OECD/G20 Base Erosion and Profit Shifting Project

# Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 2)

## INCLUSIVE FRAMEWORK ON BEPS: ACTION 14



OECD

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**Please cite this publication as:**
OECD (2021), *Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 2): Inclusive Framework on BEPS: Action 14*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, *https://doi.org/10.1787/cc6e7579-en*.

ISBN 978-92-64-59819-5 (print)
ISBN 978-92-64-99934-3 (pdf)

OECD/G20 Base Erosion and Profit Shifting Project
ISSN 2313-2604 (print)
ISSN 2313-2612 (online)

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# *Foreword*

The integration of national economies and markets has increased substantially in recent years, putting a strain on the international tax rules, which were designed more than a century ago. Weaknesses in the current rules create opportunities for base erosion and profit shifting (BEPS), requiring bold moves by policy makers to restore confidence in the system and ensure that profits are taxed where economic activities take place and value is created.

Following the release of the report *Addressing Base Erosion and Profit Shifting* in February 2013, OECD and G20 countries adopted a 15-point Action Plan to address BEPS in September 2013. The Action Plan identified 15 actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency as well as certainty.

After two years of work, measures in response to the 15 actions were delivered to G20 Leaders in Antalya in November 2015. All the different outputs, including those delivered in an interim form in 2014, were consolidated into a comprehensive package. The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century. Once the new measures become applicable, it is expected that profits will be reported where the economic activities that generate them are carried out and where value is created. BEPS planning strategies that rely on outdated rules or on poorly co-ordinated domestic measures will be rendered ineffective.

Implementation is now the focus of this work. The BEPS package is designed to be implemented via changes in domestic law and practices, and in tax treaties. With the negotiation of a multilateral instrument (MLI) having been finalised in 2016 to facilitate the implementation of the treaty related BEPS measures, over 90 jurisdictions are covered by the MLI. The entry into force of the MLI on 1 July 2018 paves the way for swift implementation of the treaty related measures. OECD and G20 countries also agreed to continue to work together to ensure a consistent and co-ordinated implementation of the BEPS recommendations and to make the project more inclusive. Globalisation requires that global solutions and a global dialogue be established which go beyond OECD and G20 countries.

A better understanding of how the BEPS recommendations are implemented in practice could reduce misunderstandings and disputes between governments. Greater focus on implementation and tax administration should therefore be mutually beneficial to governments and business. Proposed improvements to data and analysis will help support ongoing evaluation of the quantitative impact of BEPS, as well as evaluating the impact of the countermeasures developed under the BEPS Project.

As a result, the OECD established the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework), bringing all interested and committed countries and jurisdictions on an equal footing in the Committee on Fiscal Affairs and all its subsidiary bodies. The

Inclusive Framework, which already has more than 135 members, is monitoring and peer reviewing the implementation of the minimum standards as well as completing the work on standard setting to address BEPS issues. In addition to BEPS members, other international organisations and regional tax bodies are involved in the work of the Inclusive Framework, which also consults business and the civil society on its different work streams.

This report was approved by the Inclusive Framework on 7 May 2021 and prepared for publication by the OECD Secretariat.

# *Table of contents*

**Abbreviations and acronyms** . . . . . 7

**Executive summary** . . . . . 9

References . . . . . 11

**Introduction** . . . . . 13

References . . . . . 19

***Part A.* Preventing disputes** . . . . . 21

[A.1] Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties . . . . . 21
[A.2] Provide roll-back of bilateral APAs in appropriate cases . . . . . 23

References . . . . . 28

***Part B.* Availability and access to MAP** . . . . . 29

[B.1] Include Article 25(1) of the OECD Model Tax Convention in tax treaties . . . . . 29
[B.2] Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process . . . . . 48
[B.3] Provide access to MAP in transfer pricing cases . . . . . 50
[B.4] Provide access to MAP in relation to the application of anti-abuse provisions . . . . . 53
[B.5] Provide access to MAP in cases of audit settlements . . . . . 54
[B.6] Provide access to MAP if required information is submitted . . . . . 59
[B.7] Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties . . . 60
[B.8] Publish clear and comprehensive MAP guidance . . . . . 62
[B.9] Make MAP guidance available and easily accessible and publish MAP profile . . . . . 65
[B.10] Clarify in MAP guidance that audit settlements do not preclude access to MAP . . . . . 66

References . . . . . 70

***Part C.* Resolution of MAP cases** . . . . . 71

[C.1] Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties . . . . . 71
[C.2] Seek to resolve MAP cases within a 24-month average timeframe . . . . . 74
[C.3] Provide adequate resources to the MAP function . . . . . 80
[C.4] Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty . . . . . 95
[C.5] Use appropriate performance indicators for the MAP function . . . . . 97
[C.6] Provide transparency with respect to the position on MAP arbitration . . . . . 99

References . . . . . 100

***Part D.*** **Implementation of MAP agreements** . . . . . 101

[D.1] Implement all MAP agreements . . . . . 101
[D.2] Implement all MAP agreements on a timely basis . . . . . 104
[D.3] Include Article 25(2), second sentence, of the OECD Model Tax Convention in tax treaties or alternative provisions in Article 9(1) and Article 7(2) . . . . . 106

Reference . . . . . 109

**Summary** . . . . . 111

***Annex A.*** **Tax treaty network of India** . . . . . 115

***Annex B.*** **MAP Statistics Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for pre-2016 cases** . . . . . 122

***Annex C.*** **MAP Statistics Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for post-2015 cases** . . . . . 124

**Glossary** . . . . . 127

## Figures

Figure C.1 Evolution of India's MAP caseload . . . . . 75
Figure C.2 End inventory on 31 December 2019 (951 cases) . . . . . 76
Figure C.3 Evolution of India's MAP inventory: Pre-2016 cases . . . . . 76
Figure C.4 Evolution of India's MAP inventory: Post-2015 cases . . . . . 77
Figure C.5 Cases closed in 2016, 2017, 2018 or 2019 (360 cases) . . . . . 78
Figure C.6 Average time (in months) to close cases in 2016-19 . . . . . 82

# *Abbreviations and acronyms*

| | |
|---|---|
| **APA** | Advance Pricing Arrangement |
| **FTA** | Forum on Tax Administration |
| **MAP** | Mutual Agreement Procedure |
| **OECD** | Organisation for Economic Co-operation and Development |

# Executive summary

India has an extensive tax treaty network with almost 100 tax treaties. India has an established MAP programme and has significant experience with resolving MAP cases. It has a very large MAP inventory, with a very large number of new cases submitted each year and around 950 cases pending on 31 December 2019. Of these cases, 83% concern allocation/attribution cases. Overall India meets half of the elements of the Action 14 Minimum Standard. Where it has deficiencies, India worked to address them, which has been monitored in stage 2 of the process. In this respect, India solved almost all of the identified deficiencies but several new issues were identified in stage 2.

All of India's tax treaties contain a provision relating to MAP. Those treaties mostly follow paragraphs 1 through 3 of Article 25 of the OECD Model Tax Convention (OECD, 2017). Its treaty network is largely consistent with the requirements of the Action 14 Minimum Standard, except mainly for the fact that:

- Approximately 6% of its tax treaties do not contain the equivalent of Article 25(1) to the OECD Model Tax Convention (OECD, 2017) (OECD whereby the majority of these treaties do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as it read prior to the adoption of the Action 14 final report (OECD, 2015b), since they do not allow taxpayers to submit a MAP request to the state of which it is a national, where its case comes under the non-discrimination provision.
- Approximately 10% of its tax treaties neither contain a provision stating that mutual agreements shall be implemented notwithstanding any time limits in domestic law (which is required under Article 25(2), second sentence), nor the alternative provisions for Article 9(1) and Article 7(2) to set a time limit for making transfer pricing adjustments.

In order to be fully compliant with all four key areas of an effective dispute resolution mechanism under the Action 14 Minimum Standard, India needs to amend and update a certain number of its tax treaties. In this respect, India signed and ratified the Multilateral Instrument, through which a number of its tax treaties have been and will be modified to fulfil the requirements under the Action 14 Minimum Standard. Where treaties will not be modified, upon entry into force of this Multilateral Instrument for the treaties concerned, India reported that it intends to update all of its tax treaties via bilateral negotiations to be compliant with the requirements under the Action 14 Minimum Standard and has put in place a plan in relation hereto.

India meets the Action 14 Minimum Standard concerning the prevention of disputes. It has in place a bilateral APA programme. This APA programme also enables taxpayers to request rollbacks of bilateral APAs and such rollbacks are granted in practice.

India further meets some requirements regarding the availability and access to MAP under the Action 14 Minimum Standard. It provides access to MAP in transfer pricing

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http://www.oecd.org/about/publishing/corrigendum-map-peer-report-india.pdf



cases and cases concerning the application of anti-abuse provisions. However, there is a risk that access to MAP is denied in eligible cases where the issue under dispute is pending substantive determination or has already been decided by the Authority for Advance Rulings in India. Furthermore, for cases where taxpayers and the tax administration enter into audit settlements through the Vivad se Vishwas Act 2020, access to MAP would be denied if the taxpayer files a MAP request before India's competent authority. India has in place a documented bilateral consultation or notification process for those situations in which its competent authority considers the objection raised by taxpayers in a MAP request as not justified. India also has issued guidance on the availability of MAP and how it applies this procedure in practice. Lastly, India has in place an administrative dispute settlement/resolution process that is independent from the audit and examination functions and which can only be accessed through a request from the taxpayer. However, the effects of such process where the issue under dispute is pending substantive determination are not addressed in India's MAP profile as well as in available guidance on such process.

Concerning the average time needed to close MAP cases, the MAP statistics for India for the period 2016-19 are as follows:

| 2016-19 | Opening inventory 1/1/2016 | Cases started | Cases closed | End inventory 31/12/2019 | Average time to close cases (in months)* |
|---|---|---|---|---|---|
| Attribution/allocation cases | 594 | 541 | 345 | 790 | 34.32 |
| Other cases | 101 | 75 | 15 | 161 | 36.13 |
| Total | 695 | 616 | 360 | 951 | 34.44 |

*The average time taken for resolving MAP cases for post-2015 cases follows the MAP Statistics Reporting Framework. For computing the average time taken for resolving pre-2016 MAP cases, India used as a *start date* the date of receipt of the MAP request by taxpayers, or if the MAP request was submitted to the other competent authority, the date of receipt of the MAP invocation letter from that competent authority, and as the *end date*: the date of sending of the letter to India's tax authorities in the field to give effect to the MAP agreement entered into between the competent authorities.

The number of cases India closed in 2016-19 is less than the number of all new cases started in those years. During these years, India's competent authority did not close MAP cases on average within a timeframe of 24 months (which is the pursued average for closing MAP cases received on or after 1 January 2016), as the average time necessary was 34.44 months. This concerns both type of cases, as the average time for attribution/allocation cases was 34.32 and for other MAP cases it was 36.13 months. Furthermore, its MAP inventory as on 31 December 2019 increased with approximately 37% as compared to 1 January 2016. While India has taken several steps to resolve cases in a timely manner, these statistics indicate that India's competent authority does not have adequate resources to conduct the MAP function and that additional resources are necessary to ensure a timely resolution of both type of MAP cases and also to cope with the increase in the number of MAP cases. Such addition of resources should enable India to timely submit position papers to treaty partners as well as to more frequently communicate with the other competent authorities concerned on the status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP case.

Furthermore, India meets most of the other requirements under the Action 14 Minimum Standard in relation to the resolution of MAP cases. India's competent authority operates fully independently from the audit function of the tax authorities and the performance

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indicators used are appropriate to perform the MAP function. However, India's competent authority does not seek to resolve MAP cases by going below the income declared by the Indian taxpayer in its return of income if required in transfer pricing cases.

Lastly, India does not meet the Action 14 Minimum Standard as regards the implementation of MAP agreements. India monitors the implementation of MAP agreements. However, India's competent authority cannot implement MAP agreements where an order is passed by the Income Tax Appellate Tribunal in respect of the issue involved in the MAP case. Further, India's competent authority cannot grant relief that would go below the income declared by an Indian taxpayer in its return of income in case of adjustments made by Indian tax authorities and accordingly, could not implement one MAP agreement.

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OECD (2015a), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264239081-en.

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# *Introduction*

## Available mechanisms in India to resolve tax treaty-related disputes

India has entered into 97 tax treaties on income (and/or capital), 95 of which are in force.[1] These 97 treaties are being applied to 98 jurisdictions.[2] All of these treaties provide for a mutual agreement procedure for resolving disputes on the interpretation and application of the provisions of the tax treaty. None of these treaties include an arbitration procedure as a final stage to the MAP process.

In India, the competent authority function is assigned to the Minister of Finance, which has been delegated to the Central Board of Direct Taxes within the Department of Revenue of this Ministry. Within the central board, two teams within the Foreign Tax and Tax Research Division are responsible for handing MAP cases. These are:

- *FT & TR-I Division (headed by Joint Secretary, FT & TR-I)*: eight persons (including the head of division) are responsible for handling MAP and bilateral APA cases concerning treaty partners in North America (including the Caribbean Islands) and Europe.
- *FT & TR-II Division (headed by Joint Secretary, FT & TR-II)*: eight persons (including the head of division) are responsible for handling MAP and bilateral APA cases concerning treaty partners in Africa, Latin America, Asia and Australia.

India has issued guidance on the governance and administration of the mutual agreement procedure ("**MAP**") in August 2020, which is shortly after the review period, and is available at:

https://www.incometaxindia.gov.in/Documents/MAP-GUIDANCE-7th-August-2020.pdf

## Developments in India since 1 September 2018

### *Developments in relation to the tax treaty network*

In the stage 1 peer review report of India, it is reflected that two of India's 96 treaties have not entered into force. This concerns the treaty with Hong Kong, China (2018) and Iran (2018). Since 1 September 2018, the treaty with Hong Kong, China has entered into force. While India has ratified the treaty, Iran has not yet. In addition, India signed a new treaty with Chile (2020), which is pending ratification. This treaty contains Article 9(2) and Article 25(1-3) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b).

Furthermore, on 7 June 2017 India signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**Multilateral Instrument**"), to adopt, where necessary, modifications to the MAP article under its tax treaties with a view to be compliant with the Action 14 Minimum Standard in respect of

all the relevant tax treaties. On 25 June 2019, India deposited its instrument of ratification, following which the Multilateral Instrument has for India entered into force on 1 October 2019. With the depositing of the instrument of ratification, India also submitted its list of notifications and reservations to that instrument.[3] In relation to the Action 14 Minimum Standard, India reserved, pursuant to Article 16(5)(a), the right not to apply Article 16(1) of the Multilateral Instrument (concerning the mutual agreement procedure) that modifies existing treaties to allow the submission of a MAP request to the competent authorities of either contracting state.[4] This reservation is in line with the requirements of the Action 14 Minimum Standard.

For those tax treaties that were in the stage 1 peer review report considered not to be in line with one or more elements of the Action 14 Minimum Standard and that will not be modified by the Multilateral Instrument, India reported that it strives updating them through future bilateral negotiations according to its plan. In the stage 1 peer review report, it is stated that the plan consists of the following three steps, of which the first two are already completed:

- identification of treaties that are not in line with the minimum standard
- identification for the treaties concerned whether the treaty partner is a signatory to the Multilateral Instrument and, if so, whether it has listed its treaty with India as a covered tax agreement
- approach the relevant treaty partners to initiate bilateral negotiations when the relevant treaties will not be modified by the Multilateral Instrument.

With respect to the last step, India reported that it will first approach treaty partners that are members of the Inclusive Framework, whereby a prioritisation is made for those jurisdictions with which there are MAP cases. Those jurisdictions that are not a member of the Inclusive Framework will be approached once the negotiations with the members of that framework have been finalised. Furthermore, in line with its plan, India reported it has already initiated negotiations with four treaty partners and has approached or has been approached by another two treaty partners to initiate such negotiations.

In the update report for stage 2 of the peer review process, India provided a detailed description of actions it has taken to bring the 11 tax treaties to be in line with the requirements under the Action 14 Minimum Standard. This concerns:

- Two treaty partners have informed India that they will withdraw their reservation under the Multilateral Instrument, following which the treaty will be in line with the requirements under the Action 14 Minimum Standard.
- Negotiations are pending with one treaty partner on an amending protocol and another treaty partner on the comprehensive revision of the existing treaty.
- Negotiations are envisaged with one treaty partner for modification of the relevant provisions.
- India has shared with its three treaty partners a draft of an amending protocol. Negotiations with one of them are envisaged, while India is awaiting a response from the other two.
- India has approached one treaty partner with a proposal of the comprehensive revision of the existing treaty, for which the treaty partner recently has agreed. Negotiations are envisaged.
- India has also approached one treaty partner, which is not a signatory to the Multilateral Instrument, with a proposal for modification of the treaty to incorporate the Action 14 Minimum Standard. India is awaiting a response from this treaty partner.

With respect to the treaty with one treaty partner, India reported that taking the situation in this treaty partner into account, it has not yet approached the treaty partner, which is not a signatory to the Multilateral Instrument, with a proposal to amend the treaty.

### *Other developments*

India reported that it has issued MAP guidance on 7 August 2020, which is after the review period. India noted that it has clarified in its MAP guidance its position on the issues for which recommendations were made in its stage 1 peer review report. Furthermore, India reported that it has increased the number of officers handling MAP cases from 15 to 16.

## Basis for the peer review process

### *Outline of the peer review process*

The peer review process entails an evaluation of India's implementation of the Action 14 Minimum Standard through an analysis of its legal and administrative framework relating to the mutual agreement procedure, as governed by its tax treaties, domestic legislation and regulations, as well as its MAP programme guidance (if any) and the practical application of that framework. The review process performed is desk-based and conducted through specific questionnaires completed by the assessed jurisdiction, its peers and taxpayers.

The process consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). In stage 1, India's implementation of the Action 14 Minimum Standard as outlined above is evaluated, which has been reflected in a peer review report that has been adopted by the BEPS Inclusive Framework on 8 May 2019. This report identifies the strengths and shortcomings of India in relation to the implementation of this standard and provides for recommendations on how these shortcomings should be addressed. The stage 1 report is published on the website of the OECD. Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by India. In this update report, India reflected (i) what steps it has already taken, or are to be taken, to address any of the shortcomings identified in the peer review report and (ii) any plans or changes to its legislative and/or administrative framework concerning the implementation of the Action 14 Minimum Standard. The update report forms the basis for the completion of the peer review process, which is reflected in this update to the stage 1 peer review report.

### *Outline of the treaty analysis*

For the purpose of this report and the statistics below, in assessing whether India is compliant with the elements of the Action 14 Minimum Standard that relate to a specific treaty provision, the newly negotiated treaties or the treaties as modified by a protocol, as described above, were taken into account, even if it concerned a modification or a replacement of an existing treaty. Furthermore, the treaty analysis also takes into account the treaties with states that itself are no longer in existence, but for which jurisdictions these treaties continued to be applied by India. This concerns the 1985 treaty with former Czechoslovakia with respect to the Slovak Republic, the 1989 treaty with Denmark with respect to the Faroe Islands (with Denmark India has in 2013 entered into a new tax treaty), and the 2006 treaty with Serbia and Montenegro with respect to both Serbia and Montenegro. As for the treaty with former Serbia and Montenegro it concerns the same tax

treaty that is being applied to multiple jurisdictions, this treaty is only counted as one treaty for this purpose. Reference is made to Annex A for the overview of India's tax treaties regarding the mutual agreement procedure.

### *Timing of the process and input received by peers and taxpayers*

Stage 1 of the peer review process was for India launched on 31 August 2018, with the sending of questionnaires to India and its peers. The FTA MAP Forum has approved the stage 1 peer review report of India in March 2019, with the subsequent approval by the BEPS Inclusive Framework on 8 May 2019. On 8 May 2020, India submitted its update report, which initiated stage 2 of the process.

The period for evaluating India's implementation of the Action 14 Minimum Standard ranges from 1 January 2016 to 31 August 2018 and formed the basis for the stage 1 peer review report. The period of review for stage 2 started on 1 September 2018 and depicts all developments as from that date until 30 April 2020.

In total 15 peers provided input: Australia, Belgium, Denmark, Germany, Ireland, Italy, Japan, the Netherlands, Norway, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom and the United States. These peers represent approximately 97% of post-2015 MAP cases in India's inventory that started in 2016 or 2017. Furthermore, these peers represent treaty partners that have a high number of MAP cases with India as well as a more moderate caseload. The experiences of these peers in handling and resolving MAP cases with India is generally positive, some of them highlighting the easiness of contacts and the frequency of communications. Furthermore, a number of peers appreciated the willingness of India to resolve cases. Other peers, however, also mentioned difficulties in resolving cases with India, particularly the long time it takes to receive positon papers, the interplay with domestic remedies and the fact that reaching an agreement on a principled basis is sometimes challenging. During stage 2, the same peers provided input. In addition, Mexico, Singapore and Spain provided input during stage 2. For this stage, these peers represent approximately 95% of post-2015 MAP cases in India's inventory that started in 2016, 2017, 2018 or 2019. Generally, all peers indicated having good relationships with India. Specifically with respect to stage 2, most peers that provided input reported that the update report of India fully reflects the experiences these peers have had with India since 1 September 2018 and/or that there was no addition to previous input given. Some peers, however, reflected additional input or new experiences, which is reflected throughout this document under the elements where they have relevance. This input particularly relates to access to MAP, a statutory dispute settlement process and the resolution of MAP cases.

### *Input by India and co-operation throughout the process*

During stage 1, India provided informative, albeit limited, answers in its questionnaire, which was submitted on time. However, other information to be provided was only submitted at a later stage and some of this information only very close to the deadline. Furthermore, the explanations given were sometimes very limited, and only references were made to domestic legislations, without any further clarification. In addition, India provided the following information:

- MAP profile[5]
- MAP statistics[6] according to the MAP Statistics Reporting Framework (see below).

Concerning stage 2 of the process, India submitted its update report on time and the information included therein was extensive. India was co-operative during stage 2 and the finalisation of the peer review process.

Finally, India is a member of the FTA MAP Forum and co-operated during the peer review process. It only provided in a few instances peer input during stage 1 and stage 2.

## Overview of MAP caseload in India

The analysis of India's MAP caseload for stage 1 relates to the period starting on 1 January 2016 and ending on 31 December 2017. For stage 2 the period ranges from 1 January 2018 to 31 December 2019. Both periods are taken into account in this report for analysing the MAP statistics of India. The analysis of India's MAP caseload therefore relates to the period starting on 1 January 2016 and ending 31 December 2019 ("**Statistics Reporting Period**"). According to the statistics provided by India, its MAP caseload during this period was as follows:

| 2016-19 | Opening inventory 1/1/2016 | Cases started | Cases closed | End inventory 31/12/2019 |
|---|---|---|---|---|
| Attribution/allocation cases | 594 | 541 | 345 | 790 |
| Other cases | 101 | 75 | 15 | 161 |
| Total | 695 | 616 | 360 | 951 |

## General outline of the peer review report

This report includes an evaluation of India's implementation of the Action 14 Minimum Standard. The report comprises the following four sections:

A. Preventing disputes

B. Availability and access to MAP

C. Resolution of MAP cases

D. Implementation of MAP agreements.

Each of these sections is divided into elements of the Action 14 Minimum Standard, as described in the terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ("Terms of Reference").[7] Apart from analysing India's legal framework and its administrative practice, the report also incorporates peer input and responses to such input by India. Furthermore, the report depicts the changes adopted and plans shared by India to implement elements of the Action 14 Minimum Standard where relevant. The conclusion of each element identifies areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed.

The basis of this report is the outcome of the stage 1 peer review process, which has identified in each element areas for improvement (if any) and provides for recommendations how the specific area for improvement should be addressed. Following the outcome of the peer monitoring process of stage 2, each of the elements have been updated with a recent development section to reflect any actions taken or changes made on how recommendations have been addressed, or to reflect other changes in the legal and administrative framework of India relating to the implementation of the Action 14 Minimum Standard. Where it

concerns changes to MAP guidance or statistics, these changes are reflected in the analysis sections of the elements, with a general description of the changes in the recent development sections.

The objective of the Action 14 Minimum Standard is to make dispute resolution mechanisms more effective and concerns a continuous effort. Where recommendations have been fully implemented, this has been reflected and the conclusion section of the relevant element has been modified accordingly, but India should continue to act in accordance with a given element of the Action 14 Minimum Standard, even if there is no area for improvement and recommendation for this specific element.

## Notes

1. The tax treaties India has entered into are available at: www.incometaxindia.gov.in. The new treaty that has been signed but has not yet entered into force is with Chile (2020) and Iran (2018). The treaty with Zambia (2018) to replace the existing treaty of 1981 has been signed but has not yet entered into force. Reference is made to Annex A for the overview of India's tax treaties regarding the mutual agreement procedure.
2. India continues to apply the 2006 tax treaty with Serbia and Montenegro to both (i) Serbia and (ii) Montenegro.
3. Available at: www.oecd.org/tax/treaties/beps-mli-position-india.pdf.
4. Ibid. This reservation on Article 16 – Mutual Agreement Procedure reads: "Pursuant to Article 16(5)(a) of the Convention, India reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified".
5. Available at: www.oecd.org/tax/dispute/country-map-profiles.htm.
6. The MAP statistics of India are included in Annex B and C of this report.
7. Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf

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# *Part A*

# Preventing disputes

## [A.1] Include Article 25(3), first sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision which requires the competent authority of their jurisdiction to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties.

1. Cases may arise concerning the interpretation or the application of tax treaties that do not necessarily relate to individual cases, but are more of a general nature. Inclusion of the first sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2017a) in tax treaties invites and authorises competent authorities to solve these cases, which may avoid submission of MAP requests and/or future disputes from arising, and which may reinforce the consistent bilateral application of tax treaties.

### *Current situation of India's tax treaties*

2. Out of India's 97 tax treaties, 95 contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) requiring their competent authority to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the tax treaty.[1] One of the remaining two treaties contains a provision that is based on the first sentence of Article 25(3), but omits the word "interpretation". The other treaty does not contain any such provision. Both treaties are therefore considered as not having the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a).

3. India reported that the absence of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) in its tax treaties does not obstruct its competent authority from entering into MAP agreements of a general nature.

4. Almost all peers that provided input during stage 1 reported that their treaty with India is in line with the requirements under the Action 14 Minimum Standard, which also regards element A.1. One peer specifically mentioned that its treaty with India does not meet the requirement under this element, which concerns one of the two treaties identified above. While this peer noted that its treaty with India will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), that instrument will actually modify this treaty and consequently it will meet the requirement under element A.1.The peer that is a treaty partner to other treaty for which the treaty is considered not to meet the requirement under element A.1 did not provide input.

## *Recent developments*

### *Bilateral modifications*

5. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

### *Multilateral Instrument*

6. India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

7. Article 16(4)(c)(i) of that instrument stipulates that Article 16(3), first sentence – containing the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a). In other words, in the absence of this equivalent, Article 16(4)(c)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(i), the depositary that this treaty does not contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a).

8. In regard of the two tax treaties identified above that are considered not to contain the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), India listed both as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(d)(i), a notification that they do not contain a provision described in Article 16(4)(c)(i). Both treaty partners are a signatory to the Multilateral Instrument, listed their treaty with India as a covered tax agreement and also made a notification on the basis of Article 16(6)(d)(i). One of these two treaty partners has already deposited its instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaty between India and this treaty partner. Therefore, at this stage, the Multilateral Instrument has modified this treaty to include the equivalent of Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a). The remaining treaty will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.

### *Peer input*

9. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with India. One of these peers concerns a treaty partner to the treaty identified above that does not contain Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) and which has been modified by the Multilateral Instrument. This peer, however, did not provide input in relation to element A.1.

### *Anticipated modifications*

10. As after the entry into force of the Multilateral Instrument for the treaties concerned, all of India's 97 tax treaties will contain a provision equivalent to Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a), there is no need for bilateral modifications. Regardless, India reported it will seek to include Article 25(3), first sentence, of the OECD Model Tax Convention (OECD, 2017a) in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [A.1] | - | - |

## [A.2] Provide roll-back of bilateral APAs in appropriate cases

Jurisdictions with bilateral advance pricing arrangement ("APA") programmes should provide for the roll-back of APAs in appropriate cases, subject to the applicable time limits (such as statutes of limitation for assessment) where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.

11. An APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustment thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.[2] The methodology to be applied prospectively under a bilateral or multilateral APA may be relevant in determining the treatment of comparable controlled transactions in previous filed years. The "roll-back" of an APA to these previous filed years may be helpful to prevent or resolve potential transfer pricing disputes.

### *India's APA programme*

12. India reported it has implemented an APA programme in 2012, under which it is allowed to enter into unilateral, bilateral and multilateral APAs. The legal basis of this programme is set forth in Articles 92CC and 92CD of the Income Tax Act of 1961. Paragraph 1 of Article 92CC stipulates that India's tax administration is allowed to enter into an APA. The period for which an APA can be entered into is, pursuant to paragraph 4, five years. If a transaction has already taken place, the request must be filed before the first day of the previous year that is relevant to the first year to which the APA relates. If transactions are yet to be undertaken, the APA request should be filed before these transactions will be undertaken.

13. For entering into a bilateral or multilateral APAs, the following basic requirements should be met:

- there is a tax treaty in place between India and the other jurisdiction(s) involved, which contains a MAP provision and the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017)
- the other jurisdiction(s) involved also have in place an APA programme.

14. The authority competent to enter into APAs is the Foreign Tax and Tax Research Division of the Central Board of Direct Taxes within the Department of Revenue of the Ministry of Finance. The two teams that within the Foreign Tax and Tax Research Division are responsible for handling MAP cases are also responsible for handling requests for

(bilateral) APAs.[3] Where it concerns bilateral or multilateral APAs, the Foreign Tax and Tax Research Division will send the APA requests to the International Taxation Directorate for analysis and the preparation of a position paper on the case. This directorate is part of the Income Tax Department, which is a sub-department of the Central Board of Direct Taxes, under which also the Foreign Tax and Tax Research Divisions reside.

15. Within the International Taxation Directorate there are four dedicated APA teams that work under the supervision of the Principal Chief Commissioner. The prepared positions by these teams are first approved by this commissioner and then sent to Foreign Tax and Tax Research Division for review and further approval. It is this latter division that will eventually prepare the position of India's competent authority, liaise with the other competent authority concerned and enters into negotiations on an APA. If such agreement has been reached and accepted by the taxpayer, it will be sent to the Central Board of Direct Taxes for approval.

16. Further to the above, India in 2012 issued Vide Notification No. 36/2012 (F. No. 133/5/2012-SO(TPL)/S 2005 (E)). On the basis of this notification, rules on APAs were introduced in Rules 10F-10T and 44GA of the Income Tax Rules of 1962 to give effect to the APA programme. These rules *inter alia* pertain to the process of filing a request for an APA, pre-filing consultations, payment of fees, the process for obtaining an APA, the terms and conditions of a signed APA and requirements for filing an annual compliance report. In addition, in 2013 India also published guidance on its APA programme.[4] This guidance includes information on: (i) types of APAs that are available in India, (ii) the authority competent to handle APA cases, (iii) the process for obtaining an APA (including a pre-filing consultation), (iv) legal effects of an APA and (v) withdrawal and renewal of APAs. Furthermore, this guidance also includes the forms taxpayer should complete with their submission of an APA request and a Q&A with information on how India runs its APA programme.

