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Dispute avoidance and resolution

Chapter on Mutual Agreement Procedure of the Handbook on Dispute Avoidance and Resolution

Note by the Subcommittee on Dispute Avoidance and Resolution

Summary

This note is presented FOR DISCUSSION AND APPROVAL at the meeting of the Committee to be held in New York on 23-26 April 2019.

The note includes the final version of Chapter 5 (Mutual Agreement Procedure) of the proposed *United Nations Handbook on Dispute Avoidance and Resolution*, which was finalized by the Subcommittee on Dispute Avoidance and Resolution

Chapter 5

The Mutual Agreement Procedure

5.1 Introduction

1. This chapter deals with the mutual
resolution procedure provided for in tax treaties.[1] That procedure, which is separate and independent from the administrative and judicial dispute resolution mechanisms provided by domestic law, allows representatives of the states that have concluded a tax treaty (usually through officials from their respective tax administrations) to address taxpayer complaints about an incorrect application of the provisions of the treaty as well as difficulties or doubts arising in relation to the interpretation or application of the treaty.

2. The MAP plays a crucial role in promoting the fulfilment of treaty obligations. It is intended to provide foreign taxpayers with the assurance that a potentially incorrect application of treaty provisions by one treaty state may be brought to the attention of tax officials from the other treaty state. The MAP is therefore a critical component of a tax treaty and a key provision for foreign investors and other taxpayers. This is especially the case in countries where foreigners may be reluctant to rely on domestic administrative and judicial dispute resolution mechanisms, for example because of a perception that the tax administrations, administrative tribunals and courts of these countries lack the necessary resources or tax treaty expertise to deal with treaty issues, which can often be complex.

■ The number of cases involving the use of the MAP has grown steadily over the last two decades: country statistics on the MAP show that the number of MAP cases increased on average by more than 11% each year each of the 40(a)4(nd)40(a)-5( )40(ke)-15(y)20( )40(p)-9(rovision countries other than large emerging economies (such as China and India).[3] As these statistics suggest, the majority of developing countries have no or limited experience with the MAP even though the number of MAP cases involving developing countries is increasing. Regardless of

prepared to meet their obligations with respect to the MAP, and must therefore understand that procedure and implement administrative processes to deal with MAP cases that may arise under their tax treaties.

4. This chapter provides practical guidance on the MAP and is primarily intended for developing countries that have little experience with that procedure, although its contents will also be relevant for a broader range of countries. It replaces the United Nations *Guide to the Mutual Agreement Procedure* which was approved by the United Nations Committee of Experts on International Cooperation in Tax Matters at its 2012 meeting.[4] The guidance included in this chapter complements the guidance on the mutual agreement procedure found in the Commentary on the UN Model, which constitutes the most authoritative source of information on the interpretation of the provisions included in that model; in case of divergences between the guidance of this chapter and that of the Commentary on the UN Model, the latter should prevail. Also, to the extent that the provisions of the UN Model dealing with the MAP are similar to those of the OECD Model, and because the Commentary of the UN Model quotes large parts of the Commentary of the OECD Model, the Commentary of the OECD Model will also be relevant, in particular as regards treaties that follow the wording of the OECD Model rather than that of the UN Model. Obviously, however, the guidance in this chapter is only relevant to the extent that the MAP provisions of the individual treaty under which a MAP case arises are identical or substantially similar to those found in the UN or OECD Models.

5. As explained in Chapter 1, the G20/OECD project on base erosion and profit shifting (BEPS) has had a significant impact on the implementation of the MAP.[5] The BEPS Action

a minimum standard with respect to the resolution of treaty-related disputes through the MAP. The Annex reproduces the elements of that minimum standard, which has the following objectives:

- Ensure that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- Ensure the implementation of administrative processes that promote the prevention and

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indeed, even cases of double taxation not addressed by the treaty may be dealt with under the MAP.

11. The MAP offers taxpayers an avenue for the resolution of a dispute concerning the application of tax treaty provisions that is distinct and independent from any available domestic dispute resolution mechanisms. While this avenue may not always be successful, it presents some advantages over purely domestic dispute resolution mechanisms:

- The MAP allows a consideration of the issue by tax officials of the two treaty states and any agreement reached in the context of the MAP could impact taxation in both treaty states, whereas the use of a domestic dispute resolution system available in a treaty state would impact only the taxation imposed in that state and thus may not be able to resolve the issue.
- The MAP involves consideration of tax treaty issues by officials who have tax treaty familiarity and expertise, which is not necessarily the case of officials and judges who deal with different types of tax disputes and even non-tax disputes.
- The MAP, being less formal than domestic judicial recourses (especially if such recourses would be required in the two treaty states in order to eliminate double taxation), may be less expensive for taxpayers and tax administrations. It may also provide a quicker resolution of the case in countries where there are lengthy delays in the processing of cases by administrative tribunals and judicial courts.[16]
- The MAP does not preclude recourse to domestic dispute resolution mechanisms in one or both treaty states (although taxpayers may be precluded from pursuing the MAP and such recourses at the same time so as to avoid the risk of conflicting decisions).

- The taxpayer considers that its tax treatment in one or both states is not, or will not be, in accordance with the treaty.
- The case must be presented to the competent authority of the state of residence of the taxpayer or, in cases involving a claim of discriminatory taxation based on nationality to which paragraph 1 of Article 24 could apply, of the state of nationality of the taxpayer.
- The case must be presented within three years from the time the person is notified of the action that allegedly result in taxation not in accordance with the treaty (for instance, a notice of assessment).

18. The only difference between paragraph 1 of the UN Model and paragraph 1 of the OECD Model relates to the second requirement. Paragraph 1 of the OECD Model was modified in 2017 to allow a person to present a case to the competent authority of either state. This difference is discussed below.[18]

Paragraph 2, which is identical in the UN and OECD models, sets out the obligations of the competent authority to whom a case is presented under paragraph 1.

20. Paragraph 3, which is also the same in the UN and OECD models, deals with the second and third situations referred to in paragraph 12 above in which the MAP may be used. Under the first sentence of the paragraph, the competent authorities must try to resolve by mutual agreement issues relating to interpretation or application of the treaty. The second sentence of the paragraph also authorizes them to consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, in the case referred to in paragraph 12.

