to. It should also be clarified that the taxpayer retains the choice as to whether to pursue a MAP or domestic proceedings first, without being denied the ability to seek other remedy afterwards. If one remedy is being pursued first by the taxpayer (whether that be MAP or domestic law remedies) it should be clarified that the other remedy (including any applicable time limits) is suspended. In addition, if a MAP is agreed that is not acceptable to the taxpayer, it should be open to the taxpayer to revisit that MAP after pursuing domestic remedies. We also welcome the proposal under Option 16 for tax authorities to publish clear guidance on the relationship between the MAP and domestic law remedies.

If tax must be paid in both jurisdictions before a taxpayer can access the MAP, it will affect the taxpayer’s access to the MAP in practice. Collection of tax by both jurisdictions where the taxpayer wishes to access the MAP should be strongly discouraged. We agree with the proposal under Option 17 that countries should be encouraged to suspend collection procedures pending resolution of a MAP case, notwithstanding that under domestic appeal requirements payment would be required. Suspension of collection procedures should also extend to protect the taxpayer’s right to pursue domestic appeal proceedings in jurisdictions where such payment is required, at least until after the MAP is completed. This is an important point for taxpayers and very clear guidance should be provided.

We welcome the proposals included in Option 18. In addition, consideration should be given to how to deal with cases where a taxpayer wishes to pursue domestic remedies first (in cases where those domestic remedies take some time to resolve) and then seek a MAP resolution. We would suggest that any time limits included in MAP provisions should be suspended in such cases.

We agree that the remedies available to a taxpayer who self-corrects prices on controlled transactions should be confirmed as proposed under Option 19.
4 Ensuring resolution

We agree with the proposal under Option 20 that countries should adopt the best practice currently included in the MEMAP concerning fair and objective MAP negotiations. We would suggest that a peer review of countries engagement with MAP might be helpful in ensuring countries engage in MAPs in a fair and principled way.

We also welcome the proposals under Option 21. We believe that in the majority of cases, taxpayer involvement would be very helpful as it should enable the competent authorities deal with issues and questions related to the taxpayer efficiently. To the extent taxpayers are not involved in the process competent authorities should commit to frequently updating them on the progress of their MAPs.

We have no objection to the proposal included under Option 33.

We welcome the proposal under Option 34.

4.1 Arbitration

We agree with the proposal under Option 22 that the footnote to Article 25(5) should be deleted and that countries, for whom national law, policy or administration are obstacles to arbitration, should be expressly required to state that in reservations or observations on the Model Tax Convention.

The primary purpose of the arbitration provision is to ensure taxpayers get access to a fair and principled evaluation of their case. If a MAP cannot be resolved in a timely fashion, it seems reasonable for a taxpayer to be able to force a fair and principled resolution, for example, through arbitration. If arbitration is considered a good mechanism for resolving disputes under MAPs, permitting contracting states to limit the category of disputes that can qualify for arbitration (as proposed under Option 23) seems arbitrary.

It has been suggested under Option 23 that contracting states might agree that cases involving application of domestic or treaty anti-abuse rules would not be appropriate for arbitration. Under Action 6, there have been some difficulties in getting consensus on the inclusion of appropriate treaty abuse provisions. The views on what constitutes abuse have been disparate. On that basis, we consider that denying access to arbitration in cases where a contracting state considers anti-abuse provisions apply will give rise to inconsistencies in access for taxpayers to arbitration. Accordingly, we recommend that contracting states are not encouraged to include provisions in Article 25 that deny access to arbitration in cases where domestic or treaty anti-abuse provisions might apply.

It would be helpful if the CFA could outline the type of instances where it considers that competent authorities could mutually agree that arbitration is not appropriate. This concept arises again under Option 26. Does it extend beyond cases where both competent authorities consider the case can be resolved in a certain and specified timeframe through MAP? We suggest that, if this concept is to be introduced to the Model Tax Convention or the Commentary, the type of instances where arbitration is not appropriate should be specifically identified in the Commentary.

We have no objection to the proposal under Option 24.
As recognised in the Discussion Draft, the BEPS project is likely to result in an increase in MAPs. It is vital that clear guidance is available on the interaction between the mutual agreement implementing the decision of the arbitration panel and pending litigation on the issues resolved through the MAP as proposed under Option 25.

As noted above, if a taxpayer’s right to force arbitration is to be limited, the circumstances when it can be limited must be specifically identified. Vague language that would permit competent authorities to defer the initiation of arbitration “in appropriate circumstances” will undermine the taxpayer’s right to confirm its tax position. If the proposal under Option 26 is adopted it should only apply in limited and specified circumstances.

We agree with the proposals made under Option 27.

We welcome the proposals made under Option 28, however, the proposals raise some questions on maintaining the confidentiality of taxpayer information which will be of paramount importance to taxpayers. If a tax authority breaches the confidentiality obligations it owes a taxpayer, the taxpayer will usually have a right of redress against the tax authority under domestic law. Will a taxpayer have a similar right of redress against an arbitrator that breaches its confidentiality obligations? Or will the arbitrator owe its confidentiality obligations to the contracting states only? If the arbitrator insists on including an immunity from suit provision in the document appointing him or her, what right of redress will the taxpayer have if confidential information is published? These are important considerations for the taxpayer and should be considered under Action 14.

While we recognise the perceived efficiencies of ‘baseball arbitration’, we consider that such an approach is not always appropriate for agreeing the tax treatment of taxpayers and should not be adopted as the preferred default form of decision-making under Option 29. Such arbitration can lead to results that are inconsistent and not based on a fully principled approach. It is not clear that equality of treatment of taxpayers is achieved under such a dispute resolution mechanism (even where the same dispute arises for two different taxpayers under the same treaty). The ‘conventional’ or ‘independent opinion’ approach has been adopted under the European Arbitration Convention. Fifteen of the countries participating in BEPS have signed up to that convention and accordingly their obligations under that convention would conflict with adopting ‘baseball arbitration’ as a default form of decision-making under Article 25. It should be open to contracting states to negotiate a particular form of preferred decision-making under Article 25 in the usual way.

We agree with the proposal under Option 30 that taxpayers’ participation in arbitration procedures should always be facilitated (either through written submissions or orally). In this regard, we suggest that the arbitration process can be compared to EU State aid cases on tax matters. In those cases, although the proceedings are between the European Commission and the relevant EU Member State, the taxpayer has a right to make its own submission. This is very important for taxpayers as it permits them to clarify the commercial background and their position. In submissions to arbitration panels taxpayers could also point to treatment agreed in other jurisdictions on similar transactions. This may not be information that the contracting states always have to hand. At a minimum, it should be clarified that in cases where a taxpayer’s domestic legal remedies are displaced by arbitration the taxpayer should always be entitled to participate in the arbitration process.

We welcome the proposal under Option 31.
While the proposal under **Option 32** to limit the costs of MAP arbitration procedures should be welcomed, any proposals to streamline the evidentiary process by limiting the material to be considered should be viewed with circumspect. It is imperative that all necessary and relevant information is considered by the arbitration panel otherwise the arbitration process will be undermined. We would expect that in determining what evidence is necessary and relevant the arbitration panel should adopt a proportionality test.

Thank you for the opportunity to comment on the Discussion Draft. Should you wish to discuss any of the comments raised, please let us know.

Yours faithfully

Sent by email, bears no signature

MATHESON
MEDEF’s comments on the OECD discussion draft on BEPS action 14: Make dispute resolution more effective

Dear Marlies,

MEDEF is pleased to provide comments on the Discussion Draft “Make dispute resolution more effective” issued on the 18th December (hereafter “the draft”).

French companies consider OECD’s work in general and BEPS Action Plan in particular as crucial if it is to provide a fair, competitive and coherent global fiscal landscape. The forthcoming changes are numerous and will have a gigantic impact on the running of their business. Companies are in the best position to identify difficulties related to implementation, to give feedback on the practical feasibility and to geographically and temporally assess the OECD proposals. They believe, however, that the operating mode, process and time-frame are inadequate to ensure a full and comprehensive analysis of the draft submitted for consultation. They regret the strengthening of that trend which will be detrimental to all: companies and Governments.
As already mentioned in our previous comments, business believes that the elimination of double taxation is crucial to facilitate international investments and growth. BEPS is mainly focused on tackling double non taxation and it seems the right time to raise the question of double taxation.

MEDEF particularly welcomes this draft as its aim is to seek solutions to ensure dispute resolution is very often -if not always- available and provides for complementary remedies to double taxation issues within an acceptable timeframe.

MEDEF also strongly supports the statement made in the draft that the number of disputes has increased and is highly likely to become even more significant due to BEPS more stringent standards. This must be viewed in addition to the remaining issues of double taxation outside transfer pricing, in the study presented by MEDEF in June 2014 during the EU Platform for Good Governance meeting.

Therefore, MEDEF is very concerned by the growing number of cases under the mutual agreement procedure (“MAP”) as shown in the recently published document by the OECD\(^1\). As far as France is concerned, if our understanding is correct, there were still 618 outstanding cases at the end of 2013 (whether pending or unresolved) which makes us the third country after Germany and the USA. MEDEF, as the federation of French business, is thus particularly worried by this situation and is eager for a quick solution to be found at an international level.

We acknowledge that only global treatment of treaty-related disputes is the optimal route in achieving an effective resolution. In this respect, we support the three-pronged approach developed in the draft as both the political, technical and administrative aspects are addressed in practical way. In this respect, the listing is comprehensive and allows for a global overview of the issues to be addressed.

MEDEF also believes that double taxation and double non taxation are two sides of the same coin: although we believe BEPS anti-abuse proposals will rapidly be enforced by States -as some are already considering integrating them in their domestic law-, we doubt that dispute resolution will reach a unanimous consensus and implementation. The fact that BEPS will create new double taxation issues is unquestionable. \textit{We would therefore suggest that the inclusion of BEPS proposals in a tax treaty should be conditioned to the inclusion of the proposals relating to dispute resolutions and the commitment by the contracting States to resolve MAP cases.}

MEDEF would also like to emphasise the importance of strong political commitment from States: in this respect, the wording often used throughout the draft where States “could commit” seems totally inappropriate to achieve this goal and does not represent any effective improvement over the current situation.

\(^1\) Mutual Agreement Procedure Statistics for 2013
Moreover, we fear that the absence of (binding) dispute resolution provisions in tax treaties or the lack of tax treaties between two States will be used as an excuse to avoid solving cross-border double taxations. We would therefore suggest including a mandatory mechanism (commitment) in the multilateral instrument (action 15). This would ensure the certainty and the predictability mentioned in the draft as cornerstones for dispute resolution.

We hope our contribution will give you a clearer insight into our expectations. We remain at your disposal and are willing to speak during the public consultation on the 23rd of January, on timing issues developed at the end of our document.

Yours sincerely,

Vanessa de Saint-Blanquat
Specific comments

Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith

In order to ensure that countries respect the political commitments proposed in the draft, MEDEF strongly supports the set-up of an appropriate forum of competent authorities which would be responsible for monitoring the functioning of the agreement procedure and the assessment of the measures to which the countries will have committed.

In this respect, MEDEF believes that the work on Action 14 should include a detailed proposal on the forum: its prerogatives, its organisational structure and its functioning. For instance, the work and findings of the forum should be publicized as the ones of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

However, political commitments would not be sufficient to ensure an effective resolution of difficulties arising from the implementation of the BEPS proposals in tax treaties. First, there is a risk of multiplication of double taxation issues which is detrimental to economic growth.

Second, MEDEF believes that the lack of dispute resolution creates uncertainty for business as no indication on how the situation should be fiscally treated is given. For example, in the transfer pricing area, the absence of agreement between States (on the method used or on the amount of the transaction) maintains the taxpayer in total legal insecurity on the way to correctly deal with the transaction in the future.

Which method/amount should he favour? The one advanced by his residence State to facilitate further negotiations with his tax authority or the one mentioned by the other State because it is more consistent with its business’ activity?

Placing the burden of responsibility as well as the threat of a future tax adjustment on the head of the company because of disagreement between States is not acceptable.

Proposal: as long as no dispute resolution is settled on a specific transaction, the States involved should not be allowed to make further tax adjustments on it.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

MEDEF agrees with the idea of including such a paragraph in all tax treaties. We also consider that even if the article is not included, it should not prevent taxpayers from using the MAP, unless under very specific circumstances.

Proposal: the Commentary on Article 25 should clearly state that, except when expressively stated in the tax treaty, the lack of Article 9(2) does not exclude transfer pricing adjustments from the scope of the MAP.
Ensuring that administrative processes promote the prevention and resolution of treaty related disputes

**OPTION 5 – Use of appropriate performance indicators**

One way to encourage States to resolve disputes effectively could be to create an indicator to measure performance (total of MAP cases, amounts, cases solved...). This information would be given to the peer review group on information exchange.

**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**

The possibility for a taxpayer to access the mutual agreement procedure should be considered as a fundamental right.

**Proposal**: article 25 should be amended to state that the right for a taxpayer to request a mutual agreement procedure cannot be waived.

**OPTION 8 – Implement bilateral APA programmes**

APAs appear to be very relevant and useful in specific circumstances. However, it should be noted that:

- Even if the APA is obtained, the taxpayer must file an annual report that demonstrates compliance with the terms of the APA: if one of the terms is changed it challenges the entirety of the agreement and leads to either revision or cancellation;
- An APA freezes the amount to be allocated which can be outdated the following year because of fast-growing business cycles; In both above mentioned situations, it should be born in mind that an APA may only be valid for one year while it takes ordinarily 2 years to be obtained.
- A lot of enterprises do not use APAs as they are not suitable for their type of business.
- APAs are sometimes difficult to obtain as competent authorities do not have sufficient staffing to meet the increasing demand.

Under those conditions, we are not sure that APAs should be seen as the best tool to solve dispute resolution issues.

**Others**:

Some States differ the opening of MAP by not answering to the other State’s request (e.g. when asking to enter into the MAP or when proposing a solution). This is detrimental to taxpayers and lengthens the timeline of the procedure.

**Proposal**: no answer from a States should be considered as an approval.
Ensuring that taxpayers can access the mutual agreement procedure when eligible

**OPTION 12** – Clarify the availability of MAP access where an anti-abuse provision is applied

BEPS actions are likely to lead to multiplying the anti-abuse provisions in the tax treaties, thus creating interpretation and application issues. As a consequence, MEDEF believes that anti-abuse provisions should be in the scope of the MAP in order to resolve such issues which relate to the access of the tax treaty provisions and protection. For instance, the Limitation-on-Benefits provisions determine the eligibility to the tax treaty, along with the residence, and are thus pivotal for the effective application of the tax treaty.

**Proposal:** ensure that anti-abuse provisions also fall under the scope of the MAP.

**OPTION 13** – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities

During the MAP, it is crucial that the taxpayer is allowed to present his case and explain his solution in front of the competent authorities, especially as the amount at stake is significant. This will enable the taxpayer to give an accurate picture of the situation and to answer potential questions.

**Proposal:** during the MAP, allow the taxpayer to present his case and explain his solution in front of the competent authorities.

**OPTION 14** – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”

MEDEF believes the work on Action 14 is a good opportunity for countries and the OCDE to clarify the meaning of “if the taxpayer’s objection appears to it to be justified”. As a consequence, such clarification should be included in the work on Action 14 and not only subject to a commitment from the countries.

**Proposal:** the implementation of BEPS proposals should be conditioned to the achievement of the works on the MAP, including this clarification, and their inclusion in the tax treaties, the OECD model and the Commentary.

**OPTION 15** – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State

MEDEF believes that the possibility for a taxpayer to access the mutual agreement procedure should be considered as a fundamental right. To ensure effectiveness of this right:

**Proposal:** Article 25 should be amended in order to allow a taxpayer to request a MAP from any or both of the contracting countries.
OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

When a mutual agreement procedure has been initiated, tax collection should be automatically suspended. Instead of amending the Commentary, MEDEF believes that Article 25 should be amended in order to state that the collection of the taxes and penalties relating to the issue for which a MAP is requested should be suspended. Such a treaty rule would overcome countries provisions which allow for the collection of taxes despite the opening of a MAP. For instance, in France, the suspension of tax collection pending the final decision of tax authorities was suppressed last year so that companies are subject to tax whatever the solution and will bear the charge to be reimbursed. An obligation to suspend the collection of the tax would constitute a strong incentive for countries to reach an agreement under the MAP.

Proposal: when a mutual agreement procedure has been initiated, tax collection should be automatically suspended.

Others:
Nothing is provided for information feedback to the taxpayer during the negotiation by States under the MAP. It would be very useful to give the taxpayer visibility on the progress of the file (file position, time of treatment, number of meetings held and to come between the authorities, etc.).

Proposal: annual update should be given by the tax authorities to the taxpayer.

Ensuring that cases are resolved once they are in the mutual agreement procedure

OPTION 21 – Improve competent authority co-operation, transparency and working Relationships

Whereas most actual MAP cases relate to transfer pricing adjustments, the implementation of the BEPS proposals in tax treaties is likely to lead to issues relating to the interpretation and application of other tax treaty provisions (e.g., the existence of a permanent establishment; the eligibility to the tax treaty provisions under the Limitation-on-Benefits article, etc...). For such issues, it might be envisaged to implement the possibility for a country during the MAP to ask for the creation of a special committee of the OECD to interpret the treaty model and the Commentary. Such a procedure would facilitate a uniform interpretation of tax treaty provisions.

Proposal: Article 25 should include the possibility for countries within a MAP to refer such preliminary question to an OECD committee.

OPTION 23 – Policy issues: Tailor the scope of MAP arbitration

Arbitration is the only way to ensure that treaty-related issues will be resolved (obligation of result). As a matter of principle, the arbitration should be compulsory and the scope of the arbitration should equal the scope of the MAP and covers any treaty-related issue.
**Proposal**: the possibility for countries to limit the scope of arbitration might only be envisaged if a most favoured nation clause is included in the tax treaty providing the most favourable treatment in terms of limitations.

**OPTION 25** – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies

As mentioned in the draft, further progress needs to be made as far as the length of the procedure is concerned. Some of them can be exceedingly extended due to the lack of resources, staff and other parameters. If States do not reach any agreement under the MAP, and because there is currently no real time constraint, taxpayers are prevented from using domestic legal remedies within the prescribed time.

In the event of the MAP failing, it would be unfair to prevent the use of domestic legal remedies because the limitation terms have expired.

**Proposal**: entering into a MAP should automatically suspend limitation terms for domestic legal remedies.

**OPTION 26** – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

The two year period already provided under Article 25 should be sufficient for countries to reach an agreement. In most cases, the absence of agreement is due to insufficient resources allocated to the MAP. In this respect, MEDEF is afraid that authorising countries to defer MAP arbitration would only lengthen the procedure without increasing the number of agreements.

**Proposal**: authorise countries to reach an agreement within the MAP during the arbitration phase as long as the arbitrators have not issued their decision.

**OPTION 27** – Practical issues: Appointment of arbitrators

**Proposal**: In order to facilitate the use of arbitration by countries, the OECD might establish a list of arbitrators, pre-drafted by the OECD, in which countries might choose their arbitrators.

**Proposal**: to ensure impartiality, no delegates or representatives of the concerned MS should be appointed as an arbitrator.

**OPTION 29** – Practical issues: Default form of decision-making in MAP arbitration

The final-offer approach might facilitate countries reaching an agreement before the arbitration since they are likely to propose a reasonable offer. This approach should be preferred if the aim is only to resolve the specific issue for which the MAP has been requested. However, an independent decision would provide more guidance for countries and the taxpayer on how similar issues should be dealt with in the future. Furthermore, if published after being
anonymized, the decision might provide guidance for other taxpayers (e.g., decision on the interpretation of a term of the tax treaty, etc...).

**Others**

End of MAP: no option deals with the end of a MAP. When a MAP results in the failure to reach an agreement, no indication is given to the taxpayer in whatever form. This maintains a climate of uncertainty and prevents the taxpayer from looking into other forms of legal remedy if possible/wanted.

**Proposal:** at the end of the MAP, obligation for States to notify an “acknowledgment of failure” to the taxpayer.

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The draft analyses in detail all the aspects and the obstacles to the dispute resolution procedure in theory and in practice. This work is very useful and is conducted in a very open way.

However its approach is mainly devoted to the Government’s actions and responsibilities in terms of procedure and resources.

We would like to introduce the enterprise into the scope in order to meet the issue raised on page 4: “the actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business”. Indeed, it is crucial to improve both the knowledge of difficulties as well as the solutions to be provided and shared to achieve this goal.

We propose the following considerations to be included into the realm of the discussion and the conclusions.

1. **Timeframe of dispute resolution**

No certainty for business could be alleged if and when the timeframe of dispute resolution remains too extended.

Any activity conducted by businesses is a continuing process and has to be considered on a day-to-day basis. Taxpayers use tax rules/methods that they consider appropriate as long as they are not challenged by tax authorities. However, if those rules are considered inappropriate by the competent authorities after numerous years, all the period including the disputed years and the following ones have to be corrected with harmful consequences. Knowing that the intervention period can go from 3 to 10 years, double taxation resulting from the adjustment should be treated as quickly as possible.

Therefore, several kinds of measures could be examined to reduce these consequences:
a) The timeframe for solving disputes should be reduced by fixing a tight timeframe with clear compulsory time limits for each stage of the procedure:
   - Start of the MAP procedure by the taxpayer as soon as the issue has been raised in writing, by one of the tax authorities
   - 6 months after: possibility for the taxpayer to ask for the arbitration procedure to be opened
   - 6 months after the taxpayers’ request: the arbitration body should be agreed upon (NB: the lack of a compulsory delay to constitute the commission is very detrimental to a successful implementation of the arbitration as shown in the EU procedure)
   - 6 months after: the arbitration body provides its opinion/decision

Failure to comply with those time limits should give rise to financial penalties.

b) Parallel procedure should be allowed: no need to wait for the end of one procedure (e.g. the tax audit) before starting another one (e.g. MAP). This should facilitate the production of a reasoned opinion by States. Moreover, the arbitration procedure could be triggered while MAP is still ongoing (that would ensure rapid treatment).

c) The MAP procedure could be differentiated according to the types of issues. A typology of these issues could be made to extract the most common ones that can be treated rapidly with specialised people within competent authorities, leading to the use of ‘fast track’ procedures. That would alleviate work load and resources, both for taxpayers and tax administrations.

2. Technical content of the resolution

Dispute resolution involves finding a common solution between two parties that satisfies both of them. In practice, it does not imply that a valid technical solution is given to the issue at stake: both States can agree to share the tax basis in a satisfying way for them without motivating their decision with technical considerations.

Yet, from a taxpayers’ point of view, such technical considerations are needed because a rule must be defined to be applied and explained for the years under examination but also for the following ones. In a nutshell: “what should we have done and what shall we do in the future to be consistent with the States views?”

A solution technically substantiated means greater legal security for the present but also for forthcoming similar cases.

We understand that States do not want the MAP decision to create precedents, however the solution of a difficult case remains a useful reference at least for the enterprise itself.

This principle should apply to both MAP and arbitration procedures.
3. Arbitration

Arbitration is a powerful way of finding a real resolution where MAP proves ineffective.

It can provide a “quality” solution to the taxpayer whether it comes from an ‘independent opinion’ or a ‘last best offer’ format and gives clarification to States that can be used in other disputes.

Unfortunately, it is often regarded as mere pressure on the MAP procedure to find a solution, so that States:
- often try to delay the conclusion of the MAP procedure,
- raise obstacles on the adoption of the arbitration clause based on a constitutional and sovereignty basis.
(These elements are mentioned in the draft §42).

MEDEF would like the States to reconsider their position on this particular question and rely more confidently on the opinion of third parties, taking into account the following points:
- In most cases, arbitral opinions or decisions are of a technical nature so that sovereignty is not really at stake;
- Entering into a tax treaty is by itself an act reducing sovereignty;
- The neutrality of the arbitrator does not actually threaten sovereignty;
- In the ‘independent opinion’ format arbitrators are expected to provide a balanced and technical opinion based on the work of tax authorities during the MAP: they only refer to exchanges of argumentation and documents provided by the competent authorities themselves;
- In the ‘last best offer’ format, the competent authorities build up their “position paper” in a way that is reasonable and properly explained in order to be acceptable. There is no doubt that a paper interfering with another State’s sovereignty would have no chance of succeeding;
- In the case of serious constitutional obstacle, consulting an independent expert on a non-compulsory basis should be considered. This would lead to an opinion that would help clarify the dispute and propose alternative solutions to be adopted by both States within the MAP.
January 15, 2015

Ms. Marlies de Ruiter  
Head of the Tax Treaty, Transfer Pricing and Financial Transactions Division  
Centre for Tax Policy and Administration  
OECD/CTPA  
Tartreaties@oecd.org

By email

Dear Ms. de Ruiter:

The National Foreign Trade Council (NFTC), organized in 1914, is an association of some 250 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial and service activities, and our members have for many years been significant investors in many countries, including all of the OECD member countries and the G20 countries. A list of NFTC Board Members is attached in an Appendix to these comments.

NFTC seeks to foster an environment in which companies can be dynamic and effective competitors in the international business arena. To achieve this goal, businesses must be able to participate fully in business activities throughout the world, through the export of goods, services, technology, and entertainment, and through direct investment in facilities abroad. As global trade grows, it is vital that companies be free from double taxation that can serve as a barrier to full participation in the international marketplace. Robust dispute resolution mechanisms are necessary to help relieve double taxation and tax disputes between tax treaty partners to provide the certainty and stability in the investment environment that is necessary to allow business to participate in the global marketplace. That is why NFTC has long supported the expansion and strengthening of the U.S. tax treaty network.

I am writing in response to the Public Discussion Draft released December 18, 2014, in connection with the BEPS Action Plan, entitled “BEPS Action 14: Make Dispute Resolution Mechanisms More Effective (the “Discussion Draft”). The NFTC commends the OECD for seeking to improve the effectiveness of the mutual agreement procedure (MAP) in resolving tax treaty-related disputes. The NFTC strongly supports the inclusion of a mandatory and binding arbitration provision to resolve disputes. The inclusion of appropriate arbitration provisions in the MAP process would ensure that no competent authority case goes unresolved.

Successful completion of Action Item 14 is critically important to the success of the entire BEPS project. Rules and principles for determining the rights of taxing jurisdictions vis-a-vis international business activities are almost meaningless if they cannot be administered properly through country audit processes, combined with intergovernmental dispute processes that are predictable, accessible, objective and principled. NFTC member companies are currently experiencing country audit practices that have been adopted in the name of BEPS ahead of final principles and practices having been agreed upon. The
current MAP process is already strained by the rapidly growing caseloads, and it is very difficult for companies to access with any level of confidence its application. The new rules and principles envisioned by the BEPS Action Plan promise to exacerbate this situation if a substantial amount of attention and resources are not made to support and enhance the MAP programs around the world.

The Discussion Draft is designed to provide solutions which will have a practical, and measurable impact, rather than merely providing additional measures or guidance that will not be fully used or implemented. The Draft provides for a three-pronged approach that would: (i) consist of political commitments to effectively eliminate taxation that is not in accordance with the Convention, (such political commitments reflecting the political dimension of the BEPS Project), (ii) provide new measures to improve access to the MAP and improved procedures, and (iii) establish a monitoring mechanism to review the proper implementation of the political commitment. The Discussion Draft provides thirty-four options to achieve these goals.

The NFTC believes that it is important that the OECD not simply rely upon a political commitment to take up the specific measures identified in the Discussion Draft. Further, if not carefully designed, a monitoring process (even if to be carried out by a forum of competent authorities as described in paragraph 8), could prove fraught with the weakness as a result of dealing with treaty partners diplomatically. Therefore, NFTC recommends that the FTA MAP Forum be given a central role in ensuring that the ultimate recommendations are driven forward on a strict timetable, and that the competent authorities, with the full support of their respective commissioners, are held accountable for the program of work.

Before providing specific comments, the NFTC observes that Action 14 of the BEPS Action Plan acknowledges that the adoption of MAP arbitration has not been as broad as expected. As described below in our specific comments, NFTC member companies view tax treaty arbitration as a tool to strengthen, not replace, the existing treaty dispute resolution procedures conducted by the competent authorities and advocate for the revision of Action 14 to support MAP arbitration. We believe that arbitration provisions would improve the operation and efficiency of the mutual agreement procedure and perhaps even the examination process. They would, therefore, benefit both governments and taxpayers.

The NFTC specific comments below are divided into four parts. The first part responds to the options designed to ensure that treaty obligations that relate to the MAP are fully implemented in good faith (Options 1–2). The second part responds to the options designed to ensure that administrative processes promote the prevention of, and resolution of, treaty-related disputes (Options 3-9). The third part responds to the options designed to ensure that taxpayers can access the MAP if eligible (Options 10-19). The final section responds to the options designed to ensure that cases are resolved once they are in the mutual agreement procedures (Options 20-34).

