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Summary

This note has been prepared by the Subcommittee on Dispute Resolution, in accordance with the mandate given to that Subcommittee by the Fifth Session of the Committee of Experts on International Cooperation in Tax Matters in the report of its meeting in Geneva from 19 to 23 October 2009. The mandate of the Subcommittee on Services is as follows:

“The Subcommittee is mandated to consider:

a) Different possible ways to improve the mutual agreement procedure (including advance pricing agreements, mediation, conciliation, recommended administrative regulations and prescribed obligations for the taxpayer applying for mutual agreement procedure).

.....

c) Possible specific problems and needs with respect to transfer pricing dispute resolution.

In doing so, the Subcommittee shall primarily focus on the specific needs and concerns of developing countries and countries in transition. The Subcommittee shall present a report, with draft provisions and Commentaries annexed, during the next annual session of the Committee for consideration and further guidance.”

This paper proposes a Guide to the Mutual Agreement Procedure under Tax Treaties. The paper is marked up to show differences to earlier drafts.

At its meeting of 19-23 October 2009, the UN Committee of Experts on International Cooperation in Tax Matters mandated its Subcommittee on Dispute Resolution “to consider ... [d]ifferent possible ways to improve the mutual agreement procedure (including advance pricing agreements, mediation, conciliation, recommended administrative regulations and prescribed obligations for the taxpayer applying for mutual agreement procedure).” The Subcommittee was also invited to “primarily focus on the specific needs and concerns of developing countries and countries in transition.”

~~This~~A first draft of a Guide to the Mutual Agreement Procedure ~~has been~~was prepared pursuant to that part of the mandate of the Subcommittee. It ~~is~~was tabled at the Committee’s meeting of 18-22 October 2010 for the sole purpose of seeking written comments.

~~The draft so that it may be~~has been subsequently revised by the Subcommittee and ~~shall be presented~~discussed at the 2011 meeting of the

1. The main purpose of this Guide is to improve the understanding and functioning of

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6. A tax treaty is an official agreement between two countries (“Contracting States”) the primary purpose of which is the prevention of the international double taxation that may arise when a specific transaction or taxpayer is subject to tax under the domestic tax laws of both Contracting States. Such double taxation discourages the free flow of international trade and investment and the transfer of technology, all of which play important complementary roles in the economic development process.

7. A tax treaty seeks to prevent international double taxation by providing for a uniform allocation of taxing rights with respect to specific classes of income between the residence State (that is, a taxpayer’s State of residence) and the source State (that is, the State where the relevant income is considered to arise). A tax treaty will further provide a method through which double taxation will be eliminated by the resident State in situations in which the treaty permits both the residence State and the source State to tax an item of income.³

8. For example, the interest ~~a~~Article of a tax treaty may permit interest arising in one Contracting State and paid to, and beneficially owned by, a resident of the other Contracting State to be taxed in both these States, with the tax charged in the source State limited to an agreed-upon rate. Double taxation is then eliminated by the relief from double taxation Article, under which the residence State will generally allow a deduction or credit against its tax for the tax paid to the source State, to the extent that the source State properly taxed the interest income under the treaty.

9. In certain cases, however, international double taxation may arise even where there is a tax treaty between two countries. Such double taxation may result, for example, from the incorrect application of the treaty by one of the Contracting States, or from differing views between the Contracting States (e.g. with respect to the the relevant facts or the characterisation of an item of income under domestic law) as to how the treaty should apply in a particular situation or context.

10. In order to resolve such issues, tax treaties typically provide for a mutual agreement procedure along the lines of what is provided for in Article 25 (Mutual

³ Where the provisions of a tax treaty permit both Contracting States (that is, the residence State and the source State) to tax an item of income, double taxation is eliminated through either the “exemption method” or the “credit method”. See Articles 23A (Exemption Method) and 23 B (Credit Method) of the UN Model. Under the exemption method, the residence

Agreement Procedure) of the UN Model. Essentially, the negotiation of an agreement pursuant to the MAP is a government-to-government process.

Transfer pricing cases

19. Historically, a large number of paragraph 1 cases have involved transfer pricing issues and the economic double taxation that may result when a Contracting State makes adjustments to income from related party non-arm's length transactions among and between the members of a multinational group of enterprises.

Through the MAP, the Contracting States may reach agreement on how the test should be applied to a taxpayer's facts.

Withholding tax cases

32. Tax treaties usually permit source State taxation of dividends, interest, and royalties paid to, and beneficially owned by, a resident of the other Contracting State, but limit the tax charged by the source State to an agreed-upon percentage of the gross amount of such payments (see Articles 10 (Dividends), 11 (Interest), and 12 (Royalties) of the UN Model). The tax charged by the source State will typically take the form of a

36-38. These issues and questions will often be of a general nature. For example, as discussed below, paragraph 3 of Article 25 may be used to agree on the definition of a specific term used in the treaty, or on procedures to give effect to a specific treaty provision. The resolution reached through the MAP will thus potentially concern a number of taxpayers, rather than solely a specific taxpayer or the parties to a specific transaction (as in a case under paragraph 1 of Article 25).

37-39. Article 3(2) of the UN Model provides that a term not defined in the treaty will, unless the context requires otherwise, have the meaning that it has under the domestic law of the Contracting State applying the treaty. In some cases, however, a term used in the treaty may not have a precise meaning under a Contracting State's domestic law, or the use of a domestic law meaning may not be appropriate given the context in which the term is used in the treaty. The first sentence of paragraph 3 of Article 25 allows the competent authorities to clarify what meaning should be given to such terms.