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5.3 Typical treaty issues dealt with through the MAP

5.3.1 List of typical MAP issues

[illegible] As previously mentioned, the vast majority of MAP cases result from requests made by taxpayers under paragraph 1 of Article 25. Issues that give rise to such requests typically result from disagreements related to the facts of a case or to the interpretation of the applicable treaty provisions. They sometimes involve the interpretation of contracts or of provisions of domestic law, such as those related to labor law or copyright law.

24 The Commentary on Article 25 of the UN Model[21] identifies a few common issues that are dealt with through the MAP. The following are examples of such issues:

- *Transfer pricing issues and issues related to the attribution of profits to a permanent establishment.* The MAP statistics of the Inclusive Framework on BEPS[22] include a breakdown of MAP cases based on whether they relate to attribution of profit issues[23] or other cases. According to the statistics prepared for 2017, such cases, which are discussed below in sections 5.3.2 and 5.3.3, represented 54% of reported MAP cases for that year.
- *Whether a permanent establishment exists in a treaty state*. Where, for example, an enterprise of State A does business in State B and State B considers that the business activities exercised on its territory constitute a permanent establishment under the

  that it considers as being attributable to that permanent establishment as well as other profits referred to in treaty provisions similar to those of paragraphs 1 (*b*) and (*c*) of Article 7 of the UN Model. State A, however, may take the view that there is no permanent establishment and that the treaty gives it the exclusive right to tax the profits of the enterprise. As a result, the profits taxed by State B would also be taxed by State A which may refuse to provide relief from double taxation.
- *Dual treaty residence of a person (individual or legal person)*. For example, an individual who is a vidual who is .

- *Alleged application of withholding taxes in contravention to the treaty provisions*. An example would be where a company resident of State A pays a dividend to a company resident of State B and the company withholds tax from the dividend at the rate of 25% ter the State B company has requested a refund of the tax withheld in excess of the applicable rate provided in paragraph 2 of Article 10 of the treaty between States A and B, the tax authorities of State A reject that request because they consider that the State B company is not the beneficial owner of the dividend. The company disagrees with that view.

- *Issues related to the characterization of income*. An example would be where a company resident of one treaty state considers that a software payment that it received from a resident of the other treaty state constitutes business profits (which, under Article 7 of the relevant treaty, the other state may not tax in the absence of a permanent establishment on its territory) but the other state requests the payment of a withholding tax on the amount paid because it considers that the payment constitutes royalties covered by Article 12 of the treaty.

- *Alleged application of domestic anti-abuse provisions in contravention to the treaty provisions.* For example, under a dividend-stripping rule found in the domestic law of State A, that state taxes as dividends the gain realized by a resident of State B upon an alienation of shares that would otherwise fall within a provision of the treaty between the two states that is similar to paragraph 6 of Article 13 of the UN Model. The taxpayer -stripping rule is

  the alienation is part of an arrangement that constitutes an abuse of the relevant treaty provision.

- *Alleged taxation by one treaty state in contravention to the treaty rules on non-discrimination*. An example would be where a company resident of a treaty state considers that the denial, under the domestic law of that state, of the deduction of certain payments made to residents of the other treaty state constitutes a violation of a treaty non-discrimination rule similar to that of paragraph 4 of Article 24 of the UN Model.

- *Issues related to cross-border employment*. An example would be where a treaty state taxes the income derived from employment services performed on its territory by a resident of the other treaty state because it considers that the employee spent more than 183 days on its territory during a 12-month period, but the taxpayer disagrees and considers that the exception of paragraph 2 of Article 15 applies to the income.

25. The above list is not an exhaustive list of treaty issues that are raised in MAP cases initiated under paragraph 1 of Article 25. That paragraph allows a person to raise any issue that may have resulted, or may result, in that person being taxed not in accordance with the provisions of a tax treaty.

26. In many cases, taxation not in accordance with the provisions of a tax treaty will result in double taxation: for example, if the amount of withholding tax that is levied in the source state exceeds what is authorized by the treaty, the treaty does not require the residence state to provide a credit for the excess tax and double taxation of the relevant income may result. Double taxation is not a required condition, however, for a MAP case to be initiated; all that is required is that person making a request under paragraph 1 of Article 25 considers that there is, or will be, taxation not in accordance with the treaty provisions.

5.3.2 Transfer pricing issues

27 Given that a large proportion of MAP cases arising under paragraph 1 of Article 25 involve issues related to the allocation of profits between associated enterprises or the attribution of profits to permanent establishments and that, on average, such cases require significantly more time to be processed,[24] it is important to understand the treaty context in which these cases typically arise.

28. Issues related to the allocation of profits between associated enterprises involve the application of treaty rules corresponding to those of Article 9 (Associated enterprises) of the UN and OECD models. These rules deal with transfer pricing adjustments based
length standard.[25] Paragraph 1 of Article 9 acknowledges that a treaty state may adjust the profits of an enterprise of a treaty state that is an associated with respect to an enterprise of the other treaty state in order to reflect the profits that would have been realized if the enterprises

states, paragraph 2 imposes an obligation on the other treaty state to provide a corresponding adjustment to the profits of the other associated enterprise but only to the extent that the adjustment made by the first state conforms with paragraph 1 of Article 9 and is therefore in

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29. The following example illustrates the application of paragraphs 1 and 2 of Article 9. Company A, a resident of State A, is a wholly-owned subsidiary of Company B, a resident of State B. The companies are therefore associated enterprises for the purposes of Article 9 of treaty between States A and B. Following a tax audit of company A, the tax administration of State A takes the position that the company paid an excessive amount for management services

24 See the OECD MAP statistics, note 2, which show that for 2016 and 2017, MAP cases involving transfer pricing issues were completed on average in 30 months whereas other cases were completed on average in 17 months.

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may be found in the United Nations,

adjustment with the aim of avoiding double taxation, countries should provide access to MAP.[30]

32.

THE FIVE STEPS OF A TYPICAL ART. 25(1) MAP

proof that taxation not in accordance with the provisions of the treaty has occurred or will occur. For the purpose of making a valid request, all that is required is that the taxpayer have a reasonable belief that this is the case based on facts that can be established.[42] Whether that [redacted] While the BEPS Action 14 minimum standard requires countries that are members of the Inclusive Framework on BEPS to include paragraph 1 of the OECD Model in their treaties,[45]

bilateral notification or consultation process for cases in which the competent authority to [46]

Countries that are members of the Inclusive Framework and thus need to comply with the minimum standard should implement such a notification or consultation process if they are not willing to allow their residents to present a MAP case (other than a case

determined with reference to the notification to the taxpayer of the last of the relevant actions or decisions taken by either treaty state. The example provided by the Commentary is where the state of source levies tax not in accordance with the treaty but the state of residence initially provides relief of double taxation through the exemption or credit method. If the state of residence subsequently notifies the taxpayer that the relief is denied with the result that the taxpayer suffers double taxation, the time period should be considered to begin with the notification of the denial of relief.