Specific Comments

Ensuring that Treaty Obligations that Relate to the MAP are Fully Implemented in Good Faith

The dispute resolution mechanism provided for by Article 25 of the OECD Model forms an integral part of the obligations assumed by a Contracting State when entering into a tax treaty, and the provisions of that article must be implemented in good faith, in accordance with the terms, and in the light of the object and purpose of, tax treaties. The first option presented in the Discussion Draft adds a paragraph to the Commentary to clarify the importance of resolving cases presented under Article 25 (1). Paragraph 2 of Article 25 provides that competent authorities “shall endeavor” to resolve a MAP case by mutual agreement. In that regard, it has been argued that the absence of an obligation to resolve a MAP case is in
itself, an obstacle to the resolution of treaty-related disputes through the MAP (although it is important to note that Article 25(2) requires an obligation to effectively attempt to resolve these cases).

**Option one** emphasizes that the competent authorities have an obligation to seek to resolve the cases presented to them for consideration, and to do so in a principled, fair and objective manner. The NFTC supports this option.

**Option two.** The concern raised by the OECD in developing the second option is that most countries consider that the economic double taxation from the inclusion of profits of associated enterprises under paragraph 1 of Article 9 is not in accordance with the object and purpose of the Convention and falls within the scope of the mutual agreement procedure under Article 25. Some countries, however, take the position that, in the absence of a treaty provision based on paragraph 2 of Article 9, they are not obliged to make corresponding adjustments or to grant access to the MAP with respect to the economic double taxation that may otherwise result from a primary transfer pricing adjustment by a treaty partner. Such a position frustrates the primary objective of tax treaties – the elimination of double taxation – and prevents bilateral consultation to determine appropriate transfer pricing adjustments.

**Option two** ensures that paragraph 2 of Article 9 is included in tax treaties. While clearly, given the terms of mutual agreement articles based on the Article 25 of the Model Convention, the absence of paragraph 2 of Article 9 in any treaty should not serve as a basis for a legitimate claim that MAP cannot be accessed, the NFTC supports **Option two** for the sake of ensuring absolute clarity on that question.

**Ensuring that Administration Processes Promote the Prevention and Resolution of Treaty-Related Disputes**

In the context of the mutual agreement procedure, the role of the competent authority is to take an objective view of the provisions of the applicable treaty and apply them to the facts of the taxpayer’s case, with a view to eliminating taxation not in accordance with the terms of the treaty. Objectivity may be compromised where the competent authority function is not sufficiently independent from a tax administration’s audit or examination function.

**Option six** focuses on Paragraph 3 of Article 25 which authorizes competent authorities “to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.” The Discussion Draft states that the question may arise, however, whether competent authorities make use of this authority. The second sentence of paragraph 3 provides, in addition, that competent authorities “may also consult together for the elimination of double taxation not provided for in the Convention,” although the competent authorities of some countries consider that they may lack the legal authority to resolve issues under that sentence. Finally, the legal value and enforceability of a mutual agreement reached under that paragraph is sometimes questioned.

**Option six** provides for the better use of paragraph 3 of Article 25. Participating countries could commit to using paragraph 3 of Article 25 more effectively in order to reinforce the consistent bilateral application of tax treaties.

The NFTC supports the adoption of **Option six** as the way to promote the effective and widespread use of Article 25(3) by competent authorities which, in turn, will result in more certainty for multinational enterprises and fewer disputes between and among countries.
The introduction to **Option seven**, in paragraph 19, states that field auditors in some countries may, on occasion, seek to influence taxpayers to not utilize their right to initiate a mutual agreement procedure in relation to audit adjustments that result in taxation not in accordance with an applicable tax treaty (e.g., by entering into a settlement with the taxpayer under which the tax authorities agree not to apply penalties in return for the taxpayer’s waiver of its right to seek MAP assistance under the applicable treaty). Taxpayers may feel pressured into giving up access to the mutual agreement procedure if they are given the choice between a high assessment without any suspension of collection, but with access to MAP, or a relatively moderate assessment without access to MAP. Additionally, taxpayers may accept such settlements based on broader concerns for their future relationship with the tax administration involved. Such audit settlements may be a significant obstacle to the proper application of the treaty, as well as to the functioning of the mutual agreement procedure. They lead to situations in which taxation not in accordance with the Convention remains while the treaty partner is not aware of the situation and may be vulnerable to self-help measures taken by the taxpayer. As a result of such settlements, the competent authority of the country where the audit took place may also remain unaware that the treaty has been improperly applied and is thus unable to take appropriate measures to ensure that the treaty is applied according to its object and purpose.

**Option seven** ensures that audit settlements do not block access to the mutual agreement procedure. Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer’s access to the mutual agreement procedure would commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements. Changes to the Commentary on Article 25 could also address the obstacles to an effective mutual agreement procedure created by audit settlements.

The NFTC strongly supports this Option, insofar as the practices described in paragraph 19 are prevalent throughout the world, and have been experienced firsthand by a significant number of our member companies.

The Discussion Draft on **Option eight** addresses the use of APAs. An advance pricing arrangement (APA) is an “arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g., pricing 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.” Then concluded bilaterally between competent authorities, APAs provide an increased level of tax certainty, lessen the likelihood of double taxation, and proactively prevent transfer pricing disputes. To date, however, bilateral APA programs have not been universally adopted.

**Option eight** provides for the implementation of bilateral APA programs, and provides that participating countries should commit to implement bilateral Advance Pricing Arrangement (APA) programs.

The NFTC also feels strongly that this Option should be adopted. In addition, the NFTC recommends that this Option include a commitment by all countries to fully support the use of their bilateral APA programs, as our members have experienced barriers to bilateral APAs even in countries that have such programs.

**Option nine** provides for the implementation of administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs. As provided in the Discussion Draft, participating countries could commit, in certain cases and after an initial tax assessment, to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same (subject to the verification of such facts and circumstances). Participating countries that have
implemented APA programs could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the statute of limitations provided by domestic law where the relevant facts and circumstances in the earlier tax years are the same (again, subject to the verification of these facts and circumstances).

**Option nine** should be adopted to provide for the simplified resolution of multi-year tax cases that hinge on the use of the same facts and circumstances.

3. **ENSURING THAT TAXPAYERS CAN ACCESS THE MUTUAL AGREEMENT PROCEDURE WHEN ELIGIBLE**

One of the main obstacles to the resolution of treaty-related disputes through the mutual agreement procedure relates to the extent of the treaty’s obligation to provide MAP access. This issue will likely become more significant and more relevant as more stringent rules are implemented.

Where procedures to access and use the MAP are not readily apparent and/or are unduly complex, taxpayers may not seek MAP assistance and, as a result, may face unrelieved double taxation or otherwise improperly be denied treaty benefits.

**Option ten** improves the transparency and simplicity of the procedures to access and use the MAP.

**Option eleven** provides additional guidance on the minimum contents of a request for MAP assistance.

**Options 10 and 11** are important, but should not rely solely on policy-level commitments to MEMAP best practices. Rather, competent authorities should work to evaluate the procedural and documentation requirements for accessing MAP, adopt consensus guidelines addressing MAP access issues, and publish such consensus guidelines in each country.

**Option twelve** was drafted to address the considerable uncertainty as to how Article 25 should be interpreted and applied when it comes to MAP access in cases of relating to the application of a domestic or treaty-based general anti-avoidance rules (GAARs). While paragraph 26 of the Commentary on Article 25 provides that – in the absence of a special provision – there is no general rule denying MAP access in cases of perceived abuse, the Commentary on Article 25 leaves open the question whether it may be justified to deny access to MAP in some cases involving anti-avoidance or abuse.

**Option twelve** provides for the clarification of the availability of MAP access where an anti-abuse provision has been applied. According to the Discussion Draft, when there is a disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a treaty anti-abuse rule have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of Article 25(1) are met. If participating countries would seek to limit or deny MAP access in all or certain of these cases, they could commit to specifically and expressly agree upon such limitations with their treaty partners. In addition, where a participating country would deny MAP access based on the application of domestic law or treaty anti-abuse provisions (or similar rules or doctrines), that country could commit to notify its treaty partner about the case and the circumstances involved.
The NFTC points out that there is already language in the commentary to Article 25 addressing this point. To the extent that there remains a lack of clarity (as indicated by the Discussion Draft), the NFTC believes that it is critically important to clarify the commentary, to ensure that in all instances in which a country believes its domestic laws preclude a treaty benefit that be communicated to the competent authority of the treaty partner and that, as indicated in the last sentence in paragraph 28, “[t]he interpretation and/or application of that rule would clearly fall within the scope of the MAP.” It is noted, therefore, that matters pertaining to the interaction of domestic laws and an applicable treaty must not only readily clear the requirements for MAP access in Article 25(1), but also must be readily accepted for MAP consultations under Article 25(2). This clarification is critical because of the potential wide-spread use of domestic anti-abuse rules to deny treaty benefits that may result from Action 6 of the BEPS Action Plan.

Because interpretations of treaty provisions sometimes vary between treaty partners, circumstances where one competent authority does not find the objection presented by the taxpayer under paragraph 1 of Article 25 to be justified, while the other competent authority finds the objection to be justified. This is the reason for Option thirteen. For example, some competent authorities hesitate to overturn assessments made by their own tax administrations and, consequently, unilaterally determine (under paragraph 2 of Article 25), that the taxpayer’s objection is not justified and, therefore, refuse to discuss the case with the competent authority of the other State. Given this potential whipsaw, a process in which a competent authority can unilaterally determine (under paragraph 2 of Article 25) that the taxpayer’s objection is not justified – and thereby prevent the case from being addressed bilaterally through the second stage of the MAP – raises legitimate issues as to the bilateral nature of treaty interpretation, application, and implementation.

Option thirteen ensures that whether the taxpayer’s objection is justified is evaluated (prima facie) by both competent authorities.

Option fourteen clarifies the meaning of “if the taxpayer’s objection appears to it to be justified”. Participating countries could commit to clarify, in the Commentary on Article 25, the meaning of the phrase “if the taxpayer’s objection appears to it to be justified”.

Option fifteen amends Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State. Paragraph 1 of Article 25 could be amended to permit a request for MAP assistance to be made to the competent authority of either Contracting State. Such an amendment could be accompanied by corresponding changes to the Commentary on Article 25, which would include the current text of paragraph 1 of Article 25 as an alternative provision to accommodate the preferences of some countries.

As recommended above, it is important that the commentary to Article 25(2) clarify that the interpretation and application of domestic law in the context of the applicable treaty must be subject to full MAP discussions in light of the purpose of Article 25 to eliminate double taxation. If this approach were adopted, then Options 13, 14 and 15 should not be necessary. That said, the NFTC believes that adoption of Options 13-15 would emphasize that countries cannot unilaterally deny MAP access, and thereby treaty relief, based on an argument that the taxpayer’s claim is not justified under domestic law.

The Discussion Draft for Option sixteen states that the mutual agreement procedure provided for by Article 25 is available to taxpayers irrespective of the judicial and administrative remedies provided by the domestic law of the Contracting States.
**Option sixteen** clarifies the relationship between the MAP and domestic law remedies. According to the Discussion Draft, participating countries could commit to clarify the relationship between the mutual agreement procedure and domestic law remedies.

The NFTC believes that there is a great deal of confusion associated with the considerations raised in paragraph 32 and a great deal of time is spent by taxpayers and competent authorities attempting to understand the resulting impact on MAP resolutions. Therefore, (i) **Option sixteen** should be adopted; (ii) additional follow-on work associated with Action 14 should focus on these issues; (ii) the Commentary on Article 25 should be amended to set forth appropriate processes, and (iv) governments should commit to modify local procedural rules to carry out these processes.

**Option seventeen** examines the problem arising when the payment of tax is a requirement for MAP access and, as a result, the taxpayer faces significant financial difficulties. If both Contracting States collect the disputed taxes, there will be double taxation and the resultant cash flow problems may have a substantial impact on a taxpayer’s business, at least for as long as it takes to resolve the MAP case. A competent authority may also find it more difficult to enter into good faith MAP discussions when it considers that it may likely have to refund taxes already collected.

**Option seventeen** clarifies issues connected with the collection of taxes and the mutual agreement procedure. According to the Discussion Draft, participating countries could commit to further clarify issues connected with the collection of taxes and the mutual agreement procedure, which could include a commitment to examine, in the context of treaty negotiations, each Contracting State’s domestic law and procedures for the collection of taxes, with a view to a clear shared understanding of such law and procedures and to address directly any obstacles to MAP access that they may effectively create. Changes to the Commentary on Article 25 could also address the suspension of collection procedures pending resolution of a MAP case; these amendments could further clarify, in particular, the policy considerations supporting a suspension of collection procedures during the period that any mutual agreement proceeding is pending and provide that such suspension should be available under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

The NFTC strongly supports **Option seventeen**. Further, the NFTC recommends that **Option seventeen** should also address the accrual of interest on deficiencies (which can be usurious some countries). The NFTC also strongly recommends that **Option seventeen** should include a commitment by competent authorities to implement collection suspension agreements in the absence of a treaty provision to the greatest extent possible.

**Option eighteen** deals with the time limits associated with the mutual agreement procedures that present particular obstacles to an effective MAP

**Option eighteen** clarifies issues connected with time limits to access the mutual agreement procedure.

In order to provide guidance to countries that wish to use treaty provisions that require a MAP case to be presented to the other competent authority within a specified period, an alternative provision and an explanation of the circumstances in which Contracting States might consider it appropriate, could be added to the Commentary on Article 25. An alternative provision could also be added to the Commentary on Article 9 to limit the time during which a Contracting State may make an adjustment pursuant to paragraph 1 of Article 9. Similarly, to provide guidance to countries that wish to use treaty provisions that deal with the length of time during which a Contracting State is obliged to make an appropriate corresponding adjustment under Article 9(2), an alternative provision could be added to the Commentary on Article 9.

304
Our experience shows that there is a great deal of confusion associated with the timing considerations
raised in the description of **Option eighteen** and that a great deal of time is spent by taxpayers and
competent authorities attempting to understand the resulting impact on MAP resolutions. Therefore, the
NFTC believes that: (i) **Option eighteen** should be adopted; (ii) additional/follow-up work associated
with Action 14 should focus on these issues; (iii) the Commentary on Article 25 should be amended, (to
the extent necessary), to set forth appropriate agreed guidelines; and (iv) governments should commit to
modify local procedural rules to carry out these guidelines.

The Discussion Draft description of the issues associated with **Option nineteen** explains that under the
laws of some States, a taxpayer may be permitted (under appropriate circumstances) to amend a
previously filed tax return to adjust the price for a controlled transaction between associated enterprises,
or to adjust the profits attributable to a permanent establishment, to reflect a result that, in the taxpayer’s
opinion, is in accordance with the arm’s length standard.

**Option nineteen** clarifies issues related to self-initiated foreign adjustments and the MAP. Changes to
the Commentaries on Articles 7, 9 and 25 could be made to clarify the circumstances where double
taxation could be resolved under MAP in the case of self-initiated foreign adjustments and to emphasize
the importance of bilateral competent authority consultation to determine appropriate corresponding
adjustments and to ensure the relief of double taxation.

The NFTC believes that if taxpayers are expected to comply with arm’s length principles, they should be
allowed to self-initiate adjustments to their positions and should not be penalized by withholding access
to MAP. Therefore, we support **Option nineteen**.

4. **ENSURING THAT CASES ARE RESOLVED ONCE THEY ARE IN THE MUTUAL
AGREEMENT PROCEDURE**

As discussed throughout the Discussion Draft, the role of the competent authority is to take an objective
view of the provisions of the applicable treaty and apply it in good faith to the facts of the taxpayer’s case,
with a view to eliminating taxation not in accordance with the terms of the treaty. Where one or both
competent authorities do not follow that approach, the resolution of MAP cases becomes very difficult,
with the risk of inappropriate results.

In drafting **Option twenty** , the OECD explained that, to avoid the problems discussed, a competent
authority should engage in discussions with other competent authorities in a fair and principled manner.
As part of a principled approach, each MAP case should be approached on its own merits and not by
reference to the results in other cases. A principled approach also requires that competent authorities take
a consistent approach to the same or similar issues and not change positions from case to case, based, for
example, on considerations such as tax revenues.

**Option twenty** ensures a principled approach to the resolution of MAP cases.

**Option twenty-one** improves competent authority co-operation, transparency and working relationships.
Pursuant to the Discussion Draft, participating countries could commit to adopt the relevant best practices
currently included in the MEMAP.

Both Options twenty and twenty-one are critically important and strongly supported by the NFTC’s
member companies. However, we recommend that **Options twenty** and **twenty-one** be addressed
through the work of the MAP Forum and not merely through a one-time policy-level commitment to
MEMAP best practices.
Pursuant to the Discussion Draft, mandatory binding MAP arbitration has been included in a number of bilateral treaties following its introduction in paragraph 5 of Article 25 of the OECD Model in 2008. Action 14 of the BEPS Action Plan recognizes, however, that the adoption of MAP arbitration has not been as broad as expected.

NFTC member companies view tax treaty arbitration as an important tool to strengthen, not replace, the existing treaty dispute resolution procedures conducted by the competent authorities. The existing procedures work well to resolve the greater majority of disputes, but they are not always adequate to address the most difficult cases. The inclusion of arbitration provisions would ensure that no competent authority case goes unresolved. Our experience with the EU multilateral convention indicates that an arbitration provision would create a strong incentive for the competent authorities to reach agreement, so that few, if any, cases would ever need to go to arbitration. We believe that arbitration provisions improve the operation and efficiency of the mutual agreement procedure and even the examination process.

Our primary goal is simply to ensure that tax disputes are resolved as efficiently as possible. Based on our long experience working with the competent authority process and with U.S. and foreign tax administrations over the years, we believe that mandatory arbitration is likely to accomplish this goal in an appropriate manner. We see the key features of arbitration that are designed to ensure that the process works as efficiently and quickly as possible, with an appropriate amount of flexibility:

- A baseball (or last-best-offer) arbitration process;
- A short timeframe for consideration, which the taxpayer may agree to extend if the competent authority process seems likely to conclude within a reasonable time;
- Adequate procedural guidelines to prevent the arbitration process from becoming deadlocked over implementation issues;
- Adequate scope to supplement those procedures if necessary; and
- Appropriate taxpayer confidentiality safeguards.

The Discussion Draft indicates that one of the main policy concerns with mandatory binding MAP arbitration relates to national sovereignty. Footnote 1 to Article 25(5) of the OECD Model recognizes that, in some States, national law, policy or administrative considerations are considered obstacles to the adoption of mandatory binding MAP arbitration. The footnote acknowledges that, at the time the arbitration provision was adopted, some OECD member countries had concerns that national sovereignty could prove a barrier to arbitration. It also reflects the fact that not all OECD countries involved in the development of the provision intended to adopt mandatory binding MAP arbitration. While the footnote makes it unnecessary for OECD member countries and non-OECD economies to state their observations, reservations and positions on the provision and its interpretation, the footnote also results in a lack of transparency, as country positions on MAP arbitration only become apparent through the conclusion of new treaties or protocols by specific countries.

A second significant policy concern relates to access to MAP arbitration and its scope. Although paragraph 68 of the Commentary on Article 25 provides that a taxpayer “should be able to request arbitration of unresolved issues in all cases dealt with under the mutual agreement procedure that have been presented under paragraph 1 on the basis that the actions of one or both of the Contracting States
have resulted for a person in taxation not in accordance with the provisions of this Convention”, some countries may want to restrict access to arbitration to a specific range type of MAP cases. In practice, some OECD member countries have followed this approach and have limited the scope of MAP arbitration to cases regarding the application of specific treaty articles (principally Articles 4, 5, 7, 9 and 12), or exclude arbitration under specific circumstances.

A third important policy concern is the co-ordination of MAP arbitration and domestic legal remedies. These concerns relate particularly to avoiding the risk of a conflict between the decision of a court and the decision of an arbitration panel.

The Discussion Draft provides for the several options seeking to address the above listed concerns.

**Option twenty-two** increases transparency with respect to MAP arbitration.

**Option twenty-three** tailors the scope of MAP arbitration.

**Option twenty-four** facilitates the adoption of MAP arbitration following a change in treaty policy.

**Option twenty-five** clarifies the co-ordination of MAP arbitration and domestic legal remedies.

**Option twenty-six** amends Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances.

**Option twenty-seven** provides for the appointment of arbitrators. In order to avoid potential differences, participating countries could agree to develop mutually agreed criteria for the appointment and qualifications of arbitrators, to be included in the text of the arbitration provision itself and/or in competent authority agreements concluded for purposes of the implementation of MAP arbitration, in advance of any MAP arbitration procedure.

**Option twenty-eight** provides for confidentiality and communications

The Discussion Draft says that there are two principal approaches to decision-making in the arbitration process. The format most commonly used in commercial matters is the “conventional” or “independent opinion” approach, in which the arbitrators are presented with the facts and arguments of the parties based on applicable law and then reach an independent decision, typically in the form of a written, reasoned analysis. The other main format is the “last best offer” or “Final Offer” approach (often referred to as “baseball arbitration”). This approach is reflected in a number of bilateral tax treaties signed by OECD member countries. Under this approach, in general, each of the competent authorities submits to the arbitration panel a proposed resolution (i.e. its proposed disposition of the specific amounts of income, expense or taxation at issue in the MAP case); together with a position paper that explains the rationale for the proposed resolution. The arbitration panel is required to adopt as its determination one of the proposed resolutions submitted by the competent authorities. The determination by the arbitration panel does not state a rationale and has no precedential value. As stated above, the NFTC strongly supports “baseball” arbitration and believes that it offers the best neutral resolution for arbitration cases based on the facts and circumstances of the case.

**Option twenty-nine** deals with default form of decision-making in MAP arbitration.

**Option thirty** deals with evidence. In light of experience with MAP arbitration, guidance in the Commentary on Article 25 of the OECD Model could be developed to address particular evidentiary issues that may arise in connection with different forms of arbitral decision-making.
Option thirty-one addresses multiple, contingent and integrated issues

Option thirty-two addresses costs and administration.

The NFTC understands that there are concerns about the potential costs of MAP arbitration and that financial constraints are an important consideration in designing the format of the arbitration process. Nevertheless, we believe that streamlined processes and time-limited arbitration panels will significantly reduce such financial burdens. MAP arbitration has worked well in a number of jurisdictions, including the United States, and some competent authorities have indicated that the mere existence of an arbitration mechanism has made the MAP processes more efficient. Therefore, the NFTC strongly believes that all countries should work transparently to address specific objections to arbitration and to implement solutions to those objections.

We understand that the substantial increase in the pace of globalization has created unique challenges for existing tax treaty dispute resolution mechanisms, and that multilateral situations raise issues for MAP, which are usually conducted on a bilateral basis

Option thirty-three addresses issues related to multilateral MAPs and advance pricing arrangements.

Changes to Article 25 and/or its Commentary could also be made in order to directly address the interpretation and application of Article 25 with respect to multilateral MAPs and APAs, in particular, the issue of how the arbitration process could be used in a multilateral MAP, the legal, practical and/or procedural issues (including issues connected with time, and issues related to ensuring that third-State competent authorities are made aware of cases with multilateral implications.

The possibility of developing a specific provision that would address mutual agreement procedure issues that arise in multilateral situations, including how the arbitration process could be used in such situations, could be considered by the interested parties that will participate in the development of the multilateral instrument contemplated by Action 15 (Develop a multilateral instrument) of the BEPS Action Plan.

There is a clear and growing need to ensure the availability of multilateral dispute resolution. Therefore, the NFTC strongly supports Option thirty-three.

Issues related to the consideration of interest and penalties in the mutual agreement procedure are of significant importance, particularly in light of the potential increased pressure on the mutual agreement procedure.

Option thirty-four provides guidance on consideration of interest and penalties in the mutual agreement procedure.

According to the Discussion draft, changes to Article 25 or its Commentary could be made to address the treatment of interest and penalties in the MAP, in particular, to explain that, while it is not appropriate to consider interest and penalties as “taxes” in order to apply limitations on source State taxation or for purposes of the obligation of the State of residence to relieve double taxation, interest and administrative penalties that are directly related to the taxes should be treated in the same way as taxes (in particular where interest and penalties are computed with reference to the amount of the underlying tax and the underlying tax is found not to have been levied in accordance with the provisions of the Convention).
These issues are encountered frequently on MAP cases and we have found that they are not treated consistently by the competent authorities. Therefore, the NFTC supports **Option thirty-four** and believes it should be addressed through additional/follow-on work on Action 14.

Sincerely,

Catherine G. Schultz  
Vice President for Tax Policy  
National Foreign Trade Council  
cschultz@nftc.org  
202-887-0278 ext. 2023
Appendix to NFTC Comments on Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

NFTC Board Member Companies:

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Toyota
Tyco International
United Parcel Service, Inc.
United Technologies
Visa, Inc.
Walmart Stores, Inc.
January 16, 2015

VIA EMAIL: taxtreaties@oecd.org

Marlies de Ruiter
Head, Tax Treaties
Transfer Pricing and Financial Transactions Division
OECD/CTPA
2, rue Andre Pascal
75775 Paris Cedex 16
France

RE: PwC Comments on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. de Ruiter:

PricewaterhouseCoopers LLP ("PwC") welcomes the opportunity to comment on the OECD's Public Discussion Draft on Action 14: Making Dispute Resolution Mechanisms More Effective (the "Discussion Draft" or "Draft"). As a global professional services business with a network of firms throughout the world, we have extensive experience relating to the obstacles that prevent countries from resolving treaty-related disputes under the Mutual Agreement Procedures ("MAP").

We recognize the size and difficulty of the task being addressed in Action 14, and accordingly, we commend the Working Group for its preliminary (but considerable) efforts in identifying obstacles that preclude resolution of disputes through MAP and developing potential options to address those obstacles. We have concerns in a number of areas, however, in which we believe further consideration and effort should be undertaken. We are primarily concerned that global consensus has not been reached on mandatory and binding arbitration, a mechanism that has proven successful in resolving treaty-related disputes, and arguably, is an effective approach to ensure certainty and predictability for business in this area.

We appreciate your consideration of our comments on the Discussion Draft and we would be pleased to assist the OECD further in its efforts under Action 14. We also would like to indicate our desire to speak in support of our comments at the public consultation meeting on Action 14 to be held in Paris at the OECD Conference Centre on January 23, 2015.

1. General Comments on the BEPS Action 14 Discussion Draft

Bilateral income tax treaties are fundamentally based on the promotion of international trade and investments. Multinational corporations need to be confident that when they choose to operate in a particular jurisdiction, they will be treated fairly and will not suffer from excessive or double taxation. The operative rules in a tax treaty are intended to further this goal, but such rules work imperfectly when dispute resolution procedures are ineffective or
inefficient. Unfortunately, the existing platform for resolving treaty-related tax disputes is struggling under tremendous strain and immediate measures are required to ensure MAPs are more effective, efficient, and practical. The current global tax controversy environment requires improvements to dispute resolution procedures that will, in practice, prevent double taxation. Business needs predictability and certainty. Our hope is that the OECD’s work on Action 14 will lead to significant improvements in the existing system for resolving cross-border tax disputes.

According to recent OECD statistics, pending treaty-related tax disputes are at record high levels. Recommendations from the base erosion and profit shifting (“BEPS”) Action Plan will likely drive these numbers higher, as a significant rise in tax audits and disputes is widely expected. Taxpayers, tax administrations, and other stakeholders need a system that offers a definitive mechanism for settling disputes in an effective, efficient, and practical manner, and within a reasonable time frame. Justice delayed is justice denied. Stakeholders are frustrated with a system that provides, in certain cases, no definitive or conclusive way of resolving cross-border tax disputes, and that inevitably results in prolonged inequities. The international community needs a practical and definitive mechanism for resolving disputes; otherwise, some observers believe the business community is left with a system that is open ended, uncertain, and opaque.

The Action 14 Discussion Draft is an important first step in identifying obstacles that prevent countries from resolving treaty-related disputes through MAP and providing options to address these obstacles. We understand the Draft merely represents views and proposals for stakeholder analysis and comment, and accordingly, does not represent a consensus view of the Committee on Fiscal Affairs (“Committee”). We do, however, hope that the forthcoming “specific measures” and “minimum standards” to which participating countries can collectively commit will represent the consensus review of the Committee.

Overall, we support most of the options set forth in the Discussion Draft to address the identified obstacles that preclude the resolution of treaty-related disputes through MAP. We agree that the “complementary solutions” alluded to in the Draft must have a “practical, measurable impact” to improve overall dispute resolution procedures. This will inevitably require the widespread adoption and actual implementation of specific measures by individual countries. It is, however, disappointing that there is no consensus on movement toward universal mandatory and binding arbitration. The use of mandatory and binding arbitration has, to date, evidenced positive results in incentivizing competent authorities to reach a resolution in a timely manner (even before arbitration) and to definitively resolve MAP cases in certain countries. The work under Action 14 is inherently global in nature and it is the optimal time to, as a minimum, recommend adoption of mandatory and binding arbitration. Alternatives to mandatory and binding arbitration, such as an international tax tribunal or an international court of tax justice, or taxpayer “self-initiated adjustments” (although not mentioned in the Draft), seem difficult, if not impossible, to reach consensus on in the foreseeable future.

