

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

BEST PRACTICES

Colombia

2019



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Dispute Resolution More Effective
MAP Peer Review Report

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Abbreviations and Acronyms

APA	Advance Pricing Arrangement
DIAN	National Tax and Customs Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

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 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.

Colombia 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 Colombia’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 (CTPA/CFA/NOE2(2016)45/REV1).

Part A

PREVENTING DISPUTES

[BP1.] 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. Colombia reported that it has implemented an APA programme, which is stipulated under Colombia's *Decreto Único Reglamentario en Materia Tributaria's* "Título 2 Precios de Transferencia - Artículos 1.2.2.4.1 – 1.2.2.4.10" ("**Tax Decree**"). Under this law, an APA request can be made by taxpayers in writing to the General Commissioner of Colombia's National Tax and Customs Administration ("**DIAN**") or his deputy. Colombia clarified that unilateral, bilateral or multilateral APAs can be requested. Colombia further reported that unilateral requests for APAs are usually processed within nine months, whereas the timeline for evaluation, negotiation and signing stages of bilateral or multilateral APA requests can be different and are jointly determined by the relevant competent authorities.
3. According to Article 1.2.2.4.6 of the Tax Decree, once it has been agreed to, a bilateral APA would be applied to the year before the agreement was signed and up to the three years after it was signed. Under certain circumstances, Colombia reported that it allows for existing APAs to be modified or terminated, the conditions for which are enumerated in Colombia's domestic law.
4. According to Article 1.2.2.4.10 of the Tax Decree, a taxpayer who has entered into an APA with DIAN is required to submit a report to the General Commissioner of DIAN showing that its transactions comply with the arm's length principle as well as the conditions that were set out in the agreement. Colombia reported that this report must contain: (i) the types of transactions to which the APA was applied and that were made during the applicable tax period (ii) prices, considerations, and/or profit margins derived from the types of operations covered by the APA and (iii) a description of the fundamental assumptions of the APA and how each assumption is met.
5. Colombia reported that it has not yet entered into a bilateral APA, although one request was received in 2014 and is still pending.
6. Peers did not provide input relating to this particular best practice.

[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. Colombia reported that its tax administration has occasionally issued opinions of a general nature related to the application and implementation of double tax treaties, which were published on DIAN's website.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

9. 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.
10. Colombia reported that it has implemented a bilateral APA programme but it does not currently publish MAP guidance, and its draft MAP guidance that is under consideration does not contain any specific APA guidance. However, Colombia's MAP profile contains links to its domestic legislation in Spanish that governs its APA programme. This domestic legislation is the Tax Decree (as modified by Decree 2120 of 2017), which is accessible at:
http://www.minhacienda.gov.co/HomeMinhacienda/content/conn/OCS/path/Contribution%20Folders/SitioWeb/Home/elministerio/NormativaMinhacienda/DURTRIBUTARIO/DURTRIBUTARIOConsolidado/23-2-2017-DUR-decreto-unico-reglamentario-tributario-actualizacion4%20oficial.htm#_Toc518551698
11. Colombia's MAP profile also provides that its tax administration has the legal authority under this law to enter into APAs and that such bilateral APAs would be applied to the year before the agreement was signed and up to the three years after it was signed.
12. 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.

13. 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.

14. Colombia reported that its tax and customs authority has a specialised division called the *Escuela de la DIAN*, which is in charge of providing continuing training to its tax officials. Colombia reported that training is not restricted to domestic law and such training also focuses on issues relating to tax treaties.

15. Furthermore, Colombia reported that its tax administration staff is exposed to a variety of trainings, some of which are sponsored by the Inter-American Development Bank. Colombia noted that this institution offers training sessions on theory and practical case studies to DIAN’s officials in charge of transfer pricing. Colombia noted that DIAN’s staff received anonymous feedback regarding the appropriate way to perform such audits. Officials from Colombia’s International Audit Unit, the Large Taxpayer unit, Bogota’s Regional Offices, as well as from the Legal Directorate and Head of Audit all participate in such workshops.

16. Colombia also reported that it has nine skill-building programme workshops, which address a variety of transfer pricing topics from a theoretical and practical standpoint through theory presentations and case study discussions. These include but are not limited to intra-group services, transfer pricing methods, mining and other extractive industries, intangibles, tax transparency, business restructuring, financial transactions, BEPS issues, thin capitalisation, and consumer good issues. Colombia also reported that two workshops include the direct participation of businesses including the mining and consumer goods sector.

17. Colombia further reported that its officials undergo trainings related to advance pricing agreements with the World Bank Group. In these trainings, Colombia reported that its officials discuss APA case studies as well as technical and processing questions regarding DIAN’s current APA caseload. Such discussions sometimes include representatives from the private sector.

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

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.

19. 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.

20. Article 736 of Colombia's tax code and Article 93-97 of Colombia's Administrative Procedure and Contentious Administrative Code state that if a taxpayer has not exhausted the administrative remedies provided in Colombia's law, the taxpayer could make a request for direct revocation to the relevant administrative authority. Colombia also reported that taxpayers have the opportunity to file a reconsideration plea, which is available to taxpayers who want to challenge administrative acts issued by Colombia's tax administration. Colombia noted that once an assessment has been notified by its tax administration, taxpayers have two months to file such a reconsideration plea with the appeals division of DIAN.

21. With respect to available judicial mechanisms, Colombia reported that a taxpayer has up to four months from the notification of the assessment or from the notification resolution in response to a reconsideration plea to file a request for annulment and restoration of rights before Colombia's administrative tribunal in the first instance. In the second instance, Colombia reported that the taxpayer would file this request to the Council of State. Colombia noted that smaller claims would always be decided by an administrative judge and by the administrative tribunal in the second instance.

