Chapter 5

Mutual Agreement Procedure

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5.5

Chapter 5

The Mutual Agreement Procedure

5.1 Introduction

This chapter deals with the mutual agreement procedure ("MAP"), which is the dispute 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

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

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 timely resolution of treaty-related disputes; and
>
> Ensure that taxpayers can access the MAP when eligible.[8]

The large number of countries that have joined the Inclusive Framework on BEPS[9] have committed to implement that minimum standard. For that reason, the elements of that minimum standard and the best practices included in the final report on Action 14 are included in the Annex and are referred to in this chapter where relevant. It is important to remember, however, that countries that have not joined the Inclusive Framework on BEPS are not required to apply that minimum standard.

The fact that compliance with the minimum standard is reviewed and monitored by other countries is intended to ensure a greater international scrutiny of how each country that is a member of the Inclusive Framework on BEPS applies the MAP.[10] Two elements of the minimum standard will also contribute to that result. First, the minimum standard requires all countries that are members of the Inclusive Framework on BEPS to provide annual statistics on their MAP cases,[11] including their total MAP caseload, the average time required to complete MAP cases, the general outcomes of the MAP cases that were closed, the other jurisdictions involved in the cases and the proportion of the cases that dealt with issues regarding the allocation of profits between associated enterprises or the attribution of profits to a permanent establishment as opposed to other issues.[12] Second, all these countries must become members of the FTA MAP Forum,[13] a subsidiary body of the Forum on Tax Administration[14] which meets regularly to deliberate on matters affecting the MAP and to monitor the implementation of the minimum standard. [Paragraphs 5 to 7 may need to be shortened or revised based on the contents of Chapter 1, once that chapter has been completed]

Since many of the countries that have joined the Inclusive Framework on BEPS are developing countries and these countries will be subject to a peer review of their MAP

(such as the meaning of a term that is not defined in the treaty). These cases are usually related to issues that affect more than one person; they may involve issues of treaty interpretation that concern a category of taxpayers or issues relating to how provisions of the treaty will be applied in practice. This situation is dealt with under the first sentence of paragraph 3 of Article 25.

The third situation is where the tax officials of the two treaty states consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, where a resident of a third state has a permanent establishment in both Contracting States and double taxation arises because both states tax the profits of the two permanent establishments. This third situation is dealt with under the second sentence of paragraph 3 of Article 25.

The guidance included in this chapter deals primarily with cases falling within the first category, which involves requests made to the tax authorities by persons that consider that they have not been taxed in conformity with the treaty.

The tax officials of a treaty state who are responsible for applying the MAP are referred to in treaties as the "competent authority" of that state. The term "competent authority" is defined in paragraph 1 (e) of Article 3 of the UN Model.[17] While countries are free to choose who is designated for that purpose, it is important that the persons or authorities so designated have sufficient authority to effectively negotiate with their counterparts in the other treaty state and to make binding decisions with respect to the cases brought before them. The competent authority will therefore generally be defined as the relevant minister or head of the tax administration and its authorized representatives, which means that senior officials in the tax administration or the ministry of finance (and not the minister or head of the tax administration personally) will perform the role assigned to the competent authority by the treaty.

The UN Model has two versions of Article 25. The only difference between the two alternative versions (alternative A and alternative B) is that alternative B includes an additional paragraph (paragraph 5) which provides for the mandatory arbitration of issues that the competent authorities are unable to resolve within three years. The arbitration process envisaged by that paragraph is discussed in chapter 7. [reference to be verified once chapter 7 has been completed]

The following provides a brief description of paragraphs 1 to 4 of both alternative versions of Article 25. Other parts of this chapter provide a detailed analysis of the requirements and obligations of each paragraph and provide guidance on their practical application.

Paragraph 1 provides an avenue for taxpayers to ask the competent authority to address potential violations of the provisions of a tax treaty. The requirements of that paragraph are:

17 Paragraph 1 (f) of Article 3 of the OECD Model.

5.3 Typical treaty issues dealt with through the MAP

5.3.1 List of typical MAP issues

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.

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 issues2ayh1 (r)3.14Dr

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% provided by State A's domestic law. After 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 disagrees with State A's view that the application of the dividend-stripping rule is justified notwithstanding the definition of the term "dividends" in the treaty because 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.

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.

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

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.

that were provided to it by company B. Based on its analysis of what an independent enterprise would have paid for similar service, State A reduces the amount of the deduction claimed by company A with respect to the payment for these services, which has the effect of increasing the taxable profits of company A and, therefore, the tax payable by the company. This is referred to as the "initial" or "primary" adjustment.

The profits on which company B has been taxed by State B, however, include the amount initially charged by that company to company A for the management services. Thus, the additional profits allocated to company A in the initial adjustment made by State A have already been taxed in State B. In order to eliminate such double taxation,[27] paragraph 2 requires State B to reduce the amount of the tax that it charged on those profits (the "corresponding adjustment"). That obligation, however, is dependent on whether or not the initial adjustment made by state A is in conformity with the arm's length standard.