Therefore, the use of mandatory and binding arbitration appears to be one of a very limited number of available treaty-based dispute resolution options that would provide a definitive mechanism for resolving MAP cases that are in deadlock – the occurrence of which is likely to increase as the BEPS reform unfolds. Accordingly, in addition to the many options for
improving MAP referenced in the Draft, we urge the OECD to strongly recommend the adoption of mandatory and binding arbitration.

2. Comments on Supplementary OECD Work under BEPS Action 14

The Discussion Draft indicates it represents the “preliminary result of work done to identify the obstacles” in resolving treaty-related tax disputes. As the work of the OECD moves forward in this area, we hope that the “specific measures” the OECD intends to constitute the “minimum standards” for participating countries to commit to will not only be obligatory, but also practical, so that member countries can easily adopt and build on those standards. It is imperative that the OECD not merely rely on a “political commitment” to implement the specific measures. Rather, the OECD should emphasize the need for policy officials at the highest levels of tax administrations to collectively adopt the specific measures contemplated and to be accountable for the results. This could be achieved by expecting tax authorities to meet specific targets and goals (for example, by exchanging position papers within six months after a MAP case has been filed).

The supplementary work to enhance MAP is just that – work remaining to be done, and it needs to be accomplished as soon as possible. This is necessarily multilateral work, and accordingly, it must be carried out through a multilateral body, inclusive of those directly responsible for the MAP programs that will be affected by the work (as opposed to a more remote, policy-oriented body). Further, it is work that will require extensive changes to tax administration processes and policies, so the work must have the unwavering support of tax policy officials at the highest levels. Given these requirements, we recommend that the MAP Forum, launched by the Forum on Tax Administration (“FTA”) Commissioners in Moscow in May 2013, be viewed as critical to the implementation of Action 14, as opposed to a body engaged in “parallel work” as described in the Discussion Draft.

Finally, the Draft refers to a “monitoring process” that would evaluate the commitment of member countries to implement the forthcoming “specific measures.” If not appropriately designed, this process could prove to be retrospective and an ineffective use of competent authority resources. Hence, we believe a monitoring process would only be effective if it is designed to ensure that the exercise of specific measures are transparent and accountable with the objective of improving taxpayer confidence in the dispute resolution processes and eliminating double taxation. If, within a set period of time (e.g., five years), the monitoring process demonstrates that those objectives have not been achieved, the OECD should commit to a new project that fundamentally improves the resolution of treaty-related disputes in the MAP processes, including, but not limited to, the endorsement of mandatory and binding arbitration (if not already undertaken) as an instrument to resolve deadlocked cases in an effective and efficient manner.

3. Comments on the Four Key Principles Identified in BEPS Action 14

Recent OECD MAP statistics show the highest pending inventory of MAP cases in history and a 94 percent increase over the numbers in 2006. These statistics are dramatic evidence of the surge in tax audits and treaty-related disputes among OECD member countries over the last eight years (all pre-BEPS). This trend is troubling and is compounded by the concern that some areas of the OECD BEPS Action Plan – such as permanent establishments and transfer
pricing – will introduce new controversial rules that may significantly alter the international tax system, and may lead to an even greater increase in audits and disputes (placing further extreme pressure on the MAP system). Accordingly, the dispute resolution process involving cross-border tax disputes is in need of immediate attention and material improvement to be an effective means of resolving controversy and preventing double taxation. The occurrence of double taxation as a direct result of a failed MAP system is unacceptable. In situations where countries fail to fully prevent double taxation in a reasonable amount of time, there must be a definitive mechanism in place that requires competent authorities to resolve the matter in question.

The Discussion Draft, along with the FTA’s “Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement” (the “Strategic Plan”) are welcomed efforts to address the unprecedented levels of cross-border tax disputes and the resultant MAP caseload that confronts the global business community. Both papers expound upon historical proposals and recommendations presented in the 2004 Proposal for Improving Mechanisms for the Resolution of Tax Treaty Disputes (now more than ten years old), and more recently in the 2007 Manual on Effective Mutual Agreement Procedures (“MEMAP”). Recognizing that further progress remains to be achieved, the Discussion Draft and the Strategic Plan focus on a number of practical areas for improving MAP with the vision that the operation of MAP be made more effective and efficient through the collective and collaborative efforts of competent authorities around the world. To reiterate, however, the forthcoming “specific measures” and the “minimum standards” (to which participating countries are expected to commit) must be fully implemented to have any measurable impact. This, we urge, will require a firm commitment (with specific target goals) of the OECD, the FTA MAP Forum, and policy officials at the highest levels of tax administrations to ensure that obstacles to effective resolution of treaty-based disputes are overcome in a timely manner.

**Principle 1: Good Faith Implementation of MAP Treaty Obligations**

We agree with the Discussion Draft’s identification of the two obstacles (and corresponding options) to ensure that treaty obligations related to MAP are fully implemented in good faith. We consider moving forward with both of these options to be important steps, making it clear that competent authorities have an obligation to resolve MAP cases (not just use “best efforts” to do so). That said, we suggest that the clarifying provision in Option 1 go one step further in addressing the absence of an obligation to resolve MAP cases. More specifically, we do not see a material difference between the phrase “shall endeavour to resolve” and the phrase “to seek to resolve.” By definition, “to seek to resolve” is merely an “attempt to resolve,” and to the extent competent authorities do not seek to resolve cases in a practical, fair, and objective manner, the pressures on MAP remain the same – with the threat of double taxation more acute. Accordingly, we recommend removing the words “to seek,” which in our opinion, would sufficiently emphasize that competent authorities have an obligation to resolve MAP cases.

**Principle 2: Improve Administrative Processes for the Prevention and Resolution of Treaty-related Disputes**
The Discussion Draft appropriately identifies seven obstacles and corresponding options to ensure that administrative processes promote the prevention and resolution of treaty-related disputes. We fully agree with those proposed solutions and with the concept that administrative “best practices” are critically important to ensuring competent authorities are able to effectively and efficiently carry out their mandates and treaty obligations. Although we agree with each of the identified options, we provide below our recommendations on how to best implement specific measures as part of the OECD’s supplementary work on implementing this principle.

**Lack of MAP Resources.** A focus on resources, both in quantity and quality, is a critical prerequisite because most competent authority teams around the world have under-staffed or inexperienced personnel. It is recognized that intra-administration competition for resources often results in dedicating resources to the audit or exam function and making adjustments to a taxpayer’s reported income, as opposed to dedicating resources to the MAP function responsible for reconciling those adjustments with other governments. This is a challenge that cannot be addressed through a mere “commitment to the best practices set out in the MEMAP.” Instead, we recommend policy officials at the highest levels of tax administrations commit to ensuring that MAP resources are experienced and are commensurate with the MAP workload. The FTA MAP Forum, under the proactive guidance of the FTA Commissioners, is the most appropriate body to lead this effort.

**Competent Authority Independence.** Ensuring the independence of resources is potentially the single greatest challenge faced by competent authorities around the world. Similar to the resource challenge, this is an issue that cannot simply be addressed by a political commitment, which historically has proven to be ineffective. Rather, the empowerment of the competent authority function can only be addressed through the dedicated work of policy officials at the highest levels of tax administrations, followed by the adoption of specific modifications to administrative practices and policies designed to remedy the problems identified.

The relational position between competent authorities and their tax administrations (and constraints imposed by those administrations) determines the competent authorities’ ability to deviate from the positions of tax auditors and thereby dictates their willingness to be practical and objective and to reach a compromise based on international principles. Solutions must be identified and implemented through the concerted efforts of the FTA MAP Forum to bring about operational change. Accordingly, the work of the MAP Forum is central to Action 14 (as opposed to working “in tandem” with Action 14). We also strongly recommend that a business advisory council be established, as described in the Draft, that would work hand-in-hand with the MAP Forum to ensure that business perspectives on MAP difficulties are brought to fruition through performing benchmarking studies and developing common approaches to shared problems.

**Performance Indicators.** Experience has shown that performance metrics and goals associated with the audit functions of the tax administration may serve to impair the objectivity of competent authorities by placing limitations on their ability to reach appropriate resolution of treaty-related disputes. These types of harmful metrics and goals need to be identified and addressed in connection with ensuring the independence of the competent authority function. We also encourage the OECD to consider developing a MAP
negotiation training program for participating countries. This type of training could be designed to ensure that competent authority resources approach the negotiation table with the mind-set to completely eliminate double taxation in the most efficient manner possible.

**Encourage Use of APAs.** We are pleased to see the Discussion Draft embraces implementation of bilateral Advance Pricing Agreements ("APAs") as an important alternative dispute resolution option to increase certainty, decrease double taxation, and proactively prevent transfer pricing audits and disputes. We also agree with the recommendation to potentially apply APA methodologies (and MAP results) in certain situations to other taxable years not formally under consideration in the APA (or the MAP case). In the current environment, we suspect that domestic barriers to access into the APA program may increase, resulting in further treaty-related disputes. Thus, the OECD should reinforce the benefits of APAs and the need for all participating countries to embrace actual implementation of bilateral APA programs, including the use of dedicated resources. In addition to the APA alternative, we strongly encourage the OECD to recommend that countries develop and improve other domestic dispute resolution mechanisms for resolving assessments involving tax disputes (such as, pre-filing agreements, administrative appeals, domestic mediation, and domestic arbitration). The availability of effective and efficient domestic law remedies would help to resolve many cross-border disputes even before the need to proceed to MAP.

**Principle 3: Improve Taxpayer Access to MAP**

The Discussion Draft identifies eight obstacles (and corresponding options) to ensure taxpayers can access MAP when eligible. For the most part, we agree with each of the solutions offered by the Draft. We do, however, make the following additional recommendations for options and processes that may help ensure measures are appropriately adopted worldwide.

**Impediments to Accessing MAP.** Auditors in certain countries are increasingly raising inappropriate roadblocks where a taxpayer indicates a desire to pursue MAP — an approach that is totally unacceptable. If the various options set forth by the Draft to improve taxpayer access to MAP are implemented by participating countries, then we suspect that denial of access to MAP would be largely reduced. Nevertheless, rather than rely on policy commitments to MEMAP practices to address this fundamental problem (as suggested in Options 10 and 11), we recommend that competent authorities develop and adopt consensus guidelines for addressing practical and legal impediments to MAP access.

**Anti-abuse Provisions.** There is tremendous uncertainty as to the interpretation and application of Article 25 in regards to MAP access where domestic laws or treaty-based general anti-avoidance rules are applied. As an example, most of the Commonwealth countries limit the scope of their treaties with respect to enabling domestic legislation, which in turn, can result in non-compliance with international treaty obligations to the detriment of taxpayers. Thus, we welcome the Draft's attempt to clarify, as part of Option 12, the availability of MAP access where domestic rules or anti-abuse provisions are applied. There is, however, an acute need to create clear and objective standards on the application of such provisions. Therefore, it is critical to adopt language in the Commentary to Article 25 clarifying that all instances in which any country believes its domestic laws preclude the
application of a treaty benefit should be made known to the competent authority of the treaty partner, and that "[t]he interpretation and/or application of that rule would clearly fall within the scope of the MAP." This clarification is even more important given the widespread use of domestic anti-abuse rules to deny treaty benefits that may result from the work on Action 6 of the BEPS Action Plan. We also recommend that the denial of the discretionary grant of treaty benefits be within the scope of MAP (contrary to the recommendation in the Public Discussion Draft Follow up Work on BEPS Action 6: Preventing Treaty Abuse to make this issue outside the scope of MAP). This could be formally included in Article 25 or through a commitment in the Limitations on Benefit article, but, in either case, should be a bilateral resolution of a proposed denial of treaty benefits under the discretionary grant provision. Further, Commentary related to Article 25(2) should make clear that the interpretation and application of domestic laws are subject to full MAP negotiations based on the overarching purpose of Article 25 to eliminate double taxation or taxation not otherwise in accordance with the treaty.

**Domestic Law Remedies.** In Option 16, the Discussion Draft suggests that it may be preferable to pursue MAP as the “first option” for resolving treaty-related disputes (with suspension of domestic law remedies) as MAP would provide a comprehensive resolution of the case. We are concerned with this proposition for at least two reasons. First, this approach would significantly (and needlessly) increase the competent authority caseload and inventory because every treaty-related dispute, including positions that may not be meritorious, would need to involve the competent authority function. It is an overly burdensome approach to resolving cross-border disputes. In fact, in certain countries, many potential treaty-related disputes never need to reach the competent authority level because the assessments are withdrawn due to a lack of merit (or other justifiable reasons). Second, and more importantly, it should be the option of the taxpayer to proceed with either domestic law remedies or MAP (or pursue both simultaneously). The taxpayer should have the fundamental right to pursue domestic law remedies, and to the extent the threat of double taxation remains after pursing those options, the taxpayer should be allowed to pursue competent authority as a means to eliminate double taxation. In the alternative, taxpayers may prefer to first pursue MAP to stay collection of taxes in certain jurisdictions. In either case, the taxpayer should not be limited to one dispute resolution option. Accordingly, supplementary work is required on this solution, and the Commentary to Article 25 should be amended to set forth appropriate processes for governments to follow in modifying local procedural rules and to encourage, in appropriate cases, resolution of cross-border disputes at the administrative level prior to proceeding to MAP, including early involvement of the competent authority function to eliminate audit assessments that are not supported by the facts of the case or applicable legal principles and economic analysis.

**Principle 4: Ensuring Cases are Actually Resolved Once in MAP**

The Discussion Draft identifies six obstacles and issues that prevent the resolution of treaty-based disputes once a case is in MAP (and correspondingly sets forth options to remedy those problems). We commend the OECD in its efforts to identify options to address obstacles that preclude the resolution of treaty-related disputes in MAP. These options would have a practical and measurable impact if individual countries commit to the “minimum standards” the Draft envisions. Nevertheless, we are disappointed that there is no consensus on movement toward universal mandatory and binding arbitration.
We elaborate below on the Draft’s proposed options to improve MAP processes. In particular, we expound on our recommendation that the OECD recommend mandatory and binding arbitration while simultaneously embarking on an initiative to more thoroughly identify the obstacles that countries identify as barriers to adopting mandatory and binding arbitration and develop a process to eliminate those obstacles.

**Principled Approach.** At the outset, we strongly agree that competent authorities should approach the resolution of MAP cases employing a “fair and principled” approach. This is the bedrock of competent authority negotiations. It is critically important that each MAP case be decided on the merits, without reference to the results of other MAP cases. Competent authorities must take consistent approaches on the same or substantially similar issues from one MAP case to another and not consider factors that are irrelevant to factual or legal issues (such as revenue considerations). Therefore, we welcome and support Option 20, but suggest that best practices also be addressed through the commitment of the MAP Forum.

**Cooperation, Transparency, and Good Working Relationships.** The Discussion Draft and the Strategic Plan emphasize the need for competent authorities to be responsible and accountable for ensuring effective and efficient MAP processes so that taxpayers are not subject to double taxation, or taxation that is not in accordance with the applicable tax convention. Individually and collectively, competent authorities must take responsibility to ensure the proper functioning of MAP. This requires the development of collegial relationships and the cohesive implementation of specific measures to ensure fully transparent MAP processes. We believe accountability for the implementation of specific measures and adherence to minimum standards should not rely merely on policy commitments (as suggested in Option 21), but rather, must be emphasized through the dedicated work of the MAP Forum and policy officials at the highest levels of tax administrations. Specific measures should include procedures and protocols (including specific targets and goals) to set appropriate expectations amongst competent authorities and taxpayers, such as project management and timetables, thereby instilling transparency and confidence in the MAP process.

**Absence of a Mechanism to Resolve Unagreed MAP Cases.** Following the inclusion of mandatory arbitration in paragraph 5 to Article 25 of the OECD Model Treaty in 2008, a number of countries have included mandatory arbitration in their bilateral income tax treaties. The provision in the OECD Model Treaty, however, does not mandate the adoption of mandatory and binding arbitration. That said, the U.S. (and other countries) are increasingly including mandatory and binding arbitration provisions in their bilateral income tax treaties, which have been recognized as an important tool to incentivize resolution of MAP cases in certain countries. Indeed, there is support for the proposition that the mere existence of an arbitration mechanism has made traditional MAP processes more efficient and effective where the mechanism exists.

We urge the OECD to recommend, as a minimum, the adoption of mandatory and binding arbitration which would set the appropriate foundation for broader acceptance. As part of the OECD’s supplementary efforts on Action 14, the OECD should work with participating countries to engage in transparent discussions to identify the objections that are asserted by certain countries and to develop solutions to eliminate those objections.
The most significant obstacle, as recognized by the Draft, is that some countries believe mandatory and binding arbitration would result in a relinquishment of "national sovereignty." This obstacle increasingly may become less of a roadblock. The recent State Aid cases make it clear that countries in the European Union ("EU") have already ceded a substantial amount of sovereignty regarding tax rules in the EU. Further, participating countries already have agreed to a form of mandatory arbitration (albeit not the "baseball" approach) as part of their membership in the World Trade Organization ("WTO"), or in free trade agreements. Thus, the concept of mandatory arbitration does not appear to be _per se_ objectionable.

The use of mandatory and binding arbitration would be an effective approach to resolve disputes for competent authorities that are unable to reach an agreement as it compels a process that is binding on both governments, constituting a resolution by mutual agreement under the treaty. The U.S. (amongst other countries) has executed income tax treaties with mandatory and binding arbitration that employs the "baseball" type of formal decision making (otherwise known as the "final offer" approach). The Draft also references the "independent opinion" type of formal decision making in arbitration. We encourage use of the baseball type of arbitration as it incentivizes competent authorities to abandon positions that an arbitrator would be unlikely to uphold, which in turn, has the effect of encouraging settlement during competent authority negotiations before the case needs to be presented to an arbitration panel. In short, under this approach, many cases may never reach arbitration because the competent authorities are encouraged to resolve the dispute prior to taking that ultimate step.

Alternatively, mandatory non-binding arbitration may be a suitable approach where policy or practical concerns preclude use of mandatory and binding arbitration. The non-binding nature of this model would leave the option of litigation on the table – providing a "method of last resort" to the taxpayer and preserving the sovereignty rights of individual countries. In such cases, the arbitration decision may become part of the record in judicial proceedings, and in fact, may weigh heavily in a court's final resolution of the tax matter. Moreover, this model would allow countries to experiment with arbitration and overcome the obstacles that prevent the use of mandatory and binding arbitration.

Finally, we also believe that taxpayers should have a material role in the arbitration process. In certain cases, the taxpayer may be in the best position to assist the arbitration panel in understanding the relevant facts and economic analyses. For example, the role of the taxpayer's participation in the arbitration process has been recognized under the U.S.-France treaty whereby the Memorandum of Understanding and the Arbitration Board Operating Guidelines explicitly provide that the taxpayer is permitted to submit its positions to the arbitration panel. We agree with the Draft's recommendation in Option 30 that taxpayers should be allowed to submit a brief setting forth its position (excluding new facts) for consideration by the arbitration panel, subject to review and comment by the participating competent authorities. We do, however, encourage the OECD to more explicitly embrace the role of the taxpayer in the arbitration process. Further, we also believe there is an appropriate role for greater taxpayer participation in general in the overall MAP process. Specifically, in more complex MAP cases, recognizing the final decision is made by the competent authorities through private negotiations, we urge the OECD to recommend that
taxpayers be allowed to attend competent authority meetings to present the facts and relevant analyses and to respond directly to any questions or inquiries presented by the parties.

4. Conclusion

We appreciate the OECD's considerable efforts in addressing the difficult task presented by Action 14. We are prepared to assist the OECD in further developing efficient, effective, and practical dispute resolution options that prevent tax controversies from arising in the first instance, and to eliminate double taxation once assessments are asserted.

* * * * * * * * *

These comments are presented on behalf of the global network of PwC member firms in response to the OECD's Public Discussion Draft on Action 14: Making Dispute Resolution Mechanisms More Effective. We would like to reiterate our desire to speak in support of our comments at the public consultation meeting on Action 14 to be held in Paris at the OECD Conference Centre on January 23, 2015.

For any clarification of this response, please contact the undersigned (or any of the contacts below).

Respectfully submitted,

C. David Swenson
Global Leader, PwC's Tax Controversy and Dispute Resolution Global Network
PricewaterhouseCoopers LLP, Washington, D.C.

cc: Stef van Weeghel, PwC's Global Tax Policy Leader

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To Marlies de Ruiter - Head, Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA

Email: taxtreaties@oecd.org

Dear Ms. De Ruiter, Dear Marlies,

Please find attached the comments on behalf of Quantera Global on the consultation draft to make dispute resolution mechanisms more effective (BEPS Action 14).

Kind regards,

Richard Slimmen
Managing Director
M: +31 6 50 88 94 37
E: r.slimmen@quanteraglobal.com

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Comments on the consultation draft to make dispute resolution mechanisms more effective (BEPS Action 14)

By

Quanterra Global
Quantera Global welcomes the opportunity to provide its comments to BEPS Action 14: Make dispute resolution mechanisms more effective (“Discussion Draft”).

We highly appreciate the work that the OECD has done so far. We believe that the Discussion Draft can be a helpful step towards a more consistent and pragmatic approach for the treatment of disputes.

We look forward to discussing these matters in more detail during the public consultation on 23 January 2015 in Paris.

General observations

The BEPS actions provide a wide range of measures to battle tax avoidance. All these measures will require taxpayers as well as tax authorities to reconsider their positions. Although the actions have a clear goal it is to be expected that stakeholders will have different interpretations. The struggle of all stakeholders to comply with all new standards will certainly result in a huge increase of disputes and it will take time before a new balance will be established. Effective dispute resolution will be key.

We appreciate and recognize that dispute resolution is complex and especially when multiple countries are involved. The Discussion Draft addresses a number of issues that have proven to be real obstacles in individual cases. We fully support the effort to come to a more effective mechanism for dispute resolution under MAP.

Although the international focus on BEPS is understandable it is essential that the international consensus on the basic principle that double taxation should be avoided is upheld. The three-pronged approach together with the four principles identified provide for a clear framework that should support the use of MAP. It is important that all countries involved take a firm stand on these principles and subscribe to their scope. We would hope that all four principles will be unanimously and explicitly supported by all countries. This would create a clear basis and guidance for the interpretation of individual issues. Although countries may not have a consensus on applying mandatory arbitration they should have a consensus on the four basic principles for any measure to be viable.

Below we will first address in general some of the issues we feel most important. Subsequently we will comment on a selection of specific options as provided in the Discussion Draft.
MAP image

Whether MAP will be an effective and efficient tool to resolve disputes and result in solutions that actually avoid double taxation of MNEs depends on many different variables. Obviously there are many technical and procedural hurdles as identified in the Discussion Draft. But also the willingness of MNEs to even consider a MAP seems to provide for a hurdle. MAP still is an instrument that is relatively scarcely used by MNEs. We feel this is also due to the fact that MAP is still rather unfamiliar to them and a perception that it is not worth the effort.

It would be helpful to stipulate that despite all the flaws in the process and the complex discussions the MAP as an instrument has proven to be reasonably effective at the end. We understand that from the MAPs actually processed the vast majority (more than 90-95%) have in fact been successful in resolving double taxation of MNEs. This despite the absence of mandatory arbitration clauses. It would be helpful to promote the use of MAP as a successful instrument next to addressing the important areas of improvement as identified in the Discussion Draft.

Sufficient competent authority resources

We believe this to be a key issue that will impact all other options. Without proper resources competent authorities will not be able to properly process MAPs in an efficient way. The allocation of resources will be a true indicator of the commitment of countries to live up to the four principles as identified. We would suggest to further specify how to determine whether resources are sufficient. As an objective measurement we would think of the average processing time of a MAP. If the mix of resources would enable a competent authority to resolve a MAP within a year this might be a good indication that sufficient resources are made available. An objective measurement would also facilitate future monitoring.

In respect of training efforts we would welcome some sort of central training institute that would facilitate training of all competent authorities on how to effectively manage and process a MAP. Sharing best practices in a safe environment would facilitate development of effective MAP procedures. It should be recognised that there are huge differences in relevant expertise between countries as well as cultural differences that may impact a MAP. Establishing a common understanding of the relevant processes and how to manage them effectively would certainly facilitate mutual understanding, good personal relationships and an efficient MAP.

Access to the MAP

We believe any limitation to access the MAP should be avoided to the extent possible. There should be a clear message that taxpayers should have access to MAP by default and only in exceptional cases such access may be denied. This should be linked to the four principles as identified.
MAP procedures

We would suggest to re-evaluate the processes and procedures applied in processing a MAP. The current practice is focused on exchange of written position papers to start negotiations between competent authorities. These will result in fixed positions that parties are reluctant to move away from. This does not facilitate a smooth processing of individual cases. Instead we would promote that competent authorities start communications first without exchanging written position papers. This will allow a flexible and efficient joint fact finding and would facilitate mutual understanding of the facts. Experience shows that transfer pricing disputes are for a large part related to different interpretations or understandings of facts. Once there is a joint understanding of the facts negotiations may be efficient and quick. Such approach could be facilitated by training efforts and sufficient resources to accommodate the face to face meetings of competent authorities. Modern communication technologies like video conferencing may facilitate ‘face to face’ meetings when geographic distance might provide for an obstacle for physical meetings.

Mediation

The Discussion Draft points out that there is no consensus to apply mandatory arbitration. Although we find this disappointing we do appreciate the positions of countries that would hesitate to accept mandatory arbitration as it would affect the sovereignty of a competent authority. We do hope however that all countries are committed to the four principles and would be willing to consider alternative options to facilitate resolution of individual cases. In this respect it might be worth considering to use mediation as an instrument to facilitate resolution of a case between competent authorities. Mediation would not infringe on the sovereignty of a competent authority to decide in a specific case. Therefore mediation might be an acceptable instrument for all countries. Mediators should be experienced practitioners that are capable of understanding complex transfer pricing cases and are independent.

Mediation as an instrument has proven to be effective in practice in many disputes. It could be used as an intermediate dispute resolution mechanism before entering into arbitration. We believe it would provide for a welcome political statement confirming the commitment of countries to the four principles if there could be a consensus on the use of mandatory mediation.
Individual options as identified in the Discussion Draft

Below we will not address all individual options but focus on some selected issues. We will reference the specific option first and then provide our comments. We will follow the order of the Discussion Draft.

1. Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith.

**Comment on option 1:**

We hope that all countries will support this new paragraph 5.1 as it clearly indicates the true intentions of the parties to really make an effort to resolve individual cases. We would suggest to add the word “actively” before the word “seek” to clarify that doing nothing would not be acceptable and that countries are expected to make a real and realistic effort to initiate and maintain communications. It might even be considered to include a target timeframe within which countries would seek to resolve the case.

**Comment on option 2:**

We would support a clear statement indicating that article 9 paragraph 1 in itself already would facilitate the use of MAP under article 25 followed by an encouragement of
participating countries to clearly confirm this by including paragraph 2 of article 9 in their tax treaties. For those countries that do not yet have article 9 paragraph 2 in their treaties the multilateral instrument could indeed provide for an efficient adjustment of the relevant treaties. An initial statement about the scope of article 9 paragraph 1 could allow / justify countries to apply article 25 even before any formal confirmation would be realized. As it is still uncertain what the expected timeframe of the multilateral instrument would be we would prefer an option that would not seem to suggest that the inclusion of paragraph 2 of article 9 would be necessary to be able to apply article 25.

2. Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes.

Comments on option 4:

As indicated before we believe this to be a key issue that will impact all other options. We would suggest to further specify how to determine whether resources are sufficient. As an objective measurement we would think of the average processing time of a MAP. If the mix of resources would enable a competent authority to resolve a MAP within a year this might be a good indication that sufficient resources are made available. Obviously a one-year period would be a target and it would time to get there. An objective measurement would also facilitate future monitoring.

As indicated before we would welcome a central training institute that would facilitate training of all competent authorities on how to effectively manage and process a MAP. Training should include both technical and soft skills. A common training by all competent authorities would provide for a common reference and a better understanding between competent authority officials. In addition to training efforts we would welcome if experienced officials would be retained for a longer period to support consistency and a steady level of expertise.


**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**

Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer’s access to the mutual agreement procedure could commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements. Changes to the Commentary on Article 25 could also address the obstacles to an effective mutual agreement procedure created by audit settlements.

Comments on option 7:

We would strongly support the option to discontinue the practice that would preclude a taxpayer from MAP access. The option of spontaneous notification would still allow this practice to continue. We believe it should be part of the good faith effort included in the four basic principles as identified to not block access to a MAP for taxpayers. Only in extreme cases there might be a justification to preclude access to MAP. We would therefore be in favour of a clear commitment to discontinue that practice.

**OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs**

Participating countries could commit, in certain cases and after an initial tax assessment, to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances.

Participating countries that have implemented APA programmes could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the applicable time limits provided by domestic law (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances.

Comments on option 9:

We would welcome if countries would allow integrated discussions involving multiple years in order to reach an overall solution for the issues in dispute. This would certainly facilitate an efficient use of resources. We would like to also include the option to permit taxpayer to expand the MAP discussions for filed tax years also to future years under an APA programme (assuming that relevant facts and circumstances would be sufficiently comparable).
3. Ensuring that taxpayers can access the mutual agreement procedure when eligible.

**OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the transparency and simplicity of the procedures to access and use the mutual agreement procedure, which should minimise the formalities involved in the MAP process taking into account the challenges that may be faced by taxpayers. This would include a commitment—

- To develop and publicise rules, guidelines and procedures for the use of the MAP (and to provide, where possible, appropriate notice to taxpayers of such guidance).
- To identify the office that has been delegated the responsibility to carry out the competent authority function (along with contact details).

**Comments on option 10:**

We support this option. We experience in practice that the MAP process is still relatively unknown to taxpayers which might result in not using the MAP while it could provide for real relief of double taxation. In order to facilitate easy access for all taxpayers we would like to suggest to establish a central depository (managed by the OECD) where relevant information of all countries in respect of MAP related issues would be available. This would facilitate taxpayers to obtain easy access to this information.

**OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the minimum contents of a request for MAP assistance. This would include a commitment—

- To identify, in public guidance, the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance, seeking to balance the burdens involved in supplying such information with the complexity of the issues the competent authority is called upon to resolve. Competent authorities would in turn expect taxpayers to submit complete and accurate information consistent with such guidance, and to respond promptly to requests for missing or other relevant information.
- Where a country has not yet provided guidance and a taxpayer’s request for MAP assistance is accompanied by relevant information in line with the guidance in Section 2.2.1 of the MEMAP, a competent authority should not, without consulting the other competent authority, deny access to MAP on the basis that the taxpayer has provided insufficient information.

**Comments on option 11:**

We generally agree to the suggestions made. We would however like to suggest to be more firm in stating, without exception, that taxpayers should not be denied access to the MAP on the basis that taxpayer has provided insufficient information in case all
information as indicated in section 2.2.1 of the MEMAP has been provided. We would suggest to treat the level of information as indicated in section 2.2.1 of the MEMAP as a maximum threshold.

**OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied**

Where there is a disagreement between the taxpayer and the competent authority to which its MAP case is presented as to whether the conditions for the application of a treaty anti-abuse rule (e.g. a treaty-based rule such as the PPT rule) have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of Article 25(1) are met. If participating countries would seek to limit or deny MAP access in all or certain of these cases, they could commit to specifically and expressly agree upon such limitations with their treaty partners. In addition, where a participating country would deny MAP access based on the application of domestic law or treaty anti-abuse provisions (or similar rules or doctrines), that country could commit to notify its treaty partner about the case and the circumstances involved.

Comments on option 12:

We believe any limitation to access the MAP should be avoided to the extent possible. There should be a clear message that taxpayers should have access to MAP by default and only in exceptional cases such access may be denied. Communications between competent authorities in case of a denied access would facilitate relevant awareness between treaty partners.

**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State**

Paragraph 1 of Article 25 could be amended to permit a request for MAP assistance to be made to the competent authority of either Contracting State (i.e. to the competent authority of one or both Contracting States). Such an amendment could be accompanied by corresponding changes to the Commentary on Article 25, which would include the current text of paragraph 1 of Article 25 as an alternative provision to accommodate the preferences of some countries.

Comments on option 15:

We would support any simplification of formalities involved in a MAP. Allowing a request to be made to either contracting state would simplify formalities.
Comments on option 16:
We fully support the suggestion to promote the use of MAP as a first option to resolve treaty-related disputes. However we feel it should be at the discretion of the taxpayer to choose the option that it deems most appropriate.

Comments on option 17:
We believe that a clear and uniform approach to the collection of taxes will facilitate the proper execution of a MAP case. We would suggest to include a clear invitation to countries to adopt their domestic laws and procedures to the extent necessary.
Comments on option 18:

We believe time limitations should not unreasonably limit the opportunity of taxpayers to access a MAP. We believe it to be unreasonable if time limitations would prevent a taxpayer to access a MAP because the formal treaty deadline would already have expired even before the primary adjustment was imposed. Sometimes domestic time limitations allow adjustments long after the transactions have taken place where the treaty applies a more limited period. We therefore would welcome a clear statement that any treaty deadline should allow a taxpayer a reasonable time to present its case for MAP.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

Changes to the Commentaries on Articles 7, 9 and 25 could be made to clarify the circumstances where double taxation could be resolved under MAP in the case of self-initiated foreign adjustments and to emphasise the importance of bilateral competent authority consultation to determine appropriate corresponding adjustments and to ensure the relief of double taxation.
Comments on option 19:
We fully support this option. We believe it should not make any difference whether an adjustment is imposed by a tax authority or it is self-initiated by a taxpayer. In all cases there may be a taxation not in line with the treaty and access to MAP should be granted. Formalistic interpretations should not lead to situations of double taxation. In case of self-initiated adjustments by a taxpayer it would be in line with the four principles as identified in the Discussion Draft that the other tax administration/competent authority would be informed of the adjustment.

4. Ensuring that cases are resolved once they are in the mutual agreement procedure.

<table>
<thead>
<tr>
<th>OPTION 21 – Improve competent authority co-operation, transparency and working relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participating countries could commit to adopt the relevant best practices currently included in the MEMAP, which would include, in particular, the following commitments –</td>
</tr>
<tr>
<td>– Countries could commit to a co-operative and fully transparent MAP process, in which competent authorities exchange documentation and information in a timely manner and regular competent authority communications are used to reinforce a collaborative working relationship. Competent authorities could also agree as to when taxpayers would be permitted to make presentations to the competent authorities to clarify – and facilitate a shared understanding of – the relevant facts and issues. Competent authorities could also commit to provide taxpayers with updates on the status of their MAP cases.</td>
</tr>
<tr>
<td>– Countries could commit, where possible, to face-to-face meetings between competent authorities, recognising that such meetings may allow for a more open discussion and collegial approach and may also represent a milestone that helps to advance a case by triggering bilateral focus and preparation.</td>
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Comments on option 21:
We strongly support the improvement of working relations. As indicated before we would suggest to re-evaluate the effectiveness of processes and procedures applied in processing a MAP. The current practice is focused on written position papers to start negotiations between competent authorities. These will result in fixed positions that parties are reluctant to move away from. This does not facilitate a smooth processing of individual cases. Instead we would promote that competent authorities start communications first without exchanging written position papers. This will allow a flexible and efficient joint fact finding and would facilitate mutual understanding of the facts. Experience shows that transfer pricing disputes are for a large part related to different interpretations or understandings of facts. Once there is a joint understanding of the facts negotiations may be efficient and quick. Such approach could be facilitated by training efforts and sufficient resources to accommodate the face to face meetings of competent authorities. Modern communication technologies like video conferencing may facilitate ‘face to face’ meetings when geographic distance might provide for an obstacle for physical meetings.
Comments on option 23:

We appreciate that there is no consensus on mandatory arbitration yet. Having a provision with limited scope would indeed be better than having nothing. At the same time we fear the limited scope will become the new standard, also for countries that do not have principled objections to the use of mandatory arbitration. The multiple options to a limited scope arbitration provision would not create a transparent landscape for taxpayers as they will be faced with many different provisions and even more interpretations. A common arbitration provision would be preferred. We would suggest to limit the number of alternative provisions.

In addition we would like to promote the option of including a mediation phase prior to arbitration. This might provide for a realistic improvement of the MAP process without the principled objections towards arbitration. This could be an option that might get consensus of all countries. Mediation would likely also provide for a more cost efficient way to resolve individual cases compared to arbitration.

Comments on option 26:

We would support a flexible approach that allows tailor-made application specific to individual cases. However the timeline mentioned in paragraph 5 of Article 25 is clearly intended to safeguard the interest of taxpayers. We feel any deferral should be subject to taxpayer approval. If competent authorities would be allowed to just agree on a deferral without the consent of a taxpayer this could effectively eliminate the intended impact of the arbitration procedure.
Comments on option 29:

We believe both the “independent opinion approach” and the “Final Offer approach” may be effective. When arbitration decisions would be published (in an anonymised format) we believe the “independent opinion approach” could provide more guidance beyond the incidental case as it would likely also include the reasoning of the arbitration commission.

We would like to suggest to clearly include a default approach in the treaty but with the option of the competent authorities to agree on a different approach on a case by case basis. In case the competent authorities would not agree on another approach the default option would be mandatory.

Comments on option 30:

We feel that taxpayer involvement in the arbitration should be allowed irrespective of the arbitration approach applied. We would not welcome an arbitration procedure that would limit the arbitrators to just desk top research in developing a clear understanding of a case. We would strongly support the opportunity for a taxpayer to make a personal representation to the arbitrators. It should be noticed that a taxpayer was not directly involved in the negotiating process under MAP and therefore will not have full knowledge...
of the arguments exchanged between competent authorities. Even if the taxpayer was able to contribute actively to the MAP process this does not take away the fact that it was only indirectly involved. When a third party like an arbitration panel is to decide on the case the taxpayer should have the opportunity to clarify its position directly to that panel. It might be left at the discretion of the arbitrators whether they would allow an oral representation by the taxpayer or would stick to some form of brief.

To avoid uncooperative behaviour of taxpayers in a MAP the arbitrators could be instructed to ignore relevant information to the extent it was only first presented by taxpayer in the arbitration phase and the taxpayer had reasonable options to have presented the information already in the MAP. If new information would become available to the arbitrators without any blame to the taxpayer there should not be a restriction for the arbitrators to take into account such information in favour of the taxpayer.

**OPTION 31 – Practical issues: Multiple, contingent and integrated issues**

Participating countries could establish mutually-agreed guidance for arbitrators on how to deal with multiple, contingent and integrated issues.

**Comments on option 31:**

We would welcome mutually agreed guidance for arbitrators. We would expect such guidance could also be addressed to competent authorities for addressing the same issues under MAP.

**OPTION 32 – Practical issues: Costs and administration**

In order to address the particular concerns that costs may present an obstacle to the adoption of MAP arbitration, participating countries could consider ways to reduce the costs of MAP arbitration procedures, with a view to developing guidance in the Commentary on Article 25 on these issues and approaches to address them.

**Comments on option 32:**

As indicated before we belief the instrument of mediation might be considered prior to entering into arbitration. Mediation would likely involve limited additional costs compared to arbitration and could avoid a number of cases to actually enter the arbitration phase. It is to be expected that mediation would not encounter the same objections by countries that are reluctant to agree to mandatory arbitration as it does not infringe on the sovereignty of countries.
Comments on Public Discussion Draft  
**BEPS Action 14:**
**Make Dispute Resolution Mechanisms More Effective**

January 14, 2015

Mrs. Marlies de Ruiter  
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division  
OECD/CTPA  
By email: taxtreaties@oecd.org

Madam,

We are pleased to comment on public discussion draft *BEPS Action 14: Make dispute resolution mechanisms more effective* (the draft) through the consultation taking place from December 18, 2014 to January 16, 2015.

We provide remarks on specific options of the draft below and conclude with some general comments.

This document may be posted on the OECD website. Full credit goes to Robert Robillard, RBRT Transfer Pricing.¹

1. **Specific comments on the draft**

   1.1. Options #1, #2, #13, #14, #15, #18, #19 and #34 are welcome additions. But it is difficult to envision how such soft language may result in different behaviors from tax administrations worldwide.

   1.2. With respect to options #3 and #7, there are specific situations where interdependence between the competent authority and the audit function is necessary for an orderly administration of the domestic tax regime of any given country. In other situations, independence is indeed required.²

¹ Robert Robillard, CPA, CGA, MBA, M.Sc. Economics, is the Transfer Pricing Chief Economist at RBRT Transfer Pricing (RBRT Inc.) and also Professor at Université du Québec à Montréal; 514-742-8086; robert.robillard@rbrt.ca. He is a former Competent Authority Economist and Audit Case Manager at the Canada Revenue Agency.

² In Canada, see Information Circular IC 71-17R5 *Guidance on Competent Authority Assistance Under Canada's Tax Conventions* for some examples.
1.3. Options #4 and #5 are honourable but no funding available, no resource. More to the point, the complexity of the rules keeps increasing. The number of rules is following suit. This can only result in a higher workload.

1.4. Option #6 suggests interesting changes. However, these changes go against the typical practices of tax administrations around the world.³

1.5. Option #8 is obviously a welcome suggestion. However, an APA program necessitates specialized resources. See 1.3 above. On the other hand, many APA programs worldwide are lacking in their actual coverage of various legitimate commercial transaction types. For example, most APA programs will not accept taxpayers with commercial transactions involving intangibles. This is illogical with respect to 21st century transfer pricing.⁴

1.6. Option #9 has already been made available in most industrialized countries under specific conditions.⁵

1.7. Options #10 and #11 are welcome suggestions. But they raise once again the issue of the availability of specialized resources. They also demonstrate the need for less complexity in the international taxation rules.⁶

1.8. Option #12 is a welcome suggestion. It may help increase tax certainty for taxpayers, if not in the results at least in the processes.

1.9. Options #16 and #17 make sense both from the taxpayer and the tax administration perspectives.⁷

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³ In Canada, Information Circular IC 70-6R6 Advance Income Tax Rulings and Technical Interpretations explains that both rulings and technical interpretation are softly binding at best from the Canada Revenue Agency perspective.

⁴ In Canada, see Information Circular IC94-4R International Transfer Pricing: Advance Pricing Arrangements (APAs).

⁵ In Canada, see Transfer Pricing Memorandum TPM-11 Advance Pricing Arrangement (APA) Rollback and Information Circular IC94-4R International Transfer Pricing: Advance Pricing Arrangements (APAs).

⁶ In Canada, Information Circular IC 71-17R5 Guidance on Competent Authority Assistance Under Canada’s Tax Conventions provides taxpayers with specific guidance on the MAP process.

⁷ In Canada, Information Circular IC 71-17R5 Guidance on Competent Authority Assistance Under Canada's Tax Conventions allows taxpayers these courses of action.
1.10. Options #20 and #21 are wishful thinking at best. “Principled and objective” MAP resolution is incompatible with the protection of the tax base for any given State. Each elected government is accountable to its citizens.

1.11. Options #22 to #32 on arbitration are simply incompatible with the basic principle of absolute sovereignty of the State with respect to taxation inside its territorial borders.

1.12. Option #33 relates to multilateral MAP. The inclusion of the arbitration process in the multilateral MAP is simply unrealistic. See 1.11 above. Multilateral APAs may indeed be considered, although they are difficult to design, implement and enforce.\(^8\)

2. Taxation is (and will stay) a national phenomenon

2.1. The draft allegedly puts forward 34 actions/options that will “ensure certainty and predictability for business” as advocated in paragraph 2.

2.2. In general we remain highly skeptical. After all, the OECD Model Tax Convention recently celebrated its 50 years of existence.\(^9\)

2.3. In spite of its apparent maturity, contentious issues and tax disputes have never been more significant and as numerous with respect to double taxation.

2.4. Kobrin (2002) tells us that “in the Westphalian state system the basic unit of economic governance is the national market defined, as in the sovereign state, in terms of mutually exclusive geographic jurisdiction. Economic governance – attempts to exert authority over economics and economic actors – is exercised through borders and territorial jurisdiction.”\(^{10}\)

2.5. Gyarmati (2010) reminds us that “states have the absolute monopoly of legitimate large-scale use of force and they are the sole subjects of international law. All national and international institutions – international law, international

\(^8\) Our professional experience with multilateral APAs leads us to think that satisfactory resolution of the issues for every party involved (that is, both States and taxpayers alike) is very unlikely.


organizations, armies, etc. – have been created to address and deal with the challenges posed by states.” ¹¹

2.6. These are well-known facts recognized by the OECD member countries, at least as it pertains to global formulary apportionment.

2.7. Regarding that controversial matter, it has long been recognized by the OECD member countries that it would “require substantial international coordination and consensus”¹² for any chance of a successful implementation.

2.8. Paragraphs 1.19 to 1.32 of the *OECD Transfer Pricing Guidelines* list a series of alleged “obstacles” to the implementation of a global formulary apportionment system.

2.9. It should be pointed out that these obstacles in fact apply to any efficient and effective dispute resolution mechanism such as the MAP and arbitration processes already included in Article 25 of the *OECD Model Tax Convention*.

2.10. In the preamble of the draft, we read indeed that “it is recognised that, in spite of several attempts to make dispute resolution mechanisms work better, further progress remains to be achieved, especially at a time when the number of disputes has increased.”

2.11. This increase in the number of disputes should come as no surprise. And it shall continue in the years to come.

2.12. It does not matter how many hundred pages of guidance are put forward by the OECD, IMF or the UN for that matter. As long as each State will give priority to unilateral action, no final resolution of the various challenges highlighted in the draft should be expected.

2.13. For example, on September 16, 2014, the OECD released its *Guidance on Transfer Pricing Documentation and Country-by-Country Reporting* ¹³ where it can be read in Part E that “it is essential that the new guidance in this Chapter of

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¹² *OECD Transfer Pricing Guidelines*, par. 1.22.

the Guidelines, and particularly the new country-by-country report, be implemented effectively and consistently.”

2.14. On December 15, 2014, the fifth webcast on the BEPS initiative indicated that guidance on the implementation of CbC reporting was forthcoming as early as February 2015. 14

2.15. Nonetheless, this has not prevented Australia 15, the United Kingdom 16 and France 17, to name some predominant OECD member countries, from unilaterally issuing “new transfer pricing rules”.

2.16. Our intention is not to criticize these unilateral actions. As aptly summarized by the International Monetary Fund: “Although there is no written constitution in the United Kingdom, British tax law also respects the principle of legality on the basis of the prescription of "no taxation without representation" that was introduced in the Magna Carta in 1215. This principle was reiterated in 1628 in the Petition of Rights, which states that "no man be compelled to make or yield one gift, loan, benevolence, tax or such like charge, without common consent by act of Parliament." This principle is one of the cornerstones of Western democracies, in that the consent to be given by the representatives of the taxpayers in parliament is considered to be a democratic guarantee against arbitrary taxation by the government.” 18

2.17. As such, it is not a few hundred pages (or a few thousand pages as far as the BEPS initiative seem to be concerned) of OECD guidance that will shatter an 800 hundred year-old principle which is, after all, the foundation of western democracies.

2.18. Taxation is and shall stay a national phenomenon.

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3. Conclusion

3.1. As more and more “rules” are put forward by the OECD, more and more divergent interpretations of these rules by tax administrations are to be expected.

3.2. The increased efforts to include non-members of the OECD in the international tax regime must however be applauded.\(^\text{19}\)

3.3. Nevertheless, it should be recognized that each of these countries, like any industrialized country, will also interpret the rules to the best of its knowledge in order to protect its own tax base.

3.4. As we suggested in a previous OECD public consultation\(^\text{20}\), the international tax regime has demonstrated its efficiency in eliminating double taxation pertaining to individuals all across the globe.

3.5. It may be time to revisit corporate taxation from an economic perspective.

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January 14, 2015

\(^{19}\) See the Report to G20 Development Working Group on the impact of BEPS in Low Income Countries (Part I, August 1, 2014; and Part II, September 22, 2014) issued by the OECD on that matter.

\(^{20}\) Robert Robillard, OECD Request for input (ref.: BEPS ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it), September 17, 2014.
Marlies de Ruiter  
Head, Tax Treaties  
Transfer Pricing and Financial Transactions Division  
OECD/Centre for Tax Policy and Administration  

By email: taxtreaties@oecd.org  

16 January 2015  

Dear Ms de Ruiter  

SABMiller plc response to the Action 14: OECD discussion paper on make dispute resolution mechanisms more effective  

The SABMiller Group is one of the world’s leading brewers, involved in the manufacture, distribution and sale of beverages across six continents. Listed on the London Stock Exchange it is ranked as one of the top 20 companies on the FTSE. It has some 70,000 employees, with over 200 branded beverages sold in over 75 countries, including a number of market-leading local brands. As a large multinational group transfer pricing is clearly an important area for the Group.  

Introduction  

We believe that it is vitally important for this action in particular, together with the OECD’s work on toolkits and capability development, to be successful in order to manage the impact of the other BEPS proposals. We therefore appreciate the OECD’s detailed consideration and assessment of all aspects of the existing mutual agreement procedure (MAP).  

We agree with the proposal’s ambition for practical solutions, and this is reflected in our comments. Our overarching view is that, whatever the final outcome, it has to actually happen. With respect to the options presented, we would agree with all of them, but as we consider it unlikely that all thirty four options will be implemented, our response has selected the areas, based on our experience and knowledge, which we believe should be prioritised. We hope that this perspective will be helpful in the OECD’s continued consideration.
**Improve availability of credible APA programmes to reduce tax controversy**

**H: Lack of advance pricing agreement (‘APA’) programmes**

The current global availability of APA programmes, and efficiency thereof, is variable. Since we believe a consequence of BEPS will be increased uncertainty for taxpayers and increased challenges to positions. By improving APA programmes, taxpayers can be proactive with tax authorities and thereby help minimise future disputes during audits and beyond. This will increase the efficiency of outcomes for all parties.

A specific point we make in relation to assisting tax authorities with implementation of an effective APA programme is regarding the cost of such activity and resource. We note that in some jurisdictions a fee is payable by the taxpayer. Overall we believe that this is reasonable because it is in the interest of the taxpayer to remove uncertainty, and it is also a contribution to the resource challenge tax authorities face (further comments below).

Finally, we understand that India responded to international comments on its APA programme and has taken steps to substantially change their approach to re-engage with taxpayers and foreign investors. This shows that change can be achieved, not only in APA programmes, but therefore surely also in MAPs.

**Overall use of MAP**

**G. Audit settlements as an obstacle to MAP access**

**S. Lack of co-operation, transparency or good competent authority working relationships**

We agree that currently taxpayers are likely to accept a settlement solution to an audit because it provides closures and it is generally known that any subsequent MAP and competent authority activity, is lengthy without any guarantee of an acceptable outcome. Business cannot operate with indefinite uncertainty.

The three pronged approach, which is explained in the proposals, is therefore vital. In the future tax environment, a good competent authority body who actively involves themselves in MAP with a fair and reasonable approach will be attractive to businesses and, we would suggest, is a worthwhile investment for governments.

**A mandatory MAP process**

**A. Absence of an obligation to resolve MAP cases presented under Article 25(1)**

**B. Absence of paragraph 2 of Article 9 in some treaties**

**F. Insufficient use of paragraph 3 of Article 25**

The future of international tax is more than ever before, going to be a two-way and/or a multilateral process and relationship, as tax-payers comply with the increasing requirements from the BEPS project. It is therefore wholly reasonable to expect that, where a government decides to have OECD membership and expects its taxpayers to follow OECD principles, the government should also be mandatorily committed to implementing proactively its competent authority and
MAP activity, not only in its treaties, but also its ways of working in dispute resolution (see further comments below about quality of process).

In addition to responding to increased compliance, we also fully support a mandatory MAP resolution requirement because we are aware of situations, where, due to the non-mandatory requirement to resolve MAP, there is no direct motivation for competent authorities to agree cases, extending uncertainty and cost for taxpayers.

**Resource: sufficient resource and quality of resource**

C. Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes
D. Lack of resources of competent authority
S. Lack of co-operation, transparency or good competent authority working relationships

Once there is a mandatory MAP process, then we acknowledge lack of resource is a current impediment to effective dispute resolution. We are aware of tax authorities who have made tax treaty commitments and have then subsequently commented that they are not able to meet those requirements.

As stated above, the future of international tax will be increasingly a two-way process and for authorities to expect taxpayers to apply the OECD principles then, in-turn, taxpayers should be able to expect a capable and experienced competent authority organisation. As we have said above, in our view, we believe this would be a positive future quality mark for tax authorities, and therefore is worth investing in.

The resource also clearly needs to be independent of other tax authority audit functions as this will impede the quality of the competent authority body.

**Quality of process**

K. Excessive or unduly onerous documentation requirements
R. Lack of a principled approach to the resolution of MAP cases
T. Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases

Having established a mandatory MAP body with appropriate capability, then it needs to work in practice. This means the process and ways of working need to be of sufficient quality. In addition to the OECD’s comments, we make the following suggestions for consideration to practically improve the quality of the process:

i) **Global standard MAP process.** The MAP process should be standardised globally for taxpayers and tax authorities in respect of the following:

(1) submission of data and content,
(2) exchange of information between parties
(3) agreed stage timelines,
(4) parties to be involved, and
(5) arbitration resolution terms.

This would enable greater consistency of resource, and potentially even resource sharing between tax authorities, especially in areas of expertise.

ii) **Time bound MAP dispute resolution.** For us it is clear that as well as standardising the process, the process should follow a clear timetable and for all cases to be resolved within, say, two years. This would be efficient for all parties but will require a standard process, and we believe it will increase the role independent arbitration will play (next point).

iii) **Arbitration.** For us this stands out as a needed and obvious requirement. This is because it will bring in external, independent and professional individuals who will hold both taxpayers and tax authorities to account. We recommend that arbitration includes individuals with experience of multinational operations.

For arbitration to be efficient, standardised procedures, such as that outlined above, will be needed. We would recommend that tax authorities and the OECD begin now in preparing this country, or above-country resource, with the ambition to create an effective, independent body of skilled authorised professionals.

iv) **Treaty Abuse claims.** Following the Action 10 consultation document, we anticipate a significant increase in disputes on this area alone. We would suggest authorities and/or the OECD create specialist teams who can provide responses more efficiently to significant numbers of potential future applications.

v) **MAP payment.** The role of a fee in the APA process was discussed above. Therefore we have considered whether a fee plays a role in future MAP dispute resolution. A taxpayer could contribute towards the cost of MAP; in particular this would help to alleviate the resource pressure described above.

However, contrary to a proactive APA programme and payment, MAP will be a controversy situation and the taxpayer could view a tax authority as motivated to enter into MAP for payment of the fee. We do not believe we are able to understand the full facts of such a proposal but believe there is something to consider here; maybe the costs of arbitration should be shared between the taxpayer and tax authority?

vi) **Understanding of today’s multinational.** Finally, we believe that a common challenge in today’s tax audits, and MAP, is that tax authorities do not have experience of multinational models, and that model will continue to keep on changing because of globalisation. BEPS will most likely lead to an increase in disputes and frequently it will include appreciation and explanation of global operations. In turn, tax payers need to present their models as clearly and as rationally as possible.
Developing this capability could be supported by companies assisting in preparing commercial toolkits with the OECD, which is part of the OECD’s current activity (per 15 December 2014 OECD webcast).

We trust that our comments are useful to the OECD’s further consideration. If you would like to contact us directly in relation to any of the above issues we would be more than happy to discuss in more detail.

Yours sincerely,

Graham Holford

Director: Group Tax, SABMiller plc
Dear Sirs,

Thank you for the opportunity to comment on Action 14 of the OECD’s Action Plan on Base Erosion and Profit Shifting ("BEPS") which presents obstacles to the resolution of treaty related disputes through mutual agreement procedure ("MAP") mechanisms and provides responsive measures in order to address these obstacles.

As proposed by the OECD, in the following, we provide our comments on the discussion draft according to our worldwide experience and, therefore, present topics and suggestions from a practical perspective.

We agree to have our comments posted on the OECD website.

Sincerely yours,

Siemens Aktiengesellschaft

Dr. Christian Kaeser

Dr. Sven Bremer

Georg Geberth
Enclosure

1) Introduction

We applaud the OECD's effort to improve dispute resolution mechanisms. At the same time it is apparent to us, that the BEPS programme will lead by itself to further numerous cases, in which the taxpayers will have to seek protection against double taxation by using such resolution procedures. This is due to the fact, that many proposals currently under discussion on the other BEPS action points are based on terms and concepts, which are untested and / or will leave more room for interpretation and discretion by the local tax authorities. By way of examples we would refer to the widened definition of permanent establishments or the concept of value creation in the area of transfer pricing. Another current example is the proposal on the treatment of interest and other financial payments in Action 4. Especially the group-wide allocation approach would lead to numerous mismatches due to differences in the country's domestic tax system. Even though the rules might be implemented in a consistent way in each and every country, they would nevertheless be incompatible due to national tax law and thus create double taxation. As mentioned in the discussion draft, it can therefore be anticipated that treaty-based disputes will increase as a consequence of the work on BEPS.

In our view, progress on Action point 14 and a clear commitment of every member state to apply an effective dispute resolution process should be a precondition for the implementation of any other measure of the BEPS programme by that state. If the OECD would fail to establish such a mechanism, this should be reflected in the BEPS process by avoiding such tax rules that foreseeably lead to more double taxation.

