

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report**

BEST PRACTICES
Canada



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Abbreviations and acronyms

ACAP	Accelerated Competent Authority Procedure
APA	Advance Pricing Arrangement
CRA	Canada Revenue Agency
FTA	Forum on Tax Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development
TSO	Tax Service Office

Introduction

The final report on BEPS Action 14: « Making Dispute Resolution Mechanisms More Effective », identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective¹ stipulates that:

The best practices are not part of the Action 14 minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Canada has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Canada's adoption of the best practices.

This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices.

¹ Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.

Part A

Preventing Disputes

[BP.1] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Canada has implemented a bilateral APA programme and the basis of that programme is to be found in Information Circular 94-4². This guidance sets out in detail what APAs are, when and by whom they can be applied for, how the process for obtaining an APA functions in Canada and what information is to be included in a request for an APA.
3. Canada applies APAs as from the first year covered by the request, irrespective of the date when the competent authorities reach an agreement, provided the pre-filing meeting (i.e. the first stage of the APA process) is held within 180 days after the end of the first fiscal year that is to be covered by the APA. For instance, if an APA request is submitted for calendar years 2016 to 2020, the pre-filing meeting should be held before 30 June 2017 and if an agreement is reached in 2018, Canada applies the APA for all five years requested.
4. According to Canada’s MAP Guidance, the Canadian competent authority generally levies a non-refundable user charge for each accepted APA request or renewal. This to cover anticipated “out-of-pocket” costs, such as travel and accommodation expenses. However, Canada states in its MAP profile that any unused portion of the user charge is refunded after the APA is finalized or the process is terminated.
5. The Canadian competent authority annually publishes an APA Program Report on the website of the CRA³. In the APA Program Report for fiscal year 2014-2015⁴, the CRA reported that 28 taxpayers applied for the program during the year, and that together with the opening inventory and the completion of other cases, this resulted in an ending inventory of 94 APA cases at the end of the period. The report also specifies that the average time to conclude a bilateral APA from acceptance into the program to completion was around 48 months and that APAs involving the United States represent 61% of Canada’s APA inventory.

² www.cra-arc.gc.ca/E/pub/tp/ic94-4r/ic94-4r-e.html.

³ www.cra-arc.gc.ca/tx/nnrstdnts/cmp/p_mp-eng.html.

⁴ www.cra-arc.gc.ca/tx/nnrstdnts/cmp/p_rprt15-eng.html.

6. One peer emphasised the fact that the Canadian competent authority underscored its commitment to APAs as a means of preventing disputes and potential MAP cases. Others indicated that the Canadian competent authority deals with APAs in a supportive way.

[BP.2] Publish mutual agreements of a general nature

Jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.

7. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.

8. Canada publishes agreements reached on difficulties or doubts arising as to the interpretation or application of their tax treaties by the competent authorities. These publications can be found at:

<http://www.cra-arc.gc.ca/tx/nrrsdnts/ntcs/menu-eng.html>

9. Peers did not provide input relating to this particular best practice.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

10. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.

11. Canada has implemented a bilateral APA programme. The guidance on APAs is to be found in Information Circular 94-4R, updated in 2001 and that is accessible at :

<http://www.cra-arc.gc.ca/E/pub/tp/ic94-4r/ic94-4r-e.html>

12. Canada's APA guidance sets out in detail what APAs are, how APAs function in practice, when and by whom they can be applied for, how the process for obtaining an APA functions in Canada, what information is to be included in a request for an APA⁵. In order to examine the APA request, the Canadian competent authority recommends taxpayers to include the following in the APA request:

- Identity of the taxpayer(s) covered in the APA request;
- The basis for the request (tax years, intragroup transactions covered);
- Functional analysis;

⁵ See Appendix IV of Information Circular 94-4R

- Financial statements of the applicant;
- Industry and market analysis;
- Transfer Pricing background (e.g. legal framework, rulings);
- The selected transfer pricing method and comparables; and
- Impact of the proposed transfer pricing method.

13. Moreover, Canada’s APA guidance includes examples for bilateral APAs requests and for APAs. Specific guidance⁶ is also published in relation to APAs for small businesses. In addition, Canada’s MAP Guidance includes in paragraph 63 a brief description of APAs and provides a link to the APA guidance in Information Circular 94-4. Canada’s MAP profile also includes information on its APA programme.

14. Peers did not provide input relating to this particular best practice.

[BP.4] Develop “global awareness” of the audit/examination functions

Jurisdictions should develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

15. Making audit/examination function of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.

16. In Canada training is provided to Canadian officials involved in the audit / examination function of the CRA to ensure that any assessments made by them are in accordance with the provisions of the tax treaties.

17. One peer noted that the Canadian competent authority has been a committed partner within the FTA MAP Forum and FTA Large Business Programme for raising awareness of the principles of the Global Awareness Training Module within its examination and competent authority functions. In this regard, discussions were appreciated with the Canadian competent authority on ways in which the two competent authorities can more efficiently reach principled resolutions in MAP cases by jointly developing “reference sets” of comparable companies for application in cases presenting common fact patterns and transfer pricing issues. This peer particularly noted that it believes that the development of these reference sets and the resolution of MAP cases using such sets, followed by the dissemination of appropriate information and guidance about these reference sets and the resolution of cases using them, would be a significant extension of the principles of the Global Awareness Training Module and that it would welcome the opportunity to discuss these ideas further with the Canadian competent authority.\

⁶ Available at <http://www.cra-arc.gc.ca/E/pub/tp/ic94-4rsr/ic94-4rsr-e.html>.