Given tax authorities' increased focus on transfer pricing and the element of uncertainty involved in the application of the arm's length principle,[28] transfer pricing adjustments and the obligation to provide corresponding adjustments under paragraph 2 of Article 9 create an important potential for disputes between taxpayers and tax authorities and between tax authorities themselves. As recognized by the last sentence of paragraph 2, which provides that the "competent authorities of the Contracting States shall if necessary consult each other" for the purposes of determining a corresponding adjustment, the MAP plays a critical role in allowing for the resolution of such disputes in a way that ensures that the same profits are not subject to tax in the two treaty states. The BEPS Action 14 minimum standard, which requires countries that have joined the Inclusive Framework on BEPS to "provide access to MAP in transfer pricing cases and implement the resulting mutual agreements (e.g. by making appropriate adjustments to the tax assessed)",[29] acknowledges the importance of allowing such disputes to be dealt with through the MAP:

… the failure to grant MAP access with respect to a treaty partner's transfer pr5.9S5Sag-1 (2(A)-2

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

As noted above, access to MAP in transfer pricing cases can thus be allowed even under treaties that do not include the corresponding adjustment provisions of paragraph 2 of Article 9. This is expressly recognized in the Commentary on Article 25 of the UN Model, which provides that "…the mere fact that Contracting States inserted in the convention the text of Article 9, as limited to the text of paragraph 1 – which usually only confirms broadly similar rules existing in domestic laws – indicates that the intention was to have economic double taxation covered by the Convention."[31] In order to avoid any doubt regarding the issue, the final report on Action 14 recommends that, as a best practice,[32] countries should include paragraph 2 of Article 9 in their tax treaties. Similarly, access to MAP should also be allowed where a corresponding adjustment is denied on the basis of paragraph 3 of Article 9 of the UN Model (according to which there is no obligation to make a corresponding adjustment in certain cases involving fraud, gross negligence or willful default) because a taxpayer may reasonably consider that the conditions for the application of that paragraph have not been met. Another issue that may be addressed through the mutual agreement procedure is the application of "secondary adjustments", a question related to the consequences of a primary transfer pricing adjustment which is discussed in the Commentary on Article 9 of the UN and OECD models.[33]

Many countries offer taxpayers the possibility of minimizing the risk of transfer pricing disputes through the conclusion of advance pricing arrangements (APAs). The use of APAs, their advantages and the issues that they may raise are discussed in Chapter 2. As explained in

OECD models and, in particular, of the provisions of paragraph 2 of that Article.[36] That paragraph contains the basic rule for determining the profits attributable to a permanent establishment and provides that these profits are the profits that the permanent establishment "would have made if, instead of dealing with the rest of the enterprise, it had been dealing with an entirely separate enterprise under conditions and at prices prevailing in the ordinary market".[37] This means that the profits attributable to a permanent establishment should be determined on the basis of the separate entity and arm's length principles.

The application of the arm's length principle to the determination of profits attributable to a permanent establishment raises issues that are very similar to those arising in the application of that principle in the context of Article 9, which deals with associated enterprises. The application of the separate entity principle, however, raises a number of additional difficulties[38] since it requires that some transfers of capital, goods and services between a permanent establishment and its head office and between a permanent establishment and other permanent establishments of the same enterprise be treated as if they were transactions between separate enterprises for purpnterp40TCID 28 eo-6 (o)-2 (t)-o (e)4 (e)4te2 pe tv2(ne)4 (1)3 (p)-10 (r.)]TJ0.2

to ensure that the profits attributable to a permanent establishment are determined in a consistent way by both treaty states.