While the commitment to a solid dispute resolution mechanism must be a prerequisite for further implementation of the BEPS programme it is also obvious that through the BEPS Process more and more anti abuse rules will penetrate into national law. We therefore welcome the option to "clarify the availability of MAP access where an anti-abuse provision is applied". If the resident state preliminarily assesses to perceive abuse this should not lead to a refusal of MAP. The taxpayer should be given the possibility to involve the other state through MAP in order to clarify whether the assessment of the resident state is in accordance with the provisions of the Convention. Avoiding double taxation can effectively succeed only if both states come to an agreement on whether and how the respective anti abuse rule is to be applied.

Given this importance of the issue at hand, we are surprised by the OECD approach to address 34 potential technical revisions, and had hoped for a substantially more ambitious attempt to improve the existing framework for dispute resolutions in general. Our following comments to the discussion draft address practical issues faced by an MNE regarding MAP topics.

2) Comments

In order to improve the resolution of treaty-related disputes through MAP, the discussion draft presents a three-pronged approach consisting of: (i) political commitments to eliminate taxation not in accordance with the OECD Model Convention, (ii) new measures to improve access to MAP and improved procedures and (iii) the establishment of a monitoring mechanism to ensure the proper implementation of the political commitment.

In this regard, forming the basis of this discussion draft, the OECD adopts four principles that should guide the political commitment with respect to implementing measures by ensuring that:

- treaty obligations related to the MAP are fully implemented in good faith;
- administrative processes promote the prevention and resolution of treaty-related disputes;
- taxpayers can access the MAP when eligible; and
- cases are resolved once they are in the MAP.

Based on our experience we welcome the general commitment by the OECD to provide easy dispute resolution mechanisms to avoid double taxation and fully agree with general key commitments as listed above. Please find our observations and comments regarding details to each topic below:
1. Treaty obligations related to the MAP are fully implemented in good faith

We welcome the suggestions of the discussion draft presented in options 1 and 2, as they establish an explicit statement by the OECD towards tax authorities to try reaching a solution in accordance with applicable international principles.

We appreciate option 2 which aims at ensuring that Article 9 paragraph 2 is included in new treaties. However, from our point of view it should be going without saying that countries grant correlative relief in case adjustments under Article 9 are made in other countries and fulfill the arm’s length principle. Therefore, we share the view of the OECD, that the absence of Article 9 paragraph 2 in the respective treaty does not mean that corresponding adjustments are not allowed or access to MAPs might be blocked. Argumentations utilizing these facts are to be considered formalistic and not fair in terms of an implementation of good faith.

The proposal as provided in the discussion draft is – from our perspective – not strong enough to emphasize the basic principle that economic double taxation should be avoided by double taxation treaties. Given the importance of transfer pricing compared to other double taxation issues and the attention that it received in other projects of the BEPS undertaking, we recommend a strong commitment by the OECD to avoid misunderstandings.

2. Administrative processes promote the prevention and resolution of treaty-related disputes

The discussion draft determines best practices which should ensure that there is a worldwide knowledge of the impact of audit functions related to international topics. This commitment is highly welcomed as it is a significant effort by improving processes throughout tax controversies and dispute resolutions.

In options 3 to 5 the discussion draft provides recommendations for the administrative setup. Although it seems self-explanatory for any tax authority seriously interested in avoiding double taxation and, thus, providing a certain degree of certainty in cross-border tax issues to provide the respective competent authority with sufficient resources, including a working organisational setup; we appreciate the emphasis by the working group with regards to that point. From our practical experience, sometimes the level of resources allocated to competent authorities does not seem to correspond with the workload and, thus, impedes efficient dispute resolution within the given time frames. In conjunction with the setting of reasonable incentives, e.g. budget-based incentives for competent authorities impeding the initiation of arbitration procedures etc., this is something that should be avoided.

In terms of organisation we would like to comment on option 3. The working group suggests the competent authority to be independent from audit and examination functions. We fully endorse this option. Competent authority should be given a mandate to decide on their own responsibility and they should not be bound by the local audit function. At the same time we acknowledge and have made the experience that when the competent authority is involving and closely collaborating with the audit function this seems to speed up and smoothen the process.

Mainly, this is due to the knowledge of facts and circumstances of the case from previous in-depth scrutiny by the audit function. We have made similar experiences both in MAP cases and our joint audits where – although performed under a different regulatory framework – results compared to a MAP were achieved. There, the issues were impartially discussed directly between the audit functions attached to the case in both countries.

From our point of view it is especially important to generally create a willingness to find feasible solutions regarding double taxation cases throughout the various levels of the tax administrations.

Option 7 aims at ensuring that audit settlements do not impede access to MAPs. Although, considering the text and idea of the treaty it should be self-explanatory. Nonetheless, such settlements seem to be common practice and an often used tool by tax authorities. From practical considerations, such settlements with the option to waive the right to a MAP – mostly informally – could be a matter of fairness for both parties. Therefore, the OECD should make clear that formalized settlement procedures which are based on waiving the right to a MAP should be avoided.

Another option (option 9) proposes that MAP and APA results can also be rolled back and forward. We appreciate that recommendation. It should go without saying that such solutions, mostly methodologies, which were negotiated during bilateral negotiations and which also represent a feasible solution for other years, should be applied for other tax years as well. However, we are convinced that such a recommendation, due to the individual nature of cases discussed, cannot be fixed in a formal way. Nonetheless, we think that the OECD is on the right track to encourage practical solutions.
Regarding option 8, the invitation to implement APA programmes, we also welcome this initiative. From our perspective however, as APAs can only cover exceptional cases and due to the complexity of cases involved, countries should concentrate on setting up sufficient processes for MAPs because more cases are potentially covered by MAPs than APAs. More so, because in our opinion and based upon experience APAs are usually not suitable to provide "advanced" certainty but have the character of more or less contemporaneous MAPs, i.e. the years in question under an APA are likely to be settled when they are already (partially) passed.

Lastly, it would be helpful if the OECD could establish a clear statement encouraging countries to permit filing of MAP requests and further submissions in languages commonly used in international trade and business, where it will not compromise the usefulness of the application and the administrative process between the involved countries. Following Action 13 D.6 a translation should only be requested in specific circumstances.

3. Taxpayers can access the MAP when eligible

Several other options are provided by the OECD under the headline that taxpayers can access a MAP when eligible. Again, this is self-explanatory. However, we appreciate the OECD’s effort to emphasise the point that playing by the rules will increase certainty both for taxpayers as well as tax authorities.

In options 10 to 14 and 18, the working group focuses on process-related issues, in particular to set up clear and binding rules regarding process, timing and obstacles impeding MAP access. Such processes should give taxpayers certainty and prevent tax authorities from arbitrarily using abuse rules etc. as a measure to deny MAPs. A strong commitment to allow MAP access even in case of disagreement about the usage of tax-abusive structures is very appreciated. To achieve certainty about the available solutions, denial of MAP access should be the absolute exception. Preconditions for such a case should be clearly specified. In case of doubt, it should be made clear that both competent authorities should decide.

In addition, a clear framework with regard to timing is appreciated in order to provide process certainty. In principle, the timing issues for MAP cases should be independent from timing issues in local law.

Finally, some additional remark regarding option 19 – clarification for cases with self-initiated foreign adjustments and MAPs: From our point of view it should be confirmed that any self-initiated adjustment by taxpayers should be treated equally to any other adjustment initiated by tax authorities.

4. Cases are resolved once they are in the MAP

In the last main point, the working group concentrates on the resolution of MAP cases and whether alternatives to binding arbitration are available. There are certainly other alternatives available but arbitration remains an effective way incentivizing tax authorities to conclude MAP cases in a reasonable way. In our opinion, the arbitration procedure and/or the way the arbitration committee is set up is very important. At the same time – from a taxpayer’s point of view – it seems more important that countries actually are willing to find a feasible solution within a MAP and are also willing to actually initiate an arbitration procedure. If tax authorities do not follow the already existing rules, there seems to be hardly any possibility for taxpayers to enforce the avoidance of double taxation.

3) Conclusion

As a summary, we appreciate the proposals made by the discussion draft. All of the suggested practical measures could improve the access of taxpayers to a MAP and safeguard protection against double taxation, if these measures were implemented in a globally consistent way. However, we also believe that it depends largely on the willingness of the participating tax authorities to use MAPs as an effective way to resolve double taxation. Despite many binding bilateral treaties, which offer such solutions, we still see a lot of room for improvement between countries.

According to all considerations presented above, it can be concluded that the working group observed as well that there are still some important topics which deserve more attention from the OECD in order to improve dispute resolution mechanisms. Unilateral measures taken by different countries lead to tax disputes and double taxation risks. Therefore, today’s reality calls for specific measures in order to ensure MAP’s effectiveness and efficiency.
Especially in the light of many new rules introduced in the BEPS project as well as the increased transparency as proposed by Action Item 13, we expect the current trend towards MAPs to continue. Therefore, we would appreciate a strong commitment (starting with the wording by replacing many “coulds” by “shoulds”) by the OECD and the member states towards MAP as an efficient and quick way to solve double taxation disputes.

However, our major concern is that some countries, whether OECD members or not, will implement only results of the BEPS project which seem to be in their favour or interpret or adjust them as they see fit, but will be very reluctant to implement effective dispute resolution mechanisms.

With regard to the present comments and suggestions, we would like to thank you again for the opportunity to share our issues concerning the OECD’s Action Plan on BEPS.

In the meantime, if you have any questions about the submission, please contact:

Dr. Sven Bremer (Global Head of Group Transfer Pricing) at +49 89 636 30242 (or mailto: sven.bremer@siemens.com)
Milan, January 16, 2015

To the attention of Mrs. Marlies de Ruiter
Head of Tax Treaties
Organization for Economic Cooperation and Development
2 rue André-Pascal
75775, Paris
Cedex 16
France

Sent by mail: Taxtreaties@oecd.org

Re: INVITATION TO COMMENT ON BEPS ACTION 14: MAKE DISPUTE RESOLUTION MECHANISM MORE EFFECTIVE

Dear Mrs. De Ruiter

I appreciate the significant efforts made so far by OECD Taxation Committees on the BEPS project and I thank you for the opportunity to provide my input and comments.

No client has engaged my tax practice to provide comments or recommendations to the draft document on this subject.

All suggestions and proposals outlined here below are based on the field experience made during my professional activity on MAP and APA procedures and are addressed to permit MAP to work better and be more effective.
OPTION 3

The competent team in charge for the APA procedures shall be the same one in charge for the MAP procedures. In some Countries, different teams are involved and this may cause the adoption of not justified different solutions in presence, for the same taxpayers, of a MAP procedure in progress on a specific period of past years and an APA in progress for the subsequent period of years.

In addition, the competent team in charge to attend the meetings shall have the full authority to discuss, solve and sign the procedure. Any segregation of the roles do not help MAP and APA procedures to work better and might cause significant delays.

Finally, the result of a MAP should also be based on grounded technical principles that might be applied consistently also to other similar and/or mirrored situations.

In no circumstance, it is acceptable for a MNE group to be informed only of the taxable income agreed by the two competent authorities and the subsequent effects in terms of income taxes, interests payable and penalties as this would not solve the taxpayer problem for the subsequent tax periods out of the MAP procedure and still open to a tax assessment.

OPTION 4 – OPTION 32

International procedures are long-lasting, expensive and request the tax administration to involve skilled independent human resources.

Even if the elimination of the double taxation should be considered a taxpayer’s right, the introduction of a submission fee payable by the MNE groups at the MAP request filing will permit the various tax administrations to grant to the independent team the necessary funding and skilled human resources. In addition, as in case of any service, the moral obligation for the competent authority to conclude the procedure should be stronger.

From the MNE group standpoint, the payment of a flat small fee would be not an obstacle provided the advantage deriving from the elimination of double taxation. This solution can help to absorb the costs for the arbitration procedure, discussed at Option 32 and it would be also a small economic incentive for each competent authority to timely conclude the dispute, without the activation of an expensive arbitration phase.

OPTION 12

Paragraph 29 – If taxpayers’ objection appears to be justified, the competent authority may be able to solve the case… in practice this is not a common solution even in circumstances where the assessment tax report prepared by the local tax office contains several mistakes.
OECD should sponsor and stress the need to have more frequently unilateral solutions carried out by the independent competent authority of the Country in which the tax assessment has been made, in order to limit the number of MAP’s to the cases really difficult to be solved.

OPTION 27

In order to grant an higher level of independence, it would be helpful to exclude or at least limit the appointment of tax administration members as arbitrators.

OPTION 29

The “independent opinion” approach is preferable to the “final offer” approach as it should grant a comprehensive solution of the dispute, grounded on technical arguments, and better safeguards MNE group policies.

Let’s assume, for example, that a group has defined a TP policy applicable to all group entities and this policy is fully compliant with the arms’ length principle. Tax authorities of Country A make a tax assessment and deny the policy. Taxpayer of Country A activate the MAP and, at the level of arbitration, the dispute is solved based on a “final offer” approach, which consist in a partial or total deviation from the group policy. Tax administration of Country A might expect local taxpayer to apply this solution also for subsequent tax periods and this would represent an abnormal deviation from group standards and the arms’ length principle.

OPTION 30

The active involvement of the taxpayer is strongly welcome in order to permit the arbitrators to have a clearer picture of complex disputes. The involvement of the taxpayer is also welcome at an earlier stage when the two tax administrations start the analysis.

OPTION 34

Interests and penalties must be suspended until the conclusion of the dispute to minimize the financial burden of the taxpayers involved. Also the assessed higher amount of income taxes should be suspended anytime there no collection risk, such as in case the two involved Countries have signed the OECD-Council of Europe Convention on Mutual Administrative Assistance in Tax Matters.

Penalties and interests should not be a matter of negotiation to avoid possible solutions of the disputes that can not be justified from a technical standpoint. Tax administration of the Country in which income taxes have been paid incorrectly shall refund the related interests to the Tax Administration of the other Country.
I hope you might find these brief comments useful. Should you have any question on the above comments, please feel free to contact me (email: paolo.tognolo@tognolo.com - phone call +39 02 86 09 88).

Yours sincerely,

Paolo Tognolo
Dear Marlies de Ruiter,

RE: Taxand responds to the OECD invitation for public comments on the OECD discussion draft on Action 14 (make dispute resolution mechanisms more effective) of the BEPS Action Plan

Further to the publication of the OECD’s invitation for public comments on the OECD discussion draft on Action 14 (make dispute resolution mechanisms more effective) of the BEPS Action Plan, Taxand is honored to provide written comments based on the practical experience we have as tax advisors.

Our response deals with practical suggestions for improving the resolution of treaty-based tax disputes under Mutual Agreement Procedures (MAP).

Taxand can confirm that we have no objections with posting the comments on the OECD website and that comments represent Taxand as a global organisation.

We appreciate this opportunity to provide comments to the OECD Committee of Fiscal Affairs and would be pleased to discuss this further and to participate in any further discussion on these matters.

More information about Taxand is provided below. Taxand is wholly committed to supporting the OECD Committee of Fiscal Affairs and we look forward to contributing to further debate.

If you wish to discuss any of the points raised in this letter, please do not hesitate to get in touch with us directly via the contact details below.

Yours faithfully,

Taxand

CONTACT DETAILS

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ABOUT TAXAND

Taxand provides high quality, integrated tax advice worldwide. Our tax professionals, more than 400 tax partners and over 2,000 tax advisors in nearly 50 countries - grasp both the fine points of tax and the broader strategic implications, helping you mitigate risk, manage your tax burden and drive the performance of your business.

We're passionate about tax. We collaborate and share knowledge, capitalising on our expertise to provide you with high quality, tailored advice that helps relieve the pressures associated with making complex tax decisions.

We're also independent—ensuring that you adhere both to best practice and to tax law and that we remain free from time-consuming audit-based conflict checks. This enables us to deliver practical advice, responsively.

Taxand has achieved worldwide market recognition. Taxand ranked in the top tier in Chambers Global Guide 2014 global network rankings and in the International Tax Review’s (ITR) World Tax 2015, 41 Taxand locations were commended and a further 26 locations listed in ITR’s World Transfer Pricing Guide 2015. 31 countries were voted top in the ITR Transaction Tax Survey 2014 and 29 in ITR Tax Planning Survey 2013. Taxand has received 65 national awards and 14 regional awards in the ITR European, Americas and Asia Tax Awards since 2009. These include Latin America Tax Disputes Firm of the Year, European TP Firm of the Year, European Indirect Tax Firm of the Year, Asia Transfer Pricing Firm of the Year, and Asia Tax Policy Firm of the Year. Full details of awards can be viewed at www.taxand.com/about-us

www.taxand.com
Taxand would like to thank the OECD for the opportunity to respectfully provide the following comments to the discussion draft on BEPS Action 14, regarding work to improve the effectiveness of resolving treaty-based disputes under MAP. Our comments below intend to be practical and experience-based, as well as constructive, in our responsibility as global tax advisors to contributing to a more comprehensive debate on the important issues raised.

The work done in the area of improving the effectiveness of resolving disputes under MAP is of great importance. As the economy continues its rapid globalisation and tax authorities around the world take action to counter BEPS, the number of treaty-based tax disputes can be expected to rise. Taxand, therefore, agrees it is critical to ensure proper access to MAP and the efficient handling of cases that are brought forward.

Experience has shown that when executed well, MAP can be a very effective tool to obtaining greater certainty in the otherwise uncertain area of international tax, in particular with respect to transfer pricing. Whether in the context of a bilateral, or multilateral, Advance Pricing Agreement (APA), or a case that originates through a tax audit adjustment, a MAP that is supported by many of the key principles noted in the discussion draft generally leads to a more satisfying experience for taxpayer and tax authority alike.

Some of these experiences include:

- **Cooperation** between the parties, for instance through joint meetings that involve the respective tax authorities and the taxpayer together. In addition to promoting the overall relationship through face-to-face meetings, this allows both tax authorities to receive the same information from the taxpayer on a contemporaneous basis, thereby aiding to establish a common understanding of the underlying facts and circumstances for all parties. Equal access to information, both factual and quantitative, is key to successful resolution in MAP. Appropriate burden should be placed on the taxpayer to facilitate the timely provision of information needed by (which may be distinct from ‘requested by’) the tax authorities to obtain a final resolution.

- **Accelerated competent authority procedures** that allow for inclusion of tax years into MAP that may not yet be settled at the examination level, but for which the same or substantially the same issue is already subject to MAP for earlier years. In general, resolving a greater number of tax periods through a single MAP helps to alleviate the case backlog and increases the overall efficiency of the process.

- ** Expedited procedures** for small or non-complex cases. A streamlined process for requesting MAP in certain cases (eg small taxpayers or routine transactions which do not involve intangibles) can aid taxpayers through enhanced access to this alternative dispute resolution forum, and assist all parties through a more efficient allocation of resources. Small taxpayers can be disproportionately harmed by double taxation cases, as the incidence of double taxation may have a greater impact on their
financial position and yet the cost or general access may be prohibitive to obtaining resolution through a full-scale MAP

- **Early notification** to the competent authority of a potential need to invoke assistance under the treaty, even if the examination giving rise to potential double taxation is not yet completed. This is typically a taxpayer initiated step that enables the taxpayer to preserve their rights to seek relief under the relevant tax treaty, but a step that is only made available if the respective jurisdiction’s rules allow for such an advance notice and through general access to the competent authority. This helps to remove potential procedural obstacles related to timing of requests within statutory time restrictions, and further helps to identify the future case load to consider resource requirements

- **Arbitration**: early experience has shown that the prospect of arbitration, in particular ‘baseball arbitration’ or ‘final offer’, can accelerate the momentum to bring the negotiating positions of the respective competent authorities closer together. Thereby resulting in quicker resolution of MAP cases

The discussion draft on BEPS Action 14 is organised along 4 main principles and the remaining commentary will follow suit.

1. **Ensuring that treaty obligations related to the mutual agreement procedure are fully implemented in good faith**

   - Implementation of the provisions in Article 25 of the OECD Model Treaty and subsequent full engagement of the competent authorities are fundamental to effective resolution of double-tax cases. Taxand supports the inclusion of necessary language to remove hurdles that competent authorities may perceive to exist in the execution of their obligations

2. **Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes**

   - Taxand applauds the step to coordinate Action 14 with the activities of the Forum on Tax Administration’s MAP Forum. Independence of the competent authority is important towards fair, principled, consistent and efficient resolution of double taxation cases
   - Experience has shown that the level of independence in the competent authority does vary by jurisdiction. A commitment by all countries to exercise independence would be a welcome component to the final guidance
   - Taxand agrees with the need to address situations in which tax examiners couple an audit settlement with restrictions on access to MAP. Such circumstances lead to uncertainty in the overall system of tax administration, place taxpayers in a difficult position vis-à-vis their ongoing and future tax audits, and result in real economic cost
3. Ensuring that taxpayers can access the mutual agreement procedure when eligible

- Taxand agrees with the effort that participating countries commit to providing clear, published guidance on how taxpayers can request MAP and that excessive documentation requirements are not placed upon taxpayers.
- As requested in paragraph 27 of the discussion draft, practical experience has shown that the guidance provided by the US Internal Revenue Service (IRS) through the relevant revenue procedure for seeking assistance of the competent authority may serve as a positive example in this regard. This guidance is easily obtained through the IRS website and the information requirements are clearly enumerated. Whilst thorough in its scope, the requirements are also not overly burdensome and can be completed with a modest level of effort. Although taxpayers may be required to submit additional information in the course of the MAP proceeding, the initial requirements to request acceptance into the MAP are quite reasonable and easily prepared.
- Taxand shares the view that situations involving self-initiated adjustments may arise in greater number in light of other BEPS initiatives. As the vast majority of taxpayers are merely ‘trying to get it right’, and should not be burdened with double taxation as a result of seeking to comply with a complex global tax system, additional language to the respective Commentary section of the Model Treaty would be helpful to take consideration of these circumstances.

4. Ensuring that cases are resolved once they are in the mutual agreement procedure

- As expressed earlier in these comments, we view that broad cooperation between all parties is required for successful resolution of MAP cases.
- Steps should be taken to encourage (mandate) timely resolution of accepted cases. Whether this is through arbitration or enhanced commitment to cooperation and the setting of enforced deadlines at the outset of a MAP case, timely and efficient resolution of these disputes brings greater certainty to the international tax system and gives full effect to the provisions of Article 25.

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We appreciate this opportunity to provide comments to the OECD and would be pleased to discuss this further and to participate in any further discussion on these matters.

More information on how to contact Taxand is provided above. Taxand is wholly committed to supporting the OECD and we look forward to contributing to further debate.

Yours faithfully,
Taxand
This response is the sole view of Taxand advisors and does not represent the opinions of Taxand clients or contacts. As provided in Treasury Department Circular 230, this response is not intended or written by any Taxand firms to be used, and cannot be used, by a client or any other person or entity for the purpose of avoiding tax penalties that may be imposed on any taxpayer. The information contained herein is of a general nature, is up to date as of January 2015 and is subject to change. Readers are reminded that they should not consider this response to be a recommendation to undertake any tax position, nor consider the information contained therein to be complete. Before any item or treatment is reported, or excluded from reporting on tax returns, financial statements or any other document, for any reason, readers should thoroughly evaluate their specific facts and circumstances, and obtain the advice and assistance of qualified tax advisors. Even though all reasonable care has been taken in the preparation of this response, Taxand and all of its firms do not accept any liability for any errors that it may contain or lack of update before being submitted, whether caused by negligence or otherwise, or for any losses, however caused, or sustained by any person. Taxand is a global organisation of tax advisory firms. Each firm in each country is a separate and independent legal entity responsible for delivering client services.
January 16, 2015

Marlies de Ruiter,
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division,
Organisation for Economic Co-operation and Development
Centre for Tax Policy and Administration
2 Rue André Pascal
75775 Paris Cedex 16
France

Via e-mail to taxtreaties@oecd.org

Dear Ms. De Ruiter

TD appreciates the opportunity to submit comments on the Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective issued by the OECD on December 18, 2014 (the “Discussion Draft”).

**Key Recommendation: OECD to establish and host the Arbitration Tribunal**

Before turning to the specific issues with respect to this Discussion Draft, we want to express grave concern about the implications of the combined BEPS proposals, which would increase pressure on and strain resources of the mutual agreement procedure (MAP), for cross-border trade and investment and the global economy. Changes of the type being contemplated under the rubric of the BEPS project, and the uncertainty that would be created by abandoning clear standards and principles in favor of vague and subjective concepts, would have a profound adverse effect in terms of stifling global business. We of course recognize the need for governments to raise revenue to support essential government functions. However, they must do so efficiently and without having a chilling effect on essential commerce.

We urge the OECD to ensure that the work on all the BEPS Actions includes full consideration of the microeconomic and macroeconomic implications of any changes. The OECD has the world-class resources needed to contribute to the global debate by educating participants about the
economic, policy, and revenue dimensions of the issues to be addressed and the solutions to be developed. This should go beyond the corporate income tax system and include the whole range of tax approaches available to governments.

The OECD and the member countries must not lose sight of the fact that the role of business in the global economy is not to provide revenue for governments. In imposing tax on business to provide government revenue, governments have both a compelling interest and an obligation to minimize the impact on business. The fact that only some businesses are subject to entity level taxes and others are not heightens the government’s obligation to minimize the impact on those businesses that are subject to tax. Disputes regarding tax matters have a major adverse impact on business with no benefit to the government. It would be unconscionable for governments to fail to take the necessary steps to eliminate and resolve tax disputes, particularly disputes that involve double taxation of business income.

As we noted in our comments on the discussion draft on Action 6, tax treaties play an essential role in the global economy by reducing or eliminating the risk of double taxation which otherwise would be a substantial barrier to cross-border trade and investment. Clarity and certainty in the application of tax treaties is vital to global companies both in understanding the tax consequences of their cross-border activities and in understanding and satisfying their global tax compliance obligations. The resolution of disputes between countries so that taxpayers are not subject to tax in two jurisdictions on the same item of income is an equally vital role of tax treaties. Just as uncertainty about the availability of treaty benefits can be tantamount to a denial of benefits, uncertainty about the resolution of disputes also is tantamount to the denial of benefits. Unresolved disputes mean unabated double taxation and the resulting barrier to cross-border trade and investment.

For these reasons, the work on Action 14 is crucial. We read with great disappointment the statement in the Discussion Draft that “there is no consensus on moving towards universal mandatory binding MAP arbitration.” That is simply unacceptable. If there is not yet consensus on this matter, the work of the OECD in this area is not yet finished. The OECD and countries must devote whatever time and resources are necessary to address countries’ concerns and doubts and reach agreement on an arbitration provision. Neither the artificial (and aggressive) timetable for completion of the BEPS project nor the demands of the multiple other work streams that make up the BEPS project should be used as justification for failure to pursue this core element of the project to the required resolution. This is as important, or more important, than any of the other work of the OECD Committee on Fiscal Affairs. The work on other elements of the BEPS project will inevitably lead to more numerous, more complex and more substantial disputes between countries. That fact reinforces the imperative around ensuring
that this element of the BEPS project succeeds in achieving a broad commitment to mandatory binding arbitration as an integral part of the MAP.

To this end, the OECD should provide the forum for full discussion of all the issues with respect to arbitration. There should be a focus on how the mechanics of arbitration can be structured to alleviate concerns about any encroachment on sovereignty. Countries that have sovereignty concerns about an arbitration approach should articulate the specifics of those concerns. Some countries that today have embraced arbitration as an element in MAP once had similar concerns about arbitration that were addressed through the design of the arbitration provision and these countries should explain the evolution of their thinking.

Looking ahead, we believe that the OECD could play a valuable global role with respect to the administration of MAP arbitration. We encourage exploration of the potential for the OECD to establish and host an arbitration tribunal. This would build on the OECD’s long history of leadership in this area. Moreover, in such a role, the OECD would gain greater insight into the difficulties and hurdles associated with the MAP which would facilitate targeted and expeditious revision of OECD guidance and the MEMAP (Manual on Effective Mutual Agreement Procedures).

We believe that the central focus of the OECD’s work on dispute resolution should be on reaching consensus on universal mandatory binding arbitration. Of course, arbitration is just one element of the MAP process and other enhancements, including many of the options laid out in the Discussion Draft, would contribute further to increasing the effectiveness of dispute resolution. We would note three areas in particular where dispute resolution could be further enhanced:

- Expanding on the Option 1 proposal for commentary language regarding countries’ obligations with respect to resolution of cases, the text of the MAP article itself should provide that countries shall resolve cases by mutual agreement, rather than the current wording that provides only that countries “shall endeavor” to resolve cases.

- With respect to all of the Options in the Discussion Draft that suggest that countries “could” make the recommended changes, a substitution of the word “should” would better communicate the OECD’s commitment to such recommendations and would be more consistent with the phrasing used in the work on other BEPS Actions.
As noted in the Discussion Draft, a monitoring mechanism should be put in place so that progress can be evaluated and systemic problems can be identified and addressed more quickly and more effectively.