### *Roll-back of bilateral APAs*

17. In 2014 India adopted the Finance (No. 2) Act 2014, pursuant to which legislative changes were introduced to allow roll-backs of bilateral APAs. Pursuant to paragraph 4 of Article 92CC of the Income Tax of 1961 in conjunction with rule 10MA of the Income Tax Rules of 1962, roll-backs can be provided for a fixed period of four years. Rule 10 MA defines that the following requirements should be met for granting a roll-back:

- the covered transactions and the involved associated enterprises are the same for the APA years and the roll-back years
- the taxpayer has timely filed its tax returns for the years for which a roll-back is requested and has timely filed the report in respect of international transactions
- the years for which a roll-back has been requested relate to transactions that have been undertaken in those years
- the taxpayer filed the required form for requesting a roll-back.

18. The granting of roll-backs can, pursuant to section (3) of rule 10 MA, be limited where a judicial decision has already been rendered by the Income Tax Appellate Tribunal (ITAT) concerning the transaction(s) that is (are) also covered by an APA. If only one or some of the four years for which a roll-back is possible is affected by this decision, then these years are excluded from the roll-back agreement. Furthermore, a roll-back may not be provided if the effect thereof is that the to be reported income in India is reduced or available losses are increased.

19. Further to the above, India reported it charges fees for requesting bilateral APAs as well as for roll-back of such APAs. For bilateral APAs the fees are INR 10 Lakh (INR 1 million) when the value of the transaction is up to INR 100 Crore (INR 1 billion), INR 15 Lakh (INR 1.5 million) if the value is between INR 100 Crore and INR 200 Crore (INR 1 to INR 1.5 billion) and INR 20 Lakh (INR 2 milion) if the value exceeds INR 200 Crore (INR 2 billion). For roll-back of bilateral APAs the fees is fixed at INR 5 Lakh (INR 0.5 million) for each request.

20. Circular No. 10 of 10 June 2015 includes information on the possibility of roll-backs of bilateral APAs in India's, which contains 13 Q&As on the conditions to be fulfilled for obtaining such a roll-back. This *inter alia* concerns an explanation of: (a) the requirement that the transactions in roll-back and future years should be the same, (b) why a roll-back is not available if the ITAT already rendered a decision and (c) on the interaction between APAs and MAP. It is also clarified that roll-backs can only be requested for all four years and that it is not possible to ask for a roll-back for only a limited number of years. This, however, is different if the transactions concerned were not entered into in all four relevant years.

### *Recent developments*

21. India reported that the APA programme already has guidance in the form of answers to FAQs since the beginning of the programme in 2012. Since 1 September 2018, the scope of the APA programme in India has been enlarged to cover the determination of income (or the manner of such determination of income) of a permanent establishment of a foreign company situated in India. India noted that detailed rules for such determination are under preparation.

22. In addition, India reported that it has examined the suggestions from taxpayers in stage 1 and the other suggestions made since 1 September 2018. It noted that on that basis, the rules governing the APA programme are being revised.

### *Practical application of roll-back of bilateral APAs*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

23. India reported that in the period 2016-31 August 2018 it publishes statistics on its APA programme on the website of its tax administration.[5] These statistics include information on the number of APA requests received, signed and pending, with a specification per treaty partner, processing times, sectors of the economy and transactions concerned. In this respect, India reported that in the period 1 January 2016-31 August 2018 it has received 134 requests for a bilateral APA, which all have been accepted into the process. Furthermore, 92 of these 134 requests also concern a roll-back. Of these requests, so far three bilateral APAs have been signed, one of which with a roll-back.

24. Nine out of the 15 peers that provided input reported not having any experiences with India in the period 1 January 2016-31 August 2018 concerning bilateral APAs or the roll-back thereof. All remaining six peers reported having such experiences. Two of these six peers reported having in the period 1 January 2016-31 August 2018 received one request for a roll-back of a bilateral APA that concerns India. For one peer the request was received in 2016 and the roll-back was granted in the same year. This peer noted that India is willing to try and deal with all years where double taxation occurred in either the MAP or the APA process. It also mentioned that in its experience India works in a positive manner to prevent

treaty disputes, including roll-backs of bilateral APAs. For the other peer the request is still under discussion, but this peer noted it has no experience that a roll-back in India would not be possible. A third peer reported to have two cases concerning roll-back with India in the period 1 January 2016-31 August 2018, one of which was granted and the other one currently pending.

25. Further to the above, two other peers reported having considerable experiences with India concerning the granting of bilateral APAs, including a roll-back thereof. One of these peers reported that it received in 2016 and 2017 nine requests for a roll-back of a bilateral APA between India and this peer. The number of APAs where a roll-back was granted as per 31 December 2017 was ten. Furthermore, this peer noted that under India's regulations it is not possible to grant a roll-back to a fiscal year for which a court decision was issued concerning the issues for which the roll-back was requested. This peer mentioned it had encountered cases where an agreed roll-back could not be applied for some years due to such court decision being rendered. The second peer reported that in January 2015 it reached an agreement on outstanding MAP cases in a framework agreement and on that basis India started in February 2016 to accept requests for bilateral APAs. Since that date it has received 65 requests for bilateral APAs, which has in fact been the fastest growing category in the peer's APA inventory, and eight of such APAs were agreed on with India. The peer further noted that it is currently working with India's competent authority on reaching an agreement in many more cases. Concerning the roll-back of bilateral APAs, this peer noted that approximately 75% of requests for bilateral APAs it received under the treaty with India included a request for roll-back. This peer confirmed that India's competent authority is open to provide for roll-back of bilateral APAs in appropriate cases and that such roll-backs have been granted during the Review Period. Lastly, one peer mentioned that it has received numerous requests for roll-back of bilateral APAs in the period 1 January 2016-31 August 2018. While this peer did not provide input on whether such roll-backs were granted, it noted that India does not permit a roll-back for more than four years as from the first year for which the bilateral APA applies, which in this peer's view can create a discrepancy between outcomes under an APA or a MAP. Furthermore, this peer mentioned that it is India's preference to always make on-site visits to taxpayers in every APA case, before sending a position. In the peer's view this can extend the time that is necessary to come to an agreement. The peer stressed that the decision for an on-site visit should be taken on a case-by-case basis, as it is questionable how useful such visits are. In fact, the peer mentioned that joint information requests and presentations by taxpayers to all involved competent authorities at the same time speeded up the process and also ensured that the competent authorities received the same information.

### *Period 1 September 2018-30 April 2020 (stage 2)*

26. India reported that since 1 September 2018 its competent authority received 64 requests for bilateral APAs, 30 of which included a request for a roll-back. India further reported that in all of these cases the APA has been granted, including a roll-back.

27. Some of the peers that provided input in stage 1, stated in stage 2 that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. Six peers provided input as to element A.2.

28. One of these peers mentioned that it has not received any requests for bilateral APAs with India since 1 September 2018, and therefore has no comment to make on the information reflected in the update report of India with respect to roll-backs of bilateral APAs.

29. Another peer commented that in 2018 it received an APA request with a roll back for earlier years, but there is not yet an agreement with respect to this case. It noted that in general it has no experience that a roll back is not possible in India. For this input, India mentioned that roll-back of APAs is allowed in its APA Program and it almost always admit roll-back requests.

30. The third peer clarified that India's competent authority has difficulties in deviating from the taxpayers' filed positions in roll-back years of an APA in case this would mean a reduction of the income to be taxed in India. In that regard, India confirmed that it is difficult – if not impossible – for India's competent authority to go below the income returned by the taxpayer in India.

31. The fourth peer provided input that several APAs requesting roll-back have been accepted by both competent authorities. However, with respect to the implementation of roll-back requests, India highlight that a roll-back may not be provided if the effect thereof is that the to-be-reported income in India is reduced or available losses are increased. A number of cases have therefore been limited in applying the roll-back provision. This peer also mentioned that one recent case highlighted the potential scope for roll-back to be provided even where the reported income in India is reduced. It suggested that further guidance to understand the approach on the application of roll-back would be a helpful step.

32. India responded that its position in respect of roll-back requests is that it is extremely difficult – if not impossible – to reduce the income or ALP already reported by the Indian taxpayer in its return of income for those years. India, however, noted that in certain cases, it has provided a downward adjustment in roll-back years, including cases with this peer. In response, this peer mentioned that it understands the reason for the difficulty is a legislative prohibition, but it appears this can be overridden. However, the circumstances when the override can take place remain obscure. Therefore, this peer suggests further guidance on the subject. Further clarity would likely assist the competent authorities in providing a response to a taxpayer request for roll-back earlier in the APA process and provide a level playing-field for the competent authorities to negotiate in terms of the scope of discussions. India responded that it duly notes the suggestions for further guidance on the subject.

33. The fifth peer provided input that although a taxpayer may otherwise meet the conditions for a roll-back request under India's domestic provisions, India's competent authority will still deny a roll-back request where a potential bilateral mutual agreement on the arm's length price would result in reducing the amount of income reported by the India taxpayer during the roll-back years. As a result, India's allowance for roll-backs in bilateral APAs is limited to instances where income reported in India will increase or remain the same. India's disallowing the reduction of income reported during roll-back years wherein the reduction is supported by arm's length pricing impedes the prevention of disputes.

34. India responded to this input and mentioned that it does not deny roll-back requests for the reason referred to by this peer and it accepts all roll-back requests unless they violate some procedural requirements. India noted that its position in respect of roll-back requests is that it is extremely difficult – if not impossible – to reduce the income or arm's length pricing already reported by the Indian taxpayer in its return of income for those years. However, in certain cases, it has provided a downward adjustment in roll-back years and most of such cases are with this peer.

35. Further to the above, one of the peers that only provided input during stage 2 commented that since September 2018, it has received requests for roll-backs in respect of six APA cases. It noted that India is generally able to provide for roll-backs for APA cases.

### *Anticipated modifications*

36. India indicated that the rules governing the APA programme are being revised.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [A.2] | - | - |

## Notes

1. These 94 treaties include the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic, the former treaty with Denmark that India continues to apply to the Faroe Islands and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
2. This description of an APA based on the definition of an APA in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD, 2017b).
3. Reference is made to the Introduction for a description.
4. Available at: https://www.incometaxindia.gov.in/booklets%20%20pamphlets/advance-pricing-agreement-guidance-with-faqs-(tpi-43).pdf.
5. Available at: https://www.incometaxindia.gov.in/Lists/Latest%20News/Attachments/360/FINAL_ANNUAL_REPORT_29_11_19.pdf. The last available published statistics are for fiscal years ending on 31 March 2019.

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# *Part B*

# Availability and access to MAP

## [B.1] Include Article 25(1) of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a MAP provision which provides that when the taxpayer considers that the actions of one or both of the Contracting Parties result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty, the taxpayer, may irrespective of the remedies provided by the domestic law of those Contracting Parties, make a request for MAP assistance, and that the taxpayer can present the request within a period of no less than three years from the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty.

37. For resolving cases of taxation not in accordance with the provisions of the tax treaty, it is necessary that tax treaties include a provision allowing taxpayers to request a mutual agreement procedure and that this procedure can be requested irrespective of the remedies provided by the domestic law of the treaty partners. In addition, to provide certainty to taxpayers and competent authorities on the availability of the mutual agreement procedure, a minimum period of three years for submission of a MAP request, beginning on the date of the first notification of the action resulting in taxation not in accordance with the provisions of the tax treaty, is the baseline.

### *Current situation of India's tax treaties*

#### *Inclusion of Article 25(1), first sentence of the OECD Model Tax Convention*

38. Out of India's 97 tax treaties, 68 contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of the state in which they are resident when they consider that the actions of one or both of the treaty partners result or will result for the taxpayer in taxation not in accordance with the provisions of the tax treaty and that can be requested irrespective of the remedies provided by domestic law of either state.[1] None of India's 97 tax treaties currently contain the equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017), as amended by the Action 14 final report (OECD, 2015b) and allowing taxpayers to submit a MAP request to the competent authority of either state.

39. The remaining 29 tax treaties can be categorised as follows:

| Provision | Number of tax treaties |
|---|---|
| A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request to the competent authority of the contracting state of which they are resident. | 28* |
| A variation of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), whereby taxpayers can only submit a MAP request to the competent authority of the contracting state of which they are resident and whereby the taxpayer can pursuant to a protocol provision not submit a MAP request irrespective of domestic available remedies. | 1 |

* These 28 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands.

40. The 28 treaties mentioned in the first row of the table above are considered not to contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), since taxpayers are not allowed to submit a MAP request in the state of which they are a national where the case comes under the non-discrimination article. However, for the following reasons 23 of those 28 treaties are considered to be in line with this part of element B.1:

- The relevant tax treaty does not contain a non-discrimination provision and only applies to residents of one of the states (two treaties).
- The non-discrimination provision of the relevant tax treaty only covers nationals that are resident of one of the contracting states. Therefore, it is logical to only allow for the submission of MAP requests to the state of which the taxpayer is a resident (21 treaties).[2]

41. The non-discrimination provision in the remaining five treaties is almost identical to Article 24(1) of the OECD Model Tax Convention (OECD, 2015a) and applies both to nationals that are and are not resident of one of the contracting states. The omission of the full text of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) is for these five treaties therefore not clarified by a limited scope of the non-discrimination article, following which they are considered not to be in line with this part of element B.1.

42. Furthermore, the treaty mentioned in the second row of the table incorporates a provision in the protocol to this tax treaty, which reads:

> The expression "irrespective of the remedies provided by the domestic law" means that the mutual agreement procedure is not alternative with the national contentious proceedings which shall be, in any case, preventively initiated, when the claim is related with an assessment of the taxes not in accordance with this Convention.

43. As pursuant to this provision a domestic procedure has to be initiated concomitantly to the initiation of the mutual agreement procedure, a MAP request can in practice thus not be submitted irrespective of the remedies provided by the domestic law. This tax treaty is therefore also considered not to be in line with this part of element B.1.

*Inclusion of Article 25(1), second sentence of the OECD Model Tax Convention*

44. Out of India's 97 tax treaties, 87 contain a provision equivalent to Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017) allowing taxpayers to submit a MAP request within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the particular tax treaty.[3]

45. The remaining ten tax treaties can be categorised as follows:

| Provision | Number of tax treaties |
|---|---|
| No filing period for MAP requests | 5 |
| A filing period for MAP requests shorter than three years (two years) | 4 |
| A filing period for MAP requests longer than three years (five years) | 1 |

*Peer input*

46. Almost all peers that provided input during stage 1 reported that their treaty with India is in line with the requirements under the Action 14 Minimum Standard, which also regards element B.1. One of these peers noted that its treaty with India will be modified by the Multilateral Instrument to allow the submission of MAP requests to either competent authority, which, however, does not correspond with the above analysis.

47. Concerning the first sentence of Article 25(1), one peer specifically mentioned that its treaty with India does not meet the requirement under element B.1, which concerns one of the six treaties referred to in paragraphs 39-43 above. This peer noted that its treaty with India will not be modified by the Multilateral Instrument to include the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), which is in line with the performed analysis. Another peer, whose treaty with India also is included in the list of six treaties referred to in paragraphs 39-43, noted that its treaty with India is not in line with this part of element B.1, but that in practice it has not caused any problems. The peers to the remaining four of the six treaties did not provide input or did not indicate that their treaty is not in line with this part of element B.1.

48. Concerning the second sentence of Article 25(1), one peer mentioned its treaty with India does not contain a filing period for MAP requests, but as both jurisdictions have signed the Multilateral Instrument, this peer concluded that a three-year period will apply for the submission of MAP request when that instrument has entered into force for this specific treaty.

### *Practical application*

*Article 25(1), first sentence, of the OECD Model Tax Convention – Period 1 January 2016-31 August 2018 (stage 1)*

Access to MAP and domestic remedies

49. As noted in paragraphs 42-43 above, in all but one of India's tax treaties taxpayers can file a MAP request irrespective of domestic remedies. In this respect, India reported that if a taxpayer submits a MAP request and simultaneously initiates domestic available remedies, access to MAP would be granted. Access would also be granted if these domestic remedies have been finalised, albeit that India is not able to derogate from decisions of its domestic courts and thus will only seek correlative relief at the level of the treaty partner.

50. One peer provided input on the practice of India to give access to MAP when cases are also pending before domestic courts. This peer noted that for many of its pending MAP with India domestic judicial remedies are simultaneously initiated in India. In this respect, the peer expressed that it would be helpful to have clarity on the circumstances where India's competent authority would not grant access to MAP for a specific case if the taxpayer does not withdraw from the domestic remedies. It also suggested to provide guidance on this issue to taxpayers. The peer further referred to cases in which taxpayers obtained a stay of statutory assessment proceedings from an Indian court, whereby for the case under review the taxpayer also submitted a MAP request at the level of the peer's competent authority. According to the peer, India was not willing to consider the case in MAP unless the taxpayer has withdrawn from the domestic court case in order to lift the stay and examinations can proceed. The peer, however, noted that its view of India's position would differ depending on whether the stay was issued before or after a draft assessment order was issued by India's tax administration. In the peer's view, if there was already a draft assessment order, then access to MAP should be given and India should enter into discussions with a view to resolve the case.

51. India responded to the peer input and mentioned that the peer input it is not clear, as India has clearly stated that access to MAP will be given irrespective of domestic remedies. India therefore mentioned that it is unclear what the peer intends to say with its statement, as India is of the view that taxpayers should have the choice to go for either remedy or both remedies together. India also responded to the peer's statement above that India would not be willing, in an individual case, to give access to MAP until the taxpayer has withdrawn from domestic remedies. In this respect, India stated that its competent authority never requires taxpayers to withdraw from domestic remedies as a prerequisite for granting access to MAP. The particular case the peer is referring to is in India's view a unique case, where the taxpayer concerned has approached India's High Court to stay the assessment proceedings in its entirety and to have a settlement via the MAP process. According to India this is a situation where the taxpayer is trying, via domestic courts, to prevent a tax assessment from being completed, but nevertheless wants a settlement under MAP. India highlighted that if assessment procedures are stayed, then there would not be a case of double taxation that could be discussed in MAP. In order for the taxpayer to have its case being discussed, India's competent authority has asked to withdraw from the court proceedings. This, however, is not a general prerequisite for access to MAP, but follows from the fact that the underlying taxation could not be established until the court procedure was withdrawn. In India's view this is a unique case and the position taken was to avoid taxpayers from remedy shopping. It therefore concluded that the peer has completely misunderstood the principled approach of India's competent authority in this case.

52. The peer provided a comment on the response given by India. It noted that if the audit proceedings in the case were at a stage where a person could not yet conclude that taxation not in accordance with the provisions of the treaty is probable, then it understands the position of India that the assessment proceedings would need to resume and proceed further before the case could be dealt with in MAP. The peer further noted that if, however, the stay was issued at a moment where the taxpayer could conclude that taxation not in accordance with the treaty is probable (e.g. once a draft assessment order has already been issued), then a stay is not a valid basis for denying access to MAP or otherwise declining to discuss a case (or issue). The peer concluded by stating that its concern is regarding this narrow issue.

53. Taking into account the peer input and India's responses, the particular case that is being referred to concerns a case where there was an issuance of an assessment notice and

before a draft assessment order could be issued, the notice was contested in front of India's courts. If the outcome of that process is that a draft assessment order could be issued, India reported that it would then be willing to discuss the case in MAP. Apart from this particular case, as referred to in paragraph 49 above, India's policy is to grant access to MAP irrespective of whether domestic remedies for the same case is pending or are already finalised.

### Access to MAP and the requirement of a final tax assessment order

54. One peer provided input and mentioned that it experienced in several cases that India's competent authority takes the position that a final assessment order is required before a case can be accepted into the MAP process and thus that access to MAP can only be granted – or a MAP case can only bilaterally be discussed – once India's tax administration has issued a final assessment order. In the peer's view access to MAP should already be given when a draft assessment order is issued, because at that moment the taxation that is not in accordance with the treaty is probable and no longer merely possible.

55. India responded to this input and mentioned that MAP discussions should only be started when in an individual case a final tax assessment has been issued, such to avoid devotion of time and resources on cases for which the underlying tax has not been finalised or is uncertain. India further reported that its policy, however, is not to deny access to MAP in such circumstances, but to postpone active discussions on the resolution of the case until there is a final assessment order. In view of the explanations given by India, its policy would be in line with the treaty provision, as access to MAP will not be denied in cases where there is no final assessment order.

### Access to MAP and the requirement of double taxation/other instances

56. The peer referred to above provided further input on the practice of India to give access to MAP in relation to the requirements under Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a). It presented two examples where India's competent authority was not willing to discuss the case, for which the peer concluded that such denials would be characterised as effective denials of access to MAP, although the MAP requests were submitted at the level of the peer's competent authority. These examples can be summarised as follows:

- *Requirements of double taxation*: Under the peer's treaty with India the requirement is that there is taxation not in accordance with the convention. In practice, however, India's competent authority has stated in face-to-face negotiations that the treaty's preamble, which refers to the avoidance of double taxation, limits the scope of cases that it may resolve in MAP. In that regard, the peer's view is that the scope of the MAP provision relates to all cases where there is, or is a risk on, taxation that is not in accordance with the provisions of the convention, and not limited to cases of double taxation. The peer gave a specific example which it encountered in 2018, where the issue at hand was whether a permanent establishment was in existence in India. India's position paper did not address this issue of MAP access. India's competent authority then stated in face-to-face negotiations that it will not address this case in MAP unless the taxpayer resident in the peer's state establishes that there is double taxation, even if it would be established that there was taxation in contravention of the tax treaty. When India's competent authority declined to discuss the case further, the peer offered to provide its view on the issue in writing in an attempt to maintain the dialogue in the case.

- *Resident requirements for single resident members of a fiscally transparent entity*: India's competent authority has verbally and informally in writing stated that it will not provide treaty benefits or grant access to MAP with respect to income of fiscally transparent entities that are treated under the peer's domestic legislation as disregarded from its single resident member. The peer understands the views of India's competent authority to be that a single resident member of a fiscally transparent entity does not qualify as a resident under the tax treaty, because such member is not referred to in the precise language of the treaty, which only refers to partnerships wherein one of the partners is a resident in the peer's state. In the peer's view, however, the resident article of its treaty with India may be interpreted to include a single member of a fiscally transparent entity. According to the peer, under its domestic legislation, generally, the tax attributes of a single member of a fiscally transparent entity flow into its owner. If such entity's owner is a resident individual, corporation, partnership, estate or trust (which are entitled to treaty benefits) of the peer, then, in the peer's opinion, this type of entity should also be entitled to treaty benefits and should not be precluded from MAP for this reason. In that regard, the peer's competent authority requested to solve the matter through an interpretative MAP under Article 25(3) of the tax treaty, but India's competent authority responded that an amendment of the treaty would be necessary for this case.

57. The peer concluded by stating that it would very much appreciate a further dialogue with India on possible solutions to the cases discussed above.

58. With respect to this input, India responded by stating that in its view the peer has raised two issues by giving examples of two different cases and has equated those with a situation that would concern an effective denial of access to MAP. In India's view, the issue raised by the peer on the availability of MAP go beyond the terms of a tax treaty is not acceptable, as these are applied in furtherance of the treaty's preamble (setting out the treaty's purpose) and cannot go beyond that. If the treaty's purpose would not be of relevance, India questioned why then under BEPS action 6 it was necessary to create a minimum standard to amend treaties' preambles. India furthermore mentioned that the specific case the peer is referring to is still under consideration, following which it is premature for the peer to provide comments, in particular since during the last face-to-face meeting both competent authorities decided that the peer would provide its view on the case in writing. Concerning the issue of single resident members of partnerships, India noted that it has made its position very clear and also that the peer even tentatively agreed to India's views. During a follow-up face-to-face meeting the issue was further discussed, but both competent authorities could not reach a solution. In this respect, India mentioned that it is aware that the peer has a similar problem with other treaty partners and that it has entered into a protocol with one of its treaty partners to allow treaty benefits to pass-through-structures. To this end, India reported it has proposed the same solution to the peer and it is therefore unclear why the peer brings this issue up as a matter of effective denying access to MAP. India concluded by stating that in its view the issue is beyond the purview of the peer review of the Action 14 Minimum Standard.

59. Lastly, with respect to the issue raised by the peer as discussed in paragraph 56, India stated that it is always willing to discuss any issue in MAP and always has done so. In India's view it is even surprising that the peer wants to discuss the two issues brought forward further, but at the same time already draws a conclusion that India is effectively denying access to MAP in these issues.

60. With respect to the first example given, the peer provided a comment to India's response. It mentioned that it disagrees that it is premature to provide comments on the case where India has declined in face-to-face negotiations to discuss a case until the taxpayer resident in the peer's state established actual double taxation. The peer further noted that its competent authority offered to provide its views in writing in an attempt to continue the dialogue in the case and that it would be pleased if India would reassess its stated position. Nevertheless, the peer concluded that until such reassessment is made, there is a risk that India will effectively deny access to MAP to this case and for cases concerning similarly situated taxpayers.

61. With the peer it has to be admitted that the wording used in Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as incorporated in India's treaties does not only concern cases of double taxation, but all instances where there is (a risk on) taxation that comes into conflict with the provisions of the applicable tax treaty. India's interpretation to limit access to MAP for cases where there is double taxation is contrary to the treaty wording and leads to an effective denial to the MAP process even when the requirements under the MAP provision have been met.

62. With respect to the second example given, the peer also provided a comment to India's response. It specified that it has solved this issue with other treaty partners through an interpretative MAP agreement under Article 25(3) of the applicable treaty. Since these treaties are similarly worded as the treaty with India, the peer believes the issue could be solved in a similar manner and not that it is solely possible to solve the issue through a protocol. In the peer's view, such route would be a much less efficient way of addressing the issue. While the issue is clear, it appears to be more of a general interpretative nature than pertaining to a specific individual case and therefore do not fall in the ambit of analysing whether access to MAP is given in eligible cases.

### The Authority for Advance Rulings ("AAR")

63. One peer provided input on access to MAP in cases of advance rulings in India. The peer mentioned that it understands that India's tax administration can issue certain administrative rulings (e.g. the authority for advance rulings (AARs)), which can be granted by an authority that is independent from the examination function within India. The peer also noted that entering in such rulings would have as a consequence that the AAR cannot be adjusted by a MAP agreement that is not consistent with the content of the ruling. The peer indicated it would appreciate further clarity on the interplay between these rulings and the MAP process, as in its view the understood practice in India may operate as an effective barrier to MAP.

64. India responded to the peer's input and mentioned that the AAR is not a statutory dispute resolution body, but instead an independent judicial authority that issues advance rulings on tax matters. It further clarified that such rulings can only be challenged in courts and as such it is a judicial proceeding that cannot be discussed in MAP. For that reason India's competent authority would not grant access to MAP. India added to this that so far no taxpayer has request for MAP assistance for cases for which an AAR ruling was obtained.

65. Taking the input from the peer and India's response into account, and similar as to the issue concerning the requirement of double taxation, the treaty between India and the peer incorporate Article 25(1) of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the amendment of the Action 14 final report (OECD, 2015b). Pursuant to this provision, taxpayers can file a MAP request when they consider there is, or will be, taxation

not in accordance with the provisions of the tax treaty. Obtaining an AAR ruling is not a basis upon which access to MAP should not be granted, all the more since it would deprive the taxpayer from obtaining relief at the level of the treaty partner.

66. This matter is considered in further detail in paragraphs 88-103 below.

*Article 25(1), first sentence, of the OECD Model Tax Convention – Period 1 September 2018-30 April 2020 (stage 2)*

67. With respect to the recommendation made in the stage 1 peer review report to ensure that access to MAP is available for cases where there is no occurrence of double taxation, but where there may be taxation not in accordance with the convention, India reported that it has accepted the recommendation and would provide MAP access in all cases where the taxation is not in accordance with the treaty, which is clarified in its newly published MAP guidance. In this respect, India reported that since 1 September 2018 MAP requests have been received in respect of cases where there was no double taxation, but there could be an instance of taxation not in accordance with the treaty, and access to MAP has been granted. In addition, India noted that it had never denied access to MAP on this ground, and it was only in respect of discussions on a particular case with a particular treaty partner where this issue came up and it relied on the provisions of the preamble of the treaty to say that there had been no double taxation in the case. Therefore, it is considered that the recommendation has been addressed.

68. In addition, India's MAP guidance, under the heading "Technical Issues", notes that India's competent authority is not allowed by its domestic law to make downward adjustments in transfer pricing cases below the amount of income declared by the taxpayer in its tax return.

### The Income Tax Appellate Tribunal (ITAT)

69. India's MAP guidance describes that the ITAT is an independent statutory appellate body, which is outside the administrative jurisdiction of the Indian tax authorities, and is the highest fact-finding body on tax matters. In this regard, India reported that the ITAT is the second level of appeal available to a taxpayer against a tax assessment and that taxpayers are required to access the ITAT as an appellate remedy to a tax assessment as a necessary step prior to a taxpayer's final available appeals before the Courts in India, i.e. the High Court and the Supreme Court of India. India clarified that access to MAP would be granted to taxpayers in respect of a matter pending decision by the ITAT and India's competent authority would also substantively discuss and endeavour to resolve such cases in MAP. The taxpayer is allowed to withdraw the case before the ITAT at any time while the matter is pending as well. However, if the matter is already decided by the ITAT, India would not be able to deviate from that ITAT's decisions and thus will only seek correlative relief at the level of the treaty partner. This is also confirmed in India's MAP guidance under the heading "Access to MAP".

70. One peer provided input that it was informed by India that India's competent authority explained its policy had changed and it was no longer able to discuss cases in MAP where a case was in the domestic court process, post-ITAT ruling being issued, and this new policy would apply retrospectively to cases which had previously been accepted and discussed by the competent authorities in MAP. This peer suggested India to explain the new position in a timely manner and to relay this change in policy to affected taxpayers as soon as possible. It noted that this policy should be covered in the to-be-published MAP guidance of India. In this respect, India responded that the issue has been covered in the recently published MAP guidance.

### Safe harbour rules

71. India's MAP guidance, under the heading "Access to MAP", describes that where an Indian or foreign taxpayer applies transfer pricing safe harbour provisions as available under India's domestic law and the consequent return of income is accepted by the tax authorities of India, the competent authorities of the other countries may accept MAP applications from their taxpayers in respect of any decision of the tax authorities of such other countries if such decision disturbs the returns filed in pursuance of such safe harbour provisions, and notify the competent authorities of India. In such a situation, India reported that it would allow access to MAP but would not change the arm's length price of the international transaction covered under the safe harbour provisions, but would only request the competent authorities of the treaty partners to provide correlative relief. India further reported that access to MAP would be granted to a taxpayer that later takes the view that an issue covered by the application of safe harbour provisions has led to an action or potential action by either State that creates taxation not in accordance with the concerned treaty, but as in the case above, India's competent authority would not change the arm's length price, but would only request the competent authorities of the treaty partners to provide correlative relief.