54. Many countries consider that MAP requests should be initiated as soon as it appears likely that an issue will result in taxation contrary to the relevant treaty. Since paragraph 1 of Article 25 authorizes the making of a MAP request even before taxation has actually materialized (provided that such taxation is probable), taxpayers are entitled to make such early requests.[54] The early consideration of a MAP case may facilitate the identification of a pragmatic solution before the tax administration and the taxpayer have devoted significant resources to the case.

55. On the other hand, some countries may be concerned about devoting resources to a MAP case until the alleged taxation not in accordance with the treaty has materialized. Their competent authorities may also have difficulties evaluating a case before the audit function has completed its review of the facts and its analysis. While the fact that a competent authority

not to impose unreasonable compliance requirements on the taxpayer, which could discourage the use of the MAP.

58. In order to facilitate access to the MAP, the MAP guidance that a country should publish[56] should include

60. The following is an example of a fictitious MAP request that would follow these suggestions and would satisfy the requirements of most countries that have published guidance on what a MAP request should include.

EXAMPLE OF A MAP REQUEST

1 November 06

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

Subject: **Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion***

Company XCO Inc., Tax Identification number: STA-123.456.789C

XCO. Employees of XCO were therefore present in State B during a total period of 125 days during the taxation year 01.

4. After the completion of the contract and before the dredgers were shipped back to State A, XCO leased one of the dredgers to company XCOB, a subsidiary of XCO which is a resident of State B, for a period of two months (1 June 01 to 31 July 01).

5. Company XCOB was incorporated on 15 April 01. On 15 May 01, it concluded separate dredging contracts with company ZCO, the owner and operator of other canals situated in State B, for the dredging of some of these canals. Company XCOB began the performance of t

COMPETENT AUTHORITY ISSUES

The Taxpayer considers the following are issues to be considered for relief by the competent authority of State A, or to be resolved by mutual agreement with the competent authority of State B:

1. Whether XCO has a permanent establishment in State B in tax year 01 arising from its activities therein, and in particular, whether the mere rental of a dredger to company XCOB should be taken into account in determining the existence of a potential permanent establishment for XCO.

2. If XCO is determined to have a permanent establishment in State B, the amount of profits attributable to such a permanent establishment and the amounts of taxes that should have been withheld at source by XCO on wages and interest borne by the alleged permanent establishment.

3. If XCO is determined to have a permanent establishment in State B in tax year 01, the amount of foreign tax credit available in State A for the tax paid to State B to which XCO is entitled under Article 23B of the Treaty.

period or periods aggregating more than 183 days in any 12-month period, this only applies if the services are furnished “through employees or other personnel engaged by the enterprise for such purpose”. XCO’s employees were only present in State B between 10 January and 10 May 01, a period that falls short of the required 183 days. Even if one assumes that the rental of the dredger during the June-July period could constitute a service (a view with which we disagree), such “service” could not be considered to have been furnished in State B through employees or other personnel.

9. The “similar activity” argument is equally flawed. The rental of the dredger was not connected in any way with the activities performed in State B by XCO’s employees. During our discussion with thots -XzÅy@1y7ŒDŽ:1r€ÁP1yžfFBX15URïPADDXvBøY$NJ70cŃrPADDXvB

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5.4.2.6 Can access to MAP be denied in certain cases?

67. While competent authorities may provide rules and procedures concerning the format and contents of a MAP request and the manner in which the request should be filed, a taxpayer cannot be prevented from making a MAP request if its case meets the requirements of paragraph 1 of Article 25. The following paragraphs illustrate this principle in relation to three situations in which access to MAP may have been questioned in the past.

Cases involving the application of anti-abuse provisions

68. The issue has sometimes arisen whether a MAP request could be made concerning the application of anti-

does not prevent in any way a taxpayer from making a MAP request because it considers that the conditions of the paragraph were not met and treaty benefits should therefore have been granted. Another example is that of paragraph 3 of Article 9 of the UN Model, which applies where there has been a fin
with respect to fraud, gross negligence or will
the benefits of the corresponding adjustment provisions of paragraph 2 of Article 9 and not to prevent access to the MAP, for instance where the taxpayer considers that the provisions of paragraph 3 have been incorrectly applied.

Domestic audit settlements

73. In many countries, the tax administration is allowed to negotiate with a taxpayer for the

represents the result of a negotiation process, some tax administrations may wish to restrict access to further recourses, including the mutual agreement procedure, concerning issues that are addressed in that settlement.

74. Since an audit settlement reached in one treaty country does not bind the other treaty country, denying access to the MAP in the case of an audit settlement could result in unrelieved double taxation. For that reason, when concluding audit settlements under their domestic law, tax administrations should not require taxpayers to renounce the right to make a MAP request.[67] This is expressly provided for in the minimum standard on BEPS Action 14, which requires countries that
that audit settlements between tax authorities and taxpayers do [68]

75. For that purpose, however, it is important to distinguish an audit settlement, which is an agreement reached between the taxpayer and the part of the tax administration in charge of

with an associated enterprise or of a transfer between a permanent establishment and another part of the same enterprise.

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obviously result in double taxation to the extent that it would increase the profits taxable in one treaty country without a corresponding adjustment to the profits of the associated enterprise or the other part of the enterprise that have been taxed in the other treaty country.

78. In order to ensure that competent authorities are allowed to resolve the double taxation that could arise in such a case of good-faith taxpayer-

achieved by allowing the taxpayer to decide which of the MAP or the domestic recourse is pursued first and by putting the other process on hold (through the mechanisms and to the extent allowed by domestic law[70]) pending the conclusion of the process that the taxpayer chose to pursue first. This is an area, however, where country practice varies and competent authorities are encouraged to follow the best practice, identified in the final report on BEPS Action 14,[71] of providing in their published MAP guidance[72] information on how taxpayers can coordinate the MAP process with any available domestic law remedies.