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We appreciate the opportunity to provide these comments on key issues with respect to the Action 14 Discussion Draft. We would be happy to respond to questions or to provide any further information that would be useful as the OECD continues its work in this important area.

Sincerely,

Peter van Dijk
Senior Vice President, Tax
TD Bank
Marlies de Ruiter  
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division  
Centre for Tax Policy and Administration  
Organisation for Economic Co-Operation and Development  
Paris, France

Via Email: taxtreaties@oecd.org

RE: OECD Public Discussion Draft BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. de Ruiter:

On 19 July 2013, the OECD published an *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries’ tax bases are being eroded or profits shifted improperly. Pursuant to Action 14 of the Plan, *Make Dispute Resolution Mechanisms More Effective*, the OECD released a public discussion draft on 18 December 2014 (hereinafter the Discussion Draft or Draft). The OECD invited interested parties to comment on the Draft’s recommendations no later than 16 January 2015. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD’s request for comments.

**TEI Background**

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws,
at all levels of government. Our nearly 7,000 individual members represent over 3,000 of the largest companies in the world.¹

**TEI Comments**

**General Comments**

The importance of adequate and effective dispute resolution mechanisms to taxpayers cannot be overstated. Along with uniformly applied, consistent, and predictable international tax rules, effective dispute resolution provides taxpayers with crucial legal certainty to remedy the international trade barriers caused by double taxation.² A comprehensive legal framework of dispute resolution that includes domestic remedies as well as mutual agreement procedures (MAP) and arbitration under double tax treaties would provide this needed certainty. It is imperative that these mechanisms be robust and reliable. They should work in a transparent, consistent and expeditious manner and be accessible by way of right for taxpayers, in both bilateral and multilateral settings.

The Discussion Draft acknowledges that, as the BEPS project moves from the final OECD reports to implementation by Member and other States, disputes and controversy will naturally increase, perhaps substantially, as taxpayers and tax administrators grapple with the new rules.³ This will make bilateral and multilateral dispute resolution mechanisms even more important under a post-BEPS international tax regime. Regrettably, the current MAP process suffers from many deficiencies. These include a lack of transparency, the inordinate length of the process, and issues related to the independence of Competent Authorities, as discussed below.

**Transparency of Process**

The Discussion Draft acknowledges that where procedures for accessing the MAP process are not transparent or are unduly complex, taxpayers may forego the process and suffer unrelieved double taxation or be improperly denied treaty benefits.⁴ Moreover, it is too often the case that once a taxpayer has successfully invoked the MAP process the settlement decided upon by the Competent Authorities does not appear to generally reflect the underlying treaty rules or the position advanced by the taxpayer. This perception will only grow with the

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¹ TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).
² The Discussion Draft uses permissive rather than direct language. To underpin the importance of effective dispute resolution mechanisms and to ensure all parties may rely on an objective, timely, and transparent process, TEI recommends that the OECD’s final report use declarative language.
³ See Discussion Draft, p.12.
⁴ See id.
potential addition to many double tax treaties of the principal purposes test devised under BEPS Action 6. Adding to taxpayer difficulties is that it often takes considerable time and expense, including in most cases the utilisation of an advisory firm, to prepare and submit a proper MAP request, which is then (it seems) sometimes given little credence by the Competent Authorities when deciding the case. The Discussion Draft acknowledges in paragraphs 37 and 38 that unprincipled approaches by Competent Authorities are an obstacle to the resolution of MAP cases. For these reasons, many taxpayers do not view the MAP process as a viable option to settle disputes and MNE tax personnel will generally not recommend relying on the MAP process except as a last resort and then only for a significant amount of tax. Indeed, the MAP process is often perceived as costlier, more involved, and less predictable than having tax matters adjudicated in the court system.

In this regard, TEI supports the suggestions set forth in Option 10 to help remedy the transparency problem by publishing guidelines and procedures for accessing and using the MAP process. In addition, the OECD should recommend publication of MAP settlements – properly redacted to protect confidential and sensitive taxpayer information – as a method to reveal the legal basis for the settlement outcome. Shining a light on the reasoning for a MAP decision would help ensure MAP settlements are based on the facts of each case, the provisions of the treaties, and the principled arguments of the taxpayers and the respective Competent Authorities. It would also dispel the perception that too many settlements are the result of “horse-trading” based on irrelevant issues or unrelated cases. In addition, consideration should be given to treating these published MAP settlements as authority that taxpayers may rely upon and cite when developing their positions, whether on the return, on audit, or in a future MAP proceeding. Finally, performance indicators for Competent Authorities should be appropriately set, as recommended by Option 5, and should not be linked to maintaining tax revenue.

The suggested mechanism for “monitoring the overall functioning of the mutual agreement procedure, including assessment of the measures to which countries will have [politically] committed” as part of a pledge to substantially improve the MAP process, would also increase transparency. TEI fully supports this proposal. In addition, TEI submits that a peer review conducted by tax authorities on the overall functioning and effectiveness of the MAP process would be a beneficial part of such a mechanism. This could be achieved through an independent committee of representatives from States other than the Contracting States that reviews a sample of settlement cases to ensure consistent application of the treaty provisions. Such a committee might be formed under the aegis of the Forum on Tax Administration MAP Forum. The FTA is a preexisting, well-functioning, and independent body that has established

5 If a properly redacted MAP settlement decision would not generally provide enough information to allow third parties to divine the legal basis for the settlement, then the suggestion in the text to publish such decisions may not have any utility.

6 Discussion Draft p.5-6.
relationships with relevant, non-governmental stakeholders. A similar committee could be formed to review cases where a Competent Authority applied the principal purposes test to ensure consistent application under similar facts and circumstances.

**Length of Time and Arbitration**

A significant hurdle taxpayers face when deciding whether to invoke the MAP processes is the time and effort it takes to reach a resolution, if one can be reached at all. Ideally, a global consensus should be developed to implement a simple, comprehensive, standard/global dispute resolution mechanism. In TEI’s view, resolving double taxation disputes through mandatory binding arbitration, after a specified time period, would be the most effective approach. The specter of a MAP case moving to arbitration should provide the States participating in the process with sufficient motivation to conclude the proceeding before reaching the arbitration stage, generally decreasing the length of time it takes to resolve a MAP case.

Adopting a binding and universal arbitration framework should be an integral part of the output of the BEPS project. Indeed, a best practice may be to grant all parties access to arbitration even before initiating a MAP case. States that have committed to arbitration already, e.g. EU Member States through the EU Arbitration Convention, should give priority to arbitration and not require a MAP case at first. If a two-step approach is favored, the MAP process should be a transparent, consistent and expeditious mechanism with an appropriate role for the taxpayer.

Outside of arbitration, the OECD should propose deadlines for Competent Authority responses to MAP requests, and for their ultimate resolution, to further accelerate the often slow pace of the MAP process. As to the latter, a treaty should commit Competent Authorities to settle a MAP case within a specified time period after its submission by the taxpayer, such as the three year timeframe set in the EU Arbitration Convention. For treaties with mandatory binding arbitration, the countries should be given a shorter time period to settle a case before it goes to arbitration. For example, under the Canada-U.S. treaty, the Competent Authorities generally have two years to resolve a case before it goes to arbitration.

To encourage timely responses to MAP requests before resolution, consequences could be imposed on Competent Authorities for non-responsiveness, as they generally already exist on the taxpayer side. The OECD should propose a standard set of penalties to be imposed on Competent Authorities that do not respond to a MAP request in a timely manner. Such penalties might include deferral of collection of the disputed amounts or the suspension or waiver of interest and penalties.

Another possible solution would be to have each Contracting State commit to setting a binding target to reduce their “time to settle a case.” Developed countries, with more resources and processes in place, may target a greater “time to settle” reduction as compared to
developing countries. This will give each Contracting State autonomy and flexibility to implement a more tax effective MAP mechanism. In addition, an annual assessment of actual results against the target commitment made by the country should be undertaken. Empirical evidence and key lessons would be shared among the Contracting States and countries that do not meet target commitments would be required to implement some of the more effective MAP mechanisms.

Finally, we note the overriding importance of preserving confidentiality taxpayer information in both regular MAP proceedings and MAP arbitration (the latter as discussed in paragraph 49). This is especially critical in jurisdictions where the MAP process is new to taxpayers and tax authorities (e.g., in many countries in Asia). Confidentiality is critical to build taxpayer confidence in the process. Confidentiality is also necessary to prevent misuse of the information disclosed to initiate audits or from being used as secret transfer pricing comparables.

Competent Authority Independence

With respect to the independence of Competent Authorities, and arbitrators where relevant, improving the transparency of the relevant procedures and rules should be instrumental in increasing taxpayer confidence in the integrity of the MAP process. This would also allay concerns or the perception that MAP outcomes are too often determined based on criteria unrelated to the merits of the issues in a particular case and the principles of the relevant treaty. Of course, it should go without saying that the Competent Authority (and arbitrators) should be actually independent to ensure the integrity of the process, in accord with Option 3 (which TEI supports). To bolster the independence of the Competent Authority, Option 3 should also limit contact between the Competent Authority and audit team to clarification of the documents received.

TEI fully supports Option 27, regarding the criteria for appointing qualified arbitrators. TEI would go further and permit the taxpayer to be involved in the arbitrator selection process to vet the qualifications of any potential candidates and have a say in their selection, along with each Competent Authority. In addition, to ensure impartiality and independence, any prospective arbitrators that have violated the standard declaration of impartiality and independence should be barred from being an arbitrator.

Comments on Specific Areas of the Draft

Option 21 would permit taxpayers to make presentations to the Competent Authorities to clarify and facilitate a shared understanding of the relevant facts and issues. The option would also encourage Competent Authorities to commit to face-to-face meetings to encourage open discussion and a collegial approach. TEI strongly supports Option 21, and in particular permitting taxpayers to participate in the MAP process by making presentations to the
Competent Authorities, including participating in face-to-face meetings. Indeed, taxpayer participation in such meetings should be a required part of the MAP process as it has the potential to expedite MAP cases considerably. Even a single presentation by a taxpayer to a joint meeting of the Competent Authorities would facilitate the process as it would allow the taxpayer an opportunity to focus the countries on what it views as the critical facts and issues. Currently, too much of the time between meetings of the Competent Authorities is spent forwarding additional questions to the taxpayer, when these questions can often be answered quickly at a Competent Authority meeting if the taxpayer attended. Indeed, the ability to engage in a back and forth discussion among the three parties may save significant time as there would be no need for taxpayers to wait for questions to be asked and tax authorities to wait for the answers. Finally, permitting taxpayers to participate in the MAP process would enhance its transparency and further encourage Competent Authorities to adopt principled positions and arguments.

Related to Option 21 is Option 11, which proposes to have specific guidelines on the minimum information that taxpayer must submit to request MAP assistance. The required information should be significantly reduced when compared to the requirements of current published guidance on MAP requests. For example, the content required for a MAP request in the United States generally necessitates hiring an outside advisor to ensure that the U.S. Competent Authority will accept the request. A simplified and expedited procedure would be for the taxpayer simply to submit the other tax authority’s proposed adjustment as its documentation. If this process were adopted, permitting taxpayers to be present at meetings of the Competent Authorities, as proposed under Option 21, would allow taxpayer to supply any missing information in an efficient manner. Similarly, taxpayers should also be able to participate in any MAP arbitration proceeding. TEI recommends that such participation go further than Option 30, which would permit the Competent Authorities to allow a taxpayer to present its position orally during the arbitration procedure, and give the taxpayer a “seat at the table” during the proceeding.

With respect to Option 7, it should be clear that part of an audit settlement cannot preclude taxpayers from utilising the MAP process or an available arbitration procedure. Similarly, with respect to Option 16, taxpayers must not be required to give up rights under double tax treaties (e.g., MAP and arbitration) to gain access to domestic remedies. More broadly, there is a need to reinforce the legal framework for APAs, MAPs and arbitration and ensure a clear and transparent interaction with available domestic dispute resolution mechanisms. In the post-BEPS environment where controversy and disputes will likely only increase, dispute resolution frameworks should be complementary and it should be clear how domestic mechanisms interact with dispute resolution under double tax treaties.
TEI applauds the acknowledgement in the Discussion Draft of the OECD’s aspiration to support “complementary solutions that have a practical, measurable impact . . . .” 7 In this regard, the importance of relevant and aligned APA and MAP statistics should be underscored. The current statistics regarding APAs, MAPs and arbitration, which generally provide details regarding total and new cases, should be updated to include information on the time it takes to complete the various processes (i.e., the time a case is in the “inventory” of the process). For this purpose, TEI encourages the OECD, other international organisations and tax authorities in general to utilise information already available to them and improve analysis rather than institutionalising additional requests for information.

Paragraphs 22 and 23 discuss the inability of taxpayers in certain jurisdictions to apply APAs to multiple years or “rollback” the APA to prior years. This discussion reflects the practical reality that APAs are similar to an advanced audit. An unfortunate difference, however, is that taxpayers have to pay a fee for tax authorities to audit them. This makes APAs more expensive than a regular audit and discourages taxpayers from utilising the APA process. Thus, the OECD should discourage the practice of charging for an APA.

The OECD correctly notes in paragraphs 28-30 that it is not uncommon for countries to unilaterally refuse access to the MAP process when the tax authorities have applied a domestic or treaty-based anti-abuse rule, or where a country decides that a taxpayer’s objection is not justified even though the other country would disagree. Similar refusals occur in criminal cases. However, in certain cases countries define a “criminal” case by reference to the amount of tax at issue and then set a very low threshold for that amount. In such a case a taxpayer can be denied access to the MAP process merely because of the amount of the tax adjustment.

Refusing access to treaty-based remedies will continue to occur when treaties or multilateral instruments introduce binding arbitration provisions. TEI recommends that the OECD discourage its Member States from permitting their tax authorities to unilaterally refuse access to the MAP process for these reasons. This could be accomplished by introducing a multilateral instrument for countries that wish to implement a binding arbitration provision that would explicitly bar the Contracting States’ tax authorities from using such an approach. Alternatively, the approach set forth in Option 15 should be adopted, which would permit a request for MAP assistance to be made to the Competent Authority of either contracting state. This would help ensure that Competent Authorities properly weigh the merits of an application when determining whether to accept a MAP request, which should build confidence in the process and enhance its transparency.

Finally, paragraph 60 discusses the potential suspension, negotiation, and/or waiver of interest and penalties as part of the MAP process. In TEI’s view, not only should interest and

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7 Discussion Draft, p.4.
penalties be suspended during the MAP process, but the taxes as well. As paragraph 33 states, a Competent Authority “may . . . find it more difficult to enter into good faith MAP discussion when it considers it may likely have to refund taxes already collected.” TEI also recommends Competent Authorities be given the ability to suspend, negotiate or waive interest and/or penalties as part of the MAP discussions. These discussions should also directly involve the taxpayer, as the other involved tax authority may not be directly impacted by the penalties and interest that the taxpayer pays to the first tax authority.

**Conclusion**

TEI appreciates the opportunity to comment on the OECD public discussion draft regarding follow up work under BEPS Action 6. These comments were prepared under the aegis of TEI’s European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of TEI’s legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,

TAX EXECUTIVES INSTITUTE, INC.

Mark C. Silbiger

*International President*
Re: BEPS Action 14, Public Discussion Draft

We are writing you as representatives of the TRIBUTE initiative for the establishment of a permanent international body specialising in the resolution of tax disputes. We note that for all of us our participation in this initiative is strictly independent and in our personal capacities.

We are pleased to take the opportunity to respond to the Public Discussion Draft on BEPS Action 14, firstly, to inform you of our initiative. Further, we wish to submit some specific comments on the discussion draft where it relates to features of our initiative. We have listed those comments separately in the annex to this letter.

The objective of TRIBUTE is to contribute to improvement of the effectiveness, fairness, and transparency of the resolution of tax disputes - including, but not exclusively, tax treaty disputes - by offering an independent, neutral, and expert third party facility. The services of TRIBUTE will comprise the full range of options for alternative dispute resolution: from facilitation, and mediation, to arbitration. TRIBUTE will avail its own high-qualified tax experts and dispute resolution experts, both groups being diverse in professional background, area of expertise, nationality, culture, and gender. The TRIBUTE services will have global coverage, being accessible to authorities and taxpayers from any jurisdiction in the world. Herewith attached is a detailed outline of the initiative, for your information.

We note that the OECD places much weight on improvements to MAP and relieving resources of competent authorities. We believe that third party facilitation may fulfil an important role in this respect, specifically by assisting in managing MAP proceedings, establishing and preserving a collaborative working relationship between competent authorities, assessing legal and technical merits of a dispute, making factual determinations, and identifying viable pathways to resolution. The OECD has identified already the potential of mediation (in the 2007 MEMAP Report, at paragraph 3.5.2, and in the Commentary on Article 25 of the Model Tax Convention, at paragraphs 86 and 87). TRIBUTE will offer a host of similar professional techniques - including facilitated structured negotiations involving mediation techniques, facilitative or evaluative mediation, and non-binding expert determination - as are being successfully applied at domestic level in such countries as the UK, United States, the Netherlands, and Australia.

We further note the OECD’s observation that at this moment there is no consensus for moving towards universal mandatory and binding arbitration. However, under the vast majority of treaties providing for the standard of Article 25 of the OECD Model Tax Convention competent authorities are free to voluntarily agree arbitration (we refer to the Commentary on Article 25, at paragraph 69). We hope and anticipate that the availability of the TRIBUTE facility will encourage more countries to include explicit arbitration clauses in their treaties, and more competent authorities to turn to arbitration if they find disputes too complicated or too principled to resolve through a compromise in MAP negotiations.
Any arbitrations brought before TRIBUTE will be supported and administered by the Permanent Court of Arbitration of the Peace Palace at The Hague. You find the confirmation letter to this effect from the Secretary-General of the Court as per attached.

TRIBUTE will be prepared to conduct arbitrations on the basis of the rules of the OECD sample mutual agreement on arbitration, as well as the rules of the UN sample mutual agreement, the UNCITRAL rules, or any other procedural rules as disputing parties may mutually agree. Next to the formats of "final offer" or "baseball" arbitration, and "independent opinion" arbitration, as both reflected in the OECD sample, TRIBUTE will offer a variety of other formats balancing time- and cost-efficiency and fair judgement, including expedited proceedings, interim measures, and emergency proceedings, which have proven their effectiveness in the area of commercial arbitration.

Over the next months we will continue working to complete the TRIBUTE lists of experts and settle matters of administrative organisation, governance and funding. We aim to have TRIBUTE formally established and operative before the end of this year.

We will be most happy to elaborate, either in writing or through an oral presentation, on details of the TRIBUTE initiative, or, more particularly, on the various services TRIBUTE will offer to facilitate MAP negotiations and arbitration, should you or the FTA MAP Forum wish so.

Sincerely,

Hans Mooij (Netherlands)
Independent international tax counsel; former Competent Authority for the Netherlands Government

Willem J. L. Calkoen (Netherlands)
Retired Partner, NautaDutilh; member of the Executive Committee of P.R.I.M.E. Finance

John F. Avery Jones (United Kingdom)
Retired Judge of the Upper Tribunal (Tax and Chancery Chamber)

Kees van Raad (Netherlands)
Professor of International Tax Law at the University of Leiden (Netherlands); Chairman of the International Tax Center Leiden
Catalina Hoyos Jiménez (Colombia)
Partner, Godoy&Hoyos; Professor of Tax Law, Rosario University (Bogota); President and member of the Board of Directors of the Colombian Institute of Tax Law (ICDT)

Manuel E. Tron (Mexico)
Partner, Manuel Tron SC; Honorary President of the International Fiscal Association (IFA)
Annex: Specific comments on the Public Discussion Draft

1. With regard to paragraphs 3 and 6 of the Public Discussion Draft, we note the absence of any recommendation for promulgation of mandatory and binding arbitration through a multilateral instrument. At the same time, we welcome the suggestion made, in paragraph 46, for the inclusion in treaties of MFN provisions as an elective mechanism for the quick implementation of treaty arbitration clauses.

2. We further note in respect of the former that taxpayers may themselves initiate arbitrations in tax disputes under investment or trade treaties, where such treaties allow for arbitration on tax matters and within their usual limitations of expropriation and unfair treatment. TRIBUTE will be available to deal with such investor-state disputes.

3. We note the expectation, expressed in paragraph 8, of a process for monitoring the overall functioning of MAP provisions, and that it is envisaged that an appropriate forum of competent authorities could be responsible for such monitoring. We propose that it contributes to enhancing transparency and accountability of MAP if the monitoring forum would involve an independent third party such as TRIBUTE.

4. In response to paragraph 21, we propose the availability of TRIBUTE to assist, through its facilitative services, in the concluding of unilateral, bilateral, or multilateral APAs, or any other international compliance arrangements between authorities and taxpayers outside the area of transfer pricing.

5. In respect of paragraphs 30 and 34, we submit that TRIBUTE will consider itself competent to arbitrate on any disputes whether access to MAP and subsequently arbitration is correctly denied having regard of the relevant treaty and domestic law provisions - including disputes on the issues mentioned, of whether a taxpayer's objection against a particular treaty application or implementation is justified, or whether access to MAP is barred by any applicable time limits.

6. We note that more principled approaches to disputed matters, as is being advocated in paragraph 38, may make it harder for competent authorities to compromise on their initial positions in MAP negotiations. This may lead to a further increase of the scope for third party facilitation of MAP negotiations.

7. We acknowledge the concerns expressed in paragraph 48 over the proper qualifications and the independence and impartiality of arbitrators to be appointed, and we agree that concerns as these may make countries hesitant to adopt arbitration. At the same time, we observe that countries, for various reasons, experience difficulties to find themselves qualified arbitrators who willing to serve in their disputes. It is for this reason that TRIBUTE will offer its own list of tax experts from which parties may choose to appoint arbitrators. All experts of the TRIBUTE list will avail of the highest qualifications, and their impartiality and independence, both generally and more particularly in respect of a dispute at hand, can be taken for granted, and will be confirmed to disputing parties in writing. Disputing parties remain free, of course, to mutually agree other arbitrators than experts from the TRIBUTE list.

8. In respect of paragraph 49, we confirm that the Code of Practice of TRIBUTE will explicitly recognise that the confidentiality of all information disclosed to it be strictly preserved except where, and to the extent in which, all parties in the dispute have agreed to its publication. However, within the privacy of its own organisation, TRIBUTE will reserve the right to share with its arbitrators and other experts, all being contractually subject to similar confidentiality and non-disclosure rules, such information from cases in which it is involved, in order to better secure consistency of approach and decision making in future cases.
9. While we acknowledge that in some cases taxpayer involvement in arbitrations may result in a lengthier, more complicated, and more expensive process, as is suggested in paragraph 52, it should also be noted that arbitrators may need a taxpayer's witness testimony in order to obtain objective and reliable information, especially where factual determinations make an important part of a dispute.

10. With regard to paragraph 55, we note that in practice it is only exceptionally that arbitrator fees are the most significant cost of arbitration. As a rule, preparation of parties' position papers, other submissions, and presentations before the arbitrators constitute the bulk of cost. TRIBUTE will have its arbitrator fees determined in a most objective and acceptable manner by the Secretary-General of the Permanent Court of Arbitration, based on what he in his vast experience considers appropriate in view of the degree of complexity of a dispute and by comparison to prior arbitrations in comparable cases.

11. With regard to the same paragraph 55, we further submit that any excessive streamlining of procedures, in particular by further reducing or omitting evidentiary production, would likely jeopardise the possibility of a balanced arbitral decision, and prevent arbitrators from accepting to deal with a case.
A permanent international tribunal for the resolution of tax disputes

Outline by the TRIBUTE initiative, at 16 January 2015

A permanent international tribunal for the resolution of tax disputes is expected to be established by the end of 2015. It is provisionally named ‘TRIBUTE’ - short for ‘International Tribunal of Independent Tax Experts’.

TRIBUTE will be supported by the Permanent Court of Arbitration of the Peace Palace at The Hague. The Permanent Court of Arbitration is a full organ of the United Nations organisation, and specialises in facilitating the resolution of disputes between states, at which it is unique, as well as disputes between state entities and private parties, notably in the area of bilateral investment treaties.

Like other tribunals supported by the Permanent Court of Arbitration, TRIBUTE will not be an integral part of the Court but will be governed by a separate legal body, with a board envisaged to consist of representatives of the international tax community at large. The board members are as yet still to be appointed.

TRIBUTE will be available to arbitrate on tax disputes arising under bilateral and multilateral tax treaties, investment or trade treaties, the European Arbitration Convention, domestic laws, or contractual arrangements, wherever there is a provision – mandatory or voluntary - for arbitration. TRIBUTE will also offers facilities for collaborative dispute resolution, such as facilitated structured negotiations, facilitative or evaluative mediation, and non-binding expert determination.

The services of TRIBUTE will be available to all States, whether member of the Permanent Court of Arbitration organisation or not, and to all of their nationals or residents. The Permanent Court of Arbitration will provide the administration of the TRIBUTE arbitrations.

Arbitral sessions may be conducted at any location in the world as parties may agree, or even through video or telephone conferencing.

TRIBUTE will avail of its own list of internationally recognised and impartial tax experts, diverse in professional background, area of expertise, nationality, culture, and gender, from which disputing parties may agree to select arbitrators. Where parties fail to agree among themselves, it is up to the Secretary General of the Permanent Court of Arbitration as the TRIBUTE appointing authority to decide on the appointment of arbitrators. Parties will remain free to agree arbitrators who are not on the TRIBUTE list, or to agree an appointing authority other than the Secretary General of the Permanent Court of Arbitration.

There will be a separate list of TRIBUTE mediation experts available to provide services for collaborative dispute resolution or assist in arbitrations.

Disputing parties have a choice of five alternative sets of arbitration rules to cover TRIBUTE arbitration proceedings:

- the rules of the OECD sample mutual agreement on arbitration in the Annex to the Commentary on Article 25 of the OECD model income and capital tax convention;
- the rules of United Nations sample mutual agreement on arbitration in the Annex to the Commentary on Article 25 (Alternative B) of the United Nations model double taxation convention;
- the procedural rules of the European Arbitration Convention;
- procedural rules for “baseball arbitration” as provided in the Memorandum of Understanding agreed under Article XXVI of the income and capital tax treaty between the United States of America and Canada; or
- TRIBUTE’s own procedural rules, based on the widely accepted UNCITRAL rules for arbitrations under investment or trade treaties.

1 At: http://www.pca-cpa.org
Next to the rules of these standard alternatives, parties may mutually agree to apply any modifications of these rules or rules of the parties’ own design.

TRIBUTE’s own arbitration rules are especially designed to ensure a fair and efficient resolution process, avoiding unnecessary delay and expense. E.g. while the applicable standard time lines of 45 days for the various communications between the disputing parties and the arbitrators are by all means short, the rules provide for optional expedited proceedings, interim measures, and even emergency proceedings resulting in the delivery of an arbitration award within 15 days. The TRIBUTE rules shall apply in any case by default, either in whole or in part, where parties have failed to agree rules among themselves.

The administrative fees and costs for TRIBUTE arbitrations are expected to range from €12,000 up to some €60,000, depending on the amount of financial interest in dispute. The fees of arbitrators are determined for each case separately following advice from the Secretary General of the Permanent Court of Arbitration on what is to be considered appropriate in the circumstances of the case.

Under the TRIBUTE arbitration rules, as a principle the losing party bears all fees and costs, but the arbitrators may determine a different allocation, for example in consideration of a party’s financial ability or in case of a divided responsibility.

TRIBUTE experts are available to advise parties which the format of collaborative dispute resolution or arbitration might best suit the scope, level of complexity, financial interest, and urgency of their specific dispute.

Other highlights of TRIBUTE arbitration:

- Reliance on the TRIBUTE own procedural rules saves parties the time and effort of having to agree such rules among themselves, as well as the likely risk that the agreement of such rules or their application becomes an additional subject of dispute.
- The TRIBUTE rules do not require parties to agree any terms of reference for the arbitrators to observe, for the similar reason of preventing that such terms become themselves subject of dispute.
- Being able to select arbitrators from the TRIBUTE list of tax experts is especially advantageous to those parties which themselves lack contacts with the scarce experts available to deal with their specific dispute, as is often the case for developing countries.
- No party can stall or frustrate the arbitration by not cooperating in the appointment of arbitrators, since in case of disagreement it is eventually the Secretary General of the Permanent Court of Arbitration who decides on that appointment in his capacity of appointing authority under the tribunal’s own rules.
- The various time lines applicable under the TRIBUTE rules can be such short since the support of the experienced administrative staff of the Permanent Court of Arbitration allows arbitrators to work more efficiently.
- Absent any specific terms of reference as may be agreed between disputing parties, the TRIBUTE arbitrators in making their determination will apply their judgment of what they believe fair in the specific circumstances of a case, next to such common authorities as the provisions of relevant treaties, explanations thereto as agreed by states, domestic laws, and OECD or UN Commentaries, Guidelines and reports.
- Availing of its own experts and administrative support allows TRIBUTE to establish time and cost-efficient working routines. Being able to share case specific information within the privacy of its own organisation allows TRIBUTE to achieve consistency in approaches to cases and their determinations.
- TRIBUTE arbitral decisions and their considerations will as a rule be published, but only with the agreement from all parties in the dispute concerned and in anonymous form.
December 12, 2014

Dear Mr. Calkoen,

I write further regarding our discussions on the establishment of a dispute resolution mechanism designed to handle tax disputes (the TRIBUTE Tribunal).