72. One peer mentioned that India has domestic legislation in place allowing the use of safe harbour rules. In the peer's view, if a taxpayer applies for the safe harbour provisions under this legislation and this is accepted by India's tax authority, the taxpayer is not entitled to invoke MAP under a double taxation agreement.

73. India responded that it has clarified regarding access to MAP in such cases in its recently published MAP guidance. India noted that the concerns of the peer that India will not provide access to MAP in respect of such cases have been allayed by the above clarification. In response, this peer noted that India's approach will severely restrict the competent authority's ability to fully relieve double taxation in accordance with the treaty.

### Unilateral APA

74. India's MAP guidance, under the heading "Access to MAP" describes that when the competent authority of the treaty partner accepts MAP applications from their taxpayers in respect of unilateral APAs and notifies India's competent authority, India's competent authority would allow access to MAP but would not change the terms and conditions of the unilateral APA and would request the competent authority of the treaty partner to provide correlative relief. Furthermore, it is also noted therein that where actions of tax authorities in India or treaty partners during a pendency of unilateral APAs give rise to taxation not in accordance with the relevant treaty and the competent authority of India or the treaty partners may accept MAP applications from their taxpayers and notify each other, India's competent authority would allow access to MAP but would not process such MAP cases until the unilateral APA is entered into. Finally, India reported that access to MAP would be granted to a taxpayer that later takes the view that an issue covered by a unilateral APA has led to an action or potential action by either State that creates taxation not in accordance with the concerned treaty, but as in the case above, India's competent authority would not deviate from the APA, but would only request the competent authorities of the treaty partners to provide correlative relief.

75. One peer provided input that where a unilateral APA has previously been agreed between India's tax authority and a taxpayer, India's competent authority does allow a case into MAP as a result of an action of a treaty partner. However, India's competent authority has explained that in such cases, India is not prepared to consider providing relief and the MAP process would be limited to whether the treaty partner considers it is appropriate to

provide relief under the double tax treaty. For this input, India confirmed that this peer's understanding is correct, and noted that India does provide access to MAP in respect of unilateral APAs. In response, this peer noted that India's approach will severely restrict the competent authority's ability to fully relieve double taxation in accordance with the treaty.

76. Another peer mentioned that pursuant to section 6.9 of India's Advance Pricing Agreement Guidance, India's competent authority will not provide access to MAP with respect to transfer pricing issues covered under a unilateral APA with India for the unilateral APA term. In response to this input, India explained that the APA Guidance referred to were issued when India began its APA programme. It also explained its current position that while it would grant access in respect of completed unilateral APAs, it cannot deviate from the terms and conditions of the Unilateral APAs and would request the other treaty partners to provide correlative relief, if possible. This is clarified in India's MAP guidance.

### Fiscally transparent entities

77. One peer stated that India does not provide treaty benefits or grant access to MAP with respect to income of fiscally transparent entities that are treated under the peer's legislation as disregarded from its single resident member. This peer noted that it continues to believe that the existing treaty may be interpreted to provide benefits, including access to MAP, in these circumstances and that an amendment to the treaty is not needed to provide these benefits.

78. India responded to this input and mentioned that on the issue of single member limited liability companies (LLCs), it has made its position very clear and has been bilaterally discussed a number of times. The principal issue is whether treaty benefits could be granted to single member LLCs. The peer's position has been that the language of Article 4 of the relevant treaty may be interpreted to include single-member LLCs and had asked whether India's competent authority could enter into an arrangement or memorandum of understanding (MoU) under paragraph 3 of Article 27 of the treaty to resolve the issue. However, the Indian position is that an MoU would not be sufficient because the issue requires an expansion of the scope of the treaty to include single member LLCs, which can be done only through an amendment of Article 4. The Indian position has been formally conveyed by India's competent authority to the peer's competent authority via letter dated 17th of July 2019. This issue was also discussed in the September 2019 bilateral meeting where the position of India was clarified again. India continues to believe that providing treaty benefits to single member LLCs would amount to expanding the scope of the existing treaty and that cannot be done without building in a suitable amending protocol into the treaty that amends the existing Article 4. It cannot be done through an MoU flowing from the existing Article 27. Furthermore, India noted that it is aware that this peer has similar problems with other jurisdictions as well and it has entered into an amending protocol with one of its treaty partners. It also noted that the issue raised by the peer is beyond the purview of the Action 14 peer review process.

### Assessment order

79. One peer mentioned that in relation to a MAP case where it has provided its position paper to India in March 2020, it was informed by India of its position not to initiate MAP based on its draft assessment orders. In response, India shared its view that the taxpayer's objection is justified and the MAP can be set in motion based on draft assessment orders received by the taxpayer without having to wait for the final assessment orders to be issued, highlighting that for one of the assessment years concerned, a final assessment was

already issued. In addition, this peer mentioned that during the matching of its 2019 MAP statistics, India informed the peer that while it accepts the said MAP case, discussions on the case may only be possible after India has issued the final assessment orders to the taxpayer concerned. India did not inform the peer if discussions can first commence for the assessment year for which a final assessment order has been issued. This peer noted that while this issue had been addressed in India's Stage 1 peer report, given that the time to be taken by India to issue a final assessment from its draft assessment is not known and the time taken on this MAP case has already started, the time taken to resolve this case would be impacted (i.e. resolution might not be possible within 24 months).

80. India responded to this input and stated that it would give access to MAP where a MAP request is made based on a draft assessment order on the ground that there will be taxation not in accordance with the treaty. In addition, India mentioned that this peer initiated MAP in some years based on draft assessment orders. In this regard, India noted that it does not agree with the view that MAP can be initiated where taxation appears as a risk which is probable, and in its view it can be initiated only where taxation appears as a risk which is certain. India further explained that its position is not to initiate MAP based on draft assessment orders, as by doing so, it tends to prepone the "start date" of MAP. Further, there is no certainty that draft assessment order will eventually result into additions/ adjustment to income in the final assessment order and in situations of no additions/ adjustment to income, any cause to pursue MAP may not remain at all. Despite these reservations, and in line with paragraph 37 of India's Stage 1 peer report, India has accepted MAP applications based on draft assessment orders. Further to the above, India commented in regard to this peer's comment "given that the time to be taken by India to issue a final assessment from its draft assessment is not known and the time taken on this MAP case has already started", start date should only be counted when the draft order turns into a final assessment order, i.e. period during which the assessment order is at draft stage should not be counted for the purposes of calculating the 24 month period. It also commented in regard to this peer's comment "India did not inform us if discussions can first commence for the assessment year for which a final assessment order has been issued", this peer is already aware that the issue in this new case is similar to the three cases (kept in abeyance by the two sides) where verdict of Hon'ble High Court of India is awaited.

### Withholding taxes

81. One peer provided input on a MAP case concerning Indian withholding taxes, where the taxpayer was denied tax credit in this peer's jurisdiction in the course of a tax audit by this peer. The taxpayer had not filed a tax return in India in which he sought refund of the withholding tax. This peer mentioned that India's competent authority initially stated that it is not possible to give access to MAP before the taxpayer has filed a tax return for a refund and been denied this, but later both competent authorities agreed to accept the MAP.

82. India responded to this input and mentioned that in this case, in its view the tax liability was not finalised in the case of the taxpayer who had filed a MAP application. In the absence of any action taken by the Indian tax authorities in the case of the taxpayer, which can be construed as not in accordance with the tax treaty, India's competent authority considered it to be difficult to give MAP access. Accordingly, this peer was advised that the taxpayer may file a return of income in India for the relevant year and seek refund of the withheld taxes, and if the Indian tax authorities deny the refund so claimed and assess the income to be taxable in India, the taxpayer may approach this peer for MAP access and both sides can discuss it under MAP in order to resolve the double taxation. India noted that this peer insisted that MAP was accepted, although in its view MAP can

be taken up for resolution when double taxation arises due to Indian authorities denying the credit.

83. In response to this comment, this peer stated that as of its understanding, a MAP application always has to be registered as a MAP case and counted for statistical purposes. If it turns out that there is no taxation not in accordance with the treaty, it will show in the outcome of the case when closed, but the case needs to be counted.

84. Another peer provided input and mentioned that there has been a change in position taken by India's competent authority with regard to withholding tax charges levied in India on payments made to companies providing services in this peer's jurisdiction. This is where India has indicated to the payer that withholding tax should have been deducted from a payment and has issued an assessment on the payer but has also issued a notice on the payee in the peer's jurisdiction that they are required to file a return in India. India's competent authority now takes the position that as no double taxation has actually taken place on the company in the peer's jurisdiction the issue cannot be taken into MAP, but it can be registered as a "protective" MAP case, not requiring the case to be recorded for MAP Forum statistical reporting purposes until double taxation actually occurs, which may be some considerable time once the Indian domestic administrative procedures have been concluded. In this respect, this peer noted that from its perspective, in these cases sufficient information has been provided to the competent authorities at the point of the "action" to allow them to decide whether the objection underlying the case appears to them to be justified. In such cases, Article 25(1) and paragraphs 13 and 14 of the Commentary provide support for the competent authorities to engage in discussions to resolve the dispute on an agreed basis without the need for delay.

85. India responded to this input and mentioned that in its view in certain situations, where obligation to deduct tax at source on the payment made by an Indian entity to a non-resident entity is enforced by an order passed under Section 201 of the Income-tax Act, 1961 and the same is disputed by the non-resident entity, MAP access will be provided to such non-resident entities anticipating an event of double taxation or taxation not in accordance with the treaty within the ambit of Article 25. However, such action (action under Section 201 of Indian Income-tax Act, 1961) being purely under domestic law on the Indian entity and recognising the right of a State to tax its own residents, MAP discussion will be taken up only after the tax demand is raised in the case of the non-resident taxpayer. India noted that this helps the limited MAP resources to be invested in resolving the cases where final tax demand has been raised.

86. In response to this comment, this peer stated that in its view early engagement in MAP could potentially save a significant amount of resource and provide certainty for the non-resident in respect of the transaction if a MAP agreement could be reached prior to the issues of the final tax demand where all the facts and information has been provided. This would seem to fit with India's competent authority's wider responsibilities with regard to MAP cases. In addition, this peer commented in respect of India's comments: "…such action (action under Section 201 of Indian Income-tax Act, 1961) being purely under domestic law on the Indian entity and recognising the right of a State to tax its own residents, MAP discussion will be taken up only after the tax demand is raised in the case of the non-resident taxpayer." It agrees with India that India is entitled to tax their own residents, however, the tax charge in question was levied on a non-resident and suffered by that entity (despite the practicalities on how the tax is collected through an obligation on the payer to withhold tax), and therefore it considers MAP provides the appropriate method to resolve the issue.

87. With respect to the matters noted by peers above, where decisions have been issued by the ITAT, India's domestic transfer pricing safe harbour rules have been accessed by taxpayers and unilateral APAs have been agreed to by taxpayers, India's competent authority would not deviate from such decision or position in MAP. Further discussion and analysis is required on whether such positions are in line with the Action 14 Minimum Standard.

### The Authority for Advance Rulings (AAR)

88. India reported that the AAR is an independent statutory dispute prevention body created under Indian law. India noted that, inter alia, non-resident taxpayers or resident taxpayers undertaking transactions with non-residents may request a ruling from the AAR on the taxability of a transaction in India, including the interpretation and/or application of tax treaties, as regards questions of fact and/or law, for proposed or completed transactions as long as the question of taxability of the issue at hand is not pending litigation before any tax authority in India for adjudication. India's MAP guidance under the heading "Denial of Access to MAP" notes that India's competent authority would deny to access to MAP where a taxpayer's application is pending substantive determination or has been decided by the AAR. Further, it is noted that India's competent authority would refuse to admit a case under MAP where the treaty partner's competent authority has accepted a MAP request by a foreign taxpayer where such taxpayer or its associated enterprise or any relevant party to the transaction applies for an advance ruling and the matter is pending substantive determination or has been decided by the AAR.

89. Further to the above, India indicated that the rulings of the AAR should be similarly treated as the Income Tax Settlement Commission under element B.5, since they are similar in India's view. India clarified that in both cases, it is the taxpayer who makes an application and seeks a resolution or an advance ruling, they are binding on the taxpayer and the tax administration and there is no appeal mechanism available to either the taxpayer or the tax authority. India noted that parties can challenge such settlement orders or advance rulings before the High Courts or the Supreme Court of India under the original Writ jurisdictions of these courts, which are not normal appeals. India further clarified that extraordinary jurisdictions of these constitutional courts can be invoked by any person against any order passed by any authority in India on the ground of, among other things, procedural irregularities, *mala fide*, and denial of natural justice. In view of the above, India noted that AAR is not appealable in courts, and the provisions regarding the AAR are provided in Chapter XIX-B of the Indian Income-tax Act (Sections 245N to 245V).

90. One peer noted that it was informed by India that India has an advance ruling procedure. It sought clarifications on: (i) what type of tax matters can be analysed via an advance ruling procedure, (ii) requirements that must be fulfilled to request it, and (iii) whether and in what cases the decisions rendered via this procedure are eligible to MAP in case of an audit in the other State related to the transactions covered by such ruling.

91. In response to this input, India clarified that:

- The AAR is an independent statutory dispute prevention body in India. The process of giving advance rulings by AAR is independent from the audit and examination functions of tax authorities. It is a voluntary process and a taxpayer has to apply for obtaining a ruling. In order to apply to AAR, it is required that the same matter (i.e. the question of taxability of the same transaction) is not pending before any other tax authority or Tribunal or Courts for adjudication. There is a prescribed form to apply before AAR with prescribed fee/s for application.

- The AAR on receipt of application for advance ruling, decides upon the question of taxability of a transaction or transactions undertaken or proposed to be undertaken by a non-resident applicant taxpayer. The AAR also decides upon the tax liability of a non-resident arising out of a transaction, which has been undertaken or proposed to be undertaken by the resident applicant taxpayer with a non-resident person. Thus, any transaction, which is either undertaken or is proposed to be undertaken by a non-resident (and in certain cases resident), may be brought before the AAR for determination of question/s of its taxability under the domestic law as well as under the relevant tax treaty.
- Once the application is accepted, the AAR examines all aspects of the question(s)/ issue(s) brought before it and pronounces its advance ruling on such question(s)/ issue(s). If the AAR pronounces an advance ruling, the same is binding on both the taxpayer and the tax authorities. India's competent authority shall not provide access to MAP to an Indian taxpayer who has already obtained an advance ruling from the AAR and such advance ruling covers the issues that are sought to be included in the MAP application. Similarly, India's competent authority shall refuse to admit a case under MAP where the competent authorities of the treaty partners have accepted a MAP application by a taxpayer who (or an associated enterprise or the relevant party to the transaction on which the ruling is sought) has already obtained an advance ruling from the AAR and such advance ruling covers the issues that have been included in the MAP application accepted by the competent authorities of the treaty partners.
- India's competent authority shall also not provide access to MAP if a taxpayer's application (or that of an associated enterprise or the relevant party to the transaction on which the ruling is sought) has been admitted by the AAR and the question(s)/issue(s) specified in the application is under examination by the AAR.

92. A second peer commented that it has been informed by India of a provision in its domestic law of issuing advance rulings on certain types of tax matters. The process is independent from the audit and examination functions and can only be accessed through a request by the taxpayer. Such rulings are issued by the AAR and the rulings are binding on both the taxpayer and the tax authorities. Together with its queries relating to the ITSC, this peer sought similar clarification in relation to the availability and access to MAP in India for cases involving applications made/orders received from the AAR. In that regard, India responded that its MAP guidance, which has been issued in August 2020, provides such clarifications, and it mailed its MAP guidance to the peer. This was confirmed by this peer.

93. A third peer provided input and mentioned that while in India's update report India proposes that the MAP Forum treat ITSC resolutions and AAR rulings similarly and conclude that denial of access to MAP in the case of AAR rulings would not be contrary to the Action 14 Minimum Standard, it does not see ITSC resolutions and AAR rulings as sufficiently analogous to compel the same result. This peer noted that it understands that the ITSC process – which is initiated by the taxpayer at any time during the examination process to settle a dispute about the taxpayer's own tax liability with the tax administration – fits under element B.5. On the other hand, it stated that in its view the AAR process is different from the ITSC process in material respects from two points. First, this peer understands that an AAR ruling is not requested to resolve an issue under examination by the tax administration. Instead, it is an advance ruling that is issued before any examination. Second, in the case of withholding taxes, an AAR ruling can be requested by the withholding agent and then is treated as binding on both the withholding agent and the

beneficial owner, even though the withholding agent and the beneficial owner's interests are not fully aligned. The peer does not think it is appropriate to restrict a beneficial owner from MAP where the payor has requested and received an AAR ruling. This peer noted that it does not see a basis for concluding that MAP access properly could be denied under element B.5 in cases where an AAR ruling has been issued.

94. India responded to this input and mentioned that the AAR procedures fulfil the criteria for element B.5 as it is a process that is independent of audit and examination function and can only be accessed through a request by the taxpayer. The ruling of AAR is binding on both the taxpayer and the tax administration. On the issue raised on the appropriateness to restrict a beneficial owner from MAP where the payor has requested and received an AAR ruling, it is stated that the ruling of AAR is on a particular transaction irrespective of whether the ruling is sought by the payor or the payee. Since the ruling is binding on the tax administration, it cannot be expected to take a different position on the same transaction in a MAP case where the payor has requested for an AAR ruling. Hence, for the sake of balance and fairness, the access to MAP is denied in case of an AAR ruling. The taxpayer requesting for a ruling has an option of filing a writ against the AAR ruling in the jurisdictional High Court as these rulings can be subject to the writ jurisdiction of the respective High Court under Article 226 of the Constitution of India. It may, however, be noted that writ is not a regular appeal. It can be filed against any order passed by any authority by invoking extraordinary jurisdiction of the High Court on grounds of, inter-alia, violation of principles of natural justice, and situations where the taxpayer shows mala fide intentions.

95. A fourth peer clarified that India notified it that if a ruling is issued by the AAR, the rulings are binding on both the taxpayer and the tax authorities. It, however, noted that it is unclear whether MAP is available once a ruling becomes binding on the taxpayer and the tax authorities. In that regard, India responded that India's competent authority shall not provide access to MAP if a taxpayer's application (or that of an associated enterprise or the relevant party to the transaction on which the ruling is sought) has been admitted by the AAR and the question(s)/issue(s) specified in the application is under examination by the AAR. India noted that this has been clarified in its MAP guidance.

96. A fifth peer clarified that it has been informed by e-mail on the existence of India's statutory dispute settlement process and its effects on MAP access. It suggested that this information be included in the MAP guidance of India and there could also be a reference in its MAP profile. India responded that the information has been included in the MAP guidance that was published recently.

97. A sixth peer mentioned that it had one taxpayer who chose to withdraw a pending AAR request after it was informed that access to MAP would not be granted after a decision by the AAR. Since the case was resolved by the competent authorities, this did not affect the case.

98. Although there is no definition for an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer in the Action 14 final report (OECD, 2015b), paragraph 31 of the Action 14 final report (OECD, 2015b) gives a clear indication of the type of processes that were envisaged to be covered. This paragraph notes that this may:

> … include, for example, a settlement process that clearly provides for a voluntary request by the taxpayer for a final audit settlement and clearly ensures that this request is made to and decided upon by a body consisting of persons that have neither directly nor indirectly been involved in the audit itself and that have the

authority to independently decide on the settlement in a way that ensures that the settlement is in line with the applicable legislation, including any applicable treaty.

99. It is clear from the above that the processes covered under element B.5 are clearly dispute settlement/resolution processes and not dispute prevention mechanisms that may be initiated prior to a dispute arising.

100. Therefore, the jurisdiction of the AAR as regards rulings granted to issues where completed transactions are pending tax audit in India would be covered under the purview of such a process. This is considered under element B.5.

101. However, the jurisdiction of the AAR to grant rulings in advance as regards proposed transactions or completed transactions where the related tax return has not been filed would not qualify as a mechanism to be considered under element B.5. Therefore, the issue of access to MAP in relation to such proceedings is discussed under this element.

102. India reiterated its view in this regard that it believes that the AAR should as a whole be considered an administrative/statutory dispute resolution mechanism covered under element B.5. India noted its understanding that dispute resolution includes resolution of anticipated disputes as well and that there is no clear demarcation between dispute resolution and dispute prevention including in MAP, which includes both cases where disputes have crystallised and cases where disputes are anticipated. India also stated its view that it would be difficult to take a different position for the same process merely on grounds that one is in the nature of dispute resolution and other is in the nature of dispute prevention, since the ruling of the AAR is binding on the tax administration.

103. Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as it read prior to the adoption of the Action 14 final report (OECD, 2015b) states that access to MAP should be granted to a taxpayer "irrespective of domestic remedies". In respect of domestic judicial remedies, the only exception allowed is in respect of final Court decisions. Paragraphs 34-35 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2017) allow competent authorities to grant access to MAP but not effectively discuss a case where all domestic remedies are exhausted and a competent authority may not deviate from a final Court decision legally or as a matter of administrative policy or practice. India's policy to not grant access to MAP when proceedings before the AAR are pending, therefore, deprives the taxpayer from having effective access to MAP and having its case resolved accordingly in such situations. This practice is contrary to the requirements under the Action 14 Minimum Standard. Further, India's policy to not grant access to MAP when the AAR has decided on the issue in question, even where a taxpayer is of the view that the decision of the Court is not in accordance with the tax treaty, not allowing even correlative relief in the other jurisdiction where possible. This practice is contrary to the requirements under the Action 14 Minimum Standard as well.

### *Article 25(1), second sentence, of the OECD Model Tax Convention*

104. For those five tax treaties mentioned in paragraph 30 above that do not contain a filing period for MAP requests, India reported that there are no restrictions in its domestic law nor that there is any administration practice that puts a time limit on the period during which a MAP request should be filed. In fact, India will give access to MAP regardless of whether it relates to closed tax years, even if it concerned years that were closed long ago.

### *Recent developments*

#### *Bilateral modifications*

105. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 25(1), first and second sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

### *Multilateral Instrument*

#### Article 25(1), first sentence of the OECD Model Tax Convention

106. India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

107. Article 16(4)(a)(i) of that instrument stipulates that Article 16(1), first sentence – containing the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017) as amended by the Action 14 final report (OECD, 2015b) and allowing the submission of MAP requests to the competent authority of either contracting state – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). However, this shall only apply if both contracting parties to the applicable tax treaty have listed this tax treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified the depositary, pursuant to Article 16(6)(a), that this treaty contains the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b). Where only one of the treaty partners made such a notification, article 16(4)(a)(i) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty is incompatible with Article 16(1) (containing the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017) as amended by the Action 14 final report (OECD, 2015b)). Furthermore, Article 16(4)(a)(i) will for a tax treaty not take effect if one of the treaty partners has, pursuant to Article 16(5)(a), reserved the right not to apply the first sentence of Article 16(1) of that instrument to all of its covered tax agreements.

108. With the signing of the Multilateral Instrument, India reserved, pursuant to Article 16(5)(a), the right not to apply the first sentence of Article 16(1) of that instrument to its existing tax treaties, with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.[4] In this reservation, India declared to ensure that all of its tax treaties, which are considered covered tax agreements for purposes of the Multilateral Instrument, contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as it read prior to the adoption of the Action 14 final report (OECD, 2015b). It subsequently declared to implement a bilateral notification or consultation process for those cases in which its competent authority considers the objection raised by a taxpayer in its MAP request as not being justified. The introduction and application of such process will be further discussed under element B.2.

109. In view of the above, following the reservation made by India, those six tax treaties identified in paragraphs 39-43 above that are considered not containing the equivalent of

Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) as it read prior to the adoption of the Action 14 final report (OECD, 2015b), will not be modified via the Multilateral Instrument with a view to allow taxpayers to submit a MAP request to the competent authority of either contracting state.

### Article 25(1), second sentence of the OECD Model Tax Convention

110. With respect to the period of filing of a MAP request, Article 16(4)(a)(ii) of the Multilateral Instrument stipulates that Article 16(1), second sentence – containing the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017) – will apply where such period is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provisions of a tax treaty. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(b)(i), the depositary that this treaty does not contain the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017).

111. In regard of the four tax treaties identified in the table of paragraph 45 above that contain a filing period for MAP requests of less than three years, India listed all of them as a covered tax agreement under the Multilateral Instrument and made, pursuant to Article 16(6)(b)(i), a notification that they do not contain a provision described in Article 16(4)(a)(ii). All four treaty partners are a signatory to the Multilateral Instrument, listed their treaty with India as a covered tax agreement and also made a notification on the basis of Article 16(6)(b)(i). Three of these four treaty partners have already deposited their instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between India and these treaty partners. Therefore, at this stage, the Multilateral Instrument has modified these three treaties to include the equivalent of Article 25(1), second sentence, of the OECD Model Tax Convention (OECD, 2017). The remaining treaty will be modified by the Multilateral Instrument upon its entry into force for the treaty concerned.

#### *Other developments*

112. India reported that for one of the six tax treaties that do not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) and will not be modified by the Multilateral Instrument, negotiations are pending with the treaty partner on the comprehensive revision of the existing treaty. For three other treaty partners, India has shared with them a draft of the amending protocol, and for one negotiations are envisaged while India is awaiting a response from the remaining two of the three treaty partners. For another treaty partner, India has approached the treaty partner with a proposal for a comprehensive revision of the existing treaty, to which the treaty partner has agreed, and negotiations are envisaged.

#### *Peer input*

113. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with India. One of these peers concerns a treaty partner to the treaties identified above that do not contain Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) and which will not be modified by the Multilateral Instrument. This peer stated that consideration will be given for modification of the relevant provisions

after the ongoing talks for different elements of the treaty between these two jurisdictions proceed to negotiations.

### *Anticipated modifications*

114. India reported that for the remaining tax treaty that does not contain the equivalent of Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), as it read prior to the adoption of the Action 14 final report (OECD, 2015b) and will not be modified by the Multilateral Instrument, it intends to update it via bilateral negotiations with a view to be compliant with element B.1. In this respect, India further reported that negotiations between the two countries are ongoing for modification of certain articles of the treaty and the relevant provision under element B.1 shall be taken care of when the discussions are finalised.

115. With respect to the first sentence of Article 25(1), India reported that it will in those bilateral negotiations propose to include the equivalent as it read prior to the adoption of the Action 14 final report (OECD, 2015b). In addition, India reported it will seek to include this equivalent in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.1] | One out of 97 tax treaties does not contain a provision that is equivalent to Article 25(1) first sentence, of the OECD Model Tax Convention (OECD, 2015a) and provides that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.<br>This treaty is expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(1), second sentence, but not as regards the first sentence of that article. For the first sentence, actions have been taken to initiate discussions on the amendment, but the treaty partner has not yet responded. | Concerning Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), India should, upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision. |
| | Five out of 97 tax treaties do not contain a provision that is equivalent to Article 25(1) first sentence, of the OECD Model Tax Convention (OECD, 2015a). None of these treaties are expected to be modified by the Multilateral Instrument to include the required provision, but for all of these five treaties bilateral negotiations have been initiated or are about to be initiated with a view to include the required provision. | India should continue pending negotiations with the five treaty partners to include the equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) in the treaty that currently does not contain such equivalent.<br>For all five treaties this concerns a provision either:<br>a. as amended by the Action 14 final report (OECD, 2015b); or<br>b. as it read prior to the adoption of Action 14 final report (OECD, 2015b), thereby including the full sentence of such provision. |
| | There is a risk that access to MAP is denied in eligible cases where the issue under dispute is pending substantive determination or has already been decided by the Authority for Advance Rulings in India. | India should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 of the OECD Model Tax Convention (OECD, 2017) can access the MAP. |

## [B.2] Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

Jurisdictions should ensure that either (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party, or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).

116. In order to ensure that all competent authorities concerned are aware of MAP requests submitted, for a proper consideration of the request by them and to ensure that taxpayers have effective access to MAP in eligible cases, it is essential that all tax treaties contain a provision that either allows taxpayers to submit a MAP request to the competent authority:

- of either treaty partner; or, in the absence of such provision
- where it is a resident, or to the competent authority of the state of which they are a national if their cases come under the non-discrimination article. In such cases, jurisdictions should have in place a bilateral consultation or notification process where a competent authority considers the objection raised by the taxpayer in a MAP request as being not justified.

### *Domestic bilateral consultation or notification process in place*

117. As discussed under element B.1, out of India's 97 treaties, none currently contain a provision equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2017) as amended by the Action 14 final report (OECD, 2015b), allowing taxpayers to submit a MAP request to the competent authority of either treaty partner. In addition, as was also discussed under element B.1, none of these tax treaties will, following India's reservation according to Article 16(5)(a) of the Multilateral Instrument, be modified by that instrument to allow taxpayers to submit a MAP request to the competent authority of either treaty partner.

118. India reported that it has introduced a documented bilateral consultation or notification process for those situations where its competent authority would consider the objection raised in a MAP request as not being justified.

### *Recent developments*

119. India reported that it has introduced a documented bilateral consultation or notification process for those situations where its competent authority would consider the objection raised in a MAP request as not being justified, and briefed all MAP staff that they should follow the process.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

120. India reported that in the period 1 January 2016-31 August 2018 its competent authority has for none of the MAP requests it received decided that the objection raised by taxpayers in such request was not justified. The 2016 and 2017 MAP statistics submitted by India show that in 2017 one MAP case was closed with the outcome "objection not justified". This, however, concerned a decision made by India's treaty partner and not by its own competent authority.

121. All peers that provided input indicated not being aware of any cases for which India's competent authority denied access to MAP in the period 1 January 2016-31 August 2018. They also reported not having been consulted/notified during the Review Period of a case where India's competent authority considered the objection raised in a MAP request as not justified, which can be clarified by the fact that no such instances have occurred in India during this period.

122. Furthermore, one peer mentioned it is not aware that India has implemented a bilateral process that would require its competent authority consult or notify the peer's competent authority before the decision is made to deny access to MAP. This peer noted that taxpayers that submit a MAP request in India would also inform the peer's competent authority of that fact, following which this competent authority would proactively request information about the acceptance status of the case from India's competent authority, be it during scheduled meetings and/or telephone conferences.

#### *Period 1 September 2018-30 April 2020 (stage 2)*

123. India reported that since 1 September 2018 its competent authority has not considered any objection raised in a MAP request as not being justified. The 2018 and 2019 MAP statistics submitted by India confirm that none of its MAP cases were closed with the outcome "objection not justified".

124. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. Two of these peers indicated that they are not aware of receiving any notification of a MAP case where India has considered the objection raised as not justified, which can be clarified by the fact that there were no such cases.

### *Anticipated modifications*

125. India indicated that in the agreed minutes to the revisions of amendments of tax treaties, reference was made to the implementation of a bilateral notification process and that it intends to take action for all remaining treaties in a similar manner.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.2] | - | - |

## [B.3] Provide access to MAP in transfer pricing cases

Jurisdictions should provide access to MAP in transfer pricing cases.

126. Where two or more tax administrations take different positions on what constitutes arm's length conditions for specific transactions between associated enterprises, economic double taxation may occur. Not granting access to MAP with respect to a treaty partner's transfer pricing adjustment, with a view to eliminating the economic double taxation that may arise from such adjustment, will likely frustrate the main objective of tax treaties. Jurisdictions should thus provide access to MAP in transfer pricing cases.