82. If a country were to allow MAP access only after a taxpayer is precluded from initiating domestic law recourses (e.g. by requiring that the taxpayer waive its right to initiate such remedies or by insisting that the MAP request be made only after the end of the period of time for initiating these remedies), the taxpayer would run the risk of losing the right to initiate domestic recourses while being unable to get a MAP solution to its case because the competent authorities cannot reach an agreement. Allowing a taxpayer to initiate both proceedings in parallel subject to choosing which process will first be actively pursued avoids this issue. In practice, taxpayers will typically prefer to pursue the MAP first and suspend domestic litigation.[73] As explained below, this is due to the fact that the vast majority of countries consider that, once a judicial decision has been rendered in a case by a domestic court, the competent authority of the country is precluded from reaching a different solution through the MAP.

83. Allowing the MAP and domestic recourses to be initiated in parallel while requiring one of the two processes to be actively pursued before the other may, however, give rise to the following issues.

84. Where the MAP is pursued first, most competent authorities would not want to reach a mutual agreement that the two countries would be required to implement while the taxpayer would resume its domestic recourses with the hope of getting a better outcome in one of the two countries. As explained in paragraph 157 below and as recommended in the Commentary,[74] most countries avoid this situation by requiring that the formal conclusion of a mutual agreement

85. In some cases, however, the taxpayer who is asked to accept a proposed mutual agreement and to terminate domestic judicial recourses may wish to defer its decision until the court delivers its decision. This issue is discussed in paragraph 161 below.

86. Where domestic law recourses are actively pursued before the MAP, the main issue that may arise is that once a final court decision is rendered, the competent authorities may consider that they do not have the legal authority, through the MAP, to deviate from the final decision of a domestic court (a question that is ultimately a matter of domestic law).[75] If this is the case, the competent authority of the state in which the decision was rendered will consider itself bound by the final decision rendered by the domestic court and will be unable to reach a different conclusion through the MAP. In such circumstances, the only additional relief that

circumstances are substantially the same across the events and years concerned and that this can be verified, it will be efficient to address the recurring issue through a single MAP case covering all the relevant taxation years or similar events. This will avoid substantially similar MAP requests based on the same facts as well as the resulting waste of resources and risk of inconsistent solutions.

89. This is recognized in the final report on BEPS Action 14. According to one of the best practices included in that report,[77] countries should put in place procedures to allow MAP requests for the resolution of recurring issues where the relevant facts and circumstances are the same (subject to verification though audit). As noted in the report, however, this would only be possible with respect to each event or taxation year for which a MAP request may still be made within the three-year time period provided by paragraph 1 of Article 25.

5.4.2.9 Can taxes be collected once a MAP request has been filed?

90. Country practice varies as regards the collection of the taxes that are the object of a MAP request. Some countries seek explicit provisions in their tax treaties that oblige both competent authorities to suspend the collection of such taxes.[78] Other countries allow for suspension or deferral of the collection of such taxes either as a general administrative practice or as a negotiated arrangement with their treaty partners. Yet other countries do not provide for the suspension of the collection of taxes pending the MAP.

91. The Commentary indicates that while Article 25 does not address the question of whether MAP may be denied if the tax in dispute has not been paid, there are various reasons that support the practice of suspending the collection of tax during the MAP.[79] First, suspending or deferring collection furthers the general goal of making MAP more accessible to taxpayers. Even where the competent authorities eliminate double taxation through the MAP, unless collection is also suspended during the negotiation process, the taxpayer may lose the time

pre-MAP tax payment is ultimately reimbursed as a result of a mutual agreement, the taxpayer may face a significant temporary cash flow burden because of the obligation to make that initial payment.

92. Second, countries favoring the suspension or deferral of the taxes that are the object of a MAP believe that doing so incentivizes the competent authorities to negotiate and reach agreements in MAP without delay. That is, if a competent authority has secured the collection of the tax, it may be hesitant to make reasonable efforts to conclude a MAP with the other competent authority.

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77 Best practice 5 (see Annex).

78 Paragraph 9 of the Commentary on Article 25 of the UN Model quotes paragraph 48 of the Commentary on Article 25 of the OECD Model which suggests the following additional sentence that countries may

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79 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraphs 46 to 48 of the Commentary on Article 25 of the OECD Model.

93. On the other hand, some countries prefer to nevertheless collect or allow for only partial deferral of the taxes that are the object of a MAP in order to avoid any tax collection risks.

94. One of the best practices included in the final report on Action 14 is that countries should take appropriate measures to provide for a suspension of collection procedures during the period a MAP case is pending and that, at a minimum, such a suspension of collection should be available under the same conditions applicable to a person pursuing a domestic administrative or judicial remedy.[80] As recognized in the Commentary, however, the suspension of collection of tax may require legislative changes in a number of countries.[81]

95. Given the economic importance of this issue for taxpayers, countries should make public to both taxpayers and their treaty partners their position with regard to the suspension or deferral of collection of taxes that are the object of a MAP.

96. A similar issue arises with respect to the payment of interest and penalties associated with the tax that is subject to a MAP. This issue is discussed in the Commentary, which recommends that, as is the case for the payment of the tax itself, the requirements concerning the payment of interest and penalties should not be more onerous in the case of request for MAP than they are in the case of a domestic recourse.[82]

5.4.2.10 Withdrawal of a MAP request

97. While Article 25 does not expressly deal with the withdrawal of a MAP request, a taxpayer who made such a request certainly has the right to withdraw the request at any time before the procedure is completed. In fact, the MAP statistics of the Inclusive Framework on BEPS[83] show that in 2017, around 5% of the MAP cases completed in that year were closed as a result of the request being withdrawn by the taxpayer. There are different reasons for which a taxpayer may want to withdraw a request previously made. In some cases, the withdrawal will simply result from the fact that the issue that was the subject of the request was resolved through domestic administrative or judicial remedies.

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another request dealing with the same issue if it is still unresolved, provided that the presentation of the new request is made before the applicable time limit and that the competent authorities, either at the unilateral or bilateral phase of the procedure, have not already reached a proposed conclusion that would have effectively closed the case.

80 Best practice 6 (see Annex).

81 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 48 of the Commentary on Article 25 of the OECD Model. That paragraph also includes a suggested additional sentence that countries may add to paragraph 2 of Article 25 to expressly provide for the suspension of assessment and collection procedures.

82 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting paragraph 49.4 of the Commentary on Article 25 of the OECD Model.

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that have joined the Inclusive Framework on BEPS to publish such guidance, recognizes that a competent authority

argument that insufficient information was provided if the taxpayer has provided the

[86] At a minimum, a MAP request should include the information

and

only the absence of such information should constitute a reason for considering that a request is invalid and should not be considered admissible.