38-40. Some countries have found that the use of the authority provided by Article 25(3) helps the implementation of the provisions of the treaty. In addition, where mutual agreements reached under Article 25(3) apply to all taxpayers or a general category of taxpayers, the publication of such agreements, which are not specific to particular cases

43-45. The UN Model uses the term “competent authority” to refer to the person or body within a Contracting State with responsibility for resolving issues that arise in connection

however, they should seek ~~to appropriate opportunities for~~ compromise in order to reach a mutual agreement that will provide relief from double taxation.

1.3.2 Who is the competent authority?

48-50. Under subparagraph (1)(e) of Article 3 (General Definitions) of the UN Model, the definition of the term “competent authority” – that is, the designation of a governmental official, agency, or entity as a Contracting State’s competent authority – is left to each of the Contracting States. In the typical case, the competent authority will be identified, for example, as “the Minister of Finance or his authorised representative” or “the ~~Gi0.35795~~ 81.32 Tmisent

“authorised representative”) who carries out the day-to-day functions of the competent authority.

~~54-56. Countries that have considerable p~~Practical experience ~~with of~~ the MAP process has ~~shownve recognised~~ that the efficiency and effectiveness of a MAP program is enhanced if the senior tax officials to whom the competent authority function has been delegated are actively and directly engaged in the MAP process – for example, where officials with decision-making authority with respect to MAP cases remain informed of the details of MAP cases and are closely involved in detailed bilateral MAP discussions.

~~55-57.~~ Countries have also found that the functioning of a MAP program is enhanced if the officials performing the competent authority function are known and readily accessible to taxpayers. To this end, Contracting States may consider it useful to publicise the identity of the officials responsible for carrying out the competent authority function, as well as information on how to contact the competent authority. Many countries provide this information to taxpayers as part of their general public guidance on how to seek MAP assistance.

~~56-58.~~ Once a Contracting State has determined who will be responsible for the day-to-day activities of the competent authority, it must also determine how the competent authority’s work will be structured. The approach chosen will, of course, depend upon the specific circumstances of a Contracting State’s tax administration, including the resources available and the present (or anticipated) MAP caseload.

~~57-59.~~ A country that is rarely involved in MAP cases may well prefer to delegate the competent authority functions to the officials in charge of the negotiation of tax treaties because these officials will be familiar with the provisions of tax treaties and, often, with the treaty negotiators and competent authorities of other countries with which tax treaties have been concluded. A Contracting State that has to deal with a very large number of MAP cases, however, may want to separate its competent authority function into various groups based on regions, taxpayer industry, or type of taxpayer (individual, corporate, etc.).

~~58-60.~~ Regardless of how the competent authority function is organised, it is important that the responsible officials implement a system of recordkeeping with respect to the receipt of requests for MAP assistance. Such records permit monitoring of the progress made in MAP cases (*i.e.* the time required to resolve a MAP case) and provide an objective measure to assess the effectiveness of a country’s MAP programme.

~~59-61.~~ It is also important that the competent authority keep records of the decisions and resolutions that have been reached through competent authority agreements. Internal records of the outcomes in MAP cases help to guarantee the consistent interpretation of a treaty in similar cases. It should be noted in this regard that countries typically do not publish taxpayer-specific agreements reached through the MAP. Since information received from the other competent authority is subject to the confidentiality requirement of paragraph 2 of Article 26, such information cannot be publicly disclosed (except for the limited purposes- provided for in that paragraph).

~~60-62.~~ The effectiveness of a MAP program may also be improved if the competent authority function is given a certain degree of independence from the tax officials responsible for taxpayer audits and adjustments (*e.g.* auditors, assessors or inspectors).

Filing a waiver of domestic time limits on assessment. Under the domestic laws of many States, the tax administration has a limited period of time within which it may assess tax with respect to a given taxable year (sometimes referred to as a statute of limitations on assessment). Taxpayers similarly have a limited period of time in which they may object to or otherwise challenge the actions of the tax administration in a domestic forum. In many of these States, however, the taxpayer and tax administration may agree to extend the relevant periods. This procedure may involve, for example, filing a request or a specific form with the tax administration.

Submitting a protective claim. In some States, taxpayers may protect their rights to certain domestic recourse procedures by filing a protective claim before any applicable deadlines. A timely claim may have the effect of keeping any applicable periods of limitations open until the claim is resolved or withdrawn. Protective claims may include, for example, a claim for refund submitted to the appropriate administrative or judicial body.

Lodging an appeal with the appropriate administrative or judicial body. In some States, taxpayers may protect their rights to certain domestic administrative or judicial procedures by lodging an appeal with the appropriate body before any applicable deadlines. As with a protective claim, a timely appeal may have the effect of keeping any applicable periods of limitations open until the appeal is resolved or withdrawn. Examples of such an appeal may include an application to a tax administration's administrative appeals division or a petition or other challenge filed with a domestic court.

67-69. Because Article 25, as drafted in most treaties, does not compel the Contracting States to reach agreement in the MAP⁸, but only to use their best efforts to do so, there will on occasion be situations in which there is no MAP agreement between the Contracting States. In such a situation, a taxpayer that has not taken appropriate measures to protect its rights under domestic law will have no further recourse.