### *Legal and administrative framework*

127. Out of India's 97 tax treaties, 70 contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) requiring their state to make a correlative adjustment in case a transfer pricing adjustment is imposed by the treaty partner.[5] Furthermore, 23 treaties do not contain a provision that is equivalent to or based on Article 9(2). The remaining four treaties contain a provision that is based on Article 9(2), but deviate from this provision for the following reasons:[6]

- In three treaties the granting of a corresponding adjustment is only optional, as the phrase "… shall make an appropriate adjustment" is replaced by "… may consult together with a view to reach an agreement on the adjustment of profits".
- In one treaty corresponding adjustments can only be made through an agreement between the competent authorities.

128. Access to MAP should be provided in transfer pricing cases regardless of whether the equivalent of Article 9(2) is contained in India's tax treaties and irrespective of whether its domestic legislation enables the granting of corresponding adjustments. In accordance with element B.3, as translated from the Action 14 Minimum Standard, India indicated that it will always provide access to MAP for transfer pricing cases and is willing to make corresponding adjustments, such regardless of whether the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) is contained in its tax treaties. In this respect, India reported that on 27 November 2017 it issued a press release to clarify that access to MAP is available in those cases where the applicable tax treaty does not contain such equivalent.[7] More specific, it is stated that it has been decided by the Central Board of Direct Taxes to accept transfer pricing MAP and APA cases regardless of whether the second paragraph of Article 9(2) is contained in India's tax treaties.

129. Previously, India made a reservation to Article 25 of the OECD Model Tax Convention (OECD, 2017), stipulating that in India's view there would not be access to MAP for cases of economic double taxation arising from transfer pricing adjustments if Article 9(2) is not contained in its tax treaties. With the 2017 update to the OECD Model Tax Convention (OECD, 2017) this reservation has been withdrawn.

### *Recent developments*

#### *Bilateral modifications*

130. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 9(2), first sentence, of the OECD Model Tax

Convention (OECD, 2017). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

### *Multilateral Instrument*

131. India reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include this provision in all of its future tax treaties. In that regard, India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

132. Article 17(2) of that instrument stipulates that Article 17(1) – containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017) – will apply in place of or in the absence of a provision in tax treaties that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument. Article 17(2) of the Multilateral Instrument does not take effect for a tax treaty if one or both of the treaty partners have, pursuant to Article 17(3), reserved the right not to apply Article 17(2) for those tax treaties that already contain the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), or not to apply Article 17(2) in the absence of such equivalent under the condition that: (i) it shall make appropriate corresponding adjustments or (ii) its competent authority shall endeavour to resolve the case under mutual agreement procedure of the applicable tax treaty. Where neither treaty partner has made such a reservation, Article 17(4) of the Multilateral Instrument stipulates that both have to notify the depositary whether the applicable treaty already contains a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). Where such a notification is made by both of them, the Multilateral Instrument will modify this treaty to replace that provision. If neither or only one treaty partner made this notification, Article 17(1) of the Multilateral Instrument will supersede this treaty only to the extent that the provision contained in that treaty relating to the granting of corresponding adjustments is incompatible with Article 17(1) (containing the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017)).

133. India has, pursuant to Article 17(3), reserved the right not to apply Article 17(2) of the Multilateral Instrument for those treaties that already contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). In regard of the 27 treaties identified above that are considered not to contain a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017), India listed all of them as a covered tax agreement under the Multilateral Instrument, and did not make a notification on the basis of Article 17(4) for all of them.

134. Of the 27 treaty partners, nine are not a signatory to the Multilateral Instrument, whereas three have not listed their treaty with India under that instrument. Of the remaining 15 treaty partners, three have, on the basis of Article 17(3), reserved the right not to apply Article 17(2) as they considered that their treaty with India already contains the equivalent of Article 9(2). Of the remaining 12 treaty partners, eight have already deposited their instrument of ratification of the Multilateral Instrument, following which the Multilateral Instrument has entered into force for the treaties between India and these treaty partners, and therefore has superseded the relevant treaty provisions to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1). [8] The provisions in the other four treaties will, upon its entry into force for these treaties, be superseded by the Multilateral Instrument

to include the equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but only to the extent that the provisions contained in those treaties relating to the granting of corresponding adjustments are incompatible with Article 17(1).

*Other developments*

135. India reported that for one of the three treaty partners that have not listed their treaty with India under the Multilateral Instrument, a draft amending protocol with the proposed provision has already been shared.

### *Application of legal and administrative framework in practice*

*Period 1 January 2016-31 August 2018 (stage 1)*

136. India reported that in the period 1 January 2016-31 August 2018, it has not denied access to MAP on the basis that the case concerned is a transfer pricing case.

137. All peers that provided input indicated not being aware of a denial of access to MAP by India in the period 1 January 2016-31 August 2018 on the basis that the case concerned was a transfer pricing case. One peer noticed its treaty with India does not have the full equivalent of Article 9(2) of the OECD Model Tax Convention (OECD, 2017), but that access to MAP will be given in all cases and that the treaty will be modified by the Multilateral Instrument to include such equivalent. This peer's treaty is among the nine treaties referred to above that will be superseded by the Multilateral Instrument to the extent of incompatibility.

*Period 1 September 2018-30 April 2020 (stage 2)*

138. India reported that since 1 September 2018 it received 200 transfer pricing MAP requests and that access to MAP was granted in all these cases except for five cases. India further reported that for the five MAP requests, access have been denied as the taxpayers have made the MAP request after the expiry of the three-year period from the date of notification of taxation being not in accordance with the relevant treaty.

139. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. Two peers provided additional input. One of them mentioned that it has had limited MAP dealings with India, but has not experienced any issues with respect to access to MAP. Another peer stated that the first two transfer pricing cases with India are in an early stage of the procedure and the relation is good.

### *Anticipated modifications*

140. India reported that it is in favour of including Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in its tax treaties where possible and that it will seek to include Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.3] | - | - |

## [B.4] Provide access to MAP in relation to the application of anti-abuse provisions

Jurisdictions should provide access to MAP in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty.

141. There is no general rule denying access to MAP in cases of perceived abuse. In order to protect taxpayers from arbitrary application of anti-abuse provisions in tax treaties and in order to ensure that competent authorities have a common understanding on such application, it is important that taxpayers have access to MAP if they consider the interpretation and/or application of a treaty anti-abuse provision as being incorrect. Subsequently, to avoid cases in which the application of domestic anti-abuse legislation is in conflict with the provisions of a tax treaty, it is also important that taxpayers have access to MAP in such cases.

### *Legal and administrative framework*

142. None of India's 97 tax treaties allow competent authorities to restrict access to MAP for cases when a treaty anti-abuse provision applies or when there is a disagreement between the taxpayer and the tax authorities as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. In addition, also the domestic law and/or administrative processes of India do not include a provision allowing its competent authority to limit access to MAP for cases in which there is a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty.

143. India reported that it will provide access to MAP in cases relating to the application of a treaty anti-abuse provision. Concerning the application of India's domestic general anti-avoidance rules, sections 90(2) and 90A(2) of the Income Tax Act of 1961 determines that relief of double taxation should be given if so provided under the applicable tax treaty. Sections 90(2A) and 90A(2A) of that act refers to the domestic general anti-avoidance rule as a reason for not granting relief of double taxation. As in India's view these sections would override treaty provisions, it constitutes a reason for not granting access to MAP. In light of the requirements under the Action 14 Minimum Standard, India, however, reported it would give access to MAP for cases concerning the question whether the application of the domestic anti-abuse provision comes into conflict with the provision of a tax treaty. India also reported that such cases then can be a subject matter of MAP discussions, possibly resulting in an agreement that would lead to relief given by India. These discussions would only pertain to the issue of double taxation that is a consequence of invocation of domestic anti-abuse provisions and whether correlative relief should be granted under the provisions of the relevant tax treaty, but not the grounds upon which India decides to invoke these provisions.

### *Recent developments*

144. India reported that it has accepted the recommendation made in its stage 1 peer review report and changed its policy to effectively allow access to MAP for issues concerning the question whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty, and is willing to discuss such issues when being accepted into the MAP process, including where there is no double taxation but where there is taxation that is not in accordance with the provisions of a tax treaty. In this respect, India noted that it has

clarified its new position in its MAP guidance that it shall provide access to MAP even in a situation where the Indian tax authorities apply domestic anti-abuse provisions.

### *Practical application*

*Period 1 January 2016-31 August 2018 (stage 1)*

145. India reported that in the period 1 January 2016-31 August 2018 it has not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. However, no such cases in relation hereto were received.

146. All peers that provided input indicated not being aware of cases that have been denied access to MAP by India in the period 1 January 2016-31 August 2018 in relation to the application of treaty and/or domestic anti-abuse provisions.

*Period 1 September 2018-30 April 2020 (stage 2)*

147. India reported that since 1 September 2018 it has also not denied access to MAP in cases in which there was a disagreement between the taxpayer and the tax authorities as to whether the conditions for the application of a treaty anti-abuse provision have been met, or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a tax treaty. However, no such cases in relation hereto were received since that date.

148. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given.

### *Anticipated modifications*

149. India did not indicate that it anticipates any modifications in relation to element B.4.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.4] | - | - |

## [B.5] Provide access to MAP in cases of audit settlements

Jurisdictions should not deny access to MAP in cases where there is an audit settlement between tax authorities and taxpayers. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, jurisdictions may limit access to the MAP with respect to the matters resolved through that process.

150. An audit settlement procedure can be valuable to taxpayers by providing certainty on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing on such settlements, taxpayers should have access to the MAP in such cases, unless they

were already resolved via an administrative or statutory disputes settlement/resolution process that functions independently from the audit and examination function and which is only accessible through a request by taxpayers.

### *Legal and administrative framework*

#### *Audit settlements*

151. India reported that under its domestic law no process is available allowing taxpayers and the tax administration to enter into a settlement agreement during the course of or after ending of an audit.

152. However, India also reported that it has launched a new dispute resolution scheme called the "Vivad se Vishwas Act, 2020" (From dispute towards trust Act), under which a taxpayer can settle a litigation pending before any forum, as on 31 January 2020, by paying the tax on the disputed income and consequently, get a full waiver of interest and/or penalties concerned if the taxpayer agreed to pay the disputed tax amount by 31 March 2020. This law provides that the order of the authority for such settlement would be final and conclusive and that "no matter covered by such order shall be reopened in any other proceeding under the Income-tax Act or under any other law for the time being in force or under any agreement, whether for protection of investment or otherwise, entered into by India with any other country or territory outside India." Since the MAP is a proceeding that arises from agreements entered into by India, it is understood that India's policy would be to deny access to MAP where an issue has been decided under this law. In this respect, India clarified that if the taxpayer has opted for a resolution under this scheme, it cannot opt for MAP as a pre-condition for applying the scheme. However, India noted that its competent authority is open to MAP discussions if the taxpayer's affiliate submits a MAP request in the treaty partner State, but India's competent authority will not deviate from the results arrived at under this scheme.

153. Further to the above, India reported that the Vivad se Vishwas Act, 2020 involves a voluntary application by the taxpayer resulting in an order by the concerned authority without any discussions between the taxpayer and the authority. India further noted that the determination of the amount under this scheme is done through the application of a formula specified in the legislation. Owing to this, India expressed its view that this scheme should not be considered an audit settlement covered under element B.5. India also stated its view that the advantages of the scheme, which include a waiver of interest and penalties, is provided to the taxpayer in return for the taxpayer agreeing to waive certain legal rights, including its right to request for MAP, and thus, the competent authority in India cannot give access to MAP in such cases.

154. The Action 14 Minimum Standard requires that jurisdictions should not deny access to MAP where an audit settlement has been agreed to between the taxpayer and the tax authorities. This is because as noted in paragraph 45.1 of the Commentary on Article 25 of the OECD Model Tax Convention (OECD, 2017), double taxation can often be a consequence of audit settlements where the treaty partner state does not provide relief for the tax paid under a settlement. India's position to deny access to MAP filed before India's competent authority in respect of matters decided under this scheme may thus, prevent correlative relief in the treaty partner State when the tax amount has been finally and conclusively paid by the taxpayer in India and MAP is only possible where the taxpayer's affiliate submits a MAP request in the treaty partner State. Therefore, this scheme is considered not in line with the requirements under the Action 14 Minimum Standard.

*Administrative or statutory dispute settlement/resolution process*

155. India reported it has in place a statutory dispute settlement process that is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer. Chapter XIXA of the Income Tax Act of 1961 includes the relevant rules for this process. Pursuant to Article 245B, the Income Tax Settlement Commission ("**ITSC**") was established and is placed outside the tax administration, thereby functioning as an independent body. The ITSC has, pursuant to paragraph 4(a) of Article 245D, the authority to settle disputes between the taxpayer and the tax administration, and consists of at least a chairman and a number of vice-chairman. Furthermore, ITSC comprises various benches, which consist of one chairman, a vice-chairman and two other members. Any member of the ITSC is appointed by the Central Government and, on the basis of paragraph 3 of Article, should be of integrity and outstanding ability, thereby also having special knowledge of and experience with direct taxation and business accounts.

156. Article 254C, paragraph 1, of the Income Tax Action of 1961 stipulates that taxpayers may request with the ITSC a settlement of a case concerning his income tax position at any stage of the assessment process, but only if his case exceeds a certain threshold of tax and interest payable. To this end, the request should include a full and true disclosure of its income that has not been disclosed with the assessing officer of the tax administration, as also details regarding the manner in which such income has been derived and the additional tax that is payable on such income. Upon receipt of the request, the ITSC shall provide a hearing with the taxpayer, to give him the opportunity to explain why his request should be accepted into the process.

157. If the taxpayer's request is accepted, then the ITSC shall, pursuant to Article 254D), paragraph 2B, request from the tax administration a report stating its position on the case under review. On the basis of that report the ITSC shall take a final decision on whether the case shall be further dealt with in the settlement process. In such a situation, the ITSC will consider all facts and evidence and on that basis it may pass an order of settlement, which determines the additional income and the tax/interest payable on such income. The order of settlement has to be taken within 18 months as from the date of the submission of the request, whereby, pursuant to Article 245BD the decision shall be made by majority voting if the members do not agree on the decision to be made. In addition, Article 245I stipulates that every order by the ITSC shall be final and cannot be reopened in any other proceedings. Pursuant to Article 254L the settlement order has to be considered as a judicial proceeding.

158. In relation to MAP, India specified that after the commission has settled the dispute it would not be possible anymore to obtain relief from double taxation through MAP. In such situation, access to MAP would thus be denied. Further, India reported that access to MAP would be denied where an issue is pending substantive determination before the ITSC. This is clarified in India's MAP guidance under the heading "Denial of Access to MAP".

159. As discussed in detail under element B.1, the jurisdiction of the AAR as regards rulings granted to issues where completed transactions are pending tax audit in India would be covered under the purview of an administrative dispute settlement/resolution mechanism that is independent from the audit and examination functions and which can only be accessed through a request by the taxpayer. In relation to the same, India reported that for all cases that are pending substantive determination or decided by the AAR, India would not grant access to MAP. This is clarified in India's MAP guidance under the heading "Denial of Access to MAP".

### *Recent developments*

160. India reported that it has launched a new dispute resolution scheme called the "Vivad se Vishwas Act, 2020" (From dispute towards trust Act), under which a taxpayer can settle a litigation pending before any forum, as on 31 January 2020, by paying the tax on the disputed income and consequently, get a full waiver of interest and/or penalties concerned, if the taxpayer agreed to pay the disputed tax amount by 31 March 2020. This development has been reflected above.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

161. India reported it has in the period 1 January 2016-31 August 2018 not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through its statutory settlement process. However, no MAP requests were received by its competent authority in such situations.

162. All peers that provided input indicated not being aware of a denial of access to MAP by India in the period 1 January 2016-31 August 2018 in cases where there was an audit settlement between the taxpayer and the tax administration or in cases that were already resolved via its statutory dispute settlement process.

#### *Period 1 September 2018-30 April 2020 (stage 2)*

163. India reported that since 1 September 2018 it has also not denied access to MAP for cases where the issue presented by the taxpayer in a MAP request has already been resolved through its statutory settlement process. However, no MAP requests were received by its competent authority in such situations.

164. Most peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. The remaining peer input covered below relate to the ITSC.

#### The Income Tax Settlement Commission (ITSC)

165. One peer provided input and mentioned that India informed it that India has a statutory tax dispute settlement process in its domestic law called the ITSC, noting the general background of this settlement process. However, as in Paragraph 85 in the stage 1 peer review report of India, it is stated that the Indian settlement process is only available for cases that exceed a certain threshold of tax and interest payable, this peer asked for the clarification in this respect. In that regard, India clarified that an applicant can approach the ITSC in respect of a particular assessment year only if no assessment order (tax audit order) has been passed by the concerned Income tax authority and the statutory time-limit for passing the order for that year has not lapsed. An applicant has to disclose an additional amount of income tax before the Commission, which is at least INR 1 million (approx. USD 13 330). In certain other category of cases, the additional amount of income tax to be disclosed is at least INR 5 million (approx. USD 66 650).

166. A second peer provided input and mentioned that it has received a notification from India, which explains that after the ITSC has settled the dispute, it would not be possible anymore to obtain relief from double taxation through MAP i.e. in such situation, access to MAP would be denied by India. In that regard, this peer sought clarity via mail on some

aspects. In response, India commented that its MAP guidance, which has been issued in August 2020, provides such clarifications, and it mailed its MAP guidance to the peer. This was confirmed by this peer.

167. A third peer mentioned that it has received from India a notification that informs about the existence in India of the ITSC. This peer asked for clarifications on the following points: (i) the kind of disputes that can be presented to that Commission, (ii) organisation of the ITSC (iii) whether the members of the Commission are independent from the Tax Administration and who are eligible, and (iv) decision making process. India responded to these inquiries as follows:

- (i) The ITSC is an independent statutory dispute resolution body. As far as the types of disputes that can be presented before the ITSC are concerned, a taxpayer can approach the ITSC at any stage of the proceedings for assessment under the Income-tax Act, 1961 pending before an Assessing Officer on the date on which an application has been submitted to ITSC, subject to certain prescribed conditions.
- (ii) and (iii) The ITSC is constituted by the central Government. It is constituted of a chairman and as many vice-chairman and members as the central government thinks fit. The chairman, vice-chairman and other members of the Settlement Commission are appointed by the central government from amongst persons of integrity and outstanding ability, having special knowledge of, and, experience in, problems relating to direct taxes and business accounts. The chairman, vice-chairman and members of the commission, are independent from the tax administration.
- (iv) The process of settlement of disputes by the ITSC is independent from the audit and examination functions of tax authorities. It is a voluntary process and a taxpayer has to apply for a settlement of its disputes. Once the application is accepted, the ITSC examines all aspects of the dispute and comes out with a settlement order. If the ITSC issues a settlement order, the same is binding on both the taxpayer and the tax authorities. If the Members of a bench differ in opinion on any point, the point is decided according to the opinion of the majority. However, if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the chairman who either hears the point or points himself or refers the case for hearing on such point or points by one or more of the other members of the Commission and such point or points are decided according to the opinion of the majority of the members of the Commission who have heard the case, including those who first heard it.

168. A fourth peer commented that it was notified by India on a statutory tax dispute settlement authority (the ITSC) in its domestic law. It noted that India holds that once such a settlement order has been issued by the ITSC, the taxpayer cannot gain access to MAP.

### *Anticipated modifications*

169. India did not indicate that it anticipates any modifications in relation to element B.5.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.5] | Access to MAP would be denied in cases where a taxpayer settles a dispute under the Vivad se Vishwas Act, 2020 and files a MAP request before India's competent authority. | India should ensure that taxpayers have access to MAP in cases where a taxpayer settles a dispute under the Vivad se Vishwas Act, 2020. |

## [B.6] Provide access to MAP if required information is submitted

Jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.

170. To resolve cases where there is taxation not in accordance with the provisions of the tax treaty, it is important that competent authorities do not limit access to MAP when taxpayers have complied with the information and documentation requirements as provided in the jurisdiction's guidance relating hereto. Access to MAP will be facilitated when such required information and documentation is made publicly available.

### *Legal framework on access to MAP and information to be submitted*

171. The information and documentation India requires taxpayers to include in a request for MAP assistance are discussed under element B.8.

172. Where a taxpayer has not included all required information in its MAP request, India reported its competent authority has no restrictions in requesting additional information or documents. India generally provides a 30 or 90 day time period for taxpayers to rectify errors in a MAP request or to request additional information respectively. There, however, is no specific timelines given to taxpayers within which they have to present the required information. While there are no further rules of procedure on how the MAP process is further continued in those situations where not all relevant information is contained in a MAP request, India reported that if taxpayers submit form No. 34F, the MAP case will be accepted into the process regardless of whether additional information is requested since the MAP request is then expected to be complete in all respects. In other words, the requesting and submission of such additional information may affect the (timely) resolution of the MAP case, but would not lead to a limitation of taxpayers' access to MAP. However, if the required defect is not cured or the additional information is not provided within the specified timeline, India reported that its competent authority may deny access to MAP. This is clarified in India's MAP guidance in Part B under the heading "Denial of Access to MAP"

### *Recent developments*

173. India has newly issued its MAP guidance on 7 August 2020, which is shortly after the review period, and contains the information and documentation India requires taxpayers to include in a request for MAP assistance.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

174. India reported that it provides access to MAP in all cases where taxpayers have complied with the information or documentation requirements as required by its domestic law. It further reported that in the period 1 January 2016-31 August 2018 it has not denied access to MAP for cases where the taxpayer had not provided the required information or documentation.

175. All peers that provided input indicated not being aware of a limitation of access to MAP by India in the period 1 January 2016-31 August 2018 in situations where taxpayers complied with information and documentation requirements.

*Period 1 September 2018-30 April 2020 (stage 2)*

176. India reported that since 1 September 2018 it has also not denied access to MAP for cases where the taxpayer had provided the required information or documentation.

177. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given.

### *Anticipated modifications*

178. India did not indicate that it anticipates any modifications in relation to element B.6.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.6] | - | - |

## [B.7] Include Article 25(3), second sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision under which competent authorities may consult together for the elimination of double taxation in cases not provided for in their tax treaties.

179. For ensuring that tax treaties operate effectively and in order for competent authorities to be able to respond quickly to unanticipated situations, it is useful that tax treaties include the second sentence of Article 25(3) of the OECD Model Tax Convention (OECD, 2017), enabling them to consult together for the elimination of double taxation in cases not provided for by these treaties.

### *Current situation of India's tax treaties*

180. Out of India's 97 tax treaties, 92 contain a provision equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) allowing their competent authorities to consult together for the elimination of double taxation in cases not provided for in their tax treaties.[9] The remaining five treaties do not contain a provision that is based on, or equivalent to, Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).

181. Almost all peers that provided input during stage 1 reported that their treaty with India is in line with the requirements under the Action 14 Minimum Standard, which also regards element B.7. Of the five treaties that do not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017), one peer provided input with respect to this element. This peer specifically mentioned that its treaty with India does not meet the requirement under element B.7, but that the treaty will be modified by the Multilateral Instrument to include such equivalent, which is in line with the above analysis.

### *Recent developments*

#### *Bilateral modifications*

182. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

#### *Multilateral Instrument*

183. India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

184. Article 16(4)(c)(ii) of that instrument stipulates that Article 16(3), second sentence – containing the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). In other words, in the absence of this equivalent, Article 16(4)(c)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(d)(ii), the depositary that this treaty does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).

185. In regard of the five tax treaties identified above that are considered not to contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017), India listed all as a covered tax agreement under the Multilateral Instrument and for all made a notification, pursuant to Article 16(6)(d)(ii), that they do not contain a provision described in Article 16(4)(c)(ii). All of the five treaty partners are a signatory to the Multilateral Instrument. All five treaty partners listed their treaty with India as a covered tax agreement under that instrument, but only four also made a notification on the basis of Article 16(6)(d)(ii). Three out of these four treaty partners have already deposited their instrument of ratification, following which the Multilateral Instrument has entered into force for the treaties between India and these treaty partners. Therefore, at this the Multilateral Instrument has modified these three treaties to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). For the remaining treaty, the instrument will, upon entry into force, modify it to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).

#### *Other developments*

186. India reported that for the remaining tax treaty that does not contain the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified by the Multilateral Instrument, it has shared with the relevant treaty partner a draft of an amending protocol to bring the treaty in line with the requirements under the Action 14 Minimum Standard. Currently, it is awaiting a response from this treaty partner.

*Peer input*

187. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with India. One of these peers concerns a treaty partner to the treaties identified above that do not contain Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) and which has been modified by the Multilateral Instrument. This peer, however, did not provide input in relation to element B.7.

### *Anticipated modifications*

188. India reported it will seek to include Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.7] | Five out of 97 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). Of these five tax treaties:<br>• Three have been modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).<br>• One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017).<br>• One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). India has approached the relevant treaty partner to initiate discussions on the amendment of the treaty with a view to include the required provision, but the treaty partner has not yet responded. | For the remaining treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) following its entry into force, India should, upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision. |

## [B.8] Publish clear and comprehensive MAP guidance

Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.

189. Information on a jurisdiction's MAP regime facilitates the timely initiation and resolution of MAP cases. Clear rules, guidelines and procedures on access to and use of the MAP are essential for making taxpayers and other stakeholders aware of how a jurisdiction's MAP regime functions. In addition, to ensure that a MAP request is received and will be reviewed by the competent authority in a timely manner, it is important that a jurisdiction's MAP guidance clearly and comprehensively explains how a taxpayer can make a MAP request and what information and documentation should be included in such request.

### *India's MAP guidance*

190. India has issued rules, guidelines and procedures on the MAP process and how it conducts that process in practice in August 2020, which is shortly after the review period. This guidance can be found at:

https://www.incometaxindia.gov.in/Documents/MAP-GUIDANCE-7th-August-2020.pdf

191. This MAP guidance consists of four chapters and sets out in detail how taxpayers can access the mutual agreement procedure and what rules apply during that procedure under tax treaties entered into by India. More specifically, it contains information on:

| | |
|---|---|
| Part A: Introduction and basic information | • Mutual Agreement Procedure (MAP)<br>• India's tax treaties or DTAAs<br>• Making a MAP application in India<br>• The MAP process<br>• Timeframe for resolving and implementing MAP cases. |
| Part B: Access and denial of access to MAP | • Access to MAP<br>• Denial of Access to MAP. |
| Part C: Technical Issues | • Downward adjustment<br>• Resolution of recurring issues<br>• Interest and penalties<br>• Secondary adjustments<br>• Bilateral and multilateral APAs<br>• Suspension of collection of taxes during the pendency of MAP<br>• Adjustment of taxes paid in pursuance of demand raised by an order under Section 201 of the Income-tax Act. |
| Part D: Implementation of MAP outcomes | • Implementation of MAP<br>• Timelines<br>• Information to CAs of India. |

192. In the MAP guidance, it is stated that Rule 44G of the Income Tax Rules of 1962 has been notified recently via G.S.R.282 (E) dated 6 May 2020 and it substitutes the previous rules 44G and 44H, which dealt with the same issue of implementation of MAP.[10] It is also stated in the guidance that the new rule is applicable on and after 6 May 2020 and, accordingly, applies to all MAP cases pending with the competent authorities of India as on 6 May 2020. It is further stated that Rule 44G contains the process and timeframes to implement MAP outcomes, and inter-alia, provides the following:

- how to apply for a MAP
- whom to apply to for a MAP
- the role of the CAs of India in making an endeavour to resolve tax disputes under the MAP
- timeframes and processes after the resolution of a MAP case
- role of Indian taxpayer and Indian tax authorities after the resolution of a MAP case.

193. India's MAP guidance contains information on:

a. contact information of the competent authority or the office in charge of MAP cases

b. the manner and form in which the taxpayer should submit its MAP request

c. the specific information and documentation that should be included in a MAP request (see also below)

d. how the MAP functions in terms of timing and the role of the competent authorities

e. access to MAP in transfer pricing cases, anti-abuse provisions, multilateral disputes and for multi-year resolution of cases

f. implementation of MAP agreements

g. rights and role of taxpayers in the process

h. suspension of tax collection

i. interest charges, refunds and penalties.

194. The above-described MAP guidance of India includes detailed and comprehensive information on the availability and the use of MAP and how its competent authority conducts the procedure in practice. This guidance includes the information that the FTA MAP Forum agreed should be included in a jurisdiction's MAP guidance, which concerns: (i) contact information of the competent authority or the office in charge of MAP cases and (ii) the manner and form in which the taxpayer should submit its MAP request.[11] Although the information included in India's MAP guidance is detailed and comprehensive, some subjects are not specifically discussed in India's MAP guidance. This concerns information on:

- whether MAP is available in cases of: (i) audit settlements and (ii) bona fide foreign-initiated self-adjustments
- relationship with domestic available remedies.

### *Information and documentation to be included in a MAP request*

195. To facilitate the review of a MAP request by competent authorities and to have more consistency in the required content of MAP requests, the FTA MAP Forum agreed on guidance that jurisdictions could use in their domestic guidance on what information and documentation taxpayers need to include in request for MAP assistance. This agreed guidance is shown below. India's MAP guidance enumerating which items must be included in a request for MAP assistance (if available) are checked in the following list:

☑ identity of the taxpayer(s) covered in the MAP request

☑ the basis for the request

☑ facts of the case

☑ analysis of the issue(s) requested to be resolved via MAP

☑ whether the MAP request was also submitted to the competent authority of the other treaty partner

☑ whether the MAP request was also submitted to another authority under another instrument that provides for a mechanism to resolve treaty-related disputes

☐ whether the issue(s) involved were dealt with previously

☑ a statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner.

196. Further to the above, Form No. 34 F, which taxpayers should use in India for the submission of a MAP request, also requires the following documents to be furnished at the time of making the application:

- copy of notice or order giving rise to the action not in accordance with the relevant DTAs
- any document(s) as support for considering the order/action of the tax authorities of the treaty partners to be not in accordance with the relevant DTAs
- any document(s) as evidence of remedy sought in the other country or specified territory
- any other document that the applicant may want to submit or the CAs of India may ask for.

197. Concerning the information to be included in a MAP request, one peer (which is the same peer for which input was reflected above) provided input. This peer mentioned that the to be prepared MAP guidance by India should specify the information taxpayers need to include in a MAP request, as currently it understands that access to MAP could be limited if the taxpayer does not provide that competent authority with sufficient information (see for a discussion hereof element B.6).

### *Recent developments*

198. India has newly issued its MAP guidance on 7 August 2020, which is shortly after the review period, and published on the website of the Income Tax Department. This development has been reflected above.

### *Anticipated modifications*

199. India did not indicate that it anticipates any modifications in relation to element B.8.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.8] | - | - |

## [B.9] Make MAP guidance available and easily accessible and publish MAP profile

Jurisdictions should take appropriate measures to make rules, guidelines and procedures on access to and use of the MAP available and easily accessible to the public and should publish their jurisdiction MAP profiles on a shared public platform pursuant to the agreed template.