101. When determining whether a request is valid, formalism should be avoided. A competent authority should not, for instance, determine that a MAP request is invalid merely because the request does not satisfy some minor procedural requirement.

102. Given the time limit involved for making a valid MAP request, it is crucial that a taxpayer be quickly informed of whether or not its request has been found admissible. In the event that the MAP request is not found admissible, the competent authority should inform the taxpayer of the reason(s) for the rejection. For instance, the competent authority that receives a request that lacks critical information should quickly indicate to the taxpayer what information is missing so that the taxpayer may submit a valid request before the applicable time limit.[87] Also,

EXAMPLE OF NOTIFICATION TO THE TAXPAYER
OF THE RECEIPT OF A MAP REQUEST

10 November 06

John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: **Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* made on behalf of Company XCO Inc.**

Tax Identification number: STA-123.456.789C

Mr. Smith,

I hereby acknowledge receipt of the request for mutual agreement procedure that you made on behalf of company Company XCO Inc. for the taxation year ending 31 December 01.

As a first step, we will determine whether that request appears to have been made in accordance with our published guidance on MAP and with Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion*. As soon as a preliminary decision on this matter has been reached, we will inform you and will begin the consideration of the merits of the case.

Please note that any correspondence or additional information concerning this case should be sent directly to me at the address below.

Sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

105. In many cases, a competent authority will be able to inform the taxpayer that the request has been found admissible at the same time that it will confirm the receipt of the request. Where this is not the case, the notification of the receipt should be quickly followed by a notification of the decision as to whether the request is admissible. The following is an example of such a subsequent notification of the admissibility of the fictitious MAP request included in paragraph 60 above.

EXAMPLE OF NOTIFICATION OF THE ADMISSIBILITY OF A MAP REQUEST

20 December 06

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: **Request for mutual agreement procedure (MAP) under Art. 25(1) of the *Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion* made on behalf of Company XCO Inc.**

Tax Identification number: STA-123.456.789C

Mr. Smith,

As a follow-up to my letter of 10 November 06 in which I acknowledged receipt of the request for mutual agreement procedure made on behalf of company XCO Inc. for the taxation year ending 31 December 01, I wish to inform you that, based on an initial review of the information included in the request and in light of Art. 25(1) of the *Convention between State A and State B for the elimination of double tax*

EXAMPLE OF NOTIFICATION TO THE OTHER COMPETENT AUTHORITY OF THE RECEIPT OF A MAP REQUEST

15 November 06

Ms Dame Ma
Assistant-Commissioner and Competent Authority
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject:

EXAMPLE OF A REQUEST FOR ADDITIONAL INFORMATION

23 January 07

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A

Subject: **Request for additional information**
Company XCO Inc., Tax Identification number: STA-123.456.789C
Taxation year ending 31 December 01

Mr. Smith,

We need to obtain the following additional information in order to determine our position concerning the MAP request referenced above:

1. The changes that would need to be made to the computation of the foreign tax credit claimed by XCO Inc. in its tax return for the taxation year 01 if the tax assessment issued by the tax administration of State B on 1 September 04 were found to be in accordance with the provisions of the Convention between State A and State B for the elimination of double taxation with respect to taxes on income and capital and the prevention of tax avoidance and evasion.

Please send the requested information within 30 days of the date of this letter.

Please note that If we do not receive the requested information within the requested time, the processing of your MAP request will be delayed and that failure to provide the information could lead to the case being closed without further action.

Yours sincerely,

[Signed]

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

EXAMPLE OF A RESPONSE TO A REQUEST FOR ADDITIONAL INFORMATION

15 February 07

Ms Jane Doe, Delegated Competent Authority
State A Taxation Office
123 Mainstreet
Capital City
STATE A

9.

administration of State A is required to provide a foreign tax credit in accordance with treaty provisions corresponding to those of Article 23B of the UN Model.

121. Once a competent authority has determined that it should provide unilateral relief, it should promptly notify the taxpayer of its decision and inform the competent authority of the other state that the MAP case is closed as a result of its decision. The decision then should be implemented promptly. The mechanism that will be used to implement the decision with depend on the nature of the relief, on domestic law and on procedures that might have been developed by the competent authority for that purpose. That implementation will typically require coordination with other parts of the tax administration, such as the service responsible for issuing refunds.

122. The MAP statistics produced for 2017[93] indicate that unilateral relief was provided in 19% of the MAP cases closed during that year. The fact that around 1 out of 5 MAP cases results in unilateral relief shows that competent authorities are often able to resolve MAP cases without the need to initiate the bilateral stage of the MAP.

123. In many cases, however, a competent authority will want to discuss the case with the

not levied in accordance with the treaty provisions or because it simply wants to obtain additional information or confirmation concerning the facts or analysis included in the MAP request. In these cases, the competent authority will initiate the bilateral stage of the MAP.

5.4.4 The bilateral stage of the consideration of the MAP case

5.4.4.1 Initiation of substantive discussions with the other competent authority

124. If the competent authority that received the MAP request concludes that the objection included in the request appears to be justified but that it is not able to solve the case unilaterally, it must initiate the bilateral stage of the MAP by engaging with the competent authority of the other treaty state with the objective of jointly arriving at a satisfactory solution of the case. This will typically be done by inviting the other competent authority to provide a position paper or by offering to do so (see the example below).

125. As noted in the Commentary,[94] once the bilateral stage of the MAP process is under way, the competent authorities need to agree on how they will communicate for the purpose of resolving the case. This will naturally depend on the nature of the case but will also depend on whether there is only one or a number of MAP cases between the two countries involved. Different methods of communication may be used for that purpose,[95] including written correspondence, informal consultations through telecommunication, meetings between

93 Paragraph 7 and note 2 above.

94 Paragraph 36 of the Commentary on Article 25 of the UN Model.

95 Paragraph 37 of the Commentary on Article 25 of the UN Model.

of a joint commission for a complicated case or a series of cases.[96] Competent authorities should remain flexible and consider every method of communication.

126. In some circumstances, competent authorities of countries that have to deal with a large number of MAP cases will want to record in the form of a memorandum of understanding or similar document the bilateral procedures they have developed for the conduct of the bilateral stage of the MAP. This guidance may be broadly applicable (for example, establishing general objectives or timelines for all MAP cases) or concern a specific sub-set of MAP cases (for example, clarifying documentation requirements for transfer pricing cases). Such arrangements could help promote a consistent approach to MAP cases and advance the MAP process, especially where they free the competent authorities to focus on substantive (rather than procedural) issues.