Part B

Availability and Access to MAP

[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP

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

18. Under Article 25(1) of the OECD Model Tax Convention, the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention, which specifies that the right to submit a MAP request is available to taxpayers without depriving them of the ordinary legal remedies available. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

19. Canada does not charge any fees to taxpayers when they request for MAP assistance and in Canada taxpayers are allowed to request for such assistance and seek to resolve the same case via domestically available judicial and administrative remedies. As explained in Canada's MAP Guidance (Appeals and Court decisions section), taxpayers are, however, not allowed to resort to domestic available remedies and MAP simultaneously. In practice, taxpayers are requested to ask the Appeals Branch to hold the notice of objection in abeyance before the issues can effectively be dealt with in MAP. Such request also ensures that the fiscal years concerned will remain open and that MAP agreements can eventually be implemented. In practice, the Canadian competent authority will also generally advise taxpayer upon opening of a MAP on how to protect their rights under tax treaties by ensuring that the fiscal years concerned will not become closed. If the objection or appeal process is not held in abeyance, the Canadian competent authority will end or suspend the MAP and will not pursue the MAP while the taxpayer is actively pursuing an alternative remedy.

20. After an Appeals Branch has rendered a decision, taxpayers can submit the issue to the Canadian competent authority (or if already submitted, ask that the competent authority to take up the case again). However, if the taxpayer agrees with the Appeals Branch decision, the Canadian competent authority will only present the case to the other competent authority to enable the latter to provide for correlative relief. Finally, as specified in its MAP Guidance, in cases where a Canadian court decision has been rendered, the Canadian competent authority is not allowed to deviate from such decision but would instead provide the other competent authority with the details of, and rationale for, that decision.

21. Peers did not provide input relating to this particular best practice.

[BP.6] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.

22. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

23. Canada issued an updated document⁷ on the competent authority Service Division, which clarifies that the MAP is available for bona fide taxpayer-initiated foreign adjustments. The document specifies that the Canadian competent authority will accept a case into MAP if it concerns a request by a Canadian taxpayer to reduce its taxable income and if the request relates to a self-initiated (that is, not initiated by a tax authority) adjustment to increase the taxable income of a related entity in another jurisdiction. This consideration of a case in MAP, however, will be provided only and insofar the following conditions are met:

- The self-initiated foreign adjustment has been accepted for consideration by the foreign tax authority;
- The foreign competent authority is willing to resolve the case under the MAP (i.e. the foreign competent authority reviews the case, provides the Canadian competent authority with a detailed analysis as to why it agrees with the adjustment and agrees to negotiate the case);
- The MAP request is submitted within the time limits provided for in the applicable tax treaty; and
- The case does not concern an issue for which the Canadian competent authority has decided, as a matter of policy, not to consider in a MAP.

24. One peer indicated that Canada has been amenable to discuss cases involving bona fide taxpayer-initiated foreign adjustments on a case-by-case basis.

⁷ <http://www.cra-arc.gc.ca/tx/nnrdsnts/cmp/pdctcsd-eng.html>

[BP.7] Provide guidance on multilateral MAPs

Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

25. In recent years, globalisation 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 Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

26. Canada's MAP guidance does not contain guidance on the availability of and access to multilateral MAP. One peer, however, noted that Canada has been amenable to considering multilateral MAP cases and that the Canadian collaboration was appreciated on those cases.

[BP.8] Provide for suspension of collection procedures for pending MAP cases

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

27. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

28. Information on the availability of the suspension of tax collection during the period a case is dealt within a MAP can be found in paragraphs 46 to 49 of Canada's MAP Guidance. Large corporations can benefit from a suspension of tax collection for 50% of the tax due if they file a protective appeal or file an objection to the tax assessment. Moreover, taxpayers other than large corporations can benefit from a suspension of tax collection while the case under review is also pending before domestic courts. This under the condition that the taxpayer files a notice of objection to the tax assessment and subsequently lodges an appeal with the tax court in Canada. However, suspension of tax collection is not available for tax, interest and penalties assessed on payments made to non-residents that are subject to withholding taxes. Finally, under certain circumstances, taxpayers are allowed to provide for a security instead of a payment of taxes when they seek competent authority assistance. In any case, suspension of collection in the course of a MAP is provided under at least the same conditions as apply to a person during a domestic or judicial remedy (or better conditions, when the taxpayer can provide security instead of payment of taxes).