200. The public availability and accessibility of a jurisdiction's MAP guidance increases public awareness on access to and the use of the MAP in that jurisdiction. Publishing MAP profiles on a shared public platform further promotes the transparency and dissemination of the MAP programme.[12]

### *Rules, guidelines and procedures on access to and use of the MAP*

201. The MAP guidance of India is issued on 7 August 2020, which is shortly after the review period, and can be found at:

https://www.incometaxindia.gov.in/Documents/MAP-GUIDANCE-7th-August-2020.pdf

202. As regards its accessibility, India's MAP guidance can be found on the website of the Income Tax Department by searching for "mutual agreement procedure" or "MAP".

### *MAP profile*

203. The MAP profile of India is published on the website of the OECD since September 2016 and last updated on 8 December 2020. This MAP profile is complete and often with detailed information. This profile includes external links which provide extra information and guidance where appropriate.

### *Recent developments*

204. India reported that it has newly issued its MAP guidance on 7 August 2020, which is shortly after the review period, and published on the website of the Income Tax Department. It further reported that its MAP profile was updated in December 2020.

### *Anticipated modifications*

205. India did not indicate that it anticipates any modifications in relation to element B.9.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.9] | - | - |

## [B.10] Clarify in MAP guidance that audit settlements do not preclude access to MAP

Jurisdictions should clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP. If jurisdictions have an administrative or statutory dispute settlement/resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer, and jurisdictions limit access to the MAP with respect to the matters resolved through that process, jurisdictions should notify their treaty partners of such administrative or statutory processes and should expressly address the effects of those processes with respect to the MAP in their public guidance on such processes and in their public MAP programme guidance.

206. As explained under element B.5, an audit settlement can be valuable to taxpayers by providing certainty to them on their tax position. Nevertheless, as double taxation may not be fully eliminated by agreeing with such settlements, it is important that a jurisdiction's MAP guidance clarifies that in case of audit settlement taxpayers have access to the MAP. In addition, for providing clarity on the relationship between administrative or statutory dispute settlement or resolution processes and the MAP (if any), it is critical that both the public guidance on such processes and the public MAP programme guidance address the effects of those processes, if any. Finally, as the MAP represents a collaborative approach between treaty partners, it is helpful that treaty partners are notified of each other's MAP programme and limitations thereto, particularly in relation to the previously mentioned processes.

### *MAP and audit settlements in the MAP guidance*

207. As previously discussed under element B.5, it is under India's domestic law possible that taxpayers and the tax administration enter into audit settlements through the Vivad se Vishwas Act 2020. As noted above, India's policy is to deny access to MAP filed before India's competent authority in a situation where an issue has already been settled under such mechanism. India is open to MAP discussions for such issues only where the taxpayer's affiliate submits a MAP request in the treaty partner State. However, this has not been addressed in India's MAP guidance.

208. Peers raised no issues with respect to the availability of audit settlements and the inclusion of information hereon in India's MAP guidance.

### *MAP and other administrative or statutory dispute settlement/resolution processes in available guidance*

209. As previously mentioned under element B.5, India has in place a statutory dispute settlement process that is independent from the audit and examination functions and that can only be accessed through a request by the taxpayer. The effects of this process with respect to MAP are addressed in its MAP guidance.

210. Next to the rules put on place in India's Income Tax Act of 1961, by which the Income Tax Settlement Commission was established and formal rules on the process before this commission were introduced, India also introduced further rules of procedure on the operation of the settlement procedure. These rules are set forth in Part IX-A of the Income Tax Rules of 1962 and relate to: (i) which procedures taxpayers have to follow when filing for a settlement application, in particular which forms need to be used, (ii) disclosure of the application form to the tax administration and (iii) levying of fees. Furthermore a specific section is introduced that details the rules that apply during the settlement process, which *inter alia* concerns: (a) language of the commission, (b) signing of notices, (c) procedure for filing a settlement application, (d) report by the tax administration, (e) preparation of documents and affidavits, and (f) hearing sessions.

211. While the Income Tax Rules of 1962 nor the rules laid down in the Income Tax Act of 1961 specifically address the effects of the settlement process before the Income Tax Settlement Commission on taxpayers' rights under the MAP process, section 245I of the Income Tax Act of 1961 stipulates that every order by the ITSC shall be final and cannot be reopened in any other proceedings. Such other proceedings would include the MAP process under India's tax treaties. In that regard, there is no particular need to specifically address the effects of the settlement process on MAP in the Income Tax Act of 1961 or the Income Tax Rules of 1962.

212. Further to the above, as discussed under element B.5, a part of the jurisdiction of the AAR is covered as an administrative/statutory dispute resolution process under element B.5. India noted that the provisions regarding the AAR are provided in Chapter XIX-B of the Indian Income-tax Act (Sections 245N to 245V). The limitation on access to MAP in cases pending substantive determination or decided by the AAR is clarified in India's MAP guidance under the heading "Access to MAP" as noted under element B.1.

213. However, the public guidance on processes before the AAR or the ITSC, including the law, guidelines and information available on the website, does not clarify that taxpayers do not have access to MAP where a matter is pending substantive determination by the ITSC or the AAR, although it is clarified in the law that the income tax authorities, including the competent authority, are bound by decisions of the AAR or the ITSC.

### *Notification of treaty partners of existing administrative or statutory dispute settlement/resolution processes*

214. India reported that the majority of its treaty partners were notified of the existence of its statutory dispute settlement processes. India's MAP profile clarifies that access to MAP would not be granted for matters settled before the ITSC or for matters decided by the AAR and thereby, addresses both mechanisms. This is considered sufficient notification for the purposes of element B.10. However, India's MAP profile does not address that access to MAP would be denied even where a matter is pending substantive determination before the ITSC or AAR.

215. All peers that provided input reported not being aware of a statutory dispute settlement process in India nor having been notified of the existence of such process.

### *Recent developments*

216. India reported that it has clarified its position in its MAP guidance about the effects on MAP when the case was resolved through statutory dispute resolution process.

### *Anticipated modifications*

217. India indicated that it intends to notify the remaining treaty partners on the existence of its statutory dispute settlement process.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.10] | The MAP guidance does not include information on the relationship between MAP and audit settlements arising from the Vivad se Vishwas Act. | India's MAP guidance should clarify the relationship between MAP and audit settlements arising from the Vivad se Vishwas Act. |
| | The effects of the administrative or statutory dispute/ resolution settlement process undertaken by the AAR or the ITSC on MAP where the issue under dispute is pending substantive determination are not addressed in available guidance on such process. | India's available guidance on the administrative or statutory dispute settlement/resolution process undertaken by the AAR or the ITSC where the issue under dispute is pending substantive determination should clarify the effects on MAP when the case was resolved through such process. |
| | Although treaty partners were notified of the existence of a statutory dispute settlement process through India's MAP profile, the effects of such processes have not been fully addressed. | India should notify all of its treaty partners on the existence of its statutory dispute settlement process and the effects of such process. |

# Notes

1. These 68 treaties include the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
2. These 21 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands.
3. These 87 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands, the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
4. This reservation on Article 16 – Mutual Agreement Procedure reads: "Pursuant to Article 16(5)(a) of the Convention, India reserves the right for the first sentence of Article 16(1) not to apply to its Covered Tax Agreements on the basis that it intends to meet the minimum standard for improving dispute resolution under the OECD/G20 BEPS Package by ensuring that under each of its Covered Tax Agreements (other than a Covered Tax Agreement that permits a person to present a case to the competent authority of either Contracting Jurisdiction), where a person considers that the actions of one or both of the Contracting Jurisdictions result or will result for that person in taxation not in accordance with the provisions of the Covered Tax Agreement, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, that person may present the case to the competent authority of the Contracting Jurisdiction of which the person is a resident or, if the case presented by that person comes under a provision of a Covered Tax Agreement relating to non-discrimination based on nationality, to that of the Contracting Jurisdiction of which that person is a national; and the competent authority of that Contracting Jurisdiction will implement a bilateral notification or consultation process with the competent authority of the other Contracting Jurisdiction for cases in which the competent authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified". An overview of India's positions on the Multilateral Instrument is available at: www.oecd.org/tax/treaties/beps-mli-position-india.pdf.
5. These 70 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands, and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
6. These 23 treaties include the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic.
7. Available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1510999.
8. These eight treaties include the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic.
9. These 92 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands, the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
10. Rule 44 G is published on the website of the Income Tax Department and can be accessed at: https://www.incometaxindia.gov.in/news/notification23_2020.pdf.
11. Available at: www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-peer-review-documents.pdf.
12. The shared public platform can be found at: www.oecd.org/ctp/dispute/country-map-profiles.htm.

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OECD (2015a), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264239081-en.

OECD (2015b), "Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report", in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264241633-en.

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# *Part C*

# Resolution of MAP cases

## [C.1] Include Article 25(2), first sentence, of the OECD Model Tax Convention in tax treaties

Jurisdictions should ensure that their tax treaties contain a provision which requires that the competent authority who receives a MAP request from the taxpayer, shall endeavour, if the objection from the taxpayer appears to be justified and the competent authority is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the competent authority of the other Contracting Party, with a view to the avoidance of taxation which is not in accordance with the tax treaty.

218. It is of critical importance that in addition to allowing taxpayers to request for a MAP, tax treaties also include the equivalent of the first sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017), which obliges competent authorities, in situations where the objection raised by taxpayers are considered justified and where cases cannot be unilaterally resolved, to enter into discussions with each other to resolve cases of taxation not in accordance with the provisions of a tax treaty.

### *Current situation of India's tax treaties*

219. Out of India's 97 tax treaties, 95 contain a provision equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) requiring its competent authority to endeavour – when the objection raised is considered justified and no unilateral solution is possible – to resolve by mutual agreement with the competent authority of the other treaty partner the MAP case with a view to the avoidance of taxation which is not in accordance with the tax treaty.[1]

220. For the remaining two tax treaties the following analysis is made:

- One tax treaty contains a provision that is based on Article 25(2), first sentence, but is not considered being the equivalent thereof as the structure and wording deviates. This concerns the fact that the phrase "if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution" is missing and that the objective of the mutual agreement procedure is to resolve cases of double taxation instead of cases not in accordance with the provisions of the underlying tax treaty.
- One tax treaty contains a provision that is based on Article 25(2), first sentence, but this provision includes additional wording that stipulates that the competent authority that received the MAP request should notify the competent authority of the other state hereof within a time limit of three years from the due date or

the date of filing a tax return in that other state, whichever is later. As such an obligation may prevent that cases are effectively dealt with in MAP, the treaty is considered not having the full equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).

221. Almost all peers that provided input during stage 1 reported that their treaty with India is in line with the requirements under the Action 14 Minimum Standard, which also regards element C.1. The relevant treaty partners to the two treaties that do not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017), did not provide input.

### *Practical application*

222. One peer provided specific input relating to India's willingness to seek to resolve MAP cases. In this respect, it mentioned that India is not willing to accept MAP requests and resolve MAP cases when the case does not relate to double taxation. This particular input was discussed under element B.1. This peer further mentioned that its competent authority and that of India fundamentally differently interpret some provisions of their tax treaty. This concerns Article 5 (Permanent Establishment), Article 7 (Attribution of Profits) and Article 12 (Royalties and Fees for Included Services). Specifically with respect to the existence of a permanent establishment, the peer noted that the competent authorities have different views on the evidence an employee of the tax administration must provide to have a conclusion that a permanent establishment is in existence will be sustained in MAP. In fact, in the absence of convincing evidence that would support such a conclusion on the basis of the explicit elements that are set forth in Article 5, India puts the obligation on taxpayers to substantiate that no permanent establishment is in existence in that state.

223. India's response to the first issue was also included in element B.1 (paragraphs 40-41). It also responded to the second issue by stating that it is clarified that existence of a permanent establishment is a question of fact. If the taxpayer claims that there is no such establishment in existence, it has to demonstrate the same. India also noted that peers cannot put specific conditions on India to resolve cases in a certain manner.

224. The peer that provided this input gave a reaction to India's response. It mentioned that it agrees with India that the existence of a permanent establishment is a question of fact. The peer, however, also believes the burden of establishing this fact lies with the tax authority that made the adjustment and the competent authority that defended such adjustment. In that regard, the peer expressed the opinion that it feels that India's competent authority has effectively sought to reverse this burden and, instead, put the onus on the taxpayer (or on the other competent authority) to *disprove* the existence of a permanent establishment (i.e. to prove a negative). The peer disagrees with this approach on the grounds that it does not comport with a fair interpretation of the treaty or with the expectations on competent authorities to explain and justify the actions taken by their tax administrations to their competent authority counterparts.

225. In view of the above, India further clarified that it has neither denied access to MAP in cases concerning the question on whether a permanent establishment is in existence, nor has it refused to resolve such cases once they have been accepted into the process by the treaty partner. For the particular case the peer referred to, India clarified that India took the position the taxpayer has to prove it has no permanent establishment in India, because the taxpayer also had conceded in discussions with India's competent authority that it did have such establishment in India. In India's view, this conflicting position of the taxpayer frustrated the process and the resolution of the case.

226. In light of the above, a recommendation was made in the stage 1 report that required India to seek to resolve all MAP cases that are accepted into the MAP process and that meet the requirements under Articles 25(1) and (2) of the OECD Model Tax Convention (OECD, 2017) as incorporated in India's tax treaties and specifically requiring India to not refuse discussions in MAP with the other competent authority concerned on the grounds that there is no double taxation.

227. With respect to this recommendation, India reported that it would seek to resolve MAP cases that are accepted into the process and that meet the requirements under Articles 25(1) and (2) of the OECD Model Tax Convention (OECD, 2017), including situations in which there is no double taxation but where there may be taxation not in accordance with the provisions of the tax treaty. In this respect, no peers reported any impediments since 1 September 2018. Therefore, the recommendation made in the stage 1 report has been addressed.

### *Recent developments*

#### *Bilateral modifications*

228. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

#### *Multilateral Instrument*

229. India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

230. Article 16(4)(b)(i) of that instrument stipulates that Article 16(2), first sentence – containing the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). In other words, in the absence of this equivalent, Article 16(4)(b)(i) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both notified, pursuant to Article 16(6)(c)(i), the depositary that this treaty does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).

231. In regard of the two tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017), India listed all as a covered tax agreement under the Multilateral Instrument and made for all, pursuant to Article 16(6)(c)(i), a notification that they do not contain a provision described in Article 16(4)(b)(i). Both treaty partners are a signatory to the Multilateral Instrument and listed their treaty with India as a covered tax agreement. However, only one of these treaty partners also made a notification on the basis of Article 16(6)(c)(i). Therefore, at this stage, one of the two tax treaties identified above will be modified by the Multilateral Instrument upon its entry into force for this treaty to include the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).

*Other developments*

232. India reported that for the remaining tax treaty that does not contain the equivalent of Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) and will not be modified by the Multilateral Instrument, it has approached the relevant treaty partner with a proposal of a comprehensive revision of the existing treaty, for which the treaty partner recently has agreed.

*Peer input*

233. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with India. None of these peers concerns a treaty partner to the two treaties identified above that do not contain Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).

### *Anticipated modifications*

234. India reported it will seek to include Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.1] | Two out of 97 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). Of these two tax treaties:<br>• One treaty is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).<br>• One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). For this treaty, negotiations on the comprehensive revision of the existing treaty are envisaged. | For the treaty that will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017), India should continue the process to initiate negotiations with the treaty partner to include the required provision. |

## [C.2] Seek to resolve MAP cases within a 24-month average timeframe

Jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).

235. As double taxation creates uncertainties and leads to costs for both taxpayers and jurisdictions, and as the resolution of MAP cases may also avoid (potential) similar issues for future years concerning the same taxpayers, it is important that MAP cases are resolved swiftly. A period of 24 months is considered as an appropriate time period to resolve MAP cases on average.

### *Reporting of MAP statistics*

236. Statistics regarding all tax treaty related disputes concerning India are published on the website of the OECD as of 2016.[2]

237. The FTA MAP Forum has agreed on rules for reporting of MAP statistics ("**MAP Statistics Reporting Framework**") for MAP requests submitted on or after January 1, 2016 ("**post-2015 cases**"). Also, for MAP requests submitted prior to that date ("**pre-2016 cases**"), the FTA MAP Forum agreed to report MAP statistics on the basis of an agreed template. India provided its MAP statistics pursuant to the MAP Statistics Reporting Framework within the given deadline, including all cases involving India and of which its competent authority was aware. The statistics discussed below include both pre-2016 and post-2015 cases and the full statistics are attached to this report as Annex B and Annex C respectively and should be considered jointly for understanding of the MAP caseload of India.[3]

238. With respect to post-2015 cases, India reported for the years 2016-19 it has reached out to all of its MAP partners with a view to have their MAP statistics matching. In that regard, India reported that it could match its statistics with all of its MAP partners.

239. Four peers provided input on the matching of MAP statistics with India and confirmed that they were able to match the statistics.

### *Monitoring of MAP statistics*

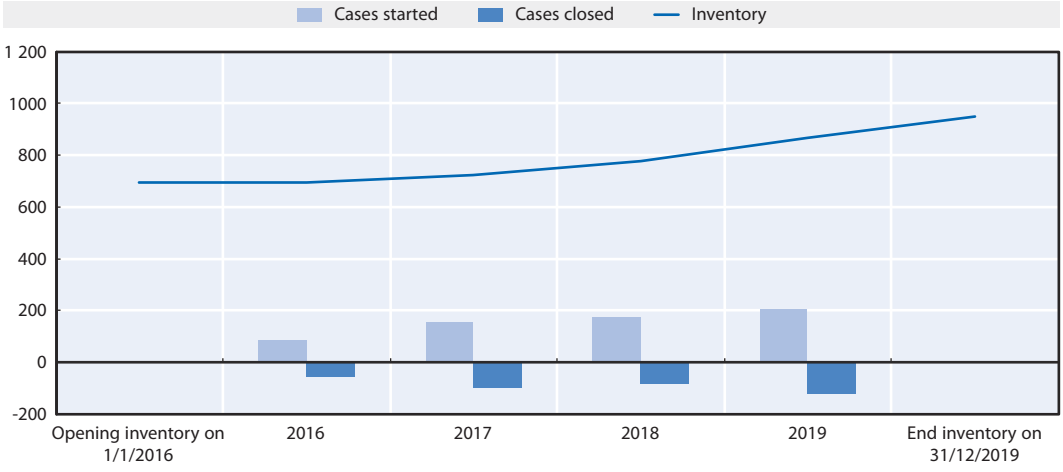
240. India reported that both competent authorities monitor their MAP inventories, whereby case handles maintain the relevant dates in an internal database that keeps track of the number of cases and time taken to resolve case.

### *Analysis of India's MAP caseload*

241. The analysis of India's MAP caseload relates to the period starting on 1 January 2016 and ending on 31 December 2019.[4]

242. Figure C.1 shows the evolution of India's MAP caseload over the Statistics Reporting Period.

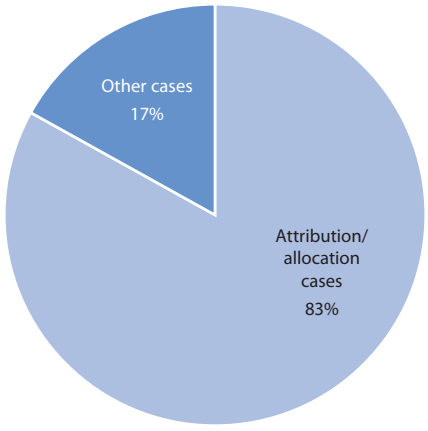
Figure C.1. **Evolution of India's MAP caseload**



243. At the beginning of the Statistics Reporting Period India had 695 pending MAP cases, 594 of which were attribution/allocation cases and 101 other MAP cases.[5] At the end of the Statistics Reporting Period, India had 951 MAP cases in its inventory, of which 790 are attribution/allocation cases and 161 are other MAP cases. Consequently, India's MAP statistics have increased by 37% during the Statistics Reporting Period. This increase can be broken down into an increase by 33% for attribution/allocation cases and an increase by 59% for other cases.

244. The breakdown of the end inventory can be shown as in Figure C.2.

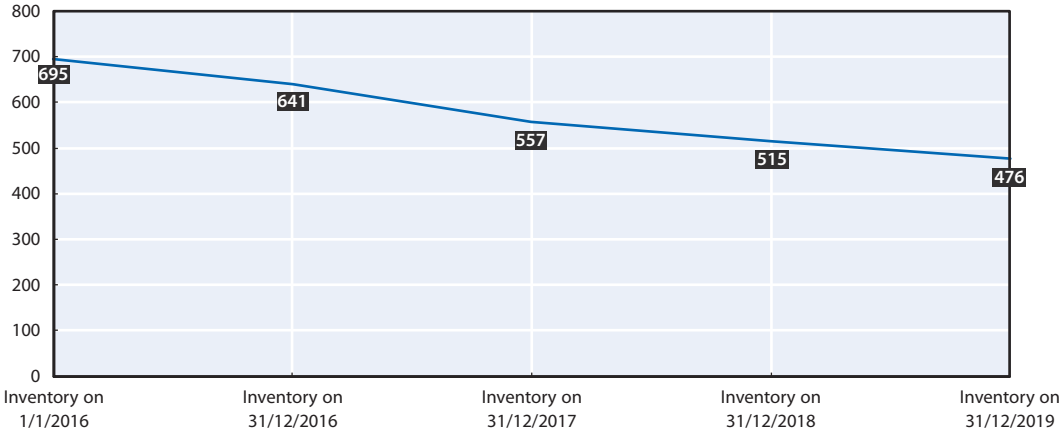
Figure C.2. **End inventory on 31 December 2019 (951 cases)**




*Pre-2016 cases*

245. Figure C.3 shows the evolution of India's pre-2016 MAP cases over the Statistics Reporting Period.

Figure C.3. **Evolution of India's MAP inventory: Pre-2016 cases**



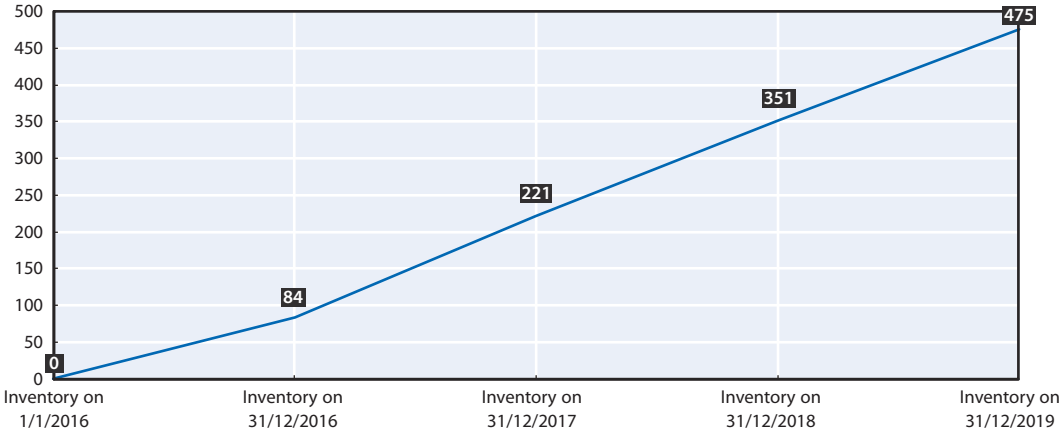
246. At the beginning of the Statistics Reporting Period, India's MAP inventory of pre-2016 MAP cases consisted of 695 cases, 594 of which were attribution/allocation cases and 101 other cases. At the end of the Statistics Reporting Period the total inventory of pre-2016 cases had decreased to 476 cases, which accounts for half of the total inventory of MAP cases and consists of 380 attribution/allocation cases and 96 other cases. The decrease in the number of pre-2016 MAP cases is shown in the table below.

| | Evolution of total MAP caseload in 2016 | Evolution of total MAP caseload in 2017 | Evolution of total MAP caseload in 2018 | Evolution of total MAP caseload in 2019 | Cumulative evolution of total MAP caseload over the four years (2016-19) |
|---|---|---|---|---|---|
| Attribution/allocation cases | -9% | -15% | -9% | -9% | -36% |
| Other cases | -3% | -1% | (no case closed) | -1% | -5% |

*Post-2015 cases*

247. Figure C.4 shows the evolution of India's post-2015 MAP cases over the Statistics Reporting Period.

Figure C.4. **Evolution of India's MAP inventory: Post-2015 cases**




248. In total, 616 MAP cases started during the Statistics Reporting Period, 541 of which concerned attribution/allocation cases and 75 other cases. At the end of this period the total number of post-2015 cases in the inventory was 475 cases, consisting of 410 attribution/allocation cases and 65 other cases. Conclusively, India closed 141 post-2015 cases during the Statistics Reporting Period, 131 of them being attribution/allocation cases and ten other cases. The total number of closed cases represent 23% of the total number of post-2015 cases that started during the Statistics Reporting Period.

249. The number of post-2015 cases closed as compared to the number of post-2015 cases started during the Statistics Reporting Period is shown in the table below.

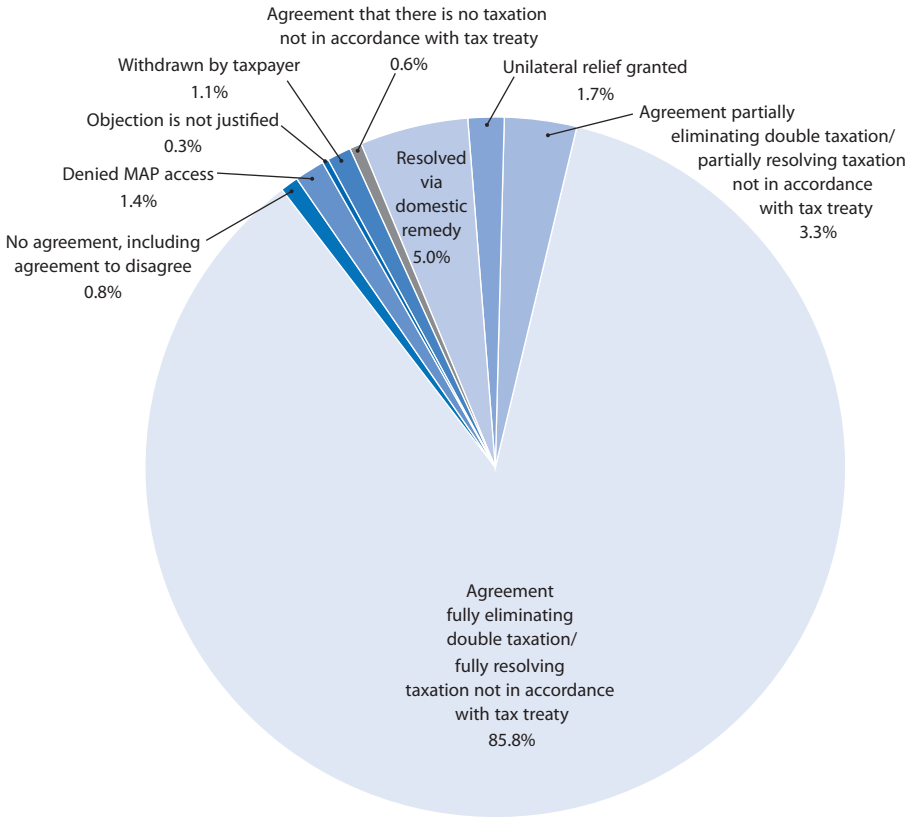
| | % of cases closed compared to cases started in 2016 | % of cases closed compared to cases started in 2017 | % of cases closed compared to cases started in 2018 | % of cases closed compared to cases started in 2019 | Cumulative percentage of cases closed compared to cases started over the four years (2016-19) |
|---|---|---|---|---|---|
| Attribution/allocation cases | 1% | 9% | 28% | 42% | 24% |
| Other cases | 0% | 12% | 10% | 23% | 13% |

## *Overview of cases closed during the Statistics Reporting Period*

### *Reported outcomes*

250. During the Statistics Reporting Period India in total closed 360 MAP cases for which the outcomes shown in Figure C.5 were reported.

Figure C.5. **Cases closed in 2016, 2017, 2018 or 2019 (360 cases)**




251. Figure C.5 shows that during the Statistics Reporting Period, 309 of the 360 cases were closed through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty.

### *Reported outcomes for attribution/allocation cases*

252. In total, 345 attribution/allocation cases were closed during the Statistics Reporting Period. In 88% of the cases the reported outcome was "Agreement fully eliminating double

taxation/fully resolving taxation not in accordance with the tax treaty". In the remaining 12% of the cases the main reported outcomes were:

- unilateral relief granted (2%)
- resolved via domestic remedy (4%)
- agreement partially eliminating double taxation/partially resolving taxation not in accordance with the tax treaty (3%).

#### *Reported outcomes for other cases*

253. In total, 15 other cases were closed during the Statistics Reporting Period. The main reported outcomes for these cases are:

- agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty (33%)
- resolved via domestic remedy (27%)
- denied MAP access (20%).

### ***Average timeframe needed to resolve MAP cases***

#### *All cases closed during the Statistics Reporting Period*

254. The average time needed to close MAP cases during the Statistics Reporting Period was 34.44 months. This average can be broken down as follows:

| | Number of cases | Start date to End date (in months) |
|---|---|---|
| Attribution/Allocation cases | 345 | 34.32 |
| Other cases | 15 | 36.13 |
| All cases | 360 | 34.44 |

#### *Pre-2016 cases*

255. For pre-2016 cases India reported that on average it needed 46.49 months to close attribution/allocation cases and 93.40 months to close other cases. This resulted in an average time needed of 47.56 months to close 219 pre-2016 cases. For the purpose of computing the average time needed to resolve pre-2016 cases, India reported that it uses the following dates:

- Start date: the date of receipt of the MAP request by taxpayers, or if the MAP request was submitted to the other competent authority, the date of receipt of the MAP invocation letter from that competent authority.
- End date: the date of sending of the letter to India's tax authorities in the field to give effect to the MAP agreement entered into between the competent authorities.

#### *Post-2015 cases*

256. For post-2015 cases, India reported that on average it needed 14.45 months to close attribution/allocation cases and 7.50 months to close other cases. This resulted in an average time needed of 14.07 months to close 141 post-2015 cases.

#### *Peer input*

257. The peer input in relation to resolving MAP cases will be discussed under element C.3. Specifically concerning the timely resolution of MAP cases, some peers reported that India's

competent authority is responsive and easy to contact, as also that they are willing to resolve cases, also on a timely basis. However, a number of peers, in particularly those that have a significant number of MAP cases with India or experiences in resolving such cases with them, mentioned that it takes a long time before position papers are being issued by India's competent authority and that this causes delay in the timely resolution of MAP cases.

### *Recent developments*

258. India was in the stage 1 peer review report under element C.2 recommended to seek to resolve the remaining 93% of its post-2015 cases pending on 31 December 2017 (206 cases) within a timeframe that results in an average timeframe of 24 months for all post-2015 cases.

259. With respect to this recommendation, India reported that it has taken steps to resolve cases within an average period of 24 months. It noted that a vast majority of its MAP inventory consists of transfer pricing disputes with the United States, and the Framework Agreement between the two countries, which was finalised in 2015, has enabled both treaty partners to resolve a large number of transfer pricing disputes pertaining to the Information Technology industry (Software Development services and IT enabled services). India further noted that the success of that approach has led to extend the agreement two more tax years than originally envisaged, which would help in expeditious resolution of cases. In addition, India reported that the number and frequency of face-to-face meetings with treaty partners have been increasing over the last couple of years. Especially between October 2019 and January 2020, five face-to-face meetings were held with five treaty partners and many disputes were resolved.