127. An important initial step in the bilateral discussions of a MAP case is ensuring that both competent authorities are working from the same set of facts and have a common understanding of those facts. The competent authority that initiates the bilateral stage should ensure that the other competent authority has received all the information submitted by the taxpayer with the MAP request or afterwards even if that information will have been submitted by the taxpayer directly to both competent authorities (see paragraphs 50 and 118 above).

128. The following illustrates how the competent authority that received the MAP request could initiate the bilateral stage of the MAP by writing to the competent authority of the other state in the case of the fictitious MAP request included in paragraph 60 above.

We have found that request admissible and our preliminary assessment of the case suggests that Company XCO's claim that it did not have a permanent establishment in State B in the taxation year 01 would seem to be justified.

133. The key point of reference for purposes of the preparation of a position paper should be the provisions of the tax treaty itself. The competent authority should also take account of any guidance promulgated under the treaty, such as a memorandum of understanding, exchange of notes or previous mutual agreement dealing with the meaning of a treaty term or the application of the treaty in specific circumstances. Where a MAP case relates to treaty provisions that are based on those of the UN or OECD models, the Commentary of these models will also constitute relevant guidance. Similarly, the guidance found in the United Nations *Practical Manual on Transfer Pricing for Developing Countries 2017* and in the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*[97] will be relevant when dealing with transfer pricing issues.

134. When the MAP request deals with a tax measure, such as an adjustment or assessment, that originated from auditors or officials of the country of the competent authority that prepares the position paper, these auditors or officials may be consulted during the preparation of that paper.

135. The following is an example of a position paper based on the fictitious MAP request in paragraph 60 above.

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Model). Having the right to tax the payment of SBP 2,000,000 (subject of its tax not exceeding SBP 200,000), State B exercised that right with respect to taxation year 01 by taxing XCO under the provisions of its domestic tax law related to permanent establishments. In doing so, it did not apply Articles 5 or 7 of the Treaty, contrary to what the MAP request alleges. It simply used the permanent establishment rules of its domestic law, rather than a more typical withholding tax mechanism, when exercising the taxing rights granted by Article 12A.

15. On the basis of the preceding analysis, we would therefore respond as follows to each of the issues raised in the MAP request:

   a. *Whether XCO had a permanent establishment in State B in tax year 01*: our answer to that question is no under the definition of permanent establishment found in the Treaty but yes under the definition of permanent establishment found in State B domestic law, which is only applicable for purposes of the domestic law application of the taxing right granted by Article 12A of the Treaty.

   b. *If XCO is determined to have a permanent establishment in State B, the amount of profits attributable to such a permanent establishment*: this question does not arise under the Treaty since there is no permanent establishment for the purposes of the Treaty. Under the domestic law of State B, the profits attributable to the permanent establishment are SBP 1,445,000 (no deduction may be claimed for the wages, insurance, interest and administrative expenses shown in the calculation of profits

136. The competent authority that receives the position paper should send a reasoned reply to the initial position paper. Ideally, this reply would include the following:

- An indication of whether a view, resolution, or proposed relief presented in the initial position paper can be accepted.

- An indication of the areas or issues where the competent authorities are in agreement or disagreement.
- If relevant, a request for any required additional information or clarification.
- If relevant, other or additional information considered relevant to the case but not presented in the initial position paper.
- In case of disagreement with the solution proposed in the initial position paper, any alternative reasoned proposals for resolution of the case.

137. The following is an example of a response to the preceding position paper based on the fictitious MAP request in paragraph 60 above.

EXAMPLE OF RESPONSE TO THE POSITION PAPER

7 June 07

Mr. Rob Inson, Senior Analyst
State B MAP Program Unit
Ministry of Finance
Room 777, 8th Floor
111 Alienstreet
Largetown
STATE B

Subject: Response to your position paper

part of your position paper that suggests that the wages, insurance, interest and administrative expenses shown in the calculation of profits included in the MAP request would not be deductible.

3. *If XCO is determined to have a permanent establishment in State B, the amount that should have been withheld at source by XCO on wages and interest borne by the alleged permanent establishment*

I am pleased to note your conclusion that in the absence of a permanent establishment under the Treaty, Company XCO did not have withholding tax obligations in State B with respect to the wages and interest paid in 01. We take note of your agreement to reduce the tax owed by XCO by the amount of SBP 400,000 representing withholding taxes on wages and interest.

4. *If XCO is determined to have a permanent establishment in State B in tax year 01, the amount of foreign tax credit available in State A for the tax paid to State B to which XCO is entitled under Article 23B of the Treaty*

As indicated above, I am prepared to recognize that XCO has a corporate tax liability of SBP 200,000 in State B for taxation year 01. Upon payment of that amount, Company XCO will be entitled to a foreign tax credit for its taxation year 01 with respect to the amount of that foreign tax. The amount of the credit will, however, be limited to the amount of tax paid in State A by XCO on the profits

138. There may be cases in which such a detailed response to the initial position paper will not be necessary, e.g. if face-to-face meetings are imminent or the receiving competent authority simply informs the competent authority that produced the position paper that it completely agrees with the views and solution put forward in the position paper.

139. Either competent authority may request additional information or clarification as the MAP discussions develop, either from each other or from the taxpayer. Such requests should be made, and responded to, as soon as practicable, given that delays in receiving additional information or clarification may delay the substantive consideration (and thus the resolution) of a MAP case. More generally, the competent authorities should endeavor to exchange all relevant information well in advance of any meetings that may be agreed to. 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.

While there is no time limit for the conclusion of the bilateral phase of the MAP,[98] competent authorities should strive to resolve cases in a timely manner and keep the taxpayer informed of the status of their request on an on-going basis. Time will be saved, for instance, if competent authorities use a common language in all communications that do not legally require the use of an official language. It will also be helpful 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 regular updates should keep both competent authorities focused on the details of the case and its overall progress, and should thereby facilitate its timely resolution. Also, where a competent authority encounters delays in the preparation or review of a position paper, it should inform its counterpart of the reasons for the delay and provide a projected timeframe for completion.