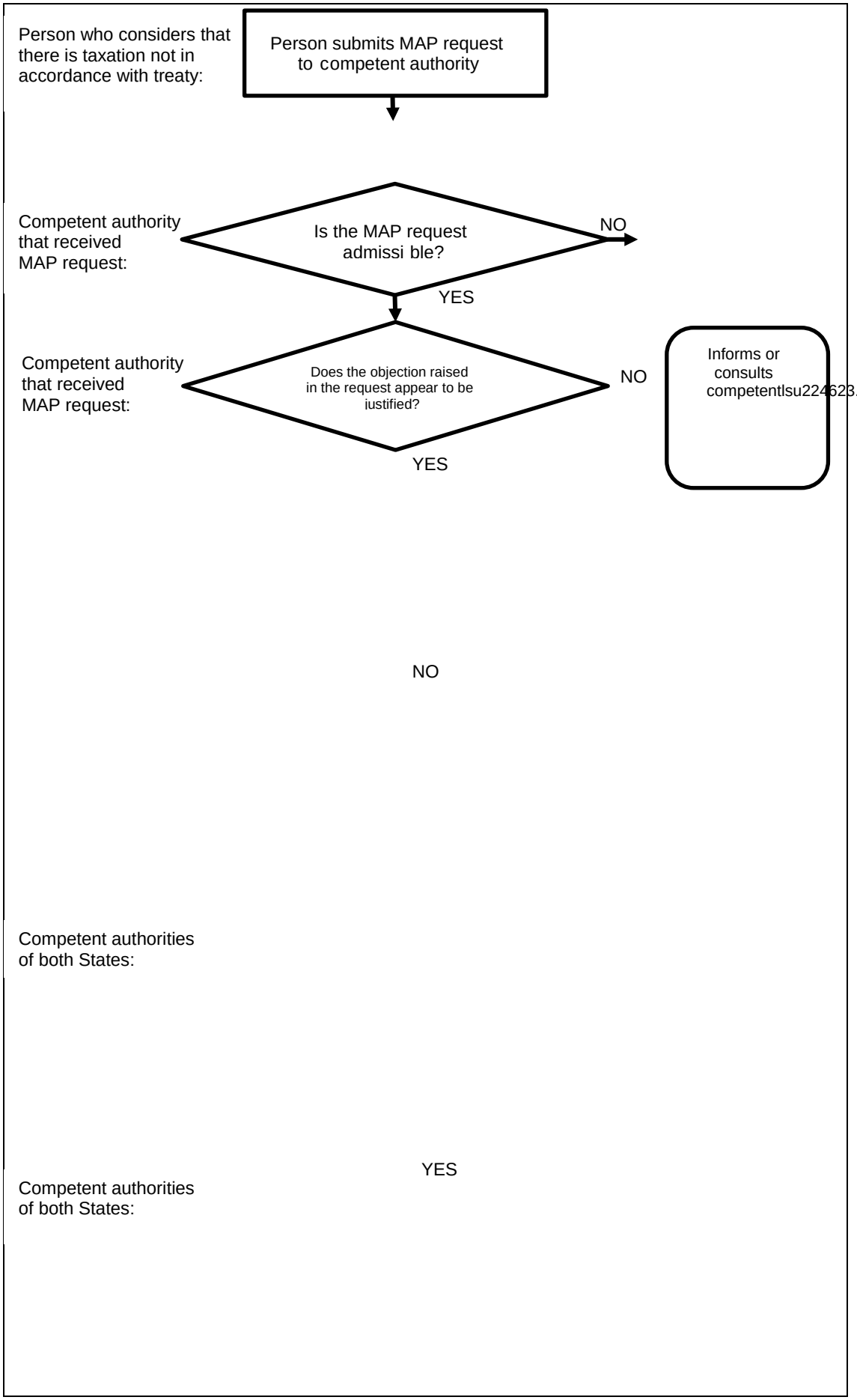
5.4 How does the MAP work?

5.4.1

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

2. Unilateral stage of the consideration of the MAP case (see section 5.4.3 below)

After the request has been determined to be admissible, the competent authority that received it should proceed to examine/MCID 1 >>BDC /TT2 1f5-9.1 P.1 (c)-2stuttt due4-10.1 (w)-7 ())]TJ-0.66c 0 Tw 2.904 18 >


Person who considers that there is taxation not in accordance with treaty:
Person submits MAP request to competent authority
Competent authority that received MAP request:
Is the MAP request admissi ble?
NO
YES
Competent authority that received MAP request:
Does the objection raised in the request appear to be iustified?
NO
Informs or consults competentlsu224623.2324 cm 0 0 m 0.196 -7.32
YES
NO
Competent authorities of both States:
YES
Competent authorities of both States:

5.4.2 The MAP request

The requirements for a MAP request to be validly made under paragraph 1 of Article 25, which are described in paragraph 17 above, relate to which person may make the request, to which competent authority it should be presented and when the request should be made. Each of these requirements, as well as what a MAP request should include, is discussed below.

As will be seen in the following paragraphs, countries sometimes apply these requirements differently and may have different views concerning what a MAP request should include. Given these differences and because most taxpayers are unfamiliar with the MAP, the tax administration of each country that has entered into a tax treaty should provide general guidance to taxpayers on the use of the MAP. The importance of doing so is recognized in paragraph 42 of the Commentary on Article 25 of the UN Model as well as in the BEPS Action 14 minimum standard, which requires countries that have joined the Inclusive Framework on BEPS to "publish rules, guidelines and procedures to access and use the MAP and take appropriate measures to make such information available to taxpayers".[39] The web site that includes the MAP profiles of these countries[40] allows easy access to the MAP information already published by some of these countries and developing countries may wish to refer to these examples in developing their own MAP guidance.

5.4.2.1 Who is allowed to make a MAP request?

Any person, as defined in Article 3 of the UN and OECD Model, may make a request for MAP under paragraph 1 of Article 25 as long as that person considers that the action of either or both treaty states have resulted, or will result, in that person being taxed in a way that would not be in accordance with the provisions of the treaty. There is no requirement of a minimum amount of taxes in dispute for making a MAP request.