260. From the statistics discussed above, it follows that India has in the period 2016-19 not closed its MAP cases within the pursued average of 24 months. For these years, the number of post-2015 cases closed as compared to the cases that started in these years was 23%. Furthermore, its MAP inventory has increased by 37% since 1 January 2016. Element C.3 will further consider these numbers in light of the adequacy of resources.

261. Of the peers that provided input during stage 2, eight provided input in relation to their experience with India as to handling and resolving MAP cases. Their input is further discussed under element C.3.

### *Anticipated modifications*

262. India did not indicate that it anticipates any modifications in relation to element C.2.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.2] | - | - |

## [C.3] Provide adequate resources to the MAP function

Jurisdictions should ensure that adequate resources are provided to the MAP function.

263. Adequate resources, including personnel, funding and training, are necessary to properly perform the competent authority function and to ensure that MAP cases are resolved in a timely, efficient and effective manner.

### *Description of India's competent authority*

264. Under India's tax treaties, the competent authority function is assigned to the Minister of Finance. This has been delegated to the Central Board of Direct Taxes within the Department of Revenue of this Ministry. Within the central board, two teams within the Foreign Tax and Tax Research Division are responsible for handing MAP cases. These are:

- *FT & TR-I Division (headed by Joint Secretary, FT & TR-I)*: eight persons (including the head of division) are responsible for handling MAP and bilateral APA cases concerning treaty partners in North America (including the Caribbean Islands) and Europe.
- *FT & TR-II Division (headed by Joint Secretary, FT & TR-II)*: eight persons (including the head of division) are responsible for handling MAP and bilateral APA cases concerning treaty partners in Africa, Latin America, Asia and Australia.

265. Next to the persons in charge of handling MAP and bilateral APA cases in both divisions, there are approximately 30 staff assistants that provide support in *inter alia* maintenance of files and organising meetings with taxpayers and other competent authorities. Next to the support staff there are also four teams that assist both divisions in fact finding and preparing position papers for bilateral APA requests. These teams are each headed by an APA commissioner and are assisted by approximately ten persons that provide administrative support.

266. Further to the above, India reported that once a MAP request is received, it will be analysed by its competent authority on whether (i) the request is in line with the requirements under its domestic legislation and the applicable tax treaty, and (ii) the objection raised in the request is justified. If the MAP request is accepted, then India's competent authority will analyse whether the case can be resolved unilaterally. If this is not the case, the bilateral phase of the MAP will be initiated. Likewise, when India's competent authority is notified of a MAP request by another competent authority, it will examine the validity of the request and if it is considered to be valid, it will notify the other competent authority via a MAP invocation and acceptance letter.

267. Concerning the preparation of position papers, India explained that once it prepares a position, information on the case under review will be requested from the local tax authorities that are responsible for the taxpayer. This particularly concerns documents that are relevant to the adjustment made to the taxpayer's position which is subject of the MAP case, provided that the adjustment was made by India. When position papers have been exchanged, or otherwise throughout the process, India reported that it will use several means of communication to reach an agreement, which can be via email or telephone, or through face-to-face meetings. With respect to the latter, India explained that its standard practice is to have reciprocal visits with treaty partners, which are being held frequently.

268. Concerning the training of staff in charge of MAP, India clarified that staff is provided with domestic and international training on various issues related to MAP.

### *Monitoring mechanism*

269. In terms of allocating resources to the competent authority function, India reported that its competent authority is funded by annual budgetary provisions, which are approved by Parliament. It is the Central Board of Direct Taxes that monitors whether the available

resources for the MAP function are sufficient. Over the past years the number of persons handling MAP cases have been increased from seven to 16 persons, for which India reported it considers that the current available resources are sufficient.

### *Recent developments*

270. As discussed under element C.2, India reported that it has taken steps to resolve cases within an average period of 24 months. It noted that a vast majority of its MAP inventory consists of transfer pricing disputes with the United States, and the Framework Agreement between the two countries, which was finalised in 2015, has enabled both treaty partners to resolve a large number of transfer pricing disputes pertaining to the Information Technology industry. India further noted that the success of that approach has led to extend the agreement two more tax years than originally envisaged, which would help in expeditious resolution of cases. In addition, India reported that the number and frequency of face-to-face meetings have been increasing over the last couple of years, especially between October 2019 and January 2020, five face-to-face meetings were held with five treaty partners and many disputes were resolved. India further reported that steps to augment and train the personnel dealing with MAP cases are being constantly undertaken.

271. Furthermore, India reported that it has increased the number of officers handling MAP cases from 15 to 16.

### *Practical application*

#### *MAP statistics*

272. As discussed under element C.2 India did not close its MAP cases during the Statistics Reporting Period within the pursued 24-month average, as the average is 34.44 months. This concerns both attribution/allocation cases (34.32 months) and other cases (36.13 months). The averages are shown in Figure C.6.

Figure C.6. **Average time (in months) to close cases in 2016-19**




*Note that these post-2015 cases only concern cases started and closed during 2016-19.

273. Based on these figures, it follows that on average it took India 34.44 months to close MAP cases, which is above the pursued average of 24 months. It took India 34.32 months to resolve attribution/allocation cases, and 36.13 months for other cases.

274. The stage 1 peer review report of India analysed the 2016 and 2017 statistics and showed an average of 35.66 months, which is above the pursued average of 24 months. This concerns both attribution/allocation cases (34.31 months) and other cases (68.70 months). India reported that one of the reasons why MAP cases could on average not be resolved within 24 months is that the competent authority of its treaty partners do not timely invoke the MAP process. Furthermore, the MAP inventory increased since 1 January 2016. In addition, Most of the peers that provided input reported positive experience in handling and resolving MAP cases with India, in particular the willingness of its competent authority to resolve MAP cases. Some peers, however, also mentioned difficulties in resolving such cases in a timely manner, particularly the long time it takes to issue or respond to position papers by India's competent authority, as well as that reaching an agreement on a principled basis is sometimes challenging. In this respect, some peers provided suggestions for improvement, which inter alia concern: (i) scheduling face-to-face meetings once a year, (ii) more frequent communications, (iii) timely issuing of and responses to position papers, in particular prior to face-to-face meetings, and (iv) ensuring that face-to-face meetings are productive.

275. Taking the above into account, India was recommended to provide adequate resources to the MAP function, in particular for other MAP cases, and to hire additional personnel to ensure that MAP cases are resolved in a timely, effective and efficient manner. Such addition of resources should enable India to: (i) timely issue position papers when the adjustment underlying the MAP case is made by India, (ii) respond to position papers issued by the other competent authority concerned in due time prior to face-to-face meeting, (iii) complete any follow-up work after a tentative MAP agreement has been reached, (iv) more frequently communicate on the status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP, and (v) and hold face-to-face meetings.

276. For stage 2, the 2018 and 2019 MAP statistics are also taken into account. The average time to close MAP cases for this year are:

| | 2018 | 2019 |
|---|---|---|
| Attribution/Allocation cases | 38.14 | 31.59 |
| Other cases | 4.99 | 19.15 |
| All cases | 36.99 | 31.10 |

277. The 2018 and 2019 statistics of India show that the average completion time of MAP cases slightly decreased from 35.66 months to 33.54 months. The average for attribution/allocation cases remained almost the same, namely from 34.31 months to 34.34 months, while for other cases the average significantly decreased from 68.70 months to 14.43 months.

278. Furthermore – as analysed in element C.2 – the MAP inventory of India increased since 1 January 2016. This can be shown as in the table below.

| | Opening Inventory on 1/1/2016 | Cases started | Cases closed | End inventory on 31/12/2019 | Increase in % |
|---|---|---|---|---|---|
| Attribution/allocation cases | 594 | 541 | 345 | 790 | 33% |
| Other cases | 101 | 75 | 15 | 161 | 59% |
| Total | 695 | 616 | 360 | 951 | 37% |

279. Also as analysed in element C.2, the inventory of pre-2016 cases, which are pending for more than 24 months, had decreased by more than 30% during the Statistics Reporting Period, but it still accounts for half of the total inventory of MAP cases.

### *Clarifications by India*

280. During stage 1, India provided a clarification for why MAP cases were not closed within the 24-month average time period during the Statistics Reporting Period. It noted that one of the reasons is that the competent authority of its treaty partners does not timely invoke the MAP process, which can even lead to an initiation of a MAP case a year after the other competent authority has received and accepted the MAP request, which affected the average completion time as India could not deal with the case until it has been notified.

281. During stage 2, India noted that the efforts taken by its competent authority to resolve MAP cases can be seen from the fact that 85.8% of its closed MAP cases were closed through an agreement that fully eliminated double taxation or fully resolved taxation not in accordance with the tax treaty. Further, India stated that the number of MAP cases in India is expected to increase each year owing to India being an emerging market economy where international transactions are increasing. Specifically with respect to the delays in resolving MAP cases within 24 months, India provided the following clarifications:

- delays in receiving the invocation letters where the taxpayer has approached the other treaty partners, which in India's case consists approximately 95% of the MAP inventory. In some instances the Indian CA has been made aware of the MAP case by the other treaty partners after elapse of this 24-month timeframe.
- taxpayers being in writ proceedings before domestic courts challenging the initiation of the audit proceedings
- stay of proceedings granted by Indian courts on audit proceedings in India
- where MAP has been invoked based on the draft assessment order, where India would discuss the case only after completion of final assessment proceedings. There is a possibility that there may be no taxation not in accordance with the treaty in the final assessment order.

282. In addition, India also provided a clarification for why in 2018 no other pre-2016 MAP cases were closed. It noted that there were discussions on a number of pre-2016 cases with treaty partners but many of them could not be resolved due to different positions amongst the competent authorities. India also noted that some of them were actually resolved but the closing letters were exchanged only in early 2019.

283. Further to the above, with respect to the recommendation made in the stage 1 peer review report, India clarified that it has been taking steps to ensure efficient, effective and timely resolution of MAP cases. First, the number and frequency of face-to-face meetings has increased over the last 2-3 years till things came to a halt due to Covid-19. Even during the difficult situation, India's competent authority office is in constant communication with its treaty partners over telephone and e-mail, so that MAP and bilateral APA cases are being discussed and pushed forward. India noted that this demonstrates India's commitment to the cause of having an efficient and effective dispute resolution mechanism. Second, position papers are being exchanged in a timely manner and replies to position papers issued by treaty partners are being responded to in a time-bound manner. Follow-up work on cases after tentative resolution at face-to-face meetings has been carried out expeditiously. Lastly, steps to augment and train the personnel dealing with MAP cases have been undertaken. In view of the large number of transfer pricing disputes with its treaty partner, one more officer has been added to this team to deal with such cases.

*Peer input – Period 1 January 2016-31 August 2018 (stage 1)*

### Handling and resolving MAP cases

284. All but three of the 15 peers that provided input reported having experiences with India in handling and resolving MAP cases. The remaining 12 peers can be split in peers that have a limited number of pending MAP cases or experiences with India, and peers that have a large number of MAP cases with India.

285. The first group consist of five peers, of which four provided constructive input on their experiences with India concerning the handling and resolution of MAP cases. One of these peers noted its MAP relationship with India is relatively new, whereas the other peers' experience regards a number of years. Most of the cases these peers have with India concern attribution/allocation cases. One peer in particular reported that it considers the relationship with India's competent authority to be constructive and that it is engaging positively in dialogue despite differences in views, as also that there is good communication between the competent authorities. This communication has improved in recent years, such by using mail, teleconferences and face-to-face meetings, which in the peer's view has significantly expedited the negotiation process and because of that both competent authorities now work in a more collaborative manner. Furthermore, this peer reported that the MAP cases are handled efficiently and that India's competent authority is very active in managing cases within a reasonable timeframe. The second peer also mentioned it has positive, albeit limited, dealings within India's competent authority and that correspondence on pending cases continue. The third peer mentioned, that it has only one case pending with India, which was initiated in 2018. This peer noted that India's competent authority timely confirmed the receipt of the opening letter and is currently preparing their position paper. It concluded that until now the co-operation with India is fine. The last peer voiced some criticism on its experiences with India in resolving MAP cases. It particularly noted that contacts have been scarce in the past, as there were a few other MAP cases in which contacts with India's competent authority used to be difficult and also timely solution for pending MAP cases could not be obtained. Furthermore, since India did until 2017 not accept transfer pricing cases into the MAP process, this peer only recently opened MAP cases of this kind with India. For these cases, as also for other MAP cases, the peer reported that India's competent authority started to respond timely.

286. The second group consist of seven peers. Their input generally is positive, but they also put forward some criticism on the functioning of India's competent authority. In this respect, one peer noted that India is an important MAP partner for them and that during the Review Period it resolved eight attribution/allocation cases (three pre-2016 cases and five post-2015 cases). It further mentioned that India's competent authority is very co-operative and willing to negotiate. A second peer mentioned that also for them India is one of the most important MAP partners, with a substantial number of MAP cases submitted each year and around 50 MAP cases pending as per the end of the Review Period. It is this peer's experience that both competent authorities contact each other without any difficulty and further that face-to-face meetings are held at least twice a year, whereby MAP cases are resolved in good relationship and in a constructive way. Similar input was given by a third peer, who mentioned that since multinational companies have operations in both countries, India is an important MAP partner for them. While the number of MAP cases is relatively low, the amounts at stake are significant. Concerning this peer's experience with India in resolving MAP cases, it reported that in general it has a good relationship with India, as it is easy to contact its competent authority, there is frequent communication via email and face-to-face meetings are on average held once per two years. This peer also

considered that staff in charge of MAP in India is well-trained to handle MAP requests. Nevertheless, this peer also mentioned that it can take a long time before India's competent authority provides a position paper, even if the case under review concerns adjustments that were imposed by India's tax administration. Furthermore, this peer noted that in those cases where MAP is initiated concomitantly with domestic remedies, there may be a risk that taxpayers will not accept any MAP agreement reached, as the MAP process is not put in abeyance until domestic proceedings have finalised. This input was echoed by another peer, who next to reflecting positive input also referred to difficulties in obtaining position papers from India's competent authority in due time for Indian-based adjustments. This peer also referred to a MAP case where its competent authority and that of India tentatively reached an agreement. The taxpayer was required to withdraw from pending judicial remedies in India as a prerequisite for implementation. However, in India the court did not accept the withdrawal for a specific fiscal year and rendered a decision on the case, following which the taxpayer was left without a solution, as the decision did not solve the case at hand. In the peer's view this is a highly unsatisfactory outcome. While the peer did not criticised the fact that India's competent authority is bound by court decisions, it believes that in such situation there should be a mechanism that where competent authorities reach an agreement before the court has rendered the decision and the taxpayer withdraws from the pending court case, such withdrawal should be accepted. Lastly, one peer also put forward that it is difficult to receive a response from India's competent authority on an issued position paper, but also that it is rather difficult to get into contact with this competent authority, although for attribution/allocation cases a considerable improvement was experienced since 2017.

287. Further to the above, two peers provided detailed input on their experiences with India in handling and resolving MAP cases. One of those peers reported that India is one of its most significant MAP partners, whereby there are a substantial number of attribution/allocation cases. Concerning communications with India's competent authority, this peer mentioned that they are frequent via email and telephone and that regularly bi-annual face-to-face meetings are scheduled. The peer concluded that a very good working relationship has been developed over the years, albeit that there are some differences of principle that can create challenges in resolving some cases. In more detail and as regards the resolution of cases this peer made the following observations:

- *Attribution/allocation cases*: negotiations with India's competent authority can sometimes become entrenched due to India's preference to apply domestic transfer pricing rules over the OECD Transfer Pricing Guidelines. In this respect, two examples were given, namely that (i) India has shown a preference for using an average of the results in a range rather than using an interquartile range and (ii) India is only willing to take into account the results of a year that is subject to an audit, albeit that recent experience of the peer is that there has been an acceptance to look at multiple years of results in some instances.
- *Other cases*: in certain cases India's competent authority has not provided a response to a position paper issued by the peer, but instead preferred to rely on assertion at face-to-face meetings based on the views of the tax administration personnel when discussing the relevant tax in dispute.

288. In addition, like also mentioned by other peers, this peer mentioned that there have been delays in receiving a small number of position papers from India's competent authority, which regards both attribution/allocation cases and other MAP cases. This peer, whilst recognising that India is by no means the only jurisdiction to have some delays, referred to instances where there have been significant delays in providing position papers

which impede progress. The peer, however, also noted that in one other case India's competent authority was prompt in responding and that the case under review was closed shortly thereafter. The improvement in the working relationship over the review period has led to more effective resolution of allocation/attribution cases, although there remains impediments to progress on the effective resolution of other MAP cases.

289. The second peer mentioned it has an active relationship with India's competent authority, which is concerned to be a critical MAP partner for this peer, both for attribution/allocation cases as for other cases. In terms of communication, this peer mentioned that formal meetings are held at least twice a year and that communications at manager and staff level are frequent throughout the year, such related to scheduling, reconciliation of inventory and other matters. Concerning the resolution of MAP cases, the peer's input differentiates between attribution/allocation and other cases, which is:

- *Attribution/allocation cases*: the relationship with India regarding these type of cases have been productive in recent years on several fronts, although it has been difficult to overcome substantive differences of views in certain areas. To enable the resolution of MAP cases, the peer's and India's competent authority reached in January 2015 an agreement on a systematic approach under which 200 cases have been resolved. The peer noted that the framework has been applauded within the OECD and by other jurisdictions as a novel and significant step forward in the resolution of tax treaty disputes. The peer further mentioned that since the agreement has been reached, its competent authority was able to resolve with India outside that framework over 125 cases relating to other issues. This peer also pointed to the fact that its competent authority and that of India consistently work together to resolve attribution/allocation cases in a timely and principled manner, as also to communicate on a regular basis; that is at least once a month. That said, this peer further noted that there have been significant numbers of cases arising out of adjustments made by India falling outside the framework for which position papers have not been timely received. According to the peer, in some situations India's competent authority explained that it was unable to proceed due to the given issue at stake being the subject of litigation. Whether for this or other reasons, the peer concluded that timely receipt of a position paper is necessary for resolving MAP cases with India in a principled manner within the pursued average of 24 months.
- *Other cases*: other than for attribution/allocation cases, there has been minimal progress in resolving other type of cases in a principled manner. In more detail, the peer reported significant difficulties in timely obtaining position papers, which experience is similar as the input of other peers reflected above. Hence in numerous cases this peers did not timely receive position papers from India's competent authority, even though the timing of sending of these papers had been agreed upon between the competent authorities. Furthermore, when such position papers are (timely) provided, they do in the peer's view not include any indication that India's competent authority has considered, as a neutral party, whether the adjustment is justified. Instead, according to the peer it seem to reiterate the analysis and conclusion of the tax administration official in charge of the case and the peer's competent authority does generally not observe an attempt in these position papers to consider or outline areas of possible exploration for principled compromise or resolution. For this the peer concluded that these obstacles create significant challenges in resolving MAP cases with India in a principled manner within the pursued average of 24 months.

290. Concerning the (timely) issuing of position papers, this peer mentioned that the timing the invocation of the MAP process may be impacting the timing for resolving MAP cases. In that regard, this peer reported that due to the fact that India's competent authority has not timely provided position papers for adjustment made by India, there has been a great impact on the time needed to resolve MAP cases. For this reason the peer's competent authority typically requests position papers from India's competent authority in their mutual MAP cases, as 98% of its attribution/allocation and all but one of the other cases follow from an adjustment made by India. To this the peer added that it is difficult to ascertain the basis for the adjustment without supporting information by India's competent authority. The peer further specified that on average its MAP cases with India have been in the inventory over four years, whereby India has not consistently provided position papers and for which the peer reported it feels this has directly impeded the timely resolution of these cases.

### Suggestions for improvement

291. A number of peers made suggestions for improvement. One peer mentioned it would be an improvement if a face-to-face meeting would be scheduled once a year. Two other peers suggested that more frequent communications and a more timely response to position papers would be beneficial. One of these peers further mentioned that it would be helpful that a response would be given to position papers, in particular other MAP cases. Two other peers made more in-depth suggestions for improvement by India in resolving MAP cases. The first peer noted that India's competent authority should:

- ensure that position papers are exchanged in due time prior to face-to-face meetings, such to ensure that such meetings are productive
- for attribution/allocation cases:
  - provide more details why certain comparables are accepted or rejected,
  - show a greater willingness to adhere to the OECD Transfer Pricing Guidelines instead of to India's domestic law and to consider other OECD endorsed methodologies in addition to cost-plus.

292. This peer also touched upon two other issues. First, it mentioned that it is its understanding that where their competent authorities reach an agreement, there is no mechanism in place that MAP agreements can be applied to future years where the facts and circumstances of the case have remained the same. In this peer's view having such mechanism in place would be helpful and would avoid that new MAP request have to be submitted for future years if India's tax administration has not followed the principle that was established by the competent authorities in the MAP agreement. Second, the peer referred to the interplay between domestic remedies and MAP, an issue that has been brought forward by other peers as well (see discussions above). The case referred to, however, is slightly different, as in this case India's court rendered a decision before the case was dealt with in MAP As the court decision resolved the case, the taxpayer subsequently withdraw its MAP request. The peer's competent authority, however, was not timely made aware hereof in either position papers or discussions, which it considered to be unfortunate. The moment the peer became aware of this outcome, it concluded that there was no basis for MAP discussions anymore and therefore suggested to close the case, to which India's competent authority agreed after some discussion. In the peer's view, as a matter of good practice, it would be highly preferable that India's competent authority was in a position to explain these circumstances at the beginning of MAP discussions to avoid devoting time and resources.

293. The second peer mentioned in a general sense that both its own and India's competent authority recognise their obligation to endeavour to resolve MAP cases, and that in that regard it is hopeful that a faithful adherence to the Action 14 Minimum Standard along with consist and open dialogue on substantive issues, will contribute to the resolution of the hundreds of pending MAP cases between their jurisdictions in a principled, efficient and effective manner. Especially concerning attribution/allocation case, the peer noted that the significant number of cases resolved in recent years reflects a productive relationship. While it is aware of resource constraints in India's competent authority, and while it values how quickly it resolves attribution/allocation cases, it expressed that it would very much appreciate the opportunity to explore ways in which to achieve the goal of resolving MAP cases within the pursued average of 24 months. This in particular concerns those cases that are eligible for the framework agreement entered into between this peer's and India's competent authority. The peer noted that India's competent authority is currently reviewing proposals made by the peer's competent authority and looks forward to a further dialogue on this. In more detail to the timely resolution of MAP cases in practice, the peer also recommended more regular email and telephone conservation. It further suggested to increase the number of face-to-face meetings from two to three times a year to resolve the rapidly growing MAP inventory. The peer also noted that it believes that a more faithful adherence to intervening agreements and steps, which were agreed upon between their competent authorities during negotiations, will significantly contribute to the timely resolution of their mutual MAP cases. Lastly, the peer suggested that India considers to increases staff in charge of MAP cases, which the peer deems necessary to achieve a more timely resolution of MAP (and APA) cases.

### Responses to peer input

294. India provided a response to the input given, for which it mentioned it has been seen and understood. It also noted that India appreciates the input given and are especially happy that some peers have effusively appreciated all the efforts made by India to make its MAP programme more efficient and effective. It may be mentioned that two peers, who are important MAP partners, have not submitted peer inputs perhaps due to being occupied. India further mentioned that it is not closing its eyes to all the criticism that has also been made by some of its peers. However, some of the criticisms are unwarranted and uncalled for. In this respect, India mentioned that the inking of a framework agreement with the last peer mentioned above, is ample proof of India's willingness to find innovative ways to find resolutions to disputes.

295. Specifically in relation to the peer input reflected in paragraphs 173-174 above, India responded to the input given by this peer. As regards domestic transfer pricing rules, India has explained that this is due to the interaction of its domestic law and the OECD Transfer Pricing Guidelines. However, recent amendments to Indian domestic law mean the Indian competent authority will be able to adopt more flexible approaches. As regards delays in issuing position papers, India accepts the criticism that there have been delays at times to issue position papers. Despite a decent workforce handling MAP cases, the resources do get stretched at times.

### Final considerations

296. The average timeframe for resolving MAP cases in India is above the pursued average of 24 months (35.66 months), which both regards attribution/allocation cases (34.31 months) and other MAP cases (68.70). In this respect, India mentioned that it is committed to resolve MAP cases in a timely and a principled manner, which in its view is recognised by all its treaty partners. As an example hereof, India referred to its commitment not to deny access to

MAP and that it over the last four years has successfully resolved MAP cases, in particular with one treaty partner where it entered into a framework agreement that enabled the resolution of approximately 180 pending cases with that treaty partner. While the concerned peer indeed reported that it was under this framework agreement indeed successful for a high number of cases, not all peers shared the conclusion that India is committed to resolve cases in a timely and principled manner. In fact, although several peers reported positive experience in handling and resolving MAP cases with India, those peers that have either large inventories with India or significant experience also put forward substantial criticisms on India's approach towards resolving MAP cases. This among others concerns the significant time it takes to resolve MAP cases due to absence or significant delays in providing or responding to position papers by India's competent authority. Other criticism put forward the position of the tax administration is followed, without a willingness to come to a principled resolution of the case.

*Peer input – Period 1 September 2018-30 April 2020 (stage 2)*

### Handling and resolving MAP cases

297. Of the peers that provided input during stage 2, eight provided input in relation to their experience with India in handling and resolving MAP cases.

298. One peer that has two MAP cases with India, which were started before 1 September 2018, provided input that it has had positive and responsive engagement with India with respect to these cases and understands that India is currently reviewing the cases.

299. Another peer provided input that in general the resolution of MAP cases with India is important as the amounts at stake are substantial, although it has relatively small number of cases. The peer noted that it has a good relationship with India, since it is easy to contact India's competent authority via email and face to face meetings are held on average once in two years. It also noted that it considers India's staff are well trained to handle MAP cases. This peer, however, raised some issues regarding the MAP process. They concern: (i) it takes a long time before India writes a position paper, even if the adjustments were made by India's tax authorities, (ii) taxpayers in India try to defend their case before court at the same time of the MAP procedure. In such a case the MAP procedure is not always put on hold and therefore there is a possibility that a taxpayer will not accept the outcome of the MAP procedure, and (iii) it takes a long time before it is clear that the Indian taxpayer accepts the MAP outcome or withdraws all possible legal procedures. Since the period between the agreement and implementation is very long, it is possible that during that period the double taxation has been taken away by a decision in the national procedure (e.g. ITAT). This peer further suggested that it would be an improvement if there would be one meeting per year, either face to face or via video conferencing.

300. India responded to this input and mentioned that with respect to (i), it agrees that sometimes there are delays in writing position papers due to the sheer number of MAP and APA cases. In addition, for APA position papers the APA Commissioners handling the fact-finding exercise sometimes find it difficult to obtain all the necessary information from the Indian taxpayers, by which they are unable to provide the factual report to India's competent authority to enable the latter to send a position paper. India noted that additional resources recently have been provided for the APA programme and for the competent authority function, which is expected to improve the situation. With respect to (ii), India clarified that MAP cases cannot be put on hold merely because the taxpayer in India has also chosen to opt for domestic court processes. Taxpayers can choose their avenues for seeking relief from double taxation and their acceptance or non-acceptance of a MAP outcome should

not deter the competent authorities from resolving MAP cases. For the input (iii), India noted that it admits that in the past there were delays in the implementation of a few MAP cases and the apprehension of the peer that during such intervening periods, a decision of the ITAT may make the MAP unimplementable is correct. In that regard, India clarified that the implementation rules have been recently amended to further quicken the pace of implementation. Taxpayers have to adhere to timelines to accept a MAP outcome and withdraw appeals. Similarly, tax authorities have to implement the MAP outcome within a specified time period. Lastly, with respect to the suggestion made by this peer to have one meeting every year, India indicated that it would be happy to do so. The meetings are a bit infrequent because of the small number of cases between the two countries.

301. The third peer, who only provided input during stage 2, commented that since September 2018, it closed seven transfer pricing cases (three received in 2017 and four received in 2018) with India. It noted that India has been professional and consistent in its adopted approach which has enabled the resolutions of the seven transfer pricing MAP cases within the targeted average time frame of 24 months. On the other hand, this peer expressed a concern for some cases. Regarding three non-transfer pricing cases (one pre-2016 case and two post-2015 cases), it agreed in August 2018 with India's proposal to put them in abeyance as similar issues under the MAP cases between this peer and India were pending resolution before India's High Court. However, it has not received any updates from India to-date. Regarding a new MAP case concerning issues similar to those in the three MAP cases described above, this peer in March 2020 provided India with its position paper, in which it had suggested re-commencing discussions on the earlier MAP cases so that the matters may be resolved expeditiously to prevent further financial hardships faced by taxpayers due to the imposition of additional taxes in India which, in its view, is not in accordance with the provisions of the relevant tax treaty. In response, India informed that for the new MAP case, it may only be able to discuss the case after India has issued the final assessment order to the taxpayer concerned. Furthermore, this peer noted that given that the time taken for a decision to be made by India's court is not known and the time taken on these MAP cases have already started, the time taken to resolve these cases would be impacted. As of May 2020, the time taken from the start of the three cases are 37.71 months, 31.63 months and 5.72 months.

302. In response to this input, India clarified that the matter on the above mentioned three cases is still pending in Hon'ble High Court of India. It noted that this peer is yet to provide any write-up on the basis of application of the peer's "operations test" and there has been no indication from the peer as to when this information, which is very crucial for these cases, shall be provided. On the new MAP case the peer referred to, India mentioned that as stated by the peer, the issue in this new case is similar to the three cases where verdict of Hon'ble High Court of India is awaited and the three cases have already been kept in abeyance with the concurrence of both sides.

303. For this response from India, the peer clarified that India had not informed it of India's position that it would also put in abeyance discussions relating to the third MAP case which it had notified India in December 2019. It had written to India pursuant to this third MAP case on 15 July 2020 to seek their views on whether both competent authorities can commence discussion on this third MAP case, but it had not received a response from India. This peer noted that as substantial time has passed, there had been prolonged uncertainty faced by the taxpayers concerned. In addition, this peer clarified that an explanation of the application of its "operations test" was conveyed to India in a letter dated 1 August 2017. This was in response to a query received dated 12 May 2017. The concept of the "operations test" was also discussed at length during the competent authorities'

meeting in August 2018. In this respect, the peer noted that in its view India's position is to put in abeyance these cases, i.e. not to continue competent authority discussions on these cases until a decision has been made by Courts.

304. In response, India stated that it shall take up all cases under MAP that the peer referred to, in pursuance to the verdict of Hon'ble High Court of India on the subject matter, which is awaited. It noted that during such MAP discussions, basis of application of "operations test" shall also be taken up for discussion, as the same is very crucial for these cases.

305. The fourth peer, who only provided input during stage 2, stated that it has recently entered into a MAP relationship with India and the two transfer pricing cases in its inventory are in an early stage of the process, and therefore, it does not have an experience in the resolution of MAP cases with India. This peer noted that the relationship with India has been good.