I understand that cases before the tribunal will involve at least one State as a party. On this basis, I can confirm that the Permanent Court of Arbitration (PCA) is available, in principle, to support such a tribunal, with the PCA Secretary-General as the appointing authority and the PCA as the administering institution for any arbitrations.

Yours sincerely,

[Signature]

Ringo H. Sibloz
Secretary-General
Comments on the OECD Public Discussion Draft on BEPS Action 14:
Make Dispute Resolution Mechanisms More Effective
Paris, 16 January 2015

1. The TUAC welcomes the opportunity to comment on the OECD Discussion Draft “Make Dispute Resolution Mechanisms More Effective” (hereafter “the draft”) for public consultation regarding implementation of Action 14 of the Base Erosion Profit Shifting (BEPS) initiative. The mandate of Action 14 is to “address obstacles that prevent countries from [re]solving treaty-related disputes under Mutual Agreement Procedures (MAP)” including arbitration. The OECD draft consists of amendment proposals to the OECD Model Tax Convention article 25 and its commentary and of additional proposals to strengthen access to MAP, including many references to the 2007 OECD Manual on Effective MAP (MEMAP). Compared with the other action points of the BEPS initiative, Action 14 is distinct in so far as it is more concerned with the risk for double taxation of MNEs, than with the opposite risk of “double non-taxation”, which is at the heart of the BEPS initiative.

2. Overall, the TUAC welcomes the proposals contained in the draft. Tax compliance is a source of risk for companies. That risk needs to be managed and mitigated like other forms of risk: financial, market, social and environmental. This is particularly true for MNEs operating across several tax jurisdictions. Better access to MAP would increase the predictability of tax treatment of MNEs and, as such, would thereby facilitate the management of tax risk. We have a number of observations to share on the OECD draft, however.

Current and “post-BEPS” obstacles

3. Action 14 is concerned with obstacles that currently prevent MNEs to access MAP. Looking from a statistical perspective however\(^1\), we note that the number of MAP that are triggered at the request of MNEs across OECD countries has grown on average by some +9% per year since 2006. This figure is three times faster than the growth of global trade. Importantly, the growth of the “stock” of MAPs at year end has not grown faster than the number of new cases. And while the average time for the completion of MAP cases increased between 2006 and 2010, it has dropped sharply since then. These figures suggest that MNEs are (i) making increasing use of MAPs, and that (ii) tax authorities are doing a reasonable job of handling the fast growing number of cases.

4. The mandate of Action 14 also points to future challenges associated with the implementation of other actions of the BEPS initiative: “the interpretation and application of novel rules resulting from the work described [in the other BEPS action points] could introduce elements of uncertainty”. The draft asserts this point where it states that MAP issues “are likely to become more significant as a result of the work on BEPS, as more stringent standards are adopted and competent authorities are called upon to develop common

interpretations of new tax treaty and transfer pricing rules through the mutual agreement procedure” (#36).

5. Indeed, other actions contained in the BEPS initiative, once they are completed and implemented, could create new sources of uncertainty in relation to MAP. But knowledge about this is rather limited at this stage. Hence there is an inherent difficulty in achieving Action 14 at this stage of the BEPS process because most of the challenges that MAP is supposed to meet are not determined and are dependent on the final outcome of other parts of the BEPS initiative.

**Staffing and empowerment of tax authorities**

6. Option 3 (“Ensure the independence of a competent authority”) & Option 4 (“Provide sufficient resources to a competent authority”) would in effect generalise the 2007 OECD MEMAP best practice n°23 on “Independence and resource of a competent authority”.

7. Administrative staff in charge of the MAP should work with sufficient “autonomy” from field departments in charge of corporate tax audit, as suggested in the draft. The use of the term “independence” on the other hand seems excessive and could be misinterpreted. Public servants in charge of a MAP are expected to act on behalf of government and the public interest. In doing so, and like any other public servant, they are not expected to be “independent”, at least not from a government perspective. On the contrary, they are expected to be bound by, report to and be accountable to public authorities. Indeed, there is a strong need for public accountability, given the context of the overly secretive nature of MAPs.

8. The proposition that tax departments in charge of MAP be sufficiently resourced in terms of “personnel, funding, training, etc. to carry out their mandate” is naturally welcome. However this should be provided in a manner that does not produce a zero-sum game. Additional funding to MAP departments should not be provided at the cost of other tax departments with responsibilities which, from a BEPS perspective, would have higher priority. Public tax administration budgets are – unfortunately – not among the highest priorities of OECD governments. Among EU member countries, a total of 56,865 jobs have been lost within tax administrations between 2008 and 2012, which is equivalent to a cut of 9.6% in the workforce.

**Domestic law remedies and collection of taxes**

9. Option 16 would see MAP prioritised over domestic remedy judicial procedures, and the latter be suspended until completion of the MAP. Option 17 would force the suspension of tax collection procedures during the entire MAP. Practices differ extensively across OECD jurisdictions on these matters and it seems that the opposite conclusions could be drawn from exiting practices and rules:

- Domestic remedies should allow to coexist with international mediation and arbitration procedures;
- the automatic suspension of taxes as a result of a MAP being engaged could well create the wrong incentives for MNEs to make abusive use of the MAP (to defer or delay the payments of their tax liabilities).

**Transparency and access to information**

10. The OECD recognises that tax is a risk that needs to be addressed at the level of the Board of Directors of the company². Tax is a risk for all corporate stakeholders and is not

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² According to the OECD Guidelines for Multinational Enterprises: “Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular,
limited to the board and to executive management of the company. Other stakeholders, including workers, creditors and shareholders of the company have a legitimate right to information about the exposure of the company to tax risk – provided that confidential requirements are met.

11. Action 14 is concerned with promoting the “taxpayer’s” access to and information on MAP. By “taxpayer”, it is meant the company and, in more practical terms, the CEO and the executive management. Action 14 is not concerned with the right to information of other corporate stakeholders with regard to MAP issues, which would help them make an informed judgement about the company’s exposure to tax risk. Corporate stakeholders, including workers and their representatives, creditors, shareholders and, not least, citizens at large, have an interest in accessing information on MAP.

12. In relation to Option 10 (“Improve the transparency and simplicity of the procedures to access and use the MAP”), countries could commit to transparency rules going beyond those suggested in the 2007 MEMAP “best practices”, regarding publicity of MAP rules and guidelines. Within the limits of business confidentiality requirements, public disclosure could cover the list of companies benefiting from a MAP, together with basic elements of the arrangements contained in the agreements.
January 14, 2015

VIA EMAIL
Marlies de Ruiter
Head, Tax Treaties, Transfer Pricing and Financial Transactions Division
Centre for Tax Policy and Administration
Organisation for Economic Cooperation and Development
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Re: USCIB Comment Letter on the OECD Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective

Dear Ms. de Ruiter,

USCIB\(^1\) is pleased to have this opportunity to provide comments on OECD’s discussion draft on BEPS Action 14. USCIB would like the opportunity to present comments at the public consultation. For ease of reference, we have included language from the discussion draft in boxes throughout this comment letter.

**General Comments**

USCIB strongly supports the intent behind Action 14, as having effective and efficient mutual agreement procedures is critically important to the success of the BEPS project as a whole. While the discussion draft includes many positive suggestions for addressing the extensive problems with current MAP programs, USCIB believes the draft, unfortunately, falls far short of describing an effort that will adequately deal with the profound dispute resolution problems that exist today. In fact, it appears from the draft that the OECD’s support for best MAP practices may have even diminished from prior publications on this topic. USCIB believes the OECD is the best forum to promote dispute resolution and urges the OECD to remain a strong

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\(^1\) USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.
champion for effective dispute resolution in every respect and to become a strong advocate for mandatory binding arbitration as an important part of the path forward.

Business is especially disappointed because, throughout the BEPS process, we have been told that we were overly concerned with increased double taxation and that improvements to the dispute resolution process would ensure a single level of taxation aligned with economic activity. The options in the Action 14 discussion draft, and the tepid tone of OECD support expressed, will not accomplish that objective. As the OECD has acknowledged “risk is inherent in commercial activities. Businesses undertake commercial activities because they seek opportunities to make profits, but those opportunities carry uncertainty”.\(^2\) The risk of double taxation is one that companies will aggressively seek to avoid. Double taxation can turn a profitable enterprise into a loss making enterprise or one where it is impossible to satisfy the hurdle rate that would justify an investment. In order to mitigate this risk, businesses will be forced to take steps that will likely shrink their global footprint and will have a negative impact on cross border trade and investment.

All parties involved in the BEPS process believe that BEPS implementation will cause disputes to proliferate. Any change to a complex legal system will result in a period of uncertainty during which issues will arise and need to be resolved. The mutual agreement procedures are already strained by rapidly growing caseloads,\(^3\) are at times difficult or impossible to access, and seem to be struggling to adhere to objectivity and predictability. Many country tax audit practices seem to have adopted new principles in the name of BEPS even before those principles have been agreed upon. The new rules and principles envisioned by the BEPS Action Plan promise to make this situation much worse if substantial improvements are not made to support and enhance MAP programs all around the world.

There is no doubt that successful work on Action 14 is critically important to the success of the entire BEPS Action Plan. If the substantive BEPS changes are to be successfully implemented by countries, there must be changes to country audit processes combined with intergovernmental dispute resolution processes that are predictable, accessible, objective, and principled that occur simultaneously with the substantive changes. Dispute resolution will be both essential and particularly sensitive, since resolution of disputes resulting from BEPS will shift taxing jurisdiction among sovereign countries during a time of intensive pressure on budgets and political pressure to avoid budget cuts.\(^4\) This is a key point since many countries believe that the intent of the BEPS project is to realign taxing rights from “residence countries” to “source countries.” To the extent that there is disagreement on the extent of such realignment,

\(^2\) BEPS Actions 8, 9, and 10: Discussion Draft on Revisions to Chapter 1 of the Transfer Pricing Guidelines (Including Risk, Recharacterisation, and Special Measures) para. 36, page 12.
\(^3\) See BIAC comment letter on Action 14 which cites recent MAP statistics.
\(^4\) The politics of finding more revenue to fund public services are the same around the globe. Politicians look first to the tax gap and then to foreign persons. The BEPS project brings both of these into play. This is acceptable if in fact the tax is owed by foreign persons, but when countries insist on collecting a tax and then refuse to resolve legitimate disputes, then the political dynamic is inappropriately controlling the tax dispute resolution process.
taxpayers will be caught in the middle, and, unless there is an effective dispute resolution mechanism, economically harmful double taxation will occur.

The discussion draft seems to take a significant step back from the MEMAP and the Article 25 Commentary. Countries have already made a political commitment to the MEMAP best practices and the Article 25 Commentary and all of those commitments should be not only reiterated but also strengthened. To the extent that important principles previously agreed to are not mentioned in the discussion draft, there may be an implication that the OECD no longer supports those principles. In addition, while USCIB recognizes that the discussion draft is attempting to set out options to address existing problems, use of the word “could,” in lieu of the word “should,” throughout the draft in connection with principles to which countries have previously committed appears to suggest that countries are starting all over with deciding what good MAP practices are.

Detailed comments on the discussion draft are provided below. We highlight here some of USCIB’s overarching recommendations:

- USCIB continues to believe that “final offer” mandatory binding arbitration must be an essential component of the mutual agreement procedures. Given the importance of effective dispute resolution, the OECD should recommend mandatory binding arbitration as a best practice and require countries that reject it to explain the basis for their objections. This issue is too important to abandon at this stage of the process.
- The OECD should reaffirm its support of all of the principles set forth in both the Article 25 Commentary and the MEMAP. In the absence of a reaffirmation, selective reference to some principles undercuts others. Action 14 should not result in a significant step backwards.
- USCIB believes that the amount of work that must be done to improve MAP is substantial, requires radical changes to tax administration policies and practices, and cannot be expected based on political commitments alone. USCIB supports the FTA MAP Forum having a central role in ensuring that MAP works in the future to eliminate the growing risk of double taxation and calls for all tax commissioners and other high-level tax officials in each government to support and carefully monitor the work of the MAP Forum, improving audit and MAP processes. This forum includes the government officials actually responsible for making decisions on the audits and dispute resolution. Their agreement to process changes is essential if change is actually going to occur.
- Greater taxpayer participation in MAP procedures should be endorsed, particularly early in the MAP process. Taxpayers are uniquely able to clarify facts. Competent Authorities should consider combined meetings with taxpayers in order to reach a common understanding of the facts.

Specific Comments

Paragraph 3 of the discussion draft provides that:
The discussion draft must be read in the broader context of the intention to introduce a three-
pronged approach designed to represent a step change in the resolution of treaty-related
disputes through the MAP. This three-pronged approach would (i) consist in political
commitments to effectively eliminate taxation not in accordance with the Convention (such
political commitments reflecting the political dimension of the BEPS Project), (ii) provide new
measures to improve access to the MAP and improved procedures (this discussion draft
describes the envisaged measures) and (iii) establish a monitoring mechanism to check the
proper implementation of the political commitment.

In terms of the overall approach to the on-going work driven by Action 14, it is imperative that
the OECD not simply rely upon a mere political commitment to take specific measures
identified in a written document and a not-yet-defined process for “monitoring” the overall
functioning of MAP programs around the world. Political commitments are easy to make and
also easy for tax administrations to subsequently ignore in the press of all that they must
handle on a day-to-day basis. The monitoring process must be carefully designed if it is to avoid
the pitfalls common to multilateral processes. As a starting point, the OECD should publish
MAP statistics for all countries. Taxpayers must be able to take effectiveness of dispute
resolution into account in making investment decisions.

USCIB supports the FTA MAP Forum having a central role in identifying the required
enhancements and reforms of current audit and dispute resolution processes and in monitoring
the progress made by governments around the world to bring about these enhancements and
reforms. The work that must be done to truly increase the effectiveness of MAP, much of
which is identified in the discussion draft, is necessarily multilateral work, so it must be carried
out through a multilateral body. This work must be done by those directly responsible for the
MAP programs that will be affected by the outcome, not by a more remote policy-oriented
body. Further, this work will require extensive changes to tax administration processes and
policies, so it must have the full and ongoing support of tax administration and tax policy
officials at the highest levels. Given these requirements, it is recommended that the MAP
Forum launched by the FTA Commissioners in Moscow in May 2013 should be viewed as a
critical body in the direct line for the implementation of Action 14, not as a body engaged in
“parallel work,” as described later in the discussion draft. In short, the competent authorities
themselves, with the unwavering support of their “commissioners” and other top policy
officials must take full ownership of the problems and solutions contemplated by Action 14.

Business is concerned that none of the three prongs mention a commitment to avoid double
taxation. This is particularly concerning given that countries may interpret BEPS as a political
commitment to raise revenue. The absence of any sense of how the monitoring mechanism
will work is also concerning.
OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

The following paragraph could be added to the Commentary on Article 25 in order to emphasise that the mutual agreement procedure is an integral part of the obligations that follow from concluding a tax treaty:

*Add the following paragraph 5.1 to the Commentary on Article 25:*

5.1 The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority “shall endeavour” to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a principled, fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law.

Comments on Option 1 in paragraph 10: USCIB supports Option 1 because this provision would emphasize that the competent authorities have an obligation to seek to resolve the cases presented to them for consideration and to do so in a principled, fair and objective manner. USCIB supports this clarification. Some USCIB members have recent experience of countries refusing to pursue MAP procedures with some other countries perhaps because of a perception that taxes are lower in these countries and therefore the country failing to pursue the MAP does not wish to cede taxing jurisdiction in such a case.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

Participating countries could commit to include paragraph 2 of Article 9 in all their tax treaties, using the multilateral instrument envisaged by Action 15 where appropriate. It would also be clarified that such a change is not intended to create any negative inference with respect to treaties that do not currently contain a provision based on paragraph 2 of Article 9.

Comment on Option 2 in para 11: Article 25 of the OECD Model Convention provides broad authority to resolve issues of taxation not in accordance with the convention. Therefore the absence of paragraph 2 of Article 9 in any treaty should not serve as a basis for a legitimate claim that MAP cannot be accessed with respect to a correlative transfer pricing adjustment. Nevertheless, USCIB supports Option 2 for the sake of ensuring absolute clarity on the question. This is an area where reiterating support for the guidance currently provided in the Commentary would be helpful. Moreover, for the sake of ensuring absolute clarity on the obligation to relieve economic double taxation arising from transfer pricing adjustments, the BEPS Project should produce a firm commitment by all participating countries to include Article
9(2) in all their tax treaties (not just a suggestion that they “could” do so) and should use the multilateral instrument envisaged by Action 15 to implement that commitment.

**Comment on paragraphs 12 and 13:** Paragraphs 12 and 13 touch on the most essential problems experienced by competent authorities in resolving MAP cases in accordance with the competent authority mandate created by tax conventions. The constraints placed on competent authorities because of their relational positions within their tax administrations determine their ability to deviate from positions staked out by tax auditors and thereby dictate their responsiveness, efficiency, and willingness to compromise based on multilateral principles. These problems, and all appropriate solutions, must be addressed if MAP functions are to operate as intended. The nature of these problems is necessarily oriented towards practical and operational considerations, not policy considerations, and solutions must be identified and implemented through concerted efforts to bring about operational change, not merely through political commitments to do so. Therefore, the work of FTA’s MAP Forum must be regarded as central to the Action 14, not as work that is merely in parallel to Action 14, as described.

In addition to Options 3, 4 and 5, which are addressed more fully below, it is understood that the MAP Forum has given some consideration to having a business advisory council dedicated to working with the MAP Forum participants to identify specific MAP problems and potential solutions. It is strongly recommended that such a council be established to work side by side with MAP Forum participants to ensure that business perspective and knowledge about MAP difficulties arising around the world is brought to bear. In addition, business can assist with the conduct of studies, benchmarking best practices, or developing and presenting common approaches to shared problems. The OECD’s VAT/TAG is an excellent example of cooperation between the OECD, countries, and business that has led to a better understanding of VAT issues on all sides and has, we believe, improved the OECD’s guidance in this area.

**OPTION 3 – Ensure the independence of a competent authority**

Participating countries could commit to adopt the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. In particular, they should take the necessary steps to ensure the autonomy of the competent authority from the audit and examination functions, as well as to guarantee, in practice, an appropriate distinction between the objective application of existing treaties and the forward-looking determination of the policy to be adopted and reflected in future treaties.

**Comment on Option 3 in paragraph 15:** Ensuring the independence of a competent authority is the principal challenge facing MAP functions face around the world. This challenge cannot be addressed by countries merely making a political commitment to the best practices set out in the MEMAP. Such commitments were made by OECD delegates, as well as by participating competent authorities, when the MEMAP was written, and the results have not lived up to
expectations. Merely renewing these commitments in an effort to complete the BEPS work is unlikely to improve the MAP process.

The “independence” of a competent authority or, in the terms used in the MAP Forum Strategic Plan, the degree to which a competent authority is “empowered,” is dependent on an wide array of administrative considerations that can only be addressed through intensive evaluative work followed by adoption of very specific changes in administrative practices and policies designed to remedy the problems identified. This difficult work must involve tax officials within each government at the highest levels.

Barriers to independence come in a variety of forms. Examples include: (1) strategic choices made by tax administrations to enhance revenue collections from enforcement of transfer pricing or treaty positions, particularly as they may pertain to foreign-based multinational corporations, and further to set specific revenue goals to be achieved by such enforcement efforts; (2) administrative practices which involve the collection of revenue upon adjustment and/or the accounting for that revenue for purposes of performance metrics prior to MAP resolution; (3) the line reporting of competent authorities to officials who are not charged with the mandate to resolve cases objectively, but who instead are expected to meet revenue collection metrics; and (4) deference paid by competent authorities to the views of policy officials, whose views may be more influenced by future policy goals than by objective applications of principles governing positions taken by taxpayers in the year under audit. These types of problems need to be identified and, where present, affirmatively addressed through substantial reforms to administrative policies and practices.

Business regularly experiences double taxation resulting from these practices. In particular, CAs cannot concede cases even if they acknowledge taxation not in accordance with the convention because of the adverse effect on exam revenue targets. Recently, the ability to resolve APA agreements and CA negotiations have been adversely effected by the BEPS project. The notion that future policy goals should not have an effect on the resolution of current disputes should apply equally to changes based on the BEPS project. Until those changes take formal effect, in the relevant tax treaties or domestic law rules, tax auditors and CAs should not be asserting these policies as a basis for either assessing tax or for resolving disputes.

**OPTION 4 – Provide sufficient resources to a competent authority**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the provision of sufficient resources to their competent authorities. They could, in particular, commit to provide their competent authorities with sufficient resources in terms of personnel, funding, training, etc. to carry out their mandate to resolve cases of taxation not in accordance with the provisions of a tax treaty in a timely and efficient manner.

**Comment on Option 4 in paragraph 16:** Funding is a political commitment. As such this is one of the few areas where a true political commitment is the essential element of achieving the goal of adequate funding. The OECD should seek to make clear at the highest levels of the G20
that inadequate funding of tax administrations including exam, MAP, APA programs will lead to a failure to implement the BEPS results.

As a result of the recent fiscal crisis, many tax administrations are struggling to meet increased demands for revenue without commensurate resources. In this environment, intra-administration competition for resources often leads to resources dedicated to audit functions making country-favorable adjustments to taxpayer’s reported income. MAP units responsible for reconciling those adjustments with other governments which may result in amounts being due to taxpayers may be seen as a lesser priority and may be underfunded.

Like the independence challenge, the resource challenge cannot be addressed through merely renewing commitment to the best practices set out in the MEMAP. Instead, the resource problem needs to be addressed through intensive evaluative work and through a commitment by tax commissioners, and other tax officials at the highest levels, to ensure that MAP resources are commensurate with MAP workload. The FTA MAP Forum, under the guidance of the FTA Commissioners, is the most appropriate body to take forward that commitment and effect the necessary change. Valid statistics on MAP would be helpful in determining whether resources are adequate, and improved and expanded reporting of the type originally agreed upon by the OECD in 2007 should be a commitment of all participating countries. Increasing caseloads and long resolutions times are a clear indication that adequate resources are not being provided. Failure to provide adequate resources and support for MAP will only increase the resource requirements for courts to adjudicate tax disputes, resulting in even greater costs to both tax administrations and taxpayers, and lost business investment due to uncertainty, for countries.

**OPTION 5 – Use of appropriate performance indicators**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the use of appropriate performance indicators for their competent authority functions and staffs based on factors such as consistency, time to resolve cases, and principled and objective MAP outcomes and not on factors such as sustained audit adjustments or maintaining tax revenues already collected.

**Comment on Option 5 in paragraph 17:** Clearly, paragraph 17 identifies a problem that should be addressed, to the extent it exists. It is unclear, however, that many, if any, competent authority functions operate based on MAP performance metrics that create disincentives to the resolution of cases. Rather, it is much more prevalent that performance metrics, revenue accounting mechanisms, and collection goals associated with the audit functions of the broader tax administration serve to impair the independence of competent authorities by placing “unwritten” limitations on their ability to reach appropriate resolutions. These types of harmful metrics and goals need to be identified and addressed in connection with the “independence” or “empowerment” problem addressed in paragraph 15. USCIB, therefore, supports Option 5.

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5 See the statistics set forth in the BIAC comment letter.
In addition to Option 5, consideration should be given to developing a program of MAP negotiation training that could be delivered to MAP negotiators in all countries. Such training could be carefully designed to ensure that MAP staff fully understand their mandate and understand that the goal for MAP negotiators is to eliminate double taxation to the fullest possible extent and to reach resolution as efficiently as possible. Such training could advance an approach to MAP discussions that maximizes the prospect for efficient resolution. For example, such training could incorporate the principles of the “getting to yes” approach to negotiation advanced by Harvard University, or some similar agreed approach for reaching mutually satisfactory results. Such training would ensure that MAP staff would come to the discussion table with a coordinated mindset as to the goals and steps of the process.

**OPTION 6 – Better use of paragraph 3 of Article 25**

Participating countries could commit to using paragraph 3 of Article 25 more effectively in order to reinforce the consistent bilateral application of tax treaties. In particular –

- Participating countries could commit to make more use of the authority provided by the first sentence of Article 25(3) and, where an Article 25(3) mutual agreement relates to a general matter which affects the application of the treaty to all taxpayers or to a category of taxpayers (rather than to a specific taxpayer’s MAP case), to publish the agreement in order to provide guidance and prevent future disputes.

- Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the use of the Article 25(3) power to relieve double taxation in cases not provided for in the Convention (e.g. in the case of a resident of a third State having permanent establishments in both Contracting States – see paragraph 55 of the Commentary on Article 25).

In addition, changes to the Commentary on Article 3 could expand upon existing guidance regarding the role of Article 25(3) mutual agreements in resolving difficulties or doubts as to the application or interpretation of the Convention where such difficulties or doubts arise as a result of an incompletely or ambiguously defined term or a conflict in meaning under the laws of the Contracting States. Additional changes to the Commentary on Article 25 could also clarify the legal status of an Article 25(3) mutual agreement, making specific reference to the principles of international law for the interpretation of treaties.

**Comment on Option 6 in paragraph 18:** USCIB supports the adoption of Option 6, as effective and widespread use of Article 25(3) by competent authorities will likely result in more certainty for multinational enterprises and fewer disputes between and among countries. It is noted, however, that effective use of this Option depends on the CA having adequate resources since the resolution of general issues and publication of the resulting mutual agreements will require substantial time and effort of expert MAP staff. USCIB reiterates its support for the MOU process to develop generally applicable safe harbor guidance out of particular cases or other safe harbors for routine transactions. We again note that asking countries to recommit to
current MEMAP best practices seems to undercut those MEMAP best practices that are not explicitly mentioned in the discussion draft.

**OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure**

Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer’s access to the mutual agreement procedure could commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements. Changes to the Commentary on Article 25 could also address the obstacles to an effective mutual agreement procedure created by audit settlements.

**Comment on Option 7 in paragraph 19:** USCIB strongly supports the discontinuation of these practices as they are prevalent throughout the world and constitute a significant barrier to MAP. Notification of the competent authorities is an inadequate response to this problem. Regardless of whether these practices can be combined with effective “self-help” measures to eliminate double taxation at times, these practices challenge the integrity of the fundamental proposition that double taxation should be relieved through formal mutual agreement procedures and hence raise questions about whether a Contracting State is applying its treaties in good faith, such that they do deserve to be addressed in the Commentary.

20. The FTA MAP Forum Strategic Plan recognises the importance of the “global awareness” of the audit functions involved in international matters – *i.e.* awareness of *(i)* the potential for creating double taxation, *(ii)* the impact of proposed adjustments on one or more other jurisdictions and *(iii)* the processes and principles by which competing jurisdictional claims are reconciled by competent authorities. In this regard, stakeholders are invited to comment on best audit practices that reflect an appropriate global awareness and that facilitate an effective mutual agreement procedure.

**Comment on paragraph 20:** The concept of “global awareness” is important to the proper functioning of the audit/MAP process. Thus, the importance of instilling “global awareness” among international audit functions within all tax administrations is clear. This would seem best accomplished through training, and it is understood that the FTA developed and approved a global awareness training module for that purpose approximately three years ago. It would seem appropriate at this juncture to revisit and enhance that module and to ensure that the training is delivered to international audit functions around the world. Development of such training is the type of project that a business advisory council could work on along with the MAP Forum to ensure that business realities and cross-border considerations are fully understood by tax auditors.
OPTION 8 – Implement bilateral APA programmes

Participating countries could commit to implement bilateral Advance Pricing Arrangement (APA) programmes.

Comment on Option 8 in paragraph 21: USCIB strongly supports the adoption of Option 8. Bilateral APA programs are critically important to achieving certainty of outcome in advance. Bilateral APAs also reduce the possibility of the “worst practices” that may occur at the audit level, since the audit should be more limited – confirming that the actual facts lined up with the APA.

It is also important to point out, however, that mere implementation of such programs is not enough if the programs, once implemented, are under-resourced such that taxpayers’ interest in utilizing the programs cannot be met, or if the administration in question prioritizes other activities, such as audit programs, over providing certainty to taxpayers as early as possible. Thus, it might be important to enhance this option such that it includes a commitment on the part of all participating countries to support and utilize their bilateral APA programs to the fullest possible extent.

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

Participating countries could commit, in certain cases and after an initial tax assessment, to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances. Participating countries that have implemented APA programmes could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the applicable time limits provided by domestic law (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances.