68-70. A Contracting State should determine the procedure to be followed when a taxpayer has invoked both the MAP and a domestic recourse procedure. As a general matter, most tax administrations will deal with a taxpayer's case in the MAP or in a domestic forum (usually a court), but not both at the same time: one process will be suspended or put on hold pending the outcome of the other.

69-71. A competent authority should therefore be able to inform taxpayers as to how it will handle cases where a taxpayer seeks to obtain relief through both the MAP and a domestic recourse procedure.

70-72. In some countries, a taxpayer may only invoke the mutual agreement procedure once the taxpayer has exhausted all domestic law remedies (e.g. by waiving its rights of appeal or letting time-limits for appealing lapse). This approach risks putting the taxpayer in a position where no solution will be found to its case if the competent authorities cannot reach an agreement.

71-73. The practice followed by many countries, however, is to allow the taxpayer to choose whether the MAP or the domestic procedure will proceed first. In this regard, it is

⁸ The situation is, however, different for treaties that follow alternative B of Article 25.

important that taxpayers be informed as to the potential consequences of pursuing a recourse through one process rather than the other. The information concerning the procedure to be followed and the consequences of pursuing first either the MAP or domestic recourse will typically be explained in a tax administration's general procedures or instructions for requesting MAP assistance, or in other appropriate public guidance. In particular, as noted below, competent authorities that consider that they cannot deviate

The certainty they provide, however, is limited, especially if the tax administration of the other jurisdiction would be expected to examine closely the transaction, or type of transaction, at issue. In addition, taxpayers have sometimes found that previously concluded unilateral APAs have precluded them from obtaining relief under the MAP from the country that has granted the APA when they subsequently found themselves subject to double taxation.

82-84. Like an audit settlement reached in a potential MAP case, a unilateral APA represents a one-sided resolution of issues with tax consequences in two jurisdictions. In order to provide for a bilateral resolution of these issues, where a foreign adjustment is made with respect to a transaction or issue covered by a unilateral APA, it is helpful for

6. A summary of the facts, including the structure, terms, and timing of all relevant transactions and the relationships between related parties (the taxpayer should advise the competent authority of how the facts may have changed during or after the relevant taxable period, and of any additional facts that come to light after the submission of the MAP request);
7. An analysis of the issues for which competent authority assistance is requested and the relevant legal rules, guidelines or other authorities (including any authorities that may be contrary to the conclusions of the taxpayer's analysis). The analysis should address all specific issues raised by either tax administration as well as the amounts related to the adjustment(s) (in both currencies and supported by calculations, if applicable);
8. For transfer pricing cases, any documentation required to be prepared under the domestic legislation of the taxpayer's State of residence (where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable) and a detailed description of the companies involved, including an analysis of their functions and risks, to the extent relevant;
9. A copy of any other relevant MAP request and the associated documents filed, or to be filed, with the competent authority of the other Contracting State, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the tax administration of the other Contracting State (translations of relevant documents may be helpful, and, where documentation is voluminous, a competent authority may determine that a description or summary of such documentation may be acceptable);
10. A statement indicating whether the taxpayer or a predecessor has made a prior request to the competent authority of either Contracting State with respect to the same or a related issue or issues;
11. A schedule of the relevant time limits and statutes of limitation in each jurisdiction (whether imposed by domestic law or the tax treaty) with respect to the taxable periods for which MAP relief is sought (in cases of multiple taxpayers, a schedule for each taxpayer);
12. A statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or any other comparable document in either of the relevant jurisdictions;
13. A statement indicating whether the taxpayer's request for MAP assistance involves issues that are currently or were previously considered by the tax authorities of either Contracting State as part of an advance pricing arrangement, ruling, or similar proceedings;
14. A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);

~~14-15.~~ _____ If the taxpayer has not already provided consent for a person to act as its authorised representative, a signed statement that a representative is authorised to act for the taxpayer in all matters connected with the MAP request.;

~~15.~~ ~~A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);~~

16. The taxpayer's view on any possible bases on which to resolve the issues;

17. Any other facts that the taxpayer may consider relevant.

~~93-95.~~ The taxpayer should attest to the accuracy and completeness of the facts and information presented in a MAP request in a signed statement accompanying the request.

~~94-96.~~ A competent authority will typically not charge a fee for a MAP request, although there may be fees associated with certain competent authority functions or activities, such as Advance Pricing Arrangement programs.

~~95-97.~~ To the extent feasible, tax administrations may consider it helpful to allow the electronic submission of documents in the context of the MAP. Electronic submission may facilitate the delivery of information to the two competent authorities as well as the connected burdens on taxpayers.

~~96-98.~~ A competent authority's ability to understand, analyse, and respond to a taxpayer's MAP request will of course depend upon the quality of the information available. A taxpayer that provides accurate and complete information in a timely manner will facilitate the resolution of its case.

~~97-99.~~ In addition, to the extent that a taxpayer provides information to both competent authorities in the MAP process,¹² the taxpayer should ensure that it provides the same information to the two competent authorities. Providing inconsistent or conflicting information may provoke delays if it is difficult for the two competent authorities to come to agreement on a common understanding of the underlying facts.

~~98-100.~~ _____ Some competent authorities may delay the acceptance or consideration of a MAP request where a taxpayer has failed to provide required information. In addition, in some Contracting States the misrepresentation of facts or other material information may result in the denial of competent authority assistance, under a Contracting State's domestic law, regulations, or other guidance.