306. The fifth peer mentioned that it had one face-to-face meeting with India during the review period, which was conducted in a very productive and collaborative spirit. It noted that India conducted thorough analyses and conscientious case preparation before the face-to-face meeting. Both competent authorities managed to solve some cases and made substantial progress in others.

307. The sixth peer provided input on one allocation/attribution case, which was closed with partial relief being provided after many years of negotiations. It mentioned that India explained that when providing relief through MAP, they were unable to deviate from both (i) the methodology used by Indian taxpayer in its returns (the "as filed methodology") and (ii) the methodology used by the assessing officer of India's tax authority when making the adjustments (the "assessing officer's methodology"). In other words, any agreement reached in MAP must be based upon either the filed methodology or the assessing officer's methodology. In the case in question, this prevented the competent authorities from taking account of facts which emerged through the MAP discussions and reaching agreement on a different methodology which could have resulted in full relief. In this respect, this peer noted that it cannot see any support for such restrictive approach in the Commentary to Article 25 of the OECD Model Tax Convention (OECD, 2017) and it considers this development may severely restrict the competent authorities' ability to fully resolve double taxation in cases moving forwards. It also noted that it considers the competent authorities have flexibility to agree a methodology as required by the facts and circumstances of the case. Furthermore, this peer noted that although India explained in the MAP discussion that India's competent authority may have been able to deviate from both the filed methodology and the assessing officer's methodology if the case had been an APA but not in MAP, it sees no reason for the differing approaches under an APA and in MAP.

308. India responded to this input and mentioned that out of the numerous cases that India and peer have resolved over the years, this is the first time when double taxation could not be fully relieved. India highlighted that the case this peer referred to was a particularly challenging one, given the very specialised and complex nature of the taxpayer's business. It was based on India's considered understanding of the facts and circumstances of this particular MAP case that India took the decision to anchor his negotiating position to the filed methodology of the taxpayer, on the basis of which the Assessing Officer in India had made the adjustments. India clarified that it is not a general principle adopted by India to stick to the filed methodology or the Assessing Officer's methodology while negotiating MAP cases, which is clarified by the fact that for another long pending MAP case resolved in January 2020 wherein the methodology that formed the basis of the resolution was neither the one followed by the taxpayer (filed methodology) nor the one followed by the Assessing Officer. India also clarified that it was not the stand of India in this particular

MAP case that India would have been willing to deviate from the filed methodology and the Assessing Officer's methodology had it been an APA case instead of a MAP case. In its view, APAs, by their very nature, entail a much more rigorous level of first-hand and holistic fact-finding on the FAR and much more intense interaction with the taxpayers than MAP cases due to the following reasons:

- Naturally, any CA is bound to first examine the case records in a MAP case before forming its own views on the case. It is only upon close examination and due consideration of the facts on record that a decision can be taken on whether or not any deviation can be made, and more importantly, whether or not any deviation is warranted, from the filed methodology and/or the methodology of the Assessing Officer.
- MAP cases are, more often than not, narrower in scope compared to APA cases, since the adjustment may be limited to just one or two transactions out of the many.
- MAP in the case of a particular taxpayer is often of much shorter duration compared to APAs, which does have an impact on how holistic an understanding of the FAR can be established, despite willingness of both competent authorities to engage intensely with the taxpayers.
- A MAP case cannot result in an outcome where the adjustment made by the Assessing Officer is enhanced, even if the same is, say, supported by robust comparability analysis and is acceptable to both the competent authorities involved, because such an outcome will cause enhancement of the dispute. To use a simplified example, if the Assessing Officer has decided to apply a mark-up of 16% on costs, against the filed position of 14% of the taxpayer, the competent authorities cannot increase the mark-up beyond 16% even in a scenario where there is robust comparability analysis available to support such an outcome as the true ALP. In contrast, in the same example, an APA will pose no such restriction because the competent authorities are free to arrive at an ALP that can be more than that determined by an Assessing Officer.

309. In this respect, India concluded that in its view different approaches and outcomes in MAP and APA cases of the same taxpayer are indeed a possibility due to the inherent differences between the nature of APA and MAP cases.

310. The seventh peer also provided input and mentioned that both competent authorities have been resolving a greater number of cases under the Framework Agreement, and agreed to extend the Framework Agreement for two additional years, which will further assist with efficiently resolving cases on a timelier basis. In addition, both competent authorities had been meeting more frequently and continue to regularly communicate to endeavour to resolve cases despite Covid-19. In this regard, this peer noted that it sees an increased resolution of MAP cases since 1 September 2018. This peer, however, noted that even with these efforts, India-initiated MAP cases' growth rate exceeds the competent authorities' ability to timely resolve outstanding cases, and this excess creates further inventory backlog. Furthermore, this peer stated that it still experiences difficulties in obtaining position papers in a timely manner for cases not resolved under the Framework Agreement. These creates significant challenges in resolving a MAP case in a principled manner within a 24-month period.

311. India responded to this input and mentioned that it agrees with the views of this peer that both competent authorities frequently interact with the intention of resolving MAP cases. The inventory is extremely large and new cases keep getting added. The delays in issuing position papers could be attributed to less than adequate resources within the

India's competent authority for handling the extremely large number of MAP and APA cases between the two jurisdictions. In this respect, India noted that it has increased its personnel handling MAP cases with this peer and that has helped in increasing resolutions. Furthermore, it pointed out that there are delays on the peer's side also at times, especially in responding to calculations pertaining to Framework MAP cases and to position papers. India also commented that delays in resolution of cases could be due to various reasons, including difficulties in agreeing to each other. India lastly noted that the fact that MAP inventory is growing is also indicative of the faith and trust of taxpayers in the MAP resolution process between this peer and India.

312. The eighth peer mentioned that although it has a very good working relationship and it is easy to communicate with India's competent authority, it seems that India's MAP division has not been working well since the end of last year, and such situation has caused delay for resolving MAP cases. In this respect, this peer asked India for the clarification of the reason for the delay.

313. In response to this input, India clarified that while regular communication has taken place between India and this peer during the period the peer referred to, no progress could be made for two months at the beginning of the year since the post of India's competent authority pertaining to this peer remained vacant. This was followed by the Covid-19 crisis, due to which a regular competent authority could not join and progress on outstanding cases was gradual. India, however, noted that it has continuously engaged with this peer to take stock of the cases. It also noted that progress would happen fast once regular negotiations restart.

### *Anticipated modifications*

314. India indicated that the number of officers handling MAP cases is expected to be increased to 19 by November 2020.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.3] | MAP cases were not closed within 24 months on average, as the average was 34.44 months, which both regards attribution/allocation cases (34.32 months) and other cases (36.13 months). Therefore, there is a risk that post-2015 are not resolved within the average of 24 months, which may indicate that the competent authority is not adequately resourced. In this respect, some peers have experienced difficulties in resolving MAP cases in a timely, efficient and effective manner, which in particular concerns:<br>• timely submission of position papers to treaty partners<br>• more frequently communicate with the other competent authorities concerned on status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP case.<br>Furthermore, the MAP inventory increased since 1 January 2016, which regards both attribution/allocation and other MAP cases. In addition, half of the total MAP inventory are pending more than 24 months. These may also indicate that the competent authority is not adequately resourced to cope with this increase and long-pending cases. | While India has taken several steps to resolve cases in a timely manner, such as addition of resources and to train staff in charge of MAP, further actions should be taken to ensure a timely resolution of MAP cases, which both regards attribution/allocation cases and other cases.<br>In that regard, India should devote additional resources to its competent authority to handle MAP cases and also to be able to cope with the increase in the number of MAP cases both for attribution/allocation and other MAP cases, such to be able to resolve MAP cases, including long-pending cases, in a timely, efficient and effective manner. Such addition of resources should enable India to:<br>• timely submission of position papers to treaty partners<br>• more frequently communicate with the other competent authorities concerned on status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP case. |

## [C.4] Ensure staff in charge of MAP has the authority to resolve cases in accordance with the applicable tax treaty

Jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.

315. Ensuring that staff in charge of MAP can and will resolve cases, absent any approval/direction by the tax administration personnel directly involved in the adjustment and absent any policy considerations, contributes to a principled and consistent approach to MAP cases.

### *Functioning of staff in charge of MAP*

316. As previously discussed under element C.3, India reported that where a MAP request is received by its competent authority the request is analysed on whether it can be accepted. If so and if no unilateral solution can be found, a position paper will be prepared and shared with the other competent authority concerned. In this respect India reported that the two teams (Joint FT & TR-I and FT & TR-II) within the Foreign Tax and Tax Research Division are responsible for handing MAP cases prepare position papers on the case. Each team has a joint secretary to the government of India, which have been delegated to the competent authority for the jurisdictions it has. Both teams are themselves responsible for preparing position papers and there is no further approval outside the competent authority.

317. Further to the above, India reported that when its competent authority reaches an agreement with the other competent authority concerned, such MAP agreement is final and no further approval is necessary outside the competent authority. In this respect and concerning the independent functioning of staff in charge of MAP from the audit department, India reported that staff in charge of MAP in practice operates independently and has the authority to resolve MAP cases without being dependent on the approval/direction of the tax administration personnel directly involved in the adjustment at issue. Furthermore, India reported that the process for negotiating MAP agreements is also not influenced by policy considerations. Where policy issues arise from a MAP case, India specified that the matter will be referred to the policy division of the Central Board of Direct Taxes.

### *Recent developments*

318. There are no recent developments with respect to element C.4.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

319. Peers that provided input generally reported no impediments in India to perform its MAP function in the absence of approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy.

320. However, as was already discussed under element C.3, two peers put forward criticism on the authority of staff in charge of MAP in India to resolve MAP cases in accordance with the terms of the applicable tax treaty absent any direction of the tax administration personnel that made the adjustments at issue. The first peer mentioned that in certain cases, but by no means in all cases, India's competent authority has not provided a response to a position paper issued by the peer, but instead preferred to rely on assertion at face-to-face meetings based on the views of the tax administration personnel when discussing the relevant tax in dispute. The second peer noted that when India's competent authority (timely) issues position papers, they do not include any indication that India's competent authority has considered, as a neutral party, whether the adjustment is justified. Instead, according to the peer it seems to reiterate the analysis and conclusion of the tax administration official in charge of the case and the peer's competent authority does generally not observe an attempt in these position papers to consider or outline areas of possible exploration for principled compromise or resolution. For this the peer concluded that these obstacles create significant challenges in resolving MAP cases with India in a principled manner within the pursued average of 24 months.

321. As already reflected under element C.3 above, India provided a response to the input given, for which it mentioned it has been seen and understood. It also noted that India appreciates the input given and are especially happy that some peers have effusively appreciated all the efforts made by India to make its MAP programme more efficient and effective. It may be mentioned that two peers, who are important MAP partners, have not submitted peer inputs perhaps due to being occupied. India further mentioned that it is not closing its eyes to all the criticism that has also been made by some of our peers. However, some of the criticisms are unwarranted and uncalled for.

322. In more detail, India responded to the criticism of one peer that that its competent authority is unwilling to come to a principled resolution of MAP cases, and also to that of another peer that India's competent authority sometimes relies on the arguments made by the examination authorities in making additions to income. In relation to the first peer, India considers these comments are unsubstantiated allegations and India disapproves such baseless comments. India noted that its competent authority is always open to principled resolution of cases and the fact that its competent authority agrees with the additions made by the examination authority in a case, does not mean that the competent authority is not neutral. In more detail. India holds the position that such a perception by peers cannot be a point of criticism especially when the adjustment by the examination authority has been made in accordance with law and on sound principles.

323. In particular response to the input by the last two peers discussed in paragraphs 287 and 289 and summarised in paragraph 320 above, India responded that the issues raised by one of these peers echoes the views of taxpayers in their arguments. It also mentioned that there is hardly any independent examination of the matters, as per the provisions of the treaty. India further stated that on numerous occasions it has observed that the peer's competent authority takes the consent of and confirmation from the taxpayers before making their arguments and before agreeing to a resolution, and even go to the extent of sharing position papers with taxpayers. Despite these observations, India mentioned it did not raise these issues in their peer review report for the sake of maintaining the cordial professional relationship that has been developed over the last few years. In this respect, India stated that such a relationship is crucial to resolving MAP cases that involve very complicated issues. However, India stressed it felt compelled to make these points now to ward off all unwarranted and uncalled criticism.

324. Further to the above, India pointed out that for nearly all of its pending MAP cases the MAP request was submitted at the level of the treaty partner. Consequently, India was not in a position to determine whether unilateral relief can be granted for adjustments made by India's tax administration. Regardless, India noted that when a MAP agreement was reached regarding such adjustments, this in more than 95% of the cases resulted in a deviation from the initial adjustment, proving in India's view that its competent authority can operate independently.

325. With respect to the responses given by India, one peer provided for a reaction, which is the second peer referred to in paragraph 320 above. This peer mentioned that it disputes India's response that is reflected in paragraph 323 above, as its competent authority carefully develops its position in a MAP case based on the applicable treaty provision and the relevant facts and circumstances. The peer further mentioned it is committed to consult with India's competent authority in good faith to come to principled outcomes. In that regard, it also specified its competent authority has in several instances proactively issued position papers to India's competent authority with the view of advancing cases that involve adjustments made by India and for which India's competent authority has not issued position papers itself. The peer also noted it will convey its understanding of India's position in its dialogue with the taxpayer concerned, such to enable the latter to fully analyse the case and to gather additional potentially relevant information.

*Period 1 September 2018-30 April 2020 (stage 2)*

326. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given.

### *Anticipated modifications*

327. India did not indicate that it anticipates any modifications in relation to element C.4.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.4] | - | - |

## [C.5] Use appropriate performance indicators for the MAP function

Jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

328. For ensuring that each case is considered on its individual merits and will be resolved in a principled and consistent manner, it is essential that any performance indicators for the competent authority function and for the staff in charge of MAP processes are appropriate and not based on the amount of sustained audit adjustments or aim at maintaining a certain amount of tax revenue.

### *Performance indicators used by India*

329. India reported that it does not use quantitative performance indicators to evaluate staff in charge of MAP, particularly because of the complexities that are involved in each MAP case. The same applies to targets set for staff in charge of MAP. In India, staff is evaluated on the basis of a number of parameters, which include progress made on MAP cases, and contributions made in various areas of their work, such as analysing and resolving MAP cases. In that regard, India reported that no performance indicators are used that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue.

330. The Action 14 final report (OECD, 2015) includes examples of performance indicators that are considered appropriate. These indicators are for India checked below:

- ☐ number of MAP cases resolved
- ☐ consistency (i.e. a treaty should be applied in a principled and consistent manner to MAP cases involving the same facts and similarly-situated taxpayers)
- ☑ time taken to resolve a MAP case (recognising that the time taken to resolve a MAP case may vary according to its complexity and that matters not under the control of a competent authority may have a significant impact on the time needed to resolve a case).

### *Recent developments*

331. There are no recent developments with respect to element C.5.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

332. Peers that provided input reported not being aware of the use of performance indicators by India that are based on the amount of sustained audit adjustments or maintaining a certain amount of tax revenue.

#### *Period 1 September 2018-30 April 2020 (stage 2)*

333. All peers that provided input in stage 2 stated that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given.

### *Anticipated modifications*

334. India did not indicate that it anticipates any modifications in relation to element C.5.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.5] | - | - |

## [C.6] Provide transparency with respect to the position on MAP arbitration

Jurisdictions should provide transparency with respect to their positions on MAP arbitration.

335. The inclusion of an arbitration provision in tax treaties may help ensure that MAP cases are resolved within a certain timeframe, which provides certainty to both taxpayers and competent authorities. In order to have full clarity on whether arbitration as a final stage in the MAP process can and will be available in jurisdictions it is important that jurisdictions are transparent on their position on MAP arbitration.

### *Position on MAP arbitration*

336. India reported that it does not support the inclusion of arbitration in tax treaties as a final stage to the MAP process, as in its view such processes are against a jurisdiction's sovereignty in tax matters. In this respect, in the Commentary of non-members to the 2017 OECD Model Tax Convention (OECD, 2017) India reserved the right not to include paragraph 5 of Article 25 in its tax treaties. India's position on MAP arbitration is also reflected in its MAP profile.

### *Recent developments*

337. There are no recent developments with respect to element C.6.

### *Practical application*

338. India has not incorporated in its tax treaties an arbitration clause as a final stage to the MAP.

### *Anticipated modifications*

339. India did not indicate that it anticipates any modifications in relation to element C.6.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.6] | - | - |

## Notes

1. These 95 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands, the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.
2. Available at: www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm. These statistics are up to and include fiscal year 2017.

3. For post-2015 cases, if the number of MAP cases in India's inventory at the beginning of the Statistics Reporting Period plus the number of MAP cases started during the Statistics Reporting Period was more than five, India reports its MAP caseload on a jurisdiction-by-jurisdiction basis. This rule applies for each type of cases (attribution/allocation cases and other cases).

4. India's 2016-18 MAP statistics were corrected in the course of its peer review and deviate from the published MAP statistics for 2016-18. See further explanations in Annex B and Annex C.

5. For pre-2016 and post-2015 India follows the MAP Statistics Reporting Framework for determining whether a case is considered an attribution/allocation MAP case. Annex D of MAP Statistics Reporting Framework provides that "an attribution/allocation MAP case is a MAP case where the taxpayer's MAP request relates to (i) the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention); or (ii) the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention), which is also known as a transfer pricing MAP case".

## *References*

OECD (2015), "Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report", in *OECD/G20 Base Erosion and Profit Shifting Project*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264241633-en.

OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://dx.doi.org/10.1787/g2g972ee-en.

# *Part D*

# Implementation of MAP agreements

## [D.1] Implement all MAP agreements

Jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.

340. In order to provide full certainty to taxpayers and the jurisdictions, it is essential that all MAP agreements are implemented by the competent authorities concerned.

### *Legal framework to implement MAP agreements*

341. India reported that it does not have a domestic statute of limitation for both upward and downward adjustments regarding the implementation of MAP agreements. In other words, regardless of whether a tax treaty contains the second sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017), India reported it will always implement MAP agreements.

342. However, India's MAP guidance, under the heading "Technical Issues", notes that India's competent authority may not implement a MAP agreement that has been finalised if its competent authority is made aware of a decision of the ITAT on the issue dealt with in the MAP.

343. India clarified in this regard that this position is owing to the fact that India's competent authority cannot deviate from an order passed by the ITAT. India noted that once a MAP agreement has been signed, India's competent authority requires the taxpayer to withdraw pending cases before the ITAT prior to accepting the resolution. However, since there is a short time period between a MAP agreement and the taxpayer withdrawing a case before the ITAT, India stated that if an order is passed by the ITAT in this time-period, India's competent authority would not be able to implement the MAP agreement. India highlighted the fact that this would be a rare occurrence, but stated its belief that this is consistent with its practice and policy.

344. Concerning the process for implementing MAP agreements, India reported that once such agreement is reached and closing letters between the competent authorities have been exchanged, the local tax administration in India will be informed in writing of the said agreement with instructions to implement it. In this respect, rule 44H of the Income Tax Rules 1962 details the process for implementing MAP agreements. Paragraph 3 stipulates that the MAP agreement has be communicated in writing to the Principal Chief Commissioner of the Income Tax Department with instructions to implement the agreement. Paragraph 4 further stipulates that a MAP agreement should be given effect by the local tax administration, provided that the taxpayer has accepted the agreement and

has withdrawn from any appeals that were initiated regarding the same issues for which a MAP was conducted.

345. India reported that the actual implementation of MAP agreements is monitored at the level of the local tax offices. Where the local tax office is requested to implement a MAP agreement, it is also asked to report back to India's competent authority to confirm implementation. By doing so, India's competent authority can keep track on whether all MAP agreements have been implemented.

### *Recent developments*

346. India reported that the MAP rules have been amended and the new MAP rules have been notified by the Government of India on 6 May 2020, by which the implementation process has been streamlined under the new rules to make it more efficient.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

347. India further reported that all MAP agreements that were reached in the period 1 January 2016-31 August 2018, once accepted by taxpayers, have been (or will be) implemented.

348. All but two peers that provided input reported not being aware of any impediments to the implementation of MAP agreements in India. One of these peers specified that it has not reached a MAP agreement with India in the period 1 January 2016-31 August 2018 and thus has no experience with respect to the implementation of such agreements. Of the two remaining peers, one noted that the many MAP cases it has resolved with India have not yet been implemented, but will be as soon as possible, which mainly stems from the fact that the agreements were reached in 2018. The second peer mentioned that on occasion there has been some misunderstandings about what has been agreed between the competent authorities, despite that such agreement has been documented in the minutes of a meeting. This peer indicated it would like to explore possible solutions on this issue.

#### *Period 1 September 2018-30 April 2020 (stage 2)*

349. India reported that for the MAP agreements that were pending implementation on 31 August 2018, all have been implemented.

350. In addition, India reported that since 1 September 2018, all agreements reached by India's competent authority that required implementation in India have either been implemented or are in the process of implementation.

351. Most peers that provided input during stage 1, stated in stage 2 that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. Of the peers that provided input, three peers provided input as regards the implementation of MAP agreements.

352. One peer provided input and mentioned that it has resolved and implemented many transfer pricing MAP cases without any problems, except for one case, where India according to internal regulations could not implement a case resolved through MAP for a specific year, since the MAP result rate was lower than the rate declared by the taxpayer in the tax return for this specific year. This peer also noted that the case was resolved with the outcome "agreement fully eliminating double taxation or fully resolved taxation

not in accordance with the tax treaty" and this position was conveyed as regards this fiscal year at the implementation stage. India responded to this input and mentioned that it agrees with this comment since as a matter of policy and domestic legal provisions, its competent authority does not go below the income declared by the Indian taxpayer in its return of income in respect of adjustments made by Indian tax authorities. India noted that its competent authority can withdraw the entire adjustment made by Indian tax authorities but cannot go below the returned income. It further noted that if the adjustment is made by the tax authorities of the treaty partner, India's competent authority could go below the returned income in India if the MAP resolution demands so.

353. Another peer commended India on its ability to implement MAP agreements within 90 days as from the date of notifying the local tax administration of the MAP agreement reached.

354. A third peer, who only provided input during stage 2, mentioned that for two transfer pricing cases resolved, it has not been able to implement the agreements reached in August 2019, pending India's response to its letter and reminders since 13 Jan 2020. India responded that the delay is on account of unavoidable circumstances since it is awaiting a confirmation from the taxpayer that they have requested the ITAT that its case is to be kept in abeyance while the MAP is being pursued. In response to this comment, this peer noted that it was not informed by India on the reason for the delay and suggested that India expedites her domestic processes so that the agreements can be implemented soon. India further responded that it has been a consistent resolve of the Indian side to achieve resolutions expeditiously in all MAP cases and well within the specified timelines. For the cases referred to, MAP resolution could not proceed beyond the tentative resolution stage as India did not have a regular competent authority at that time. With a regular competent authority of India having joined, final MAP resolution shall be achieved expeditiously going forward. India noted that since the prerogative of acceptance of MAP or pursuing domestic remedy lies with the applicant, on acceptance of the final MAP resolution in its case, it shall be incumbent upon the applicant to withdraw its appeal pending with the ITAT.

### *Anticipated modifications*

355. India did not indicate that it anticipates any modifications in relation to element D.1.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [D.1] | India's competent authority did not implement a mutual agreement in one case where it later realised that the relief would go below the income declared by the Indian taxpayer in its return of income in respect of adjustments made by Indian tax authorities. In addition, India's competent authority will not implement a mutual agreement where an order is passed by the Income Tax Appellate Tribunal in respect of the issue involved in the MAP case. | India should ensure to implement all MAP agreements reached if its conditions for such implementation are fulfilled. In this respect, India should ensure that appropriate procedures are put in place to ensure that its conditions for implementation of MAP agreements are fulfilled prior to the finalisation of MAP agreements, in order to enable the implementation of all MAP agreements. |

## [D.2] Implement all MAP agreements on a timely basis

Agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

356. Delay of implementation of MAP agreements may lead to adverse financial consequences for both taxpayers and competent authorities. To avoid this and to increase certainty for all parties involved, it is important that the implementation of any MAP agreement is not obstructed by procedural and/or statutory delays in the jurisdictions concerned.

### *Theoretical timeframe for implementing mutual agreements*

357. As discussed under element D.1, India reported it has a specific system in place for the implementation of MAP agreements. Pursuant to paragraph 4 of rule 44(H) of the Income Tax Rules of 1962, a MAP agreement shall be implemented within 90 days as from the date of the notification of the agreement to the local tax administration if the requirements for implementation are fulfilled. In this respect, India reported that the moment its competent authority enters into a MAP agreement, it is notified to the local tax administration. The latter will then reach out to the taxpayer to convey its acceptance of the agreement. If so, the taxpayer has to withdraw from any domestic court procedures as a prerequisite for implementation. If more than one taxpayer is involved in the case, all of them need to withdraw from such procedures. It is only when both steps have been completed, that the MAP agreement will be implemented. The actual time for implementation may vary for individual cases, but generally MAP agreements are implemented within 90 days as from the date of notifying the local tax administration of the MAP agreement reached. In a few cases, delays, however, may occur when completing all the steps.

### *Recent developments*

358. India reported that as discussed under element C.3, the implementation rules have been recently amended to further quicken the pace of implementation. Taxpayers have to adhere to timelines to accept a MAP outcome and withdraw appeals. Similarly, tax authorities have to implement the MAP outcome within a specified time period.

### *Practical application*

#### *Period 1 January 2016-31 August 2018 (stage 1)*

359. India reported that all MAP agreements that were reached in the period 1 January 2016-31 August 2018, once accepted by taxpayers, have been (or will be) timely implemented and that no cases of noticeable delays have occurred.

360. Almost all peers that provided input reported not being aware of any impediments to the implementation of MAP agreements in India on a timely basis. Two peers, however, reported difficulties concerning the timely implementation of MAP agreements in India. One of these peers mentioned that when its competent authority reaches an agreement with India's competent authority, it takes a long time before it is clear that taxpayers in India have accepted the agreement and (if applicable) withdraw from all possible legal proceedings. In this peer's view, the time between reaching an agreement and implementation tends to be long. The second peer mentioned that it did not encounter any delays regarding the implementation of MAP agreements its competent authority entered into with India in the period 1 January 2016-31 August 2018, but that MAP agreements in earlier cases are still pending implementation.

*Period 1 September 2018-30 April 2020 (stage 2)*

361. As discussed under element D.1, India reported that for the MAP agreements that were pending implementation on 31 August 2018, all have been implemented.

362. In addition, as also discussed under element D.1, India reported that since 1 September 2018, all agreements reached by India's competent authority and required implementation in India have either been implemented or are in the process of implementation.

363. Most peers that provided input during stage 1, stated in stage 2 that the update report provided by India fully reflects their experience with India since 1 September 2018 and/or there are no additions to the previous input given. Of the peers that provided input, three peers provided input as regards the timely implementation of MAP agreements.

364. One peer mentioned that as discussed under element C.3, it takes a long time before it is clear that the Indian taxpayer accepts the outcome and withdraws all possible legal procedures, and therefore the period between agreement and implementation is long. In response to this input, as noted under element C.3, India clarified that the implementation rules have been recently amended to further quicken the pace of implementation: taxpayers have to adhere to timelines to accept a MAP outcome and withdraw appeals, and tax authorities have to implement the MAP outcome within a specified time period.

365. Another peer, who has limited experience with implementation in India, stated that in one case it has been timely, in another (perhaps more complex) case the implementation is still pending ten months after the communication from India's competent authority to the local tax office. It should be noted that this concerns only one single case and, taking into account the disruption caused by covid-19 as well as the fact that there seems to be IT-related issues causing the delay. Therefore, this peer noted that it does not believe that any general conclusion regarding implementation can be drawn from this.

366. In response to this input, India mentioned that its competent authority always endeavours that the time period between agreement and implementation should be the least, and therefore it was swift in action and a resolution order of the MAP agreement was passed immediately. However, the field tax office after receiving the resolution has to check if the agreement reached involves multiple issues. In this particular case, the MAP resolution has been given effect but there was a delay as transfer pricing issues were also involved, and the Assessing Officer had to refer it to the Transfer Pricing Officer before implementation. This must have caused some delay and it was further delayed due to the Covid-19 situation.

367. The last peer noted that it is not aware of any MAP agreement reached on or after 1 September 2018 that has not been implemented by India. Anticipated modifications

368. India did not indicate that it anticipates any modifications in relation to element D.2.

## *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [D.2] | - | - |

## [D.3] Include Article 25(2), second sentence, of the OECD Model Tax Convention in tax treaties or alternative provisions in Article 9(1) and Article 7(2)

Jurisdictions should either (i) provide in their tax treaties that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law, or (ii) be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.

369. In order to provide full certainty to taxpayers it is essential that implementation of MAP agreements is not obstructed by any time limits in the domestic law of the jurisdictions concerned. Such certainty can be provided by either including the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) in tax treaties, or alternatively, setting a time limit in Article 9(1) and Article 7(2) for making adjustments to avoid that late adjustments obstruct granting of MAP relief.

### *Legal framework and current situation of India's tax treaties*

370. As discussed under element D.1, India does not have a statute of limitation for implementing MAP agreements.

371. Out of India's 97 tax treaties, 87 contain a provision equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) stipulating that any mutual agreement reached through MAP shall be implemented notwithstanding any time limits in their domestic law.[1] Furthermore, six treaties do not contain such equivalent nor the alternative provisions in Article 9(1) and Article 7(2), setting a time limit for making adjustments.

372. For the remaining four treaties the following analysis is made:

- In one treaty a time limit is set for the implementation of MAP agreements, which is ten years from the due date or the date of filing of the tax return. As this may obstruct the full implementation of a MAP agreement notwithstanding domestic time limits in both states, the treaty is considered not having the equivalent of the second sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017).
- In one treaty the second sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017) is contained, but whereby the implementation is made dependent on the notification of a MAP request within a period of five years from the end of the taxable year to which the case relates, which may cause that a MAP agreement cannot be implemented due to a non-timely notification. The treaty is therefore considered not having the equivalent of the second sentence of Article 25(2).
- In one treaty no provision on the implementation of MAP agreements is contained, but in a protocol provision it is stipulated that if the mutual agreement procedure has been introduced within a period of five years as of the moment the tax assessment became final, then any MAP agreement shall be implemented notwithstanding domestic time limits of the treaty partners. As, however, this provision sets a timing for the introduction of a MAP request, there is a risk that a MAP agreement cannot be implemented due to a non-timely introduction. This treaty therefore is also considered not having the equivalent of the second sentence of Article 25(2) of the OECD Model Tax Convention (OECD, 2017).
- In one treaty the second sentence of Article 25(2) is not contained, but the treaty contains the alternative provision for Article 9(1).

373. Almost all peers that provided input during stage 1 reported that their treaty with India is in line with the requirements under the Action 14 Minimum Standard, which also regards element D.3. Concerning the ten treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) or the alternative provisions, two peers provided input regarding element D.3. One of them mentioned it had sent a proposal to India for an amending protocol to the treaty with a view to bring the treaty in line with all requirements under the Action 14 Minimum Standard. The other peer mentioned it is working on updating its notifications under the Multilateral Instrument to meet the requirement under element D.3.