The person making a MAP request could be a natural person (i.e. an individual) or a legal person such as a company. In most cases, the person will also need to be a resident of one of the treaty states since, under Article 1 (Persons covered), the application of most treaty provisions is restricted to residents of a treaty state. Paragraph 1 of Article 25 of the UN Model, however, recognizes that a person that is a national of one of the treaty states, without necessarily being a resident of either state, may also make a MAP request based on the provisions of paragraph 1 of Asions ofsouo9 sa 7-4 (m)-16 (ak)-4 (e)-12 (ha)4 2 (l)-2 (l)prta

which the MAP case was presented does not consider the taxpayer's objection to be justified".[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 related to paragraph 1 of Article 24) to the competent authority of the other state.

A taxpayer who files a MAP request with a competent authority of a treaty state may

resulting in taxation" should therefore be interpreted as referring to the notification of the individual action concerning the taxation of a specific person, as evidenced, for instance, by a notice of assessment or an official demand for the payment of tax, as opposed to when an administrative decision that concerns a large number of taxpayers, such as a change of administrative practice concerning how to apply a certain treaty provisions, has been taken. Since the practical application of this principle may raise difficulties, the Commentary illustrates its application in a number of cases,[52] including:

> Where tax is levied by the deduction of a withholding tax at source, the three-year period should generally begin to run upon the payment of the relevant income from

In order to facilitate access to the MAP, the MAP guidance that a country should publish[56] should include information on how a MAP request should be presented, to whom it should be presented and what information it should include. The importance of doing so was

SUGGESTED CONTENTS OF A MAP REQUEST

(i) Identity of the taxpayer(s) covered in the MAP request – the identity of the taxpayer(s) covered in a MAP request must be sufficiently specific to allow the competent authority to identify and contact the taxpayer(s) involved. The information provided should include the name, address, taxpayer identification number or birth date, contact details and the relationship between the taxpayers covered in the MAP request (where applicable).

(ii) The basis for the request – the MAP request should state the specific tax treaty including the provision(s) of the specific article(s) which the taxpayer considers is not being correctly applied by either one or both Contracting Party (and to indicate which Party and the contact details of the relevant person(s) in that Party).

(iii) Facts of the case – the MAP request should contain all the relevant facts of the case including any documentation to support these facts, the taxation years or period involved and the amounts involved (in both the local currency and foreign currency).

(iv) Analysis of the issue(s) requested to be resolved via MAP – the taxpayer should provide an analysis of the issue(s) involved, including its interpretation of the application of the specific treaty provision(s), to support its basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both Contracting Party. The taxpayer should support its analysis with relevant documentation (for example, documentation required under transfer pricing

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 in come and capital and the prevention of tax avoidance and evasion

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

For State A taxation year ending 31 December 01

Dear Ms Doe,

XCO respectfully requests the assistance of the competent authority of State A for the purposes of eliminating taxation not 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 (the "Treaty").

This request follows a notice of tax assessment, dated 1 September 04, that was issued to XCO by the tax administration of State B. That notice required XCO to pay SBP 835,000 (representing SBP 200,000 of corporate tax, SBP 400,00 for taxes that should have been withheld on wages and interest expenses attributable to the PE, SBP 100,000 of penalties and SBP 135,000 of interest) by 1 December 04. It related to XCO's activities in State B during State B's taxable year that ended 31 December 01. A copy of the tax assessment issued by State B is enclosed as Annex [X].

The tax assessment was based on the view that XCO had a permanent establishment in State B in B's tax year 01. The assessment required the payment of State B's corporate tax at the rate of 25% on profits of SBP 840,000 which, according to the tax administration of State B, were attributable to the alleged permanent establishment. Tax of SBP 10,000 previously withheld on a rental payment made to XCO was deducted from the amount of that tax. The assessment also required the payment of SBP 400,000 on account of the tax that allegedly should have been withheld on the salaries of the employees of XCO that were attributable to the alleged permanent establishment and on the interest paid by XCO on borrowed money used for the alleged permanent establishment.

In accordance with Art. 25(1) of the treaty, XCO hereby requests that the competent authority of State A ensures that State A provides relief for the tax assessed by State B for the tax year 01. If State A is not itself able to arrive at a satisfactory solution, XCO requests that the competent authority of State A endeavor to resolve the case by mutual agreement with the competent authority of State B, with a view to the avoidance of taxation which is not in accordance with the Treaty.

IDENTIFICATION

1. Taxpayer's name and address: Company XCO Inc., 456 Anystreet, Capital City, State A.

2. Assessing / adjusting tax administration: The tax administration that issued the assessment / adjustment that triggered this request is the tax administration of State B. The office that issued the assessment is District 9 Tax Office, 444 Alienstreet, Largetown, State B.

3. Relevant treaty article(s): The relevant articles of the Treaty are Articles 5 (Permanent Establishment), 7 (Business Profits), 12 (Royalties), 23B (Credit Method), and 25 (Mutual Agreement Procedure). The provisions of these articles are identical in all respects to those of the UN Model.