~~99-101.~~ _____ Article 26 (Exchange of Information) of the UN Model authorizes the competent authorities of the Contracting States to exchange such information as is

¹² As discussed above, under Article 25(1) of the UN Model Tax Convention, a taxpayer will in most cases make a request for MAP assistance to the competent authority of its state of residence. That competent authority will generally then itself communicate the facts and information relevant to the MAP request to the competent authority of the other contracting

necessary for carrying out the provisions of the treaty. Article 26 thus expressly authorizes the exchange of taxpayer information between competent authorities to carry out the MAP provided for by Article 25.

~~400.102.~~ Paragraph 1 of Article 26 provides that any information exchanged between the competent authorities is required to be treated as secret in the same manner as if such information were obtained under the domestic laws of the respective Contracting States. Competent authorities should continually keep in mind their obligations under Article 26, which is intended to supplement the generally applicable confidentiality provisions of Contracting States' domestic tax laws.

2.3.1 *When can a taxpayer first make a MAP request?*

~~401.103.~~ Under paragraph 1 of Article 25 of the UN Model, the triggering event that

~~even a concluded adjustment may or may not trigger a claim for a correlative adjustment; even if it does, the latter adjustment may occur without problems. As a consequence, many competent authorities may decide that the process should not be invoked until the correlative adjustment (or other tax consequence in the second country) is involved at some point.~~

~~16.— However, some competent authorities may prefer that the bilateral process be invoked earlier, perhaps at the proposed adjustment stage. Such involvement may make the process of consultation easier, in that the first country will not have an initial fixed position. In such a case, the other competent authority should be prepared to discuss the case at this early stage with the first competent authority. Other competent authorities may be~~

The competent authority uses this information to determine how the taxpayer's case will move forward from a procedural perspective. Thus, for example, where a Contracting State does not allow the simultaneous consideration of a taxpayer's case in both the MAP and a domestic forum, the competent authority can determine whether one process should be suspended or put on hold pending the outcome of the other process.

Has there been a decision, a settlement, or any other resolution with respect to the taxpayer's case in any domestic forum utilized by the taxpayer?

The information recommended to be provided with a MAP request includes an indication whether domestic law remedies pursued by the taxpayer have resulted in a decision, a settlement, or any other resolution. As discussed above, a tax administration may consider that it does not have the legal authority to deviate from the decision of a domestic court in the MAP. Accordingly, depending on a Contracting State's domestic law and procedure, a court decision (or other similar

typically prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that is alleged to be contrary to the treaty. In a more complex MAP case, the other competent authority should prepare and present a reasoned rebuttal to the initial position paper.

~~132.~~133. When the competent authorities are ready to discuss a MAP case, their discussions may take place using a great variety of methods – for example, by correspondence, by telephone or video conference, or in face-to-face meetings. Depending on the complexity of the issues involved, the competent authority negotiations may occur in a series of meetings or other consultations. The MAP discussions may also lead to requests for additional information or other clarification from the taxpayer.

~~133.~~134. As with other aspects of the MAP, Article 25 of the UN Model is silent with respect to how Contracting States will conduct their MAP negotiations. Under Article 25(4), the Contracting States are directed to develop appropriate bilateral procedures to implement the MAP. Such procedures include procedures for the notification and discussion of MAP cases.

~~134.~~135. As explained in paragraphs ~~2040~~ to ~~4635~~ of the Commentary on Article 25 of the UN Model, the procedures developed for the conduct of the MAP should take into account, among other considerations, the experience of the respective competent authorities, their current and anticipated MAP caseload, and the resources available to the competent authorities. The MAP process should avoid unnecessary formality and promote forthright discussion and a collaborative approach to issue resolution. Competent authorities should also inform taxpayers of the procedural details of the MAP, ideally as

through a corresponding adjustment – that is, an adjustment by the first Contracting State that offsets, in whole or in part, the other Contracting State’s initial adjustment.

2.4.2 Other barriers to access to the MAP: fraud, gross negligence, wilful default and tax avoidance

~~139~~-140. Paragraph 3 of Article 9 is relevant in discussing barriers to MAP. That paragraph provides:

The provisions of paragraph 2 [of Article 9] shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.

~~140~~-141. Under specific conditions, paragraph 2 of Article 9 obliges one Contracting State (State A) to make a correlative adjustment with respect to a State A enterprise where the other Contracting State (State B) has made a transfer pricing adjustment with respect to a related State B enterprise. Where paragraph 3 of Article 9 applies, however, State A no longer has an obligation to make such an adjustment with respect to the State A enterprise.

~~141~~-142. Paragraph 3 of Article 9 does not technically preclude access to MAP but merely removes the requirement that State A make an appropriate correlative adjustment when the conditions of the paragraph are met. State A may determine in particular circumstances that it is appropriate to consider providing MAP relief even in a case where paragraph 3 applies. Consistent with the Commentary on Article 25 noted above, many countries would consider the provision of such relief to be within the scope of, and authorized generally by, Article 25. Paragraph 93 of the Commentary on Article 9 states that Member countries may consider the double penalties that apply in Article 9(3) cases to be too harsh, a factor that could make them consider MAP access potentially appropriate. In any case, this paragraph of the Commentary on Article 9 also notes that these cases “are likely to be exceptional and there would be no application of [Article 9(3)] in a routine manner”.