5.4.4.3 Treatment of interest and penalties associated with the taxes at issue in a MAP case

141. Article 25 does not directly address the treatment of any interest and penalties that are associated with the taxes at issue in a MAP. As indicated in the Commentary on Article 2 (Taxes covered), most countries do not consider that Article 2 of the UN and OECD models, which determines which are the taxes covered by the treaty, applies to interest and administrative penalties associated to taxes that are themselves covered by that Article. The

accordance with a mutual agreement under Article 25, interest and administrative penalties accessory to such taxation should be withdrawn or reduced to the extent that they are directly [99]

98 Some treaties, however, provide for the mandatory arbitration of unresolved issues after a certain period of time: see paragraph 5 of Article 25 Alternative B of the UN Model and the corresponding provisions of the OECD Model, which are discussed in Chapter 7. It should also be noted that the countries that

olve MAP cases within an

99 Paragraph 4 of the Commentary on Article 2 of the UN Model, quoting paragraph 4 of the Commentary on Article 2 of the OECD Model. A similar statement is included in paragraph 9 of the Commentary on

5.4.5.1 Proposed mutual agreement

153. When the competent authorities reach a tentative agreement in a MAP case, they should document the details of that proposed agreement in writing. Their correspondence should describe the extent to which each state will provide relief, the method of relief, when and for which period the relief will be provided as well as any other relevant details.

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would conclude a mutual agreement that would be binding on the tax administrations of the treaty states but where the taxpayer would resume or initiate judicial proceedings in order to obtain a different result in one of these states, the Commentary goes on to recommend that the conclusion of a mutual agreement be subject to the taxpayer acceptance and to the termination and relinquishment of any available domestic law recourse, such as continuing previously-suspended court proceedings on the same matters as those dealt with through the MAP,[108] even though Article 25 does not expressly require such acceptance.

158. As a general rule, a taxpayer will not be permitted to accept only parts of the proposed agreement (such as the decisions tentatively reached with respect to certain issues or certain taxable periods) unless both competent authorities agree to such a partial acceptance. Since the proposed agreement may represent a series of compromises and concessions, the competent authorities may find it unacceptable, especially in complex cases, to separate the proposed agreement into different parts and to accept only some parts of the overall negotiated solution.

The competent authorities may, however, wish to consider any alternative proposed solution that the taxpayer could formulate at this stage. This could be particularly helpful where the taxpayer identifies unforeseen consequences that the proposed agreement could have. In such cases, the competent authorities will be able to modify the proposed agreement before it is finalized.

160. A taxpayer presented with the terms of a proposed agreement could obviously decide to reject it. The experience of countries that have substantial experience with the MAP suggests, however, that in practice it is very rare for a taxpayer to do so.

161. A taxpayer may also wish to defer acceptance of the proposed mutual agreement until the conclusion of ongoing judicial proceedings in one of the treaty states dealing with the same issues. While the Commentary on the UN and OECD models[109] indicates that there would no grounds for rejecting a request for such a deferred acceptance, as an efficiency and administrative matter, the practice of some competent authorities is to require that the taxpayer express his acceptance or rejection of the MAP resolution within a specified number of days.[110]

162. Where the taxpayer definitively rejects the proposed agreement, the competent authorities may consider that the MAP has reached its conclusion. In that case, the competent authority to which the MAP request was presented should formally notify the taxpayer that the MAP case has been closed. In that case, it is open to the taxpayer to resume or initiate any

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EXAMPLE OF RESPONSE TO CLOSING LETTER FROM STATE A

7 July 07

Ms Jane Doe, Delegated Competent Authority
MAP Program Unit
State A Taxation Office
123 Mainstreet
Capital City
STATE A

Subject: **Closing of MAP case**
MAP request to State A by Company XCO Inc.
Tax Identification number: STA-123.456.789C
MAP case reference: STBMAP06-12345LT

Dear Ms Doe,

This is in response to your letter of 4 July 07 informing us that the MAP case referred to above has been closed with the following agreement, duly accepted by Company XCO, which was reached between the competent authorities of our two countries and which fully eliminates any double taxation

b. Start Date: 22 November 06
c. Milestone 1: 19 April 07
d. End date: 28 June 07 (the date when you informed company XCo Inc. of the outcome of the case
e. Outcome of MAP: Fully resolving taxation not in accordance with tax treaty

often depend on specific unilateral procedures that were developed by the competent authority for this purpose taking into account the division of responsibilities and functions within the tax administration.

170. The actions needed to implement a mutual agreement will, of course, depend on the nature of the relief to be provided to the taxpayer. In certain cases, the implementation of the agreement may require nothing more than a refund of tax by one of the treaty states. Where, for example, a MAP case concerns the proper rate of withholding tax applied to a dividend payment made by a company resident of State A to a resident of State B, the mutual agreement may provide 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 State A-State B tax treaty. Relief would therefore 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.

174. Paragraph 44 of the Commentary on Article 25 of the UN Model provides the following additional examples of the procedures that may be used to provide different types of reliefs that may be needed to implement a mutual agreement dealing with transfer pricing issues:

i) The first country may consider deferring a tax payment under the adjustment or even waiving the payment if, for example, payment or reimbursement of an expense charge by the associated enterprise is prohibited at the time because of currency or other restrictions imposed by the second country.

ii) The first country may consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. Thus, if income is imputed and taxed to a parent corporation because of service to a related foreign subsidiary, the related subsidiary may be allowed, as far as the parent country is concerned, to establish on its books an account payable in favor of the parent, and the parent will not be subject to a second tax in its country on the establishment or payment of the amount receivable. Similarly, such payment should not be considered a dividend by the country of the subsidiary.

iii) The second country may consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. This may, for example, involve recognition of the payment made as a deductible item, even though prior to the adjustment there was no legal obligation to pay such amount. This is really an aspect of the correlative adjustment.

175. Since the last sentence of paragraph 2 of Article 25 of both the UN and OECD models provides that the implementation of a mutual agreement is not subject to any time limits in the domestic law of the treaty states (for instance a time limit beyond which the tax administration could not make any tax adjustment with respect to a given tax year), the competent authority may need to coordinate with those officials of the tax administration in charge of applying domestic time limits, such as statutes of limitation, that would otherwise prevent the adjustment of tax liabilities for previous tax years.

176. While some countries consider that the time limit for implementation of mutual agreements should be linked to domestic law time limits and have therefore, in their treaties, omitted the second sentence of paragraph 2 or expressly provided a time limit for the implementation of a mutual agreement,[114] it should be noted that the application of domestic

5.4.8

186. The case of an enterprise of a third state that has permanent establishments in both of the treaty states is the most-often cited example of double taxation not addressed by the provisions of a treaty that may be dealt with under the second sentence of paragraph 3. The following example illustrates such a case:

Example X

Company T, a resident of State T, has a permanent establishment situated in State A where it manufactures spare parts for appliances. Company T also has a permanent establishment situated in State B from which it sells these spare parts to consumers.