22. Colombia reported that a taxpayer may request MAP assistance at any time once it has received notification of a proposed adjustment in writing, so long as the filing period as stipulated under the tax treaty has not expired. Colombia further reported that a taxpayer is allowed to file a request for MAP assistance at any time prior to a final judicial ruling issued by Colombia's competent court. In such cases, the taxpayer would be requested to join Colombia's withdrawal of the related claims within 15 business days. If the case contains issues that will not be submitted to MAP, Colombia explained that the taxpayer may be asked to join Colombia in a partial withdrawal of such claims.

23. Furthermore, if a MAP request involves a taxable period where a final judicial decision has already been rendered, Colombia reported that its competent authority will only consider a taxpayer's request for assistance to alleviate double taxation in the foreign contracting state and that it would not take any action to worsen the taxpayer's situation in light of the final judicial ruling. Colombia noted that its competent authority would only provide access to MAP in order to seek relief from its treaty partner to the extent of relieving the double taxation in question and would not undertake any actions that would otherwise change such agreements or final judicial decisions.

24. As will be mentioned in BP.10, Colombia does not publish guidance on the relationship between MAP and domestic law administrative and judicial remedies. However, Colombia reported that its draft MAP guidance currently under consideration will contain such information, which Colombia expects to be made public in November 2018.

25. 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.

26. 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.

27. Colombia reported that its current domestic legal framework does not address the issue of bona-fide taxpayer initiated adjustments. However, Colombia noted that its tax administration is of the opinion that there is nothing in Colombia's current tax law that prevents its competent authority from giving access to MAP in double taxation cases resulting from bona fide taxpayer initiated foreign adjustments where appropriate and that it would grant access to MAP in practice. Furthermore, Colombia reported that its draft MAP guidance that is currently under consideration will state that if a taxpayer self-initiates a bona fide foreign tax adjustments, such a situation must be disclosed to Colombia's competent authority in the taxpayer's request for MAP.

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

[BP.7] Provide guidance on multilateral MAPs

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

29. 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.

30. Colombia has not yet issued MAP guidance. Apart from what is available in Colombia's MAP profile, there is no information publicly available on multilateral MAPs involving Colombia. Colombia's MAP profile notes that currently there are no rules and/or procedures in Colombia that address how Colombia would handle a multilateral MAP request.

In this respect, Colombia reported that its draft MAP guidance that is currently under consideration will contain information on multilateral MAPs.

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

[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.

32. 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.

33. Colombia reported that the suspension of collection is not yet available but that it intends to provide for the suspension of collection procedures during the period a MAP case is pending. However, Colombia's MAP profile notes that currently there are no rules and/or procedures in Colombia with respect to the interaction of MAP and the suspension of tax collection procedures during the period a MAP case is pending.

34. Colombia reported that its draft MAP guidance that is currently under consideration will make clear that it will provide for the suspension of collection procedures during the period a MAP case is pending.

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

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.

36. 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.

37. Colombia reported that its current practice is to allow for taxpayers to request the multi-year resolution of recurring issues through MAP. According to Colombia's MAP profile, there are currently no rules and/or procedures in Colombia that address whether taxpayers may request for multi-year resolution of recurring issues through MAP with respect to filed tax years.

38. However, Colombia reported that its draft MAP guidance that is currently under consideration will explain that if a taxpayer requests a multi-year resolution of recurring issues with respect to filed tax years, he must provide information that proves all relevant facts and circumstances are the same as for the case that is under review.

39. 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.

40. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. 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.

41. Colombia has not yet published an explanation of the relationship between MAP and domestic remedies. Colombia reported that Article 720 of its published domestic law *Estatuto Tributario* stipulates how taxpayers can file a reconsideration plea, and that Article 736 of this law stipulates how taxpayers could request a direct revocation. This process is further explained under Colombia’s Administrative Procedures and Contentious Administrative Code, “Código de Procedimiento Administrativo y de lo Contencioso Administrativo – Article 93 – 97”. Furthermore, information on the judicial mechanisms available in Colombia’s legal framework can be found in Articles 720 and 829 of Colombia’s tax code, as well as in Article 139 of Colombia’s “Código de Procedimiento Administrativo y de lo Contencioso Administrativo.” However, no explanation is publicly available regarding the interaction of Colombia’s domestic remedies with MAP.

42. Colombia reported that its draft MAP guidance – which it expects to be publicly available in November 2018 – will contain an explanation of the relationship between MAP and domestic remedies.

43. 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.

44. 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.

45. Colombia reported that, in practice, it takes interest and/or penalties into consideration in a mutual agreement procedure. Apart from what is available in Colombia’s MAP profile, there is no information publicly available on the consideration of interest and penalties in MAP by Colombia. Colombia’s MAP profile notes that although currently no domestic tax rules and/or procedures exist regarding the consideration of interest and penalties in a MAP case, the current view of Colombia’s tax authority is that interest and penalties resulting from adjustments made pursuant to a MAP agreement may be waived or dealt with as part of MAP. Colombia reported that its draft MAP guidance – which it expects to be publicly available in November 2018 – will state that its competent authority may consider interest and penalties as part of a MAP agreement only if such interest and penalties are directly connected to taxes covered within the scope of the relevant tax treaty.

46. 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.

47. 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.
48. All of Colombia's 14 tax treaties contain a provision 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. Furthermore, Colombia reported that it is committed to including Article 9(2), of the OECD Model Tax Convention in all of its future tax treaties.
49. Peers did not provide input relating to this particular best practice.

Part D

IMPLEMENTATION OF MAP AGREEMENTS

50. 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 Resolution Mechanisms More Effective
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Tax Decree	Titulo 2 Precios de Transferencia - Artículos 1.2.2.4.1 – 1.2.2.4.10, as modified by Decree 2120 of 2017
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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For more information:

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