~~142~~-143. In practice, some competent authorities have refused to provide relief where the adjustment underlying a taxpayer’s MAP request is based upon an anti-avoidance provision in their countries’ domestic laws (for example, a thin capitalisation provision) even where a tax convention does not provide expressly that MAP assistance will not be provided in such circumstances. If such cases are accepted for MAP consideration, these competent authorities may do no more than forward the cases to the other competent authority, which may then provide correlative relief at its discretion.

~~143~~-144. This approach may likely not lead to a satisfactory resolution. Moreover,

~~145-146.~~ Some of these These barriers to the MAP may ~~in many cases~~ be inconsistent with a Contracting State's obligation under Article 25 of the UN Model to endeavour to resolve through the MAP all "justified" taxpayer objections to taxation not in accordance with the treaty. These barriers may also likely conflict with a Contracting State's more general obligations under the international law of treaties.¹⁸ They are certainly inconsistent with the general spirit and purpose of the MAP. Contracting States should accordingly not raise such barriers to access to the MAP without careful consideration.

2.4.3 What is the effect of invoking the MAP?

~~146-147.~~ An aspect of the MAP that is closely linked to the relationship between the MAP and domestic law¹⁹ – and with respect to which Article 25 of the UN Model is silent – is the legal effect of the taxpayer's invocation of the MAP.

~~147-148.~~ In general, a mutual agreement is conditioned on the acceptance by the taxpayer of the mutual agreement. If the taxpayer does not accept it, the mutual agreement does not come into effect and each Contracting State will tax according to its understanding of the relevant facts and how it understands the treaty to apply with respect to those facts.

2.4.4 What is the taxpayer's role in the MAP?

~~148-149.~~ Article 25 of the UN Model provides that a taxpayer may present a MAP request, but does not otherwise provide for taxpayer participation in the MAP. Contracting States may, however, provide for a taxpayer role in the MAP pursuant to the directive contained in paragraph 4 of Article 25 to develop, through competent authority consultations, "appropriate bilateral procedures, conditions, methods, and techniques" for the implementation of the MAP.

~~149-150.~~ In practice, the taxpayer's role in the MAP is typically determined by domestic law (or other guidance) in the taxpayer's State of residence, on how to seek MAP assistance.²⁰ Although domestic procedures for MAP access will necessarily vary to a greater or lesser degree, the following general comments may be made with respect to the taxpayer's role in the MAP.

~~150-151.~~ The taxpayer's primary role in the MAP is to provide the competent authority of its State of residence with complete and accurate information and documentation in a timely manner. The taxpayer should promptly advise its competent

¹⁸ See Articles 26 ("*Pacta sunt servanda*") and 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331). Article 26 of the Vienna Convention provides that every treaty is binding on the parties thereto and must be performed by them in good faith. Article 27 of the Vienna Convention provides that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform under a treaty.

¹⁹ See section 1.4 above.

²⁰ A Contracting State may generally prefer to apply the same procedures to all resident taxpayers seeking MAP assistance, regardless of the applicable tax treaty, rather than to develop specific procedures for MAP access under each individual tax treaty. This policy may facilitate the administration of a competent authority's MAP function and assure the uniform treatment of taxpayers (with respect to access to the MAP).

authority of any material changes in the facts and circumstances relevant to its case, as well as any new facts and information that emerge subsequent to the taxpayer's prior submissions. The taxpayer should similarly provide complete and timely responses to any competent authority requests for additional information. The competent authority may also ask the taxpayer for assistance in interpreting the information provided including: economic models and legal memoranda justifying the taxpayer's application of the arm's length standard.

~~151~~-152. The taxpayer should additionally make certain that the information provided to both competent authorities is consistent and free of conflicts. A taxpayer will generally not itself provide information connected with a MAP request directly to the competent authority of the other Contracting State. Rather, the competent authority of the State of residence will typically provide such information to the competent authority of the other Contracting State, under the authority of Article 26 (Exchange of Information) and as part of the bilateral procedures developed for the conduct of the MAP.

~~152~~-153. Circumstances may arise, however, where a taxpayer is involved in the preparation of information that is provided separately to both competent authorities. For example, where a MAP request regards a transaction with a related party in the other Contracting State, and the related foreign party itself makes a MAP request to the other competent authority, the taxpayer may often be involved in the preparation of information or documents that are presented to the other competent authority.

~~153~~-154. Certain Competent authorities Contracting States may permit taxpayers to present briefs or make presentations to both competent authorities as part of the MAP process. The material presented may in some cases also include taxpayer proposals for the resolution of a MAP case. Providing taxpayers with appropriate opportunities to present relevant information may help both competent authorities to reach a common understanding of the facts and issues, especially in particularly complex MAP cases, and thereby improve the functioning of the MAP.

~~154~~-155. In general, taxpayers have no further direct involvement in the consultation between the two competent authorities. Many Contracting States regard MAP consultations as a confidential, government-to-government process in which taxpayer participation would be barred or otherwise inappropriate.

~~155~~-156. In addition, the MAP is a bilateral process in which both parties share common interests: the resolution of international double taxation and the correct interpretation and application of the tax treaty. A taxpayer's main interest, in contrast, will generally be to minimize, over time, its worldwide tax liability. Direct taxpayer involvement in competent authority negotiations could thus reasonably be expected to extend or distort the MAP process.