Spare parts are regularly shipped from the permanent establishment situated in State A to the permanent establishment situated in State B. For the purposes of determining the profits attributable to both permanent establishments, Company T treats such transfers as sales.

Following a tax audit of the activities carried on through the permanent establishment situated in State A, the tax administration of State A has increased by 30 000 the profits attributable

5.5 How should the competent authority perform its MAP functions?

5.5.1 Organization of the MAP function

194. Tax treaties typically assign different roles to the competent authority of a state: the provisions of the UN Model provide that, apart from dealing with MAP, the competent authority is responsible for notifying the other state of significant changes made to the domestic tax law (paragraph 4 of Article 2), for the exchange of information (Article 26), for the assistance in the collection of taxes (Article 27) and for granting discretionary treaty benefits in certain circumstances (paragraphs 6 and 8 (*c*) of Article 29). Some tax treaties add other responsibilities to that list. With crucial developments in the area of exchange of tax information,[125] the addition to many treaties of provisions on assistance in collection of taxes[126] and the increased number of MAP cases,[127] the importance of these different roles has increased significantly over the last decades.

195. As already noted,[128] countries are free to choose who is formally designated as competent

202. In addition to skilled personnel, the competent authority should be provided with adequate

expenses related to face-to-face meetings with other competent authorities (such as travel and accommodation expenses) may need to be incurred, although developing countries with few MAP cases may prefer to use telecommunication or, if a face-to-face meeting is necessary, may prefer to host it in order to avoid such costs. Also, while the competent authorities of developing countries may not have financial resources to pay for the translation of documents (for example, translations of contracts or foreign tax law), the taxpayer will often provide such translations.

203. It is crucial that information on how to contact the competent authority of a state be readily available. The availability of such information is needed in order to ensure that taxpayers are able to make a request under paragraph 1 of Article 25. These details should be included in the information that a country makes available on its MAP process.[135] Also, the BEPS Action 14 minimum standard requires countries that have joined the Inclusive [136]

This means that the contact details of the competent authorities of a large number of countries may be accessed from a single web site.[137]

It is also crucial that the officials in charge of dealing with MAP cases implement a reliable system of internal recordkeeping that facilitates access to information concerning MAP requests received, MAP cases currently under discussion and previously completed MAP cases while ensuring the confidentiality of the relevant information. Such recordkeeping should, among other things, allo 594t f29(A66 0 ho/F2 nu1)4(l)-0 ho/F2 342.0.34256he inprog6(e)4(nt)481(ot)42.

211. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue considerations or an overall balance of results. Moreover, competent authorities should strive to be consistent in their approach to an issue, regardless of the state that benefits from that approach in a particular case and regardless of the position taken by colleagues who have produced the disputed tax adjustment. Notwithstanding disagreements on facts or principles, competent authorities should seek and be able to compromise in order to reach a mutual agreement.

5.6 Possible improvements to the MAP

5.6.1 Framework agreements

212. The functioning of the MAP may be improved through the conclusion, under paragraph

framework agreements may address procedural or administrative issues related to the MAP (as is envisaged by the second sentence of paragraph 4 of the UN Model) or may deal with specific substantive treaty issues. For instance, where several MAP cases raising similar issues are pending, such framework agreements may allow for a quicker resolution of these cases by addressing the underlying substantive treaty issues. This approach was found to be particularly useful in the case of the India-United States tax treaty: within one year of its conclusion, a framework agreement signed in January 2015 facilitated the resolution of more than 100 cases in the information technology (software development and information technology enabled services) sector.[140]

213. The usefulness of such agreements will depend on the specific situation of the countries involved. They may be particularly helpful where there are a large number of pending MAP cases between two countries. They may also be helpful, however, in order to facilitate future discussions between countries that have not previously discussed MAP cases or that had difficulties in addressing a few cases. The agreements would then address administrative issues and procedural issues such as the conduct of regular meetings and the implementation of specific deadlines for the processing of the cases.

5.6.2 Use of technology

214. Since technology is ever evolving, the question arises of whether new technologies could be used to improve how competent authorities deal with the MAP and, in particular, how technology can complement and make more effective the way competent authorities interact during the MAP process. For developing and least developed countries, resource constraints still pose a great challenge in meeting the requirements for a successful implementation of the MAP. This section briefly describes some technologies that may be particularly relevant to the performance of competent authority functions, especially for procedural matters. New technology can facilitate the contacts and sharing of information between the taxpayers and

140 https://www.incometaxindia.gov.in/Lists/Press%20Releases/Attachments/439/PressRelease_28-1-16.pdf

pre-programmed information concerning the type of documents necessary and a separate upload of each document type would be possible.

ANNEX

2. Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes

2.1 Countries should publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers. Countries should ensure that their MAP guidance is clear and easily accessible to the public.

2.2 Countries should publish their country MAP profiles on a shared public platform (pursuant to an agreed template to be developed in co-ordination with the FTA MAP Forum).

2.3

be interpreted as consultation as to how to resolve the case).

3.2

documentation that a taxpayer is required to submit with a request for MAP assistance. Countries should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information.

3.3 Countries should include in their tax treaties the second sentence of paragraph 2 of

the second sentence of paragraph 2 of Article 25 in their tax treaties should be willing to accept alternative treaty provisions that limit the time during which a Contracting State 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.

Best practices

1. Countries should ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner

1. Countries should include paragraph 2 of Article 9 in their tax treaties.

2. Countries should ensure that administrative processes promote the prevention and timely resolution of treaty-related disputes

2. Countries should have appropriate procedures in place to publish agreements reached

resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Conve

such agreements provide guidance that would be useful to prevent future disputes and where the competent authorities agree that such publication is consistent with principles of sound tax administration.

3.

involved in international matters through the delivery of the Forum on Tax

4. Countries should implement bilateral APA programmes.

5. Countries should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests for the multiyear resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit. Such procedures would remain subject to the requirements of paragraph 1 of Article 25: a request to resolve an issue with respect to a particular taxable year would only be allowed where the case has been presented within three years of the first notification of the action resulting in taxation not in accordance with the Convention with respect to that taxable year.

3. Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access the mutual agreement procedure

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

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

8. Countries should include in their published MAP guidance an explanation of the relationship between the MAP and domestic law administrative and judicial remedies. Such public guidance should address, in particular, whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a