4. Taxation year(s) involved: This request relates to the taxation 01 (same taxation year in State A and B).

5. Prior MAP requests: XCO has not made a prior MAP request on this issue or any other relevant issue.

6. Whether the MAP request was also submitted to State B: Yes. An identical copy of this request has been sent by fax on 1 November 06 to Ms Dame Ma, Assistant-Commissioner and Competent Authority, Ministry of Finance, room 777, 8th Floor, 111 Alienstreet, Largetown, State B, fax +99 8765 4321.

7. Relevant time limits

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.

4. Whether the amount of penalties and interest included in the tax assessment issued by the tax administration of State B was justified.

ANALYSIS

Issue 1: Determination e onsr62 oCIh0 .023 Tw 9 96 -0 0(e)-12.2 ei96 10pf2Ih0 Tw k on 1:abln e in6-1.1 (o)-6.3 92 (a

		SBP	SAD
Revenues from rental of the dredger to XCOB		40,000	20,000
Expenses			
Insurance	1,000		
Interest	1,500		
General administrative expenses	2,000		
Depreciation of the dredger for 2 months	5,500		
	10,000	(10,000)	(5,000)

77,000 which would need to be reimbursed by State A to XCO together with interest calculated from the date on which XCO filed its tax return for 01.

Issue 4: Payment of penalties and interest

17. The tax administration of State B has imposed penalties of SBP 60,000 for failure to file a tax return for 01 and SBP 40 000 for failure to withhold tax It has also assessed SBP 135,000 of interest on the amount of unpaid corporate tax and withholding tax. If our position that XCO did not have a permanent establishment in State B in tax year 01 should prevail, it seems clear that both the penalties and the interest should be eliminated together with the tax.

REQUEST FOR RELIEF

In light of the above, XCO requests that the competent authority of State A determine whether it considers that the tax assessment dated 1 September 04 issued by the tax administration of State B resulted in taxation in accordance with the provisions of the Treaty.

If the competent authority of State A considers that the assessment resulted in taxation in accordance with the provisions of the Treaty, XCO requests that, in accordance with Article 23B of the Treaty, State A provide a credit to XCO against its tax liability for the tax year 01 for the additional tax imposed by State B through the assessment and that it refund to XCO the overpaid tax together with interest.

If the competent authority of State A considers that the assessment is not in accordance with the provisions of the Treaty, XCO requests that the competent authority of State A contact the competent Authority of State B under Art. 25(2) of the Treaty to negotiate and reach a mutual agreement that eliminates taxation not in accordance with the provisions of the Treaty together with the interest and penalties that were added to the alleged unpaid tax.

On behalf of Company XCO, I certify that all the information and documentation included in this MAP request and annexes is accurate to the best of my knowledge. XCO Inc. will assist you in the resolution of this MAP case by providing in a timely manner any relevant additional information or documentation that you may require.

For further correspondence and additional information concerning this request, please contact

Mr. John Smith
ABC LLP
HighTower, floor 13
009 Second street
Capital City
STATE A
(email at john.smith@network.com; tel: 01 23 45 67 89)

ABC LLP has been mandated by Company XCO Inc. (“XCO”) to present this MAP request on its behalf. The letter authorizing ABC LLP to do so is included in Annex [X].

We appreciate your assistance in this matter.

Sincerely,

[Signed]

Ms Am Elia, director and Chief Financial Officer of XCO Inc
Company XCO Inc.
456 Anystreet,
Capital City
STATE A

[The relevant annexes would be attached to this request]

5.4.2.6 Can access to MAP be denied in certain cases?

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 final ruling that one of the associated enterp1 (t)-2 (ha)-1 (p1 (t)-s)-5 (h)-4 e(e)-10

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

Such a change made in good faith in order to reflect the arm's length principle could 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.

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-initiated adjustment, taxpayers should be

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.

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, taxpayersjEMC l4 (c)4 (tr)-7 (n-1 (i) (pa)-6 (r0 (y)20 (i)-2 (i)-2 (e)4 (que)4 -5 (w)-

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.

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 the competent authority of that state could pursue for the taxpayer would be to seek relief from the competent authority of the other state. Assume, for example, that following litigation initiated by a State A company, a court of State A confirms a transfer pricing adjustment made by the State A tax administration which had the effect of increasing the profits derived by that company from a non-arm's length transaction with an associated enterprise of State B. Following that court decision, the competent authority of State A will consider that the only thing that it can do through the MAP is to seek to have State B agree to make a corresponding adjustment that would reflect a corresponding reduction of the profits of the enterprise of State B with an eventual refund of the tax paid in State B. The tax administration of State B will not, of course, be bound by the court decision rendered in State A. Any relief provided through the

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.

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?

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.

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 4 (t)-2 (i)-2 (on o)-10 (f)3 (t)-2 (a)4 (x)6652.36 -1..12 TingMC BT/Span ‹)TjM13vsuppor tre4

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.