Comment on Option 9 in paragraph 23: USCIB strongly supports the adoption of Option 9, but it could be further enhanced to be more forward-looking. The joint audit tool, developed by the FTA, the competent authorities’ general authority to consult with one another, plus use of tools like APAs and APA roll-backs, could provide an opportunity for countries to work together on issues as they are identified to ensure that issues are pursued (1) when appropriate (taking “global awareness” concepts into account), (2) jointly (using a joint audit approach), and (3) in a way that addresses the most number of years possible (by using APAs and APA roll-backs). After a joint audit with another country, the United States has agreed to apply the audit result not only to the years covered by the audit but also to future years under an APA.
Ultimately, any country intending to initiate an audit of a transaction involving a second country could invite that second country to engage in a joint audit of the transaction with the agreed-upon result applying not only for the audit years in the first country, but also for unaudited years in the second country and for future years in both countries. Of course, such processes require that the audit, APA and competent authority functions of the tax administrations involved be as coordinated as possible, much like the U.S. IRS has integrated its international functions under a single deputy commissioner.

**OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the transparency and simplicity of the procedures to access and use the mutual agreement procedure, which should minimise the formalities involved in the MAP process taking into account the challenges that may be faced by taxpayers. This would include a commitment –

- To develop and publicise rules, guidelines and procedures for the use of the MAP (and to provide, where possible, appropriate notice to taxpayers of such guidance).

- To identify the office that has been delegated the responsibility to carry out the competent authority function (along with contact details).

**OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance**

Participating countries could commit to adopt the best practices currently included in the MEMAP concerning the minimum contents of a request for MAP assistance. This would include a commitment –

- To identify, in public guidance, the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance, seeking to balance the burdens involved in supplying such information with the complexity of the issues the competent authority is called upon to resolve. Competent authorities would in turn expect taxpayers to submit complete and accurate information consistent with such guidance, and to respond promptly to requests for missing or other relevant information.

- Where a country has not yet provided guidance and a taxpayer’s request for MAP assistance is accompanied by relevant information in line with the guidance in Section 2.2.1 of the MEMAP, a competent authority should not, without consulting the other competent authority, deny access to MAP on the basis that the taxpayer has provided insufficient information.
Comment on Options 10 and 11 in paragraphs 25 and 26: USCIB supports the best practices currently included in the MEMAP and believes countries should recommit to all of those best practices, although this will likely be insufficient to achieve the objectives of Options 10 and 11. Participating competent authorities should (1) revisit in the MAP Forum the procedural and documentation requirements for accessing MAP, (2) adopt a set of consensus guidelines addressing these MAP access elements, and (3) take responsibility for publishing the consensus guidelines as the local standard in each country. A process that is consistent across jurisdictions is important to business and will ultimately be simpler than multiple processes (even if some of those individual processes are somewhat simpler). Further, participating countries should maintain up-to-date websites that contain this information on MAP processes and should ensure that they provide the OECD on an ongoing basis with full and up-to-date information necessary for the publication of their MAP Country Profiles on the OECD website, as approved by the OECD in 2007. Countries should also consider simplified procedures for smaller taxpayers or issues involving less tax revenue.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

Where there is a disagreement between the taxpayer and the competent authority to which its MAP case is presented as to whether the conditions for the application of a treaty anti-abuse rule (e.g. a treaty-based rule such as the PPT rule) have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of Article 25(1) are met. If participating countries would seek to limit or deny MAP access in all or certain of these cases, they could commit to specifically and expressly agree upon such limitations with their treaty partners. In addition, where a participating country would deny MAP access based on the application of domestic law or treaty anti-abuse provisions (or similar rules or doctrines), that country could commit to notify its treaty partner about the case and the circumstances involved.

Comment on Option 12 in paragraph 29: The existing Commentary on Article 25 has for a number of years specifically addressed the question of whether a country is entitled to deny access to MAP based on allegations of abuse. Paragraphs 26 and 27 of that Commentary clearly express the relevant standards:

- “In the absence of a special provision, there is no general rule denying perceived abusive situations going to the mutual agreement procedure….” (paragraph 26)
- “The simple fact that a charge of tax is made under an avoidance provision of domestic law should not be a reason to deny access to mutual agreement.” (paragraph 26)
- “The circumstances in which a State would deny access to the mutual agreement procedure should be made clear in the Convention.” (paragraph 26)

• “The recognised general principle for tax and other treaties is that domestic law, even domestic constitutional law, does not justify a failure to meet treaty obligations....” (paragraph 27)
• “It follows that any justification for what would otherwise be a breach of the Convention needs to be found in the terms of the Convention itself, as interpreted in accordance with accepted tax treaty interpretation principles.” (paragraph 27)
• “[T]he view that a matter is not susceptible of taxpayer initiated mutual agreement procedure should not be lightly made, and needs to be supported by the terms of the Convention as negotiated. A competent authority relying upon a domestic law impediment as the reason for not allowing the mutual agreement procedure to be initiated by a taxpayer should inform the other competent authority of this and duly explain the legal basis of its position.” (paragraph 27)

Of the 34 OECD Member countries and the more than 30 non-OECD countries that have published their positions on the OECD Model, only Hungary has expressed any potential disagreement with these principles.7 Action 14 should guarantee that all participating countries are committed to and will live up to these principles. The discussion draft’s suggestion that there is a lack of clarity about countries’ obligations in this respect is troubling. To the extent there is any need to state in the Commentary, even more clearly than has already been done, that in the absence of an explicit treaty provision providing otherwise, a competent authority is not entitled to unilaterally find a taxpayer’s case “unjustified” for further handling under Article 25(2) on the grounds of alleged abuse, whether the allegation is based on domestic law or a treaty anti-abuse provision, that further statement should be made. The commitment to notification also set forth in paragraph 27 of the Commentary is a necessary mechanism to ensure treaty obligations are met whenever one Contracting State is contemplating denying access to treaty benefits based on grounds of alleged abuse, but it in no way should be seen as exhausting that State’s potential obligations under Article 25. The participating countries should acknowledge that good faith compliance with the obligations of Article 25 implies a duty on such a Contracting State to negotiate with the other Contracting State on the question of whether valid grounds do exist for denying the treaty benefit in question. This clarification will be made even more important given that wide-spread use of domestic anti-abuse rules to deny treaty benefits will likely result from the work on Action 6 of the BEPS Action Plan. Further, this important clarification should be made with regard to application of all domestic laws effectively precluding results contemplated by a treaty, such as laws denying allocations of home office expenses or rules requiring excessive documentation to substantiate the charge out of service fees.

Experience shows that, in most instances, domestic laws leading to the denial of treaty benefits are invoked by the country of source or by the country of residence of a subsidiary corporation (leading to potential double taxation of the parent corporation resident in a second country). Thus, MAP access via the residence country or the country of the parent’s residence is not the

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7 Even Hungary’s observation could be interpreted as limited to situations where a Hungarian court has already ruled on the merits of the case.
problem, at least in most cases, and the concerns raised in section 3L and section 3M must not be addressed merely through language ensuring MAP access in these types of cases via Article 25(1). As indicated above, commentary pertinent to Article 25(2) should make clear that the interpretation and application of the domestic laws in question should be subject to full MAP negotiations in light of the overarching purpose of Article 25 to eliminate double taxation or taxation not otherwise in accordance with the treaty.

**OPTION 13 – Ensure that whether the taxpayer’s objection is justified is evaluated prima facie by both competent authorities**

Where the relevant Convention follows the current wording of paragraph 1 of Article 25, participating countries could commit to a bilateral notification and/or consultation process where the competent authority to which a MAP case is presented does not consider the taxpayer’s objection to be justified.

Whilst such a process would ensure that the determination whether the objection is justified is made taking into account all potentially relevant facts and circumstances, it would be clarified that such notification and/or consultation should not be interpreted as consultation as to how to resolve the case.

**OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”**

Participating countries could commit to clarify, in the Commentary on Article 25, the meaning of the phrase “if the taxpayer’s objection appears to it to be justified”.

**OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State**

Paragraph 1 of Article 25 could be amended to permit a request for MAP assistance to be made to the competent authority of either Contracting State (i.e. to the competent authority of one or both Contracting States). Such an amendment could be accompanied by corresponding changes to the Commentary on Article 25, which would include the current text of paragraph 1 of Article 25 as an alternative provision to accommodate the preferences of some countries.

**Comment on Options 13, 14 and 15 in paragraph 30:** USCIB believes that that options 13, 14, and 15 are not mutually exclusive and could bring useful clarity to MAP access. Of course, any changes to the treaty text should not lead to any negative inference about countries’ obligations to engage in good faith negotiations on MAP cases for which there is no mutual agreement exclusion from MAP. While clarity is important, even more important is broad MAP access. Thus, USCIB believes that MAP access should only be denied if both treaty partners agree that the taxpayer’s claim does not appear to be justified. Further, USCIB believes that commentary to Article 25(2) should be clarified to provide that the interpretation and application of the domestic laws in the context of the applicable treaty must be subject to full MAP discussions in light of the overarching purpose of Article 25 to eliminate double taxation.
or taxation not otherwise in accordance with the treaty. Such commentary to Article 25(2) would foreclose any possibility that the country seeking to apply its domestic law notwithstanding the treaty would be able to deny access to MAP based on the claim that the taxpayer’s objection is not justified.

**OPTION 16 – Clarify the relationship between the MAP and domestic law remedies**

Participating countries could commit to clarify the relationship between the mutual agreement procedure and domestic law remedies. They could, in particular, commit –

- To facilitate recourse to the mutual agreement procedure as a first option to resolve treaty-related disputes through appropriate adaptations to their domestic legislation and administrative procedures, which may include provision for the suspension of domestic law proceedings as long as a MAP case is pending.

- To publish clear guidance on the relationship between the MAP and domestic law remedies, the processes involved and the conditions and rules underlying these processes. Such guidance could address, specifically, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP, or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice, and thereby permit taxpayers to make an informed choice between the MAP and domestic law remedies. The Commentary on Article 25 could also be amended to address this issue.

**Comment on Option 16 in paragraph 32:** USCIB supports the adoption of Option 16. In particular, the Commentary on Article 25 should be amended to set forth appropriate processes and governments should commit to modify local procedural rules to carry out these processes. These changes would reduce confusion and time spent unproductively trying to resolve these issues and thus would lead to more efficient MAP processes. Further, with respect to the notion that a competent authority will not deviate from a domestic court decision, the OECD should discourage this practice, as it effectively amounts to a domestic law override of a treaty benefit.

**OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure**

Participating countries could commit to further clarify issues connected with the collection of taxes and the mutual agreement procedure, which could include a commitment to examine, in the context of treaty negotiations, each Contracting State’s domestic law and procedures for the collection of taxes, with a view to a clear shared understanding of such law and procedures and to address directly any obstacles to MAP access that they may effectively create. Changes to the Commentary on Article 25 could also address the suspension of collection procedures pending resolution of a MAP case; these amendments could further clarify, in particular, the policy considerations supporting a suspension of collection procedures during the period that
any mutual agreement proceeding is pending and provide that such suspension should be available under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

**Comment on Option 17 in paragraph 33:** The requirement that taxpayers pay assessments prior to accessing MAP is a very serious impediment to MAP access, as described in some detail at paragraphs 46 – 48 of the existing Commentary on Article 25. USCIB strongly supports options that would reduce this impediment. The options currently recommended in the Commentary (escrow accounts, bank guarantees, and topping up the tax payment rather than paying the whole amount twice) should all be supported. We also support Option 17 and recommend the following modifications. First, Option 17 should focus not only on the suspension of collection of taxes but also on the accrual of interest on any finally determined deficiencies. In some countries the interest charged on underpayments is so high that payment of the proposed deficiency is necessary, even if not mandated, merely to avoid excessive interest charges on any amounts ultimately paid after MAP resolution. Second, Option 17 seems to contemplate addressing the problem of collection (and interest accrual) primarily in the context of treaty negotiations. While this would be welcomed, of course, it should be noted that many competent authorities may have the authority to suspend collection (although perhaps not interest accrual) without a specific treaty provision so providing. Thus, Option 17 should include an instruction to competent authorities to implement suspension of collection arrangements with their partners to the fullest possible extent and a suggestion that such implementation of bilateral collection suspension agreements should be made a focus for the MAP Forum.

Suspension of collection is especially important given the significant proposed changes to the transfer pricing rules in the area of intangibles, risk, recharacterization and special measures. It is unlikely that the rollout of these provisions will be smooth and if collection is not suspended during the pendency of any dispute, taxpayers may find themselves being forced to pay punitive assessments of hundreds of millions of dollars. Once these amounts are collected (and booked as revenue) it may be very difficult if not impossible to get a refund. As mentioned in the general comment section of this letter, these are instances when double taxation may convert a profitable enterprise into a loss-making enterprise. Option 17 should strongly support all countries that currently permit suspension of collection and encourage other countries to adopt this practice.

**P. Time limits to access the MAP**

**Description of the obstacle**

34. Time limits connected with the mutual agreement procedure present particular obstacles to an effective MAP. In some cases, uncertainty regarding the “first notification of the action resulting in taxation not in accordance with the provisions of the Convention” may present interpretive difficulties. More importantly, some countries may be reluctant to accept “late” cases – *i.e.* cases initiated by a taxpayer within the deadline provided by Article 25(1) but long
after the taxable year at issue. Countries have adopted various mechanisms to protect their competent authorities against late objections, which include requirements to present a MAP case to the “other” competent authority within an agreed-upon period in order for MAP relief to be implemented and treaty provisions limiting the period during which transfer pricing adjustments may be made. In practice, competent authorities have found that the early discussion of MAP cases may contribute to a more effective and timely MAP process (recognising that competent authority consultation prior to the conclusion of the audit should respect the principle of the independence of the competent authority and audit functions).

**OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure**

Participating countries could commit to different measures to clarify issues connected with time limits to access the mutual agreement procedure, including, in particular –

– To adopt the best practices currently included in the MEMAP concerning time limits to access the mutual agreement procedure, in particular to allow early resolution of MAP cases and to provide the benefit of the doubt to taxpayers when interpreting a tax treaty’s time limitation for MAP requests in borderline cases (e.g. where it is not clear when “first notification” has occurred).

– To include in their treaties the second sentence of paragraph 2 of Article 25 (“Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States”). Where a country does not include that sentence or deviates from its wording, it could commit to ensure that its audit practices do not unduly create the risk of late adjustments for which taxpayers may not be able to obtain MAP relief.

– Where there are difficulties or doubts as to what constitutes “first notification” for purposes of paragraph 1 of Article 25, to discuss and agree on the necessary clarifications with their treaty partners.

In order to provide guidance to countries that wish to use treaty provisions that require a MAP case to be presented to the other competent authority within a specified period in order for relief to be implemented, an alternative provision – and an explanation of the circumstances in which Contracting States might consider it appropriate – could be added to the Commentary on Article 25. An alternative provision could also be added to the Commentary on Article 9 to limit the time during which a Contracting State may make an adjustment pursuant to paragraph 1 of Article 9. Similarly, to provide guidance to countries that wish to use treaty provisions that deal with the length of time during which a Contracting State is obliged to make an appropriate corresponding adjustment under Article 9(2), an alternative provision could be added to the Commentary on Article 9.

**Comment on Option 18 in paragraph 34:** USCIB generally supports the adoption of Option 18. We believe that the current Commentary and MEMAP should be a minimum standard, so any
alternatives to these standards should improve taxpayer protections. Thus, we would support
an alternative provision that would limit the time during which a Contracting State may make
an adjustment under Article 9 paragraph 1. It is not clear what the second alternative would be
and therefore we express no opinion, other than to reiterate that taxpayer rights should not be
narrowed. The existing Commentary also has very helpful language on this topic changes to the
Commentary should only expand, not narrow, taxpayer rights. In this regard, he Commentary
on Article 25 should be amended to set forth appropriate detailed guidelines and governments
should commit to modify local procedural rules to carry out those guidelines.

**OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual
agreement Procedure**

Changes to the Commentaries on Articles 7, 9 and 25 could be made to clarify the
circumstances where double taxation could be resolved under MAP in the case of self-initiated
foreign adjustments and to emphasise the importance of bilateral competent authority
consultation to determine appropriate corresponding adjustments and to ensure the relief of
double taxation.

**Comment on Option 19 in paragraph 35:** USCIB supports Option 19. Taxpayers must comply
with arm’s length principles. They should, therefore, be allowed to self-initiate adjustments to
their reported positions and should not be penalized afterwards by withholding access to MAP
for purposes of eliminating any double taxation that results.

**OPTION 20 – Ensure a principled approach to the resolution of MAP cases**

Participating countries could commit to different measures to ensure a principled approach to
the resolution of MAP cases, including, in particular –

- To adopt the best practice currently included in the MEMAP concerning fair and objective
  MAP negotiations, based on a good faith application of the treaty, and the resolution of MAP
  cases on their merits.

- Where the interpretation of a treaty provision is likely to be difficult or controversial, to agree
  on specific interpretive guidance (e.g. in the form of a protocol or exchange of notes)
  proactively, ideally at the same time the treaty is negotiated. Such interpretive issues could also
  appropriately be resolved by the competent authorities of the Contracting States under the
  authority of paragraph 3 of Article 25.

**OPTION 21 – Improve competent authority co-operation, transparency and working
relationships**

Participating countries could commit to adopt the relevant best practices currently included in
the MEMAP, which would include, in particular, the following commitments –
− Countries could commit to a co-operative and fully transparent MAP process, in which competent authorities exchange documentation and information in a timely manner and regular competent authority communications are used to reinforce a collaborative working relationship. Competent authorities could also agree as to when taxpayers would be permitted to make presentations to the competent authorities to clarify – and facilitate a shared understanding of – the relevant facts and issues. Competent authorities could also commit to provide taxpayers with updates on the status of their MAP cases.

− Countries could commit, where possible, to face-to-face meetings between competent authorities, recognising that such meetings may allow for a more open discussion and collegial approach and may also represent a milestone that helps to advance a case by triggering bilateral focus and preparation.

**Comment on Options 20 and 21 in paragraphs 38 and 39:** USCIB strongly supports Options 20 and 21. However, a recommitment to MEMAP best practices is not enough. Options should be addressed through an intensive program of work conducted by the MAP Forum. One particular point that should be made clearer, taxpayers should always have the right to make a written presentation on an issue. Taxpayers are uniquely able to explain their business and the facts involved in any dispute and should therefore be able to present their view in writing.

USCIB’s general comments with respect to arbitration are at the end of the arbitration options. Those comments that relate only to a particular option are included beneath that option.

**OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration**

In order to provide transparency with respect to country positions on mandatory binding MAP arbitration, footnote 1 to Article 25(5) could be deleted (and paragraph 65 of the Commentary on Article 25 modified accordingly).

**Comment on Option 22 in paragraph 25:** USCIB strongly supports Option 22. We believe these changes are intended to mean that the OECD supports mandatory binding arbitration as the general rule and those countries that do not support it would be required to enter a reservation or take a formal position to preserve their opposition. Establishing mandatory binding arbitration as the recommended model is a significant step forward. Requiring countries to make a formal reservation or take a formal position would identify those countries that oppose arbitration and perhaps cause them to be clearer about their objections.

**OPTION 23 – Policy issues: Tailor the scope of MAP arbitration**

**OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy**
Because national policies with respect to MAP arbitration may be expected to evolve over time, particularly as more countries gain experience and familiarity with MAP arbitration, most favoured nation (MFN) provisions could be used as an elective mechanism for the quick implementation of MAP arbitration between a country and its treaty partners where that country determines in the future that MAP arbitration should appropriately be included as part of its treaty policy. Commentary would be developed to accompany such provisions to illustrate their potential advantages and disadvantages.

**OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies**

In order to improve the articulation of MAP arbitration and domestic remedies, participating countries could commit to provide guidance on the interaction between the mutual agreement implementing the decision of the arbitration panel and pending litigation on the issues resolved through the mutual agreement procedure (such guidance would complement the guidance to be developed pursuant to the commitment described above under Option 16). The Commentary on Article 25 could also be amended to provide greater clarity, addressing, for example, the reference to a “decision” in the final sentence of Article 25(5).

**OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances**

Paragraph 5 of Article 25 could be amended to permit the competent authorities to defer the initiation of MAP arbitration in appropriate circumstances – e.g. to allow the competent authorities to mutually agree to defer the initiation of MAP arbitration under specific conditions.

**Comment Option 26 in paragraph 47:** USCIB supports option 26 because we believe it will encourage countries to include mandatory binding arbitration in their treaties. USCIB is concerned, however, that this authority could be subject to abuse, and therefore it might be useful to describe the situations in which the arbitration deferral is appropriate – for example, in situations in which the competent authorities mutually and genuinely believe the case is close to resolution without arbitration.

**OPTION 27 – Practical issues: Appointment of arbitrators**

In order to avoid potential differences, participating countries could agree to develop mutually agreed criteria for the appointment and qualifications of arbitrators, to be included in the text of the arbitration provision itself and/or in competent authority agreements concluded for purposes of the implementation of MAP arbitration, in advance of any MAP arbitration procedure. To ensure that prospective arbitrators are impartial and independent, participating countries may also wish to develop a standardised declaration that would be executed by
arbitrators to attest to their fitness to serve as arbitrators and to disclose any potential conflicts of interest.

Comment on Option 27 in paragraph 48: USCIB supports these proposals.

OPTION 28 – Practical issues: Confidentiality and communications

In order to protect the confidentiality of taxpayer information in the context of MAP arbitration (and the overall integrity of the MAP arbitration process), the Article 25 arbitration provision could be amended as follows:

• To ensure the proper consideration of the relevant information in the MAP arbitration process, any disclosure of taxpayer information by a competent authority to the members of the arbitration panel would be made pursuant to the authority of the Convention and subject to confidentiality requirements that are at least as strong as those applicable to the competent authorities. An express provision in the text of the Convention itself, with a cross-reference to Article 26, would ensure the legal status of the arbitrators.

• The Commentary on Article 25 could provide additional relevant guidance, noting the practice of some competent authorities (i) to request that taxpayers authorise the disclosure of relevant information to the arbitrators and (ii) to require that the arbitrators and their staffs agree in writing to maintain the confidentiality of the information they receive in the course of the arbitration process (subject only to further disclosure in accordance with the requirements and further authorisation of the competent authorities and the affected taxpayers).

• The Commentary on Article 25 could also note the practice of some countries to oblige taxpayers and their representatives to maintain confidentiality regarding arbitration in a MAP case, subject to any necessary disclosures such as for financial reporting purposes, with a view to avoiding potential taxpayer manipulation of the MAP arbitration process.

Comment on Option 28 in paragraph 49: USCIB agrees that the security of taxpayer and competent authority information and communication are critical to public confidence in tax administration. We, therefore, support these provisions that address maintaining confidentiality.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

In light of experience with MAP arbitration, participating countries could develop additional guidance under Article 25 of the OECD Model on the use of different decision-making mechanisms as default approaches in MAP arbitration, with an explanation of the respective advantages and disadvantages of the independent opinion and Final Offer approaches. Stakeholder comments are invited in particular on the preferred default form of decision-making in MAP arbitration.
Comment on Option 29 in paragraph 50: USCIB strongly supports Final Offer arbitration but independent opinion is preferable to no arbitration.

**OPTION 30 – Practical issues: Evidence**

In light of experience with MAP arbitration, guidance in the Commentary on Article 25 of the OECD Model could be developed to address particular evidentiary issues that may arise in connection with different forms of arbitral decision-making. Such guidance could provide, for example, that where the format for arbitral decision-making is the Final Offer approach, an “on the record” evidentiary format should be used. This guidance could also provide, for example, that where the format for arbitral decision-making is the independent opinion approach, it may be appropriate in some cases for the competent authorities to permit the taxpayer to present its position orally during the arbitration procedure, at the request, or with the permission, of the arbitrators. Stakeholder comments are invited on approaches to evidentiary issues in the MAP arbitration process. In addition, in order to ensure that the taxpayer’s position is clearly communicated to the arbitration panel, guidance under Article 25 could allow for the taxpayer’s submission of some form of brief for consideration by the panel (subject to review and comment by the competent authorities); such a brief should not, however, contain new facts which have not previously been considered by the competent authorities.

Comment on Option 30 in paragraph 52: USCIB strongly supports the right of a taxpayer to make a written submission in an arbitration proceeding.

**OPTION 31 – Practical issues: Multiple, contingent and integrated issues**

Participating countries could establish mutually-agreed guidance for arbitrators on how to deal with multiple, contingent and integrated issues.

**OPTION 32 – Practical issues: Costs and administration**

In order to address the particular concerns that costs may present an obstacle to the adoption of MAP arbitration, participating countries could consider ways to reduce the costs of MAP arbitration procedures, with a view to developing guidance in the Commentary on Article 25 on these issues and approaches to address them.

**General comments on Options 22-32 in paragraphs 41-55:** That MAP arbitration can work to ensure efficient MAP resolution has been proven. Further, there is support among some competent authorities for the proposition that the mere existence of an arbitration mechanism has made traditional MAP processes more efficient and effective where the mechanism exists. Given this positive experience and support, and given the critical need for MAP enhancement, it is imperative that (1) all countries work together toward widespread acknowledgement of the need for arbitration as a MAP resolution tool, (2) all objections to the adoption of arbitration be made known by countries harboring those objections, and (3) all countries work intensively
together to address specific objections to arbitration and to implement any and all possible 
solutions to those specific objections. The discussion set forth in section 3T makes a good first 
start at cataloguing possible objections and potential solutions. The follow-on work on Action 
14 should focus on furthering a transparent discussion of these objections and solutions, and 
others that may not yet be identified, with a goal of ensuring that all barriers to MAP 
arbitration are eliminated as the earliest possible time.

Only in the event that countries are unwilling to agree to mandatory binding arbitration, one 
possible alternative that could be considered would be mandatory non-binding arbitration. 
That is, under this alternative a country could proceed to domestic dispute resolution options if 
the arbitrator’s decision were unfavorable. The fact of the decision and the decision itself 
(either the independent opinion or the other country’s position) would be admissible in any 
judicial proceeding. This approach might deal with the sovereignty issue; that is the country 
always has the choice to use its own judicial mechanism, so accepting the arbitrator’s decision 
is merely settling a tax case, not a concession of sovereignty. Taxpayers rights would need to 
be protected so, for example: (i) taxpayers must not be obligated to waive their rights to 
domestic remedies to have access either to MAP itself or the arbitration proceeding; (ii) the 
time period for pursuing judicial remedies in the event of a failure to achieve a mutual 
agreement upon the conclusion of the arbitration must be kept open until the conclusion of the 
arbitration proceeding. This approach might also allow countries to become comfortable with 
arbitration and move on to mandatory binding arbitration.

**OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements** 
**(APAs)**

Changes to Article 25 and/or its Commentary could also be made in order to address directly 
the interpretation and application of Article 25 with respect to multilateral MAPs and APAs, in 
particular to address the issue of how the arbitration process could be used in a multilateral 
MAP and to address legal, practical and/or procedural issues, including issues connected with 
time limits (e.g. domestic statutes of limitation for assessment) and issues connected with 
ensuring that third-State competent authorities are made aware of cases with multilateral 
implications.

The possibility of developing a specific provision that would address mutual agreement 
procedure issues that arise in multilateral situations, including how the arbitration process 
could be used in such situations, could be considered by the interested parties that will 
participate in the development of the multilateral instrument contemplated by Action 15 
*(Develop a multilateral instrument)* of the BEPS Action Plan.

**Comment on Option 33 in paragraph 59:** Experience shows a growing prevalence of situations 
in which multilateral resolution mechanisms would provide great efficiencies for both 
businesses and competent authorities. USCIB, therefore, supports Option 33. It should be 
noted, however, that, in addition to the legal and process barriers that need to be addressed 
through this work, there appears to be an important, but less tangible, concern held by at least
some competent authorities that multilateral case resolution may undercut their ability to argue for their position strenuously enough. This reluctance to engage in a process in which a country is forced to defend its position against more than one other country must be addressed head-on, and situations in which a country simply refuses to engage multilaterally, notwithstanding a lack of legal or process barriers, must be dealt with.

**OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure**

Changes to Article 25 or its Commentary could be made to address the treatment of interest and penalties in the MAP, in particular to explain that whilst it is not appropriate to consider interest and penalties as “taxes” in order to apply limitations on source State taxation or for purposes of the obligation of the State of residence to relieve double taxation, interest and administrative penalties that are directly connected to the taxes to which they are related should be treated in the same way as taxes to which they are directly connected (in particular where interest and penalties are computed with reference to the amount of the underlying tax and the underlying tax is found not to have been levied in accordance with the provisions of the Convention).

**Comment on Option 34 in paragraph 60:** Experience shows that these issues are encountered frequently on MAP cases and that competent authorities, while willing to deal with them on a case-by-case basis, do not have consistent policies for doing so, and certainly these policies are not uniform among treaty partners. USCIB, therefore, supports development of Option 34.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)