~~156~~-157. Even though a taxpayer will usually not be directly involved in MAP discussions, the competent authority to which its MAP request was submitted should regularly communicate with the taxpayer regarding the status of its case and the relevant consultations. Such communications may encourage taxpayer cooperation with the MAP (for example, the prompt submission of additional information or documentation, when necessary) and should also improve the overall transparency of the MAP process.

~~465-166.~~ Article 25 provides considerable latitude to the Contracting States to create a procedural framework for the MAP that takes into account their specific circumstances and preferences. The Commentary on Article 25 of the UN Model contains the following useful discussion in this regard:

~~2535.~~ The competent authorities will have to decide how their consultation should proceed once that part of the procedure comes into operation. Presumably, the nature of the consultation will depend on the number and character of the cases involved. The competent authorities should keep the consultation procedure flexible and leave every method of communication open, so that the method appropriate to the matter at hand can be used.

~~2636.~~ Various alternatives are available, such as informal consultation by telecommunication or in person; meetings between technical personnel or auditors of each country, whose conclusions are to be accepted or ratified by the competent authorities; appointment of a joint commission for a complicated case or series of cases; formal meetings of the competent authorities in person etc. It does not seem desirable to place a time limit on when the competent authorities must conclude a matter, since the complexities of particular cases may differ. Nevertheless, competent authorities should develop working habits that are conducive to prompt disposition of cases and should endeavour not to allow undue delay.

~~466-167.~~ As noted in paragraph ~~3142~~ of the Commentary on Article 25 of the UN Model, the competent authorities should make public, in as complete a manner as possible, the procedures they have adopted for the conduct of the mutual agreement procedure.

~~467-168.~~ The framework for the MAP consultation in a specific case is typically provided by a position paper prepared by one of the Contracting States. As already explained, a position paper is a document that sets out a detailed description of the relevant facts and issues, frames the questions to be resolved, and presents reasoned proposals for their resolution.

~~468-169.~~ The position paper will generally be prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that the taxpayer alleges to be contrary to the treaty, regardless of the competent authority to which the taxpayer made its MAP request. The preparation and transmission of position papers is generally regarded as a matter of priority because of their important role in facilitating meaningful MAP discussions – and thus the timely resolution of a MAP case.

~~469-170.~~ A position paper should generally contain the following relevant information:

1. The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;
2. Contact information for the competent authority official in charge of the MAP case;

3. A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;
4. The taxation years or periods involved;
5. The amount of income and the relevant tax for each taxable year, if applicable;

2. An indication of the areas or issues where the competent authorities are in agreement or disagreement;
3. Requests for any required additional information or clarification;
4. Other or additional information considered relevant to the case but not presented in the initial position paper; and
5. Alternative reasoned proposals for resolution.

~~173.174.~~ In practice, competent authorities may conduct their discussions and consultations using many different means, including letters, facsimiles, electronic mail, telephone and video conferences, and face-to-face meetings. |

174.175.

~~180.~~181. ____ A competent authority must determine for itself the manner in which it informs a taxpayer that a MAP agreement has been reached, as well as the level of detail provided in its explanation of the proposed resolution.²² The summary of the MAP agreement provided to the taxpayer may typically take the form of a closing letter and/or an oral presentation in the context of a closing meeting. Regardless of the method chosen, the competent authority should ideally explain to the taxpayer the rationale for the MAP resolution.

~~181.~~182. ____ Once presented with the terms of the agreement reached in the MAP, the taxpayer may have the option to accept or reject the MAP resolution.²³

~~182.~~183. ____ Although taxpayers may often be permitted to reject a MAP agreement, they are generally not permitted to accept the MAP agreement only in part – that is, only with respect to certain issues or certain taxable periods – unless both competent authorities agree to such a partial acceptance. Particularly in more complex cases, it may be unacceptable to the competent authorities to separate a MAP resolution into its component parts, given that the resolution, as a whole, represents a series of compromises and concessions by both competent authorities based on the totality of the facts and circumstances.

~~183.~~184. ____ Where the taxpayer accepts the MAP resolution, such acceptance must typically be communicated to the competent authority in writing. The relevant competent authority may also ask the taxpayer to withdraw formally any domestic objections that were suspended or put on hold pending the outcome of the MAP process and/or to agree not to pursue any other forms of relief with respect to the same issue(s) and taxable period(s).

~~184.~~185. ____ The competent authorities' initial summary record is then generally followed by an exchange of letters formalising the MAP agreement. Depending on the specific procedure developed between the two competent authorities, this exchange of letters may occur before, or

relief in a domestic court or administrative appeals process, the taxpayer may then proceed to avail itself of those procedures. There is, of course, no guarantee that any domestic law recourse procedure will relieve international double taxation or otherwise resolve the issue(s) that prompted the MAP request in a taxpayer-favourable manner.

~~188-189.~~ In some circumstances, a competent authority agreement in an important area may reasonably be considered to provide a more general indication of the Contracting States' views on a particular issue. Paragraph ~~3243~~ of the Commentary on Article 25 of the UN Model advises that competent authorities should develop appropriate procedures to publish such determinations (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

~~189-190.~~ The MAP is most likely to produce an agreement that is susceptible to providing public guidance when the matter resolved is a general question of interpretation or application (that is, a case described in the first sentence of Article 25(3)). Such a MAP agreement might concern, for example, the definition of a term used in the treaty, or a process used to apply the treaty (for example, a certification process used to determine whether a person is a resident of a Contracting State or otherwise entitled to the benefits of the treaty).