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]

5.4.2.11Role of the competent authority that receives the request

The competent authority which receives a request made pursuant to paragraph 1 of Article 25 will normally perform two initial tasks:

Determine whether the request is valid and should therefore be considered admissible. While a competent authority may reject a request that does not meet the requirements of the paragraph as interpreted in its own published rules, guidelines and procedures, it does not have the discretion to reject a request that was validly made.[84] Although a valid MAP request must be considered admissible by the competent authority to which

that have joined the Inclusive Framework on BEPS to publish such guidance, recognizes that a competent authority should not prevent access to MAP "based on the argument that insufficient information was provided if the taxpayer has provided the required information."[86] At a minimum, a MAP request should include the information requested in a country's own published rules, guidelines and procedures on MAP and only the absence of such information should constitute a reason for considering that a request is invalid and should not be considered admissible.

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.

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 indicat0 (e)4 t32lac tax-4-8 (p)2 (q)2 w6 (e).002 Tc 0.12

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

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.

to initiate the second stage of the MAP. In such a case, the notification of the request that the competent authority would send to the competent authority of the other state could also serve to indicate that the unilateral stage of the MAP has been completed and to initiate the bilateral stage of the MAP.2 (pe)4 (t)-2 (e) thh ped 5.4.3/MCI12 291.48 /MCI12 191.48 7a-10d [(T th) (P)-8 TD[(u

Implement a process through which a competent authority that considers that a MAP

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 note that If we do not receive the requested information within the requested time, the [redacted]
to the case being closed wiha tle

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

Subject: Request for additional information
Company XCO Inc., Tax Identification number: STA -123.456.789C

Dear Ms Doe,

This letter is in response to your letter dated 23 January 07 in which you informed us that the MAP

9.	Foreign credit: lower of State B tax (lines 5 + 6) or State A tax on State B income (line 7 or 8)		3,000	80,000
10.	Tax payable in State A (line 4 – line 9)		1,597,000	1,520,000
11.	Overpayment for 01		77,000	

If you need any additional information concerning the above or concerning our MAP request, please do not hesitate to contact me.

Sincerely,

[Signed]

John Smith
ABC LLP

On behalf of Company XCO Inc.

Circumstances may arise where a taxpayer is involved in the preparation of information that is provided separately to both competent authorities. For example, where a MAP request relates to a transaction between a taxpayer and a related company resident of the other trecc2 refBT0 g-0.00

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.

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.

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.

In many cases, however, a competent authority will want to discuss the case with the competent authority of the other state either because it considers that the other state's tax was 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

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,

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.

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.

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).

Th

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.

I would therefore appreciate receiving your position paper explaining the basis on which your tax

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 will be relevant when dealing with transfer pricing issues.

The information given in this letter is provided under the terms of the Convention between State A

Relevant provisions of the State A -State B treaty

6. The most relevant 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 (the “Treaty”) are Article 12 (Royalties) and Article 12A (Fees for Technical Services). These Articles are similar to Article 12 and 12A of the United Nations Model Double Taxation Convention between Developed and Developing Countries, 2017 version (the UN Model).

7. Paragraph 2 of Article 12 allows taxation of royalties that arise in a Contracting State but if the beneficial owner of the royalties is a resident of the other Contracting State the tax cannot exceed more than 10% of the gross amount of the royalties.

8. Paragraph 2 of Article 12A allows taxation of fees for technical services that arise in a

An indication of the areas or issues where the competent authorities are in agreement or disagreement.

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.

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 providasonstovidly-2 (nf)3 84 (nd (ut)-2 (i)-2

This only applies, however, where the interest/penalties are computed with reference to the amount of the underlying tax liability or some other amount relevant to the determination of tax.

An example provided by the Commentary is where interest and administrative penalties based on the amount of a transfer pricing adjustment are imposed by a country at the time of making that transfer pricing adjustment and that adjustment is subsequently reduced or withdrawn as a result of a mutual agreement. In that case, the interest and penalties should be proportionally reduced.

The Commentary adds that some countries may prefer to amend paragraph 2 of Article 25 to expressly provide that the competent authorities shall endeavor to agree on the application of domestic law provisions related to interest and administrative penalties related to a MAP case.[100] In any event, as recognized by the final report on Action 14, it is a good practice for countries to make sure that their positions regarding the treatment of interest and penalties are publicly known.[101]

Since interest is typically calculated on the basis of the amount of tax charged, it should be relatively straightforward to determine when it is directly connected to the underlying tax liability and should therefore be withdrawn or reduced as a result of a mutual agreement. A different issue may arise where a treaty country has required the immediate payment of an amount of tax that is subject to a MAP and that amount is subsequently reduced or eliminated as a result of a mutual agreement. In that case, that country should pay a reasonable amount of interest on the amount of tax that will be reimbursed to the taxpayer.[102] This will be particularly important if there are differences between the domestic law of the two treaty states on the accrual of interest on tax liabilities and refunds. Assume, for instance, that a MAP results in the confirmation of a tax liability in one country and a corresponding refund of tax in the other country. If the first country has collected the relevant tax prior to the MAP or charges interest on the late payment of that tax but the other country does not pay interest on the corresponding amount of tax refunded to the taxpayer, this will result in a substantial economic burden on the taxpayer.