### *Recent developments*

#### *Bilateral modifications*

374. India signed a new treaty with one treaty partner, which concerns a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty contains a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017). It is pending ratification. The effects of the newly signed treaty have been reflected in the analysis above where they have relevance.

#### *Multilateral Instrument*

375. India signed the Multilateral Instrument and deposited its instrument of ratification on 25 June 2019. The Multilateral Instrument has for India entered into force on 1 October 2019.

376. Article 16(4)(b)(ii) of that instrument stipulates that Article 16(2), second sentence – containing the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) – will apply in the absence of a provision in tax treaties that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). In other words, in the absence of this equivalent, Article 16(4)(b)(ii) of the Multilateral Instrument will modify the applicable tax treaty to include such equivalent. However, this shall only apply if both contracting parties to the applicable tax treaty have listed this treaty as a covered tax agreement under the Multilateral Instrument and insofar as both, pursuant to Article 16(6)(c)(ii), notified the depositary that this treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017). Article 16(4)(b)(ii) of the Multilateral Instrument does will for a tax treaty not take effect if one or both of the treaty partners has, pursuant Article 16(5)(c), reserved the right not to apply the second sentence of Article 16(2) of that instrument for all of its covered tax agreements under the condition that: (i) any MAP agreement shall be implemented notwithstanding any time limits in the domestic laws of the contracting states, or (ii) the jurisdiction intends to meet the Action 14 Minimum Standard by accepting in its tax treaties the alternative provisions to Article 9(1) and 7(2) concerning the introduction of a time limit for making transfer pricing profit adjustments.

377. In regard of the ten tax treaties identified above that are considered not to contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) or both alternatives provided for in Articles 9(1) and 7(2), India listed all of them as a covered tax agreements under the Multilateral Instrument, but only for nine treaties did it make a notification, pursuant to Article 16(6)(c)(ii), that they do not contain a provision described in Article 16(4)(b)(ii). Of the relevant nine treaty partners, two are not a signatory to the Multilateral Instrument, whereas two made a reservation on the

basis of Article 16(5)(a) and two did not make a notification pursuant to Article 16(6)(c)(ii). The remaining three treaty partners made such a notification. Two out of these three treaty partners have already deposited their instrument of ratification, following which the Multilateral Instrument has entered into force for the treaties between India and these treaty partners. Therefore, at this the Multilateral Instrument has modified these two treaties to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017). For the remaining treaty, the instrument will, upon entry into force, modify it to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017).

### *Other developments*

378. For the remaining seven tax treaties that do not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017), or both alternatives provided for in Articles 9(1) and 7(2), and will not be modified by the Multilateral Instrument, India reported that (i) for two treaties the relevant treaty partners have informed India that they will withdraw their reservation under the Multilateral Instrument, following which the treaty will be in line with the requirements under the Action 14 Minimum Standard; (ii) negotiations are pending with one relevant treaty partner on an amending protocol; and (iii) negotiations are envisaged with two relevant treaty partners.

379. Furthermore, India reported that for the remaining two treaty partners that are not a signatory to the Multilateral Instrument, it has approached one of them with a proposal for modification of the treaty to incorporate the Action 14 Minimum Standard. India is awaiting a response from this treaty partner.

### *Peer input*

380. Of the peers that provided input during stage 2, seven provided input in relation to their tax treaty with India. One of these peers concerns a treaty partner to the treaties identified above that do not contain Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) and which will not be modified by the Multilateral Instrument. This peer stated that consideration will be given for modification of the relevant provisions after the ongoing talks for different elements of the treaty between these two jurisdictions proceed to negotiations.

## ***Anticipated modifications***

381. India reported that for the remaining treaty, India reported that it has not yet approached the treaty partner with a proposal to amend the treaty.

382. Regardless, India reported it will seek to include Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties.

### *Conclusion*

| | Areas for improvement | Recommendations |
|---|---|---|
| [D.3] | Ten out of 97 tax treaties neither contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) nor both alternative provisions provided for in Article 9(1) and Article 7(2). With respect to these ten treaties:<br>• Two have been modified by the Multilateral Instrument to include the required provision.<br>• One is expected to be modified by the Multilateral Instrument to include the required provision.<br>• Two treaties will be modified by the Multilateral Instrument once the treaty partners have withdrawn its reservation and updated their notifications under that instrument.<br>• Five will not be modified by the Multilateral Instrument to include the required provision. With respect to these five treaties:<br>- For one negotiations are pending.<br>- For two negotiations are envisaged.<br>- India has approached one treaty partner to initiate discussions on the amendment of the treaty with a view to include the required provision, but the treaty partner has not yet responded.<br>- For one no actions have been taken nor are any actions planned to be taken at this stage. | For the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017), India should:<br>• continue negotiations with the treaty partner for which negotiations are currently pending to include the required provision via bilateral negotiations or be willing to accept both alternative provisions<br>• initiate negotiations with the two treaty partners for which negotiations are envisaged to include the required provision via bilateral negotiations or be willing to accept both alternative provisions<br>• upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision or be willing to accept the inclusion of both alternative provisions<br>• for one treaty partner request the inclusion of the required provision via the bilateral negotiations or be willing to accept both alternative provisions when the situation in the treaty partner has changed. |

## Note

1. These 87 treaties include the former treaty with Denmark that India continues to apply to the Faroe Islands, the treaty with former Czechoslovakia that India continues to apply to the Slovak Republic and the treaty with former Serbia and Montenegro that India continues to apply to both (i) Serbia and (ii) Montenegro.

## *Reference*

OECD (2017), *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris, https://dx.doi.org/10.1787/g2g972ee-en.

# Summary

| | Areas for improvement | Recommendations |
|---|---|---|
| **Part A: Preventing disputes** | | |
| [A.1] | - | - |
| [A.2] | - | - |
| **Part B: Availability and access to MAP** | | |
| [B.1] | One out of 97 tax treaties does not contain a provision that is equivalent to Article 25(1) first sentence, of the OECD Model Tax Convention (OECD, 2015a) and provides that the timeline to file a MAP request is shorter than three years from the first notification of the action resulting in taxation not in accordance with the provision of the tax treaty.<br>This treaty is expected to be modified by the Multilateral Instrument to include the equivalent of Article 25(1), second sentence, but not as regards the first sentence of that article. For the first sentence, actions have been taken to initiate discussions on the amendment, but the treaty partner has not yet responded. | Concerning Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a), India should, upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision. |
| | Five out of 97 tax treaties do not contain a provision that is equivalent to Article 25(1) first sentence, of the OECD Model Tax Convention (OECD, 2015a). None of these treaties are expected to be modified by the Multilateral Instrument to include the required provision, but for all of these five treaties bilateral negotiations have been initiated or are about to be initiated with a view to include the required provision. | India should continue pending negotiations with the five treaty partners to include the equivalent to Article 25(1), first sentence, of the OECD Model Tax Convention (OECD, 2015a) in the treaty that currently does not contain such equivalent.<br>For all five treaties this concerns a provision either:<br>a. as amended by the Action 14 final report (OECD, 2015b); or<br>b. as it read prior to the adoption of Action 14 final report (OECD, 2015b), thereby including the full sentence of such provision. |
| | There is a risk that access to MAP is denied in eligible cases where the issue under dispute is pending substantive determination or has already been decided by the Authority for Advance Rulings in India. | India should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 of the OECD Model Tax Convention (OECD, 2017) can access the MAP. |
| [B.2] | - | - |
| [B.3] | - | - |
| [B.4] | - | - |
| [B.5] | Access to MAP would be denied in cases where a taxpayer settles a dispute under the Vivad se Vishwas Act, 2020 and files a MAP request before India's competent authority. | India should ensure that taxpayers have access to MAP in cases where a taxpayer settles a dispute under the Vivad se Vishwas Act, 2020. |
| [B.6] | - | - |

| | Areas for improvement | Recommendations |
|---|---|---|
| [B.7] | Five out of 97 tax treaties do not contain a provision that is equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). Of these five tax treaties:<br>• Three have been modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017)<br>• One is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017)<br>• One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017). India has approached the relevant treaty partner to initiate discussions on the amendment of the treaty with a view to include the required provision, but the treaty partner has not yet responded. | For the remaining treaty that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(3), second sentence, of the OECD Model Tax Convention (OECD, 2017) following its entry into force, India should, upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision. |
| [B.8] | - | - |
| [B.9] | - | - |
| [B.10] | The MAP guidance does not include information on the relationship between MAP and audit settlements arising from the Vivad se Vishwas Act. | India's MAP guidance should clarify the relationship between MAP and audit settlements arising from the Vivad se Vishwas Act. |
| | The effects of the administrative or statutory dispute/ resolution settlement process undertaken by the AAR or the ITSC on MAP where the issue under dispute is pending substantive determination are not addressed in available guidance on such process. | India's available guidance on the administrative or statutory dispute settlement/resolution process undertaken by the AAR or the ITSC where the issue under dispute is pending substantive determination should clarify the effects on MAP when the case was resolved through such process. |
| | Although treaty partners were notified of the existence of a statutory dispute settlement process through India's MAP profile, the effects of such processes have not been fully addressed. | India should notify all of its treaty partners on the existence of its statutory dispute settlement process and the effects of such process. |
| **Part C: Resolution of MAP cases** | | |
| [C.1] | Two out of 97 tax treaties do not contain a provision that is equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). Of these two tax treaties:<br>• One treaty is expected to be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017).<br>• One will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017). For this treaty, negotiations on the comprehensive revision of the existing treaty are envisaged. | For the treaty that will not be modified by the Multilateral Instrument to include the equivalent to Article 25(2), first sentence, of the OECD Model Tax Convention (OECD, 2017), India should continue the process to initiate negotiations with the treaty partner to include the required provision. |
| [C.2] | - | - |

| | Areas for improvement | Recommendations |
|---|---|---|
| [C.3] | MAP cases were not closed within 24 months on average, as the average was 34.44 months, which both regards attribution/allocation cases (34.32 months) and other cases (36.13 months). Therefore, there is a risk that post-2015 are not resolved within the average of 24 months, which may indicate that the competent authority is not adequately resourced. In this respect, some peers have experienced difficulties in resolving MAP cases in a timely, efficient and effective manner, which in particular concerns:<br>• timely submission of position papers to treaty partners<br>• more frequently communicate with the other competent authorities concerned on status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP case.<br>Furthermore, the MAP inventory increased since 1 January 2016, which regards both attribution/allocation and other MAP cases. In addition, half of the total MAP inventory are pending more than 24 months. These may also indicate that the competent authority is not adequately resourced to cope with this increase and long-pending cases. | While India has taken several steps to resolve cases in a timely manner, such as addition of resources and to train staff in charge of MAP, further actions should be taken to ensure a timely resolution of MAP cases, which both regards attribution/allocation cases and other cases.<br>In that regard, India should devote additional resources to its competent authority to handle MAP cases and also to be able to cope with the increase in the number of MAP cases both for attribution/allocation and other MAP cases, such to be able to resolve MAP cases, including long-pending cases, in a timely, efficient and effective manner. Such addition of resources should enable India to:<br>• timely submission of position papers to treaty partners<br>• more frequently communicate with the other competent authorities concerned on status of the case and discuss the impact of domestic court procedures on the MAP case, in particular when such procedures would lead to a closure of the MAP case. |
| [C.4] | - | - |
| [C.5] | - | - |
| [C.6] | - | - |
| **Part D: Implementation of MAP agreements** | | |
| [D.1] | India's competent authority did not implement a mutual agreement in one case where it later realised that the relief would go below the income declared by the Indian taxpayer in its return of income in respect of adjustments made by Indian tax authorities. In addition, India's competent authority will not implement a mutual agreement where an order is passed by the Income Tax Appellate Tribunal in respect of the issue involved in the MAP case. | India should ensure to implement all MAP agreements reached if its conditions for such implementation are fulfilled. In this respect, India should ensure that appropriate procedures are put in place to ensure that its conditions for implementation of MAP agreements are fulfilled prior to the finalisation of MAP agreements, in order to enable the implementation of all MAP agreements. |
| [D.2] | - | - |

| | Areas for improvement | Recommendations |
|---|---|---|
| [D.3] | Ten out of 97 tax treaties neither contain a provision that is equivalent to Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017) nor both alternative provisions provided for in Article 9(1) and Article 7(2). With respect to these ten treaties:<br>• Two have been modified by the Multilateral Instrument to include the required provision.<br>• One is expected to be modified by the Multilateral Instrument to include the required provision.<br>• Two treaties will be modified by the Multilateral Instrument once the treaty partners have withdrawn its reservation and updated their notifications under that instrument.<br>• Five will not be modified by the Multilateral Instrument to include the required provision. With respect to these five treaties:<br>- For one negotiations are pending.<br>- For two negotiations are envisaged.<br>- India has approached one treaty partner to initiate discussions on the amendment of the treaty with a view to include the required provision, but the treaty partner has not yet responded.<br>- For one no actions have been taken nor are any actions planned to be taken at this stage. | For the remaining five treaties that will not be modified by the Multilateral Instrument to include the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (OECD, 2017), India should:<br>• continue negotiations with the treaty partner for which negotiations are currently pending to include the required provision via bilateral negotiations or be willing to accept both alternative provisions<br>• initiate negotiations with the two treaty partners for which negotiations are envisaged to include the required provision via bilateral negotiations or be willing to accept both alternative provisions<br>• upon receipt of a response from the relevant treaty partner agreeing to include the required provision, work towards updating the treaty to include this provision or be willing to accept the inclusion of both alternative provisions<br>• for one treaty partner request the inclusion of the required provision via the bilateral negotiations or be willing to accept both alternative provisions when the situation in the treaty partner has changed. |

# *Annex A*

## Tax treaty network of India

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| Treaty partner | DTC in force? | | Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority? (new Art. 25(1), first sentence) | Inclusion Art. 25(1) second sentence? (Note 1) If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | Inclusion Art. 25(2) second sentence? (Note 4) If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| | Y = yes<br>N = signed pending ratification | If N, date of signing | E = yes, either CAs<br>O = yes, only one CA<br>N = No | Y = yes<br>i = no, no such provision<br>ii = no, different period<br>iii = no, starting point for computing the 3 year period is different<br>iv = no, other reasons | if ii, specify period | Y = yes<br>i = no, but access will be given to TP cases<br>ii = no and access will not be given to TP cases | Y = yes<br>i = no and such cases will be accepted for MAP<br>ii = no but such cases will not be accepted for MAP | Y = yes<br>N = no | Y = yes<br>i = no, but have Art. 7 equivalent<br>ii = no, but have Art. 9 equivalent<br>iii = no, but have both Art. 7 & 9 equivalent<br>N = no and no equivalent of Art. 7 and 9 | Y = yes<br>N = no | Y = yes<br>N = no | Y = yes<br>N = no |
| Albania | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Armenia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Australia | Y | N/A | N | Y | N/A | Y | i | Y | Y | Y* | Y* | N |

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| Treaty partner | DTC in force? | | Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority? (new Art. 25(1), first sentence) | Inclusion Art. 25(1) second sentence? (Note 1) If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | Inclusion Art. 25(2) second sentence? (Note 4) If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| Austria | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Bangladesh | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Belarus | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Belgium | Y | N/A | O | Y* | 2 years | i*** | i | Y | Y | Y | Y* | N |
| Bhutan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Botswana | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Brazil | Y | N/A | O | ii | 5 years | i | i | Y | Y | Y | Y | N |
| Bulgaria | Y | N/A | O | Y | N/A | i** | i | Y | Y | Y | Y | N |
| Canada | Y | N/A | O | Y* | 2 years | Y | i | Y | ii | Y | Y | N |
| China (People's Republic of) | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Chile | N | 3/11/2020 | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Colombia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Croatia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Cyprus[a] | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Czech Republic | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Denmark | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Egypt | Y | N/A | O | i | N/A | i | i | Y | Y* | Y | Y | N |
| Estonia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Ethiopia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Faroe Islands | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Fiji | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| | | | Inclusion Art. 25(1) first sentence? | Inclusion Art. 25(1) second sentence? (Note 1) | | | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? | | Inclusion Art. 25(2) second sentence? (Note 4) | | | |
| Treaty partner | DTC in force? | | If yes, submission to either competent authority? (new Art. 25(1), first sentence) | If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| Finland | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Former Yugoslav Republic of Macedonia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| France | Y | N/A | N | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Georgia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Germany | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Greece | Y | N/A | N | i | N/A | i** | i | N | N | N* | N* | N |
| Hong Kong (China) | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Hungary | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Iceland | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Indonesia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Iran | N | 2/17/2018 | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Ireland | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Israel | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Italy | Y | N/A | N | ii* | 2 years | i** | i | Y | N | Y | Y | N |
| Japan | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Jordan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Kazakhstan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Kenya | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| Treaty partner | DTC in force? | | Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority? (new Art. 25(1), first sentence) | Inclusion Art. 25(1) second sentence? (Note 1) If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | Inclusion Art. 25(2) second sentence? (Note 4) If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| Korea | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Kuwait | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Kyrgyzstan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Latvia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Libya | Y | N/A | O | i | N/A | i | i | Y | N | Y | Y | N |
| Lithuania | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Luxembourg | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Malaysia | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Malta | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Mauritius | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Mexico | Y | N/A | O | Y | N/A | Y | i | N* | N | Y | Y | N |
| Mongolia | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Montenegro | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Morocco | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Mozambique | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Myanmar | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Namibia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Nepal | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Netherlands | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| New Zealand | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Norway | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| | | | Inclusion Art. 25(1) first sentence? | Inclusion Art. 25(1) second sentence? (Note 1) | | | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? | | Inclusion Art. 25(2) second sentence? (Note 4) | | | |
| Treaty partner | DTC in force? | | If yes, submission to either competent authority? (new Art. 25(1), first sentence) | If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| Oman | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Philippines | Y | N/A | O | Y | N/A | Y | i | Y | N | Y | Y | N |
| Poland | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Portugal | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Qatar | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Romania | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Russia | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Saudi Arabia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Serbia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Singapore | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Slovak Republic | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Slovenia | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| South Africa | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Spain | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Sri Lanka | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Sudan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Sweden | Y | N/A | O | Y | N/A | i*** | i | Y | Y | Y | Y | N |
| Switzerland | Y | N/A | N | Y | N/A | Y | i | Y | N | Y | Y | N |
| Syrian Arab Republic | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Chinese Taipei | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Tajikistan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |

| | | | Article 25(1) of the OECD Model Tax Convention ("MTC") | | | Article 9(2) of the OECD MTC | Anti-abuse | Article 25(2) of the OECD MTC | | Article 25(3) of the OECD MTC | | Arbitration |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | B.1 | B.1 | | B.3 | B.4 | C.1 | D.3 | A.1 | B.7 | C.6 |
| Column 1 | Column 2 | | Column 3 | Column 4 | | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 |
| Treaty partner | DTC in force? | | Inclusion Art. 25(1) first sentence? If yes, submission to either competent authority? (new Art. 25(1), first sentence) | Inclusion Art. 25(1) second sentence? (Note 1) If no, please state reasons | | Inclusion Art. 9(2) (Note 2) If no, will your CA provide access to MAP in TP cases? | Inclusion provision that MAP Article will not be available in cases where your jurisdiction is of the assessment that there is an abuse of the DTC or of the domestic tax law? If no, will your CA accept a taxpayer's request for MAP in relation to such cases? | Inclusion Art. 25(2) first sentence? (Note 3) | Inclusion Art. 25(2) second sentence? (Note 4) If no, alternative provision in Art. 7 & 9 OECD MTC? (Note 4) | Inclusion Art. 25(3) first sentence? (Note 5) | Inclusion Art. 25(3) second sentence? (Note 6) | Inclusion arbitration provision? |
| Tanzania | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Thailand | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Trinidad and Tobago | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Turkey | Y | N/A | O | i | N/A | Y | i | Y | N | Y | Y | N |
| Turkmenistan | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Uganda | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Ukraine | Y | N/A | N | Y | N/A | i | i | Y | Y | Y | N | N |
| United Arab Emirates | Y | N/A | O | Y* | 2 years | i*** | i | Y | Y | Y | Y | N |
| United Kingdom | Y | N/A | O | i | N/A | Y | i | Y | Y* | Y | Y* | N |
| United States | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Uruguay | Y | N/A | O | Y | N/A | Y | i | Y | Y | Y | Y | N |
| Uzbekistan | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Viet Nam | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |
| Zambia | Y | N/A | O | Y | N/A | i | i | Y | Y | Y | Y | N |

*Note:* a. Footnote by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus" issue.

Footnote by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

*Legend*

| | |
|---|---|
| E* | The provision contained in this treaty was already in line with the requirements under this element of the Action 14 Minimum Standard, but has been modified by the Multilateral Instrument to allow the filing of a MAP request in either contracting state. |
| E** | The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this standard. |
| O* | The provision contained in this treaty is already in line with the requirements under this element of the Action 14 Minimum Standard, but will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then allow the filing of a MAP request in either contracting state. |
| O**/E*** | The provision contained in this treaty is already in line with the requirements under this element of the Action 14 Minimum Standard, but will be or has been superseded by the Multilateral Instrument only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument. |
| Y* | The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been modified by the Multilateral Instrument and is now in line with this element of the Action 14 Minimum Standard. |
| Y** | The provision contained in this treaty already included an arbitration provision, which has been replaced by part VI of the Multilateral Instrument containing a mandatory and binding arbitration procedure. |
| Y*** | The provision contained in this treaty did not include an arbitration provision, but part VI of the Multilateral Instrument applies, following which a mandatory and binding arbitration procedure is included in this treaty |
| i*/ii*/iv*/N* | The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be modified by the Multilateral Instrument upon entry into force for this specific treaty and will then be in line with this element of the Action 14 Minimum Standard. |
| i**/iv**/N** | The provision contained in this treaty is not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty will be superseded by the Multilateral Instrument upon entry into force for this specific treaty only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument. |
| i***/ii*** | The provision contained in this treaty was not in line with the requirements under this element of the Action 14 Minimum Standard, but the treaty has been superseded by the Multilateral Instrument only to the extent that existing treaty provisions are incompatible with the relevant provision of the Multilateral Instrument. |

# *Annex B*

## MAP Statistics Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for pre-2016 cases

| 2016 MAP Statistics | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Number of pre-2016 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of pre-2016 cases in MAP inventory on 1 January 2016 | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of pre-2016 cases remaining in on MAP inventory on 31 December 2016 | Average time taken (in months) for closing pre-2016 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 |
| Attribution/ Allocation | 594 | 0 | 0 | 0 | 0 | 2 | 48 | 1 | 0 | 0 | 0 | 543 | 27.45 |
| Others | 101 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 1 | 0 | 0 | 98 | 108.33 |
| Total | 695 | 0 | 0 | 0 | 0 | 2 | 50 | 1 | 1 | 0 | 0 | 641 | 31.94 |

*Notes:* There is a discrepancy between the number of pre-2016 MAP cases in India's inventory as per 31 December 2016 and 1 January 2017.

- The reported number of MAP cases pending on 31 December 2016 was 568, which consists of 499 attribution/allocation cases and 69 other cases.
- The reported number of MAP cases pending on 1 January 2017 was 641, which consists of 543 attribution/allocation cases and 98 other cases.

In order to have matching numbers for 31 December 2016 and 1 January 2017, the number of pre-2016 cases pending on per 1 January 2016 was corrected.

| 2017 MAP Statistics | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Number of pre-2016 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of pre-2016 cases in MAP inventory on 1 January 2017 | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of pre-2016 cases remaining in on MAP inventory on 31 December 2017 | Average time taken (in months) for closing pre-2016 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 |
| Attribution/ Allocation | 543 | 0 | 0 | 0 | 0 | 2 | 78 | 0 | 0 | 3 | 0 | 460 | 42.67 |
| Others | 98 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 97 | 80.02 |
| Total | 641 | 0 | 0 | 0 | 0 | 2 | 79 | 0 | 0 | 3 | 0 | 557 | 43.11 |

| 2018 MAP Statistics | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Number of pre-2016 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of pre-2016 cases in MAP inventory on 1 January 2018 | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of pre-2016 cases remaining in on MAP inventory on 31 December 2018 | Average time taken (in months) for closing pre-2016 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 |
| Attribution/ Allocation | 460 | 0 | 0 | 0 | 0 | 0 | 42 | 0 | 0 | 0 | 0 | 418 | 60.53 |
| Others | 97 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 97 | n.a. |
| Total | 557 | 0 | 0 | 0 | 0 | 0 | 42 | 0 | 0 | 0 | 0 | 515 | 60.53 |

| 2019 MAP Statistics | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Number of pre-2016 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of pre-2016 cases in MAP inventory on 1 January 2019 | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of pre-2016 cases remaining in on MAP inventory on 31 December 2019 | Average time taken (in months) for closing pre-2016 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 |
| Attribution/ Allocation | 418 | 1 | 0 | 1 | 0 | 3 | 33 | 0 | 0 | 0 | 0 | 380 | 64.86 |
| Others | 97 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 96 | 61.97 |
| Total | 515 | 1 | 0 | 1 | 0 | 4 | 33 | 0 | 0 | 0 | 0 | 476 | 64.79 |

# *Annex C*

## MAP Statistics Reporting for the 2016, 2017, 2018 and 2019 Reporting Periods (1 January 2016 to 31 December 2019) for post-2015 cases

| 2016 MAP Statistics | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of post-2015 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of post-2015 cases in MAP inventory on 1 January 2016 | No. of post-2015 cases started during the reporting period | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of post-2015 cases remaining in on MAP inventory on 31 December 2016 | Average time taken (in months) for closing post-2015 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 | Column 15 |
| Attribution/ Allocation | 0 | 78 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 77 | 6.60 |
| Others | 0 | 7 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 7 | n.a. |
| Total | 0 | 85 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 84 | 6.60 |

*Notes:* There is a discrepancy between the number of post-2015 MAP cases in India's inventory as per 31 December 2016 and 1 January 2017.

- The reported number of MAP cases pending on 31 December 2016 was 77, which consists of 70 attribution/allocation cases and 7 other cases.
- The reported number of MAP cases pending on 1 January 2017 was 84, which consists of 77 attribution/allocation cases and 7 other cases.

In order to have matching numbers for 31 December 2016 and 1 January 2017, the number of post-2015 cases started during the reporting period was corrected.

| 2017 MAP Statistics | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of post-2015 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of post-2015 cases in MAP inventory on 1 January 2017 | No. of post-2015 cases started during the reporting period | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of post-2015 cases remaining in on MAP inventory on 31 December 2017 | Average time taken (in months) for closing post-2015 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 | Column 15 |
| Attribution/ Allocation | 77 | 134 | 0 | 0 | 0 | 4 | 0 | 6 | 2 | 0 | 0 | 0 | 199 | 7.91 |
| Others | 7 | 17 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 22 | 3.59 |
| Total | 84 | 151 | 1 | 1 | 0 | 4 | 0 | 6 | 2 | 0 | 0 | 0 | 221 | 7.30 |

*Notes:* There is a discrepancy between the number of post-2015 MAP cases in India's inventory as per 31 December 2017 and 1 January 2018.
- The reported number of MAP cases pending on 31 December 2017 was 206, which consists of 186 attribution/allocation cases and 20 other cases.
- The reported number of MAP cases pending on 1 January 2018 was 221, which consists of 199 attribution/allocation cases and 22 other cases.

In order to have matching numbers for 31 December 2017 and 1 January 2018, the number of post-2015 cases started during the reporting period was corrected.

| 2018 MAP Statistics | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of post-2015 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of post-2015 cases in MAP inventory on 1 January 2018 | No. of post-2015 cases started during the reporting period | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of post-2015 cases remaining in on MAP inventory on 31 December 2018 | Average time taken (in months) for closing post-2015 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 | Column 15 |
| Attribution/ Allocation | 199 | 145 | 0 | 0 | 2 | 0 | 2 | 31 | 6 | 0 | 0 | 0 | 303 | 15.21 |
| Others | 22 | 29 | 2 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 48 | 4.99 |
| Total | 221 | 174 | 2 | 0 | 2 | 0 | 2 | 32 | 6 | 0 | 0 | 0 | 351 | 14.51 |

*Notes:* There is a discrepancy between the number of post-2015 MAP cases in India's inventory as per 31 December 2018 and 1 January 2019.
- The reported number of MAP cases pending on 31 December 2018 was 326, which consists of 292 attribution/allocation cases and 34 other cases.
- The reported number of MAP cases pending on 1 January 2019 was 351, which consists of 303 attribution/allocation cases and 48 other cases.

In order to have matching numbers for 31 December 2018 and 1 January 2019, the number of post-2015 cases started during the reporting period was corrected.

| 2019 MAP Statistics | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of post-2015 cases closed during the reporting period by outcome | | | | | | | | | | | |
| Category of cases | No. of post-2015 cases in MAP inventory on 1 January 2019 | No. of post-2015 cases started during the reporting period | Denied MAP access | Objection is not justified | Withdrawn by taxpayer | Unilateral relief granted | Resolved via domestic remedy | Agreement fully eliminating double taxation/ fully resolving taxation not in accordance with tax treaty | Agreement partially eliminating double taxation/partially resolving taxation not in accordance with tax treaty | Agreement that there is no taxation not in accordance with tax treaty | No agreement, including agreement to disagree | Any other outcome | No. of post-2015 cases remaining in on MAP inventory on 31 December 2019 | Average time taken (in months) for closing post-2015 cases during the reporting period |
| Column 1 | Column 2 | Column 3 | Column 4 | Column 5 | Column 6 | Column 7 | Column 8 | Column 9 | Column 10 | Column 11 | Column 12 | Column 13 | Column 14 | Column 15 |
| Attribution/ Allocation | 303 | 184 | 1 | 0 | 1 | 2 | 5 | 66 | 2 | 0 | 0 | 0 | 410 | 15.17 |
| Others | 48 | 22 | 0 | 0 | 0 | 0 | 3 | 1 | 1 | 0 | 0 | 0 | 65 | 10.58 |
| Total | 351 | 206 | 1 | 0 | 1 | 2 | 8 | 67 | 3 | 0 | 0 | 0 | 475 | 15.07 |

# *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 |
| **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 |
| **Pre-2016 cases** | MAP cases in a competent authority's inventory that are pending resolution on 31 December 2015 |
| **Post-2015 cases** | MAP cases that are received by a competent authority from the taxpayer on or after 1 January 2016 |
| **Statistics Reporting Period** | Period for reporting MAP statistics that started on 1 January 2016 and that ended on 31 December 2019 |
| **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 |

OECD/G20 Base Erosion and Profit Shifting Project

# Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 2)

## INCLUSIVE FRAMEWORK ON BEPS: ACTION 14

Under Action 14, countries have committed to implement a minimum standard to strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP). The MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties. The Action 14 Minimum Standard has been translated into specific terms of reference and a methodology for the peer review and monitoring process. The peer review process is conducted in two stages. Stage 1 assesses countries against the terms of reference of the minimum standard according to an agreed schedule of review. Stage 2 focuses on monitoring the follow-up of any recommendations resulting from jurisdictions' stage 1 peer review report. This report reflects the outcome of the stage 2 peer monitoring of the implementation of the Action 14 Minimum Standard by India.

PRINT ISBN 978-92-64-59819-5
PDF ISBN 978-92-64-99934-3