~~190-191.~~ In the majority of MAP cases, however, the agreement reached by the competent authorities is based on a taxpayer's specific facts and circumstances and is generally not intended to establish a precedent, whether with respect to other taxpayers or even with respect to the same taxpayer in different taxable years. In practice, the letters exchanged by the competent authorities to formalise a MAP agreement may often contain an express Statement that the agreement has no precedential value.

2.4.8 How is relief implemented?

~~191-192.~~ Following the competent authorities' exchange of letters and the taxpayer's acceptance of the MAP agreement, each competent authority must take the appropriate steps to implement the relief provided for in the MAP agreement, pursuant to the authority granted by Article 25 and any applicable provisions of a Contracting State's domestic law. The implementation of the MAP agreement should take place with all possible speed.

~~192-193.~~ The specific steps taken to implement a MAP agreement will, of course, depend upon the nature of the relief to be provided to the taxpayer.

~~193-194.~~ In certain MAP cases, implementation of relief may require no more than a refund of tax by one of the Contracting States.

~~194-195.~~ For example, a MAP case may concern the proper rate of withholding tax on a dividend, interest, or royalty payment made by a resident of State A to a resident of State B. The competent authorities may agree in the MAP that State A should not have levied withholding tax at the rate provided by State A domestic law, but rather at the lower rate provided in the applicable article of the State A-State B tax treaty. Relief would be provided to the State B resident through a refund by State A of the tax withheld in excess of the rate provided in the treaty.

~~195-196.~~ A second example is provided by a permanent establishment case. The competent authorities may agree in the MAP that a State A enterprise did not have a permanent establishment in State B and, accordingly, that the State A enterprise should

not have been subject to State B tax with respect to certain business income, under the business profits article of the State A-State B tax treaty. Relief would be provided to the State A enterprise through a refund of the State B tax on the relevant business income.

~~496-197.~~ _____ In other MAP cases, the competent authority of one Contracting State

| Action | | | |
|-----------------|--|------------------------------------|--------------------------------------|
| Taxpayer | State A Competent Authority (Taxpayer's State of Residence) | State B Competent Authority | Target Time Frame or Deadline |

| | | | |
|------------------|--|---|--|
| | <ul style="list-style-type: none"> • Determine whether MAP request will be accepted. • If case accepted, determine whether unilateral relief is possible and appropriate. • Notify Taxpayer whether MAP request will be accepted and whether unilateral relief is possible and appropriate. • In transfer pricing cases, inform State B CA that MAP request is not accepted or that unilateral relief is possible and appropriate. | | <p>Within three months of Taxpayer's submission of all information required by State A CA to determine whether the MAP request will be accepted and whether unilateral relief is possible and appropriate.</p> |
| STAGE TWO | | | |
| | <ul style="list-style-type: none"> • If no unilateral relief possible, propose to State B CA to initiate MAP discussions – issue opening letter to State B CA and communicate all relevant information in order to allow State B CA to examine the case. | | <p>Within three month of the notification to the taxpayer that MAP request is accepted and unilateral relief is not possible and appropriate.</p> |
| | | <ul style="list-style-type: none"> • Confirm receipt of State A CA request to initiate MAP discussions. • Preliminary review of MAP request. • Where necessary, request that State A CA obtain additional information from Taxpayer. | <p>Within one months of State B CA's receipt of State A CA's opening letter.</p> |

| | | | |
|--|---|--|---|
| | | <ul style="list-style-type: none"> • Notify State A CA whether request to initiate MAP discussions is accepted. | <p>Within three months of State B CA's confirmation</p> |
| | <p>If State B CA agrees to MAP discussions, the CA of the Contracting State that initiated the adjustment or, in the absence of an adjustment, of the Contracting State the taxation of which is considered not in accordance with the Convention (whether State A CA or State B CA) analyses and evaluates the MAP case and prepares a position paper for the other CA.</p> <ul style="list-style-type: none"> • Review of MAP case by the other CA. • Where necessary, the other CA may request that the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention, provide additional information or explanation. • Determination by the other CA whether unilateral relief is possible an 10.357 in 112.03 (a) 301.37 (a) 59851734# 62.567 at 12S. | | <p>Within six months of State B CA's agreement to enter into MAP discussions.</p> |

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|---|---|--|---|
| Notify State A CA whether it accepts the MAP agreement. | | | Within one month of notification of the MAP agreement. |
| | If Taxpayer accepts the MAP agreement, State A CA and State B CA confirm and formalise MAP agreement through exchange of letters. | | Within one month of the Taxpayer's acceptance of the MAP agreement. |
| | Implementation of the MAP agreement. | | No later than three months after the exchange of letters formalising the MAP agreement. |

206-207. Throughout the consideration of a MAP case, the competent authority that received the MAP request may consider it a useful practice to provide periodic, informal status updates to the taxpayer.

207-208. It may also be valuable for the competent authorities to advise each other on a regular basis (for example, every three months) of their progress on a MAP case. Such updates should keep both competent authorities focused on the details of the case and its overall progress, and should thereby facilitate its timely resolution.