As noted in the Commentary, countries should try to adopt flexible approaches with respect to the provision of relief for interest in the MAP. Such relief from interest is especially appropriate for the period during which the MAP is ongoing process, given that the amount of time it takes to resolve a case through the MAP is, for the most part, outside the taxpayer's

Article 25 of the UN Model, quoting paragraph 49 of the Commentary on Article 25 of the OECD Model.

100 Last sentence of paragraph 49.1 of the Commentary on Article 25 of the OECD Model, as quoted in paragraph 9 of the Commentary on Article 25 of the UN Model.

101 Best practice 10 (see Annex).

102 Paragraph 9 of the Commentary on Article 25 of the UN Model, quoting the last part of paragraph 48 of the Commentary on Article 25 of the OECD Model.

control. It is recognized, however, that in some cases, changes to the domestic law of a country may be required to permit the competent authority of that country to provide interest relief.[103]

The decision of whether to allow relief in MAP for penalties associated with taxes that

the resolution of a MAP case. Both competent authorities should be encouraged to communicate with the taxpayer.

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. Competent authorities may wish to use their published MAP guidance to make their positions regarding taxpayer involvement in the MAP process known to both taxpayers and other competent authorities.

Even though a taxpayer will usually not be directly involved in MAP discussions, the competent authority to which a MAP request was submitted should regularly communicate with the taxpayer regarding the status of its case and the relevant consultations. Such regular communication will encourage the taxpayer to cooperate when requested(o c)4 -l(ons)-1 (ul)-2 ((r))4 -l(

5.4.5.1 Proposed mutual agreement

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.

In order to avoid possible disagreement as to what was agreed to during the MAP discussions, facilitate the presentation of the proposed agreement to the taxpayer and expedite the implementation of the agreed solution once accepted by the taxpayer, this correspondence should take place as soon as possible after the conclusion of these discussions.

When the solution is tentatively agreed to during a meeting which could involve the discussion of a number of MAP cases, the proposed solution of each case completed during the meeting could be documented through the agreed minutes of the meeting.

5.4.5.2 Taxpayer's notification and acceptance of a proposed agreement

The taxpayer should be promptly notified of the proposed agreement. If two taxpayers are involved (which is often the case in transfer pricing MAP cases), each competent authority will typically notify the taxpayer that is its own resident. In other cases, the notification will be provided by the competent authority that received the MAP request unless agreed otherwise. The manner in which a competent authority will provide this notification may be governed by domestic law or administrative practices. The notification may, for example, take the form of a letter providing a short description of what was tentatively agreed to and/or an oral presentation. The following provides an example of a letter notifying the taxpayer of the proposed agreement reached as regards the fictitious MAP request referred to in paragraph 60 above:

EXAMPLE OF A NOTIFICATION TO TAXPAYER OF THE PROPOSED

My discussions with the competent authority of State B have allowed us to reach the following conclusions and we now consider the case to be settled, subject to your agreement:

Å

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.

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.

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.

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

domestic tax remedies that may still be available concerning the issues that were the subject of the MAP case.

Where the proposed agreement has been accepted by the taxpayer and, as part of that acceptance, domestic legal remedies have been terminated or relinquished, the next step is the formal conclusion of the mutual agreement by the competent authorities. This may involve an exchange of letters between the competent authorities confirming the proposed agreement. Alternatively, the proposed agreement reached between the competent authorities may have been drafted in the form of a conditional agreement subject to the acceptance of the taxpayer, which means that once this condition is met, the mutual agreement is automatically concluded.

The following provides an example of an exchange of letters by the competent authorities (sometimes referred to as "closing letters") concerning the agreement reached as regards the fictitious MAP request referred to in paragraph 60 above:

EXAMPLE OF CLOSING LETTER FROM STATE A TO STATE B

4 July 07

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

Subject: Closing of MAP request made by Company XCO Inc.
Tax Identification number: STA -123.456.789C
Taxation year ending 31 December 0101

(Your MAP case reference: STBMAP06- 12345LT)

Dear Mr. Inson,

As a follow-

- Foreign tax credit in State A: Upon proof of the payment of 200,000 of tax to State B for the taxation year 01, the tax administration of State A will recognize that company XCO is entitled to claim a foreign tax credit in State A for the same taxation year. That credit will correspond to the lower of the amount of SBP 200,000 (expressed in SAD at the rate applicable at the date of the payment to State B) and the amount of tax paid in State A by XCO on the profits associated to the 2,000,000 of revenues received from YCO. The computation of that additional foreign tax credit will be made by the tax administration of State A on the basis of the domestic tax rules of State A.