29. One peer provided input on this best practice and expressed its concerns about the fact that collecting 50% of the tax due could deter some taxpayers from submitting MAP requests for treaty-related disputes. One taxpayer indeed reported that it was advised to pay more than 50% of the adjustment prior to the opening of the MAP. In this respect, it is reiterated that the acceptance of a MAP request by Canada is not dependent on the payment of tax in advance. Indeed, the Canadian competent authority operates independently from both the audit and collections functions within the CRA. The taxpayer may wish to pay in advance more than 50% of the tax due in order to minimise the ongoing accrual of interest charges and late payment of penalties. In any case, the decision of the taxpayer to do so or not would not have any impact on their access to the MAP.

Part C

Resolution of MAP cases

[BP.9] Permit taxpayers to request multi-year resolution of recurring issues through the MAP

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

30. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

31. Canada has implemented a procedure to permit taxpayers to request multi-year resolution of recurring issues through the MAP. This procedure is called the Accelerated competent authority Procedure ('ACAP'). Canada indicates in its MAP guidance⁸ that the main objective of the ACAP is to streamline certain steps in the MAP process such as being able to simultaneously handle with both MAP and ACAP years at the same time with the other competent authority. An ACAP request will generally be considered for acceptance if all of the following conditions are met:

- an ACAP request is made at the same time as the related MAP request;
- the issues in the ACAP request are the same as those in the MAP request;
- years subsequent to those included in the MAP request and for which the taxpayer has requested ACAP consideration have been filed and initially assessed;
- after consultation between the appropriate TSO and the Canadian competent authority, the CRA is satisfied that the facts and circumstances have remained unchanged between the MAP and ACAP taxation years;
- the other competent authority agrees to include the ACAP period with the related MAP request; and
- there are no issues involving unusual situations or transactions that would render the application of an ACAP impractical.

⁸ Available at: www.cra-arc.gc.ca/tx/nrdsnts/cmmn/trns/tpm12-eng.html.

32. One taxpayer suggested that a MAP agreement provides assurance for later years (i.e. still open or future years). Canada duly responded that this, however, cannot be considered as an automatism as MAP negotiations rely on facts for a specific period and cannot be relied upon as a substitute for future years, for which a full analysis is required to conclude a five years go-forward agreement such as an APA.

33. Peers did not provide input relating to this particular best practice.

[BP.10] Publish explanation of the relationship between the MAP and domestic remedies

Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

34. As mentioned under BP.5, taxpayers are allowed to submit a MAP request irrespective of available domestic remedies pursuant to Article 25(1) of the OECD Model Tax Convention. This, however, does not further specify how to proceed if both available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

35. Canada has included in its domestic guidelines and procedures an explanation addressing the relationship between MAP and domestic law administrative and judicial remedies (see for further information the details provided under BP.5). Paragraphs 38 to 45 of Canada's MAP Guidance specifically address that taxpayers may not pursue an objection or appeal and a MAP request simultaneously and how both procedures interact in practice.

36. Furthermore, its MAP Guidance and its MAP profile also specifies that the Canadian competent authority is not allowed to deviate from a court decision and in cases where a Canadian court decision has already been rendered. In such situation the Canadian competent authority will provide the other competent authority with the details of, and rationale for, the outcome of the court decision.

37. Peers did not provide input relating to this particular best practice.

[BP.11] Provide guidance on consideration of interest and penalties in MAP

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

38. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

39. Canada does not take interest and penalties in consideration in a MAP, which is specified under paragraphs 50 to 52 of its MAP Guidance. However, where the CRA has proposed to (re)assess or has (re)assessed a transfer pricing penalty and the competent authorities negotiate a change to the amount of the transfer pricing income or capital adjustments, the CRA will adjust the amount of the penalty accordingly. Moreover, from a domestic perspective, the CRA will consider waiving or cancelling a portion of the

interest that accrues during the period of time that a MAP is pending. This, however, does not apply to interests on penalties.

40. Peers did not provide input relating to this particular best practice.

[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties

Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.

41. Article 9(2) of the OECD Model Tax Convention allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

42. Out of Canada’s 96 tax treaties, 57 contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention requiring their competent authorities to make a correlative adjustment in case a transfer pricing adjustment is made by the treaty partner. 17 tax treaties do not include such a provision while 22 include a provision that is similar to Article 9(2) of the OECD Model Tax Convention, but uses different or includes additional wording. These 22 treaties can be classified as follows:

- 21 treaties do not include the sentence “and the competent authorities of the contracting states shall, if necessary, consult each other” of Article 9(2), where 16 of them provide in the MAP article that the competent authorities can discuss a transfer pricing case ; and
- One treaty includes such a provision but only enables a corresponding adjustment to be made through a MAP.

43. Canada explained that they consider Article 25(3) of the OECD Model Tax Convention as allowing competent authorities to consult on Article 9 matters of both taxpayer specific and general matters, by which in the absence of the equivalent of Article 9(2) of the OECD Model Tax Convention in tax treaties does not obstruct granting access to the MAP to transfer pricing cases.

44. Peers did not provide input relating to this particular best practice.

Part D

Implementation of MAP Agreements

45. There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Settlement Mechanisms More Effective
MAP guidance	Information Circular on Competent Authority Assistance Under Canada's Tax Conventions (IC71-17R5)
Multilateral Instrument	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 15 July 2014
OECD Transfer Pricing Guidelines	OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective



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