208-209. Requests for additional information or clarification (whether competent authority-to-taxpayer or competent authority-to-competent authority) should not, however, be deferred until these periodic MAP case status updates. Such requests should be made as soon as practically possible, given that delays in receiving additional information or clarification may delay the substantive consideration (and thus the resolution) of a MAP case.

209-210. As discussed above, the framework for analysis and discussion in a MAP case is generally provided by a position paper. In most contexts, it is considered realistic and appropriate for the position paper to be prepared by the responsible authority. The position paper should be prepared by the responsible authority in a timely manner and should be updated as necessary. The position paper should be prepared by the responsible authority in a timely manner and should be updated as necessary.

212-213. More generally, the competent authorities should endeavour to exchange all relevant information well in advance of their meetings. Where both competent authorities have adequate time prior to a meeting to review the materials and to consider fully the case and issues, the competent authorities can make the most effective use of their meeting time and the MAP consultations will be more productive.

213-214. Certain MAP cases will not be resolved within three years of the date of their acceptance (or any other similar deadline determined or recommended by the Contracting States). Delays may arise where a taxpayer does not timely provide necessary information or where a MAP case is particularly complex.

214-215. In circumstances in which a MAP case is not resolved by a generally applicable deadline, the competent authorities may agree to continue their discussions, to extend the time frame for discussion and resolution, or take other appropriate action,

219-220. _____ A Contracting State's views on the relationship between the MAP and domestic law penalty provisions may also depend on the nature of a specific penalty. Certain penalties – for example, a penalty for failure to maintain proper transfer pricing documentation – may concern domestic law compliance issues that are outside the scope of the MAP and the tax treaty. The competent authority may as a result be unable or unwilling to discuss them in the MAP.

220-221. _____ In contrast, other penalties (such as certain transfer pricing penalties) may be linked to the amount of an adjustment that is itself the object of a MAP request. In a case in which a Contracting State that has applied such a penalty agrees in the MAP to reduce the amount of the underlying adjustment, that State should appropriately reduce the amount of the penalty, regardless of its view as to whether the treaty covers penalties.

221-222. _____ Some Contracting States may also be willing to provide relief from penalties through the MAP even where the adjustment that gave rise to the MAP is fully or partially sustained in the MAP. A Contracting State may feel that such relief is appropriate, for example, if it appears after MAP review that the application of the penalty is no longer justified.

222-223. _____ Differences between domestic law provisions on the accrual of interest on tax liabilities and refunds may create other issues for the MAP. Even if the MAP eliminates the international double tax that was the object of the MAP request, the taxpayer may still suffer a significant and equivalent economic burden if there are asymmetries with respect to how interest accrues on tax liabilities and refunds in the two Contracting States.

223-224. _____ For example, a MAP agreement may often result in an additional tax liability in one Contracting State and a corresponding refund of tax in the other Contracting State. In a scenario in which the first Contracting State charges interest on the tax deficiency (or collects tax prior to the MAP resolution) and the second Contracting State does not pay interest on the amount refunded to the taxpayer, this may result in a substantial economic burden on the taxpayer.

224-225. _____ In light of this burden, it is desirable for Contracting States to adopt flexible approaches to provide for relief of interest in the MAP, where they consider that their competent authorities are permitted to do so and where such relief is appropriate. Some Contracting States may feel that relief from interest is especially appropriate for the period

227-228. A requirement to pay tax prior to a MAP resolution may also impose significant costs on a taxpayer. Even where the competent authorities eliminate double

take into account the specific requirements of their domestic transfer pricing laws, including, for example, their requirements with respect to documentation.

234-235. Although APA negotiations are conducted pursuant to the general authority of the MAP article, the Contracting States must also determine the interaction of their

resolution and the MAP case is closed without an agreement.²⁶ In such situations, there may be unrelieved double taxation or taxation not in accordance with the treaty.

~~240.241. _____ The language of Article 25 similarly does not oblige the Contracting States to reach timely agreement in the MAP. Where taxation not in accordance with the treaty remains unresolved for an unreasonably long period, taxpayers may face many of the same burdens that they would face in a situation in which there is no competent authority agreement in the MAP.~~

~~241.242. _____ This inability to ensure a final (or timely) resolution of MAP cases is one of the primary obstacles to an effective MAP. When a taxpayer or a tax administration is unsure that a matter will be resolved through the MAP, it may be hesitant to commit time and resources to seeking a MAP resolution. In addition, a competent authority may not take all possible steps to find a resolution through the MAP where there is no obligation to do so and no mechanism in place to break a stalemate in MAP negotiations.~~

~~243. _____ As mentioned in paragraph 36 of the Commentary on Article 25, in light of these shortcomings of the MAP, some tax administrations consider that the MAP could be improved through the addition of an arbitration provision as a tool to ensure that the competent authorities are able to reach an agreed solution to a taxpayer's case. In light of these shortcomings of the MAP, Article 25 (Alternative B) of the UN Model provides for a mandatory arbitration provision designed to ensure that the competent authorities are able to reach an agreed solution to a taxpayer's case. [GW/CD] Resolution of tax disputes by way of mandatory binding arbitration would eliminate double taxation risk for foreign investors and facilitate international trade. Mandatory binding arbitration also requires less human resources of the competent authorities and thus facilitates tax administration. Contracting States are urged to include provisions allowing mandatory binding arbitration in Article 25 of their double taxation agreements. [ICC] The Commentary on paragraph 5 of Article 25 (Alternative B) of the UN Model as well as the Annex on that Commentary~~