I propose that this letter and your reply thereto constitute a mutual agreement between the competent authorities of our two States within paragraph 2 of Article 25 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 and be implemented by both States as soon as possible.

I also understand that, in implementing that mutual agreement, the penalty of SBP 60,000 imposed on Company XCO for failure to file a tax return in State B for taxation year 01 will be maintained but the penalty of SBP 40,000 for failure to withhold tax will be withdrawn by the tax administration of State B. The interest of SBP 135,000 included in the assessment of 4 September 04 will be reduced so that interest is only charged on 200,000 of unpaid tax to be calculated by the tax administration of

EXAMPLE OF RESPONSE TO CLOSING LETTER FROM STATE A

7 July 07

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.

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,

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 to67the ad Td( )T 1 Tf0 Tc 0 Tw 1.17

enterprise or a permanent establishment under paragraph 2 of Article 7 or paragraph 1 of Article 9.

5.4.7 Summary and timetable of the different actions involved in a MAP

The table included at the end of this section summarizes the different actions involved in a MAP process that were discussed in the preceding sections. It also provides a tentative timetable showing reasonable deadlines for each of these different actions.

While the deadline for the presentation of a valid MAP request is mandatory (pursuant to paragraph 1 of Article 25), the other deadlines are merely suggestions based on previous MAP cases or on recommendations derived from BEPS Action 14.

In practice, some of the actions included in the following table will be omitted or will be done simultaneously. For instance, a competent authority that receives a MAP request may be able to notify the taxpayer that is has received the request at the same time that it will indicate that the request is valid and that it needs additional information to pursue its examination of the case. A competent authority may also be able to notify the other competent authority of the request at the same time that it will provide a position paper to initiate the bilateral stage of the MAP.

SUMMARY AND SUGGESTEDTIMETABLE FOR THE ACTIONS INVOLVED IN A MAP

BY WHOM?

5.4.8 The process for a MAP under paragraph 3 of Article 25

As already mentioned,[120] paragraph 3 of Article 25 provides for two types of MAP that are different from the taxpayer-initiated MAP under paragraph 1:

> Under the first sentence of the paragraph, the competent authorities seek to resolve by mutual agreement issues relating to interpretation or application of the treaty provisions. Typically, this type of MAP relates to matters of a general nature that concern a category of taxpayers and may be initiated by the competent authorities without a request from a taxpayer. For example, competent authorities may reach such a mutual agreement in order to complete or clarify the definition of a term in the tax treaty or to determine appropriate procedures for the application of specific treaty provisions (e.g. the procedures for confirming a taxpayer's status as a resident of a Contracting State, or the procedures and criteria used to grant treaty benefits to fiscally transparent entities).
>
> Under the second sentence of the paragraph, the competent authorities consult each other for the elimination of double taxation in cases not dealt with under the treaty, for example, where a resident of a third state has a permanent establishment in both treaty states and the double taxation involves the profits of these two permanent establishments.

Where mutual agreements reached under paragraph 3 deal with issues of interpretation or application of a tax treaty that are relevant for all taxpayers or a category of taxpayers, the publication of such agreements, which are not specific to particular cases and should not, therefore, include any taxpayer-specific information, will serve to provide guidance and may prevent potential future disputes. As recognized by the final report on Action 14, it is therefore a good practice for countries to publish such agreements[121] (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

Paragraph 2 of Article 3 provides that a term that is not defined in the treaty "shall, unless the context requires otherwise" have the meaning that it has under the domestic law of the state that applies the treaty. A competent authority wishing to conclude a mutual agreement under Art. 25(3) that would reflect an agreed meaning to be given to a term not defined in a treaty should therefore consider to what e

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 to that permanent establishment after concluding that the arm's length price that an independent manufacturer would have charged for the sale of specific spare parts that were transferred to the other permanent establishment would have been 100 000 rather than 70 000, which is the amount shown as sales in the accounts prepared for the permanent establishment.

Since the profits attributable to the permanent establishment in State B were computed on the basis that the cost of the spare parts transferred to that permanent establishment was 70 000, the adjustment made by the tax administration of State A results in double taxation of 30 000 of profits.

5.4.9 Communication with the other competent authority

The competent authorities have a lot of flexibility as regards the ways in which they may communicate in the context of a MAP under either paragraph 1 or paragraph 3. Paragraph 4 of Article 25 of the UN and OECD models allows them to communicate with each other directly and they can do so by letter, telephone, email, physical meeting or other means of communication; there is therefore no need to use diplomatic channels.

Although the paragraph also indicates that they may communicate "through a joint commission consisting of themselves or representatives", competent authorities that deal with few MAP cases rarely find it necessary to set up such a commission. The Commentary explanations of how such a commission would work and, in particular, the suggestion that each delegation should be chaired by "a high official or judge chosen primarily on account of his special experience" and that the taxpayer would have "the right to make representations in writing or orally, either in person or through a representative"[123] suggests the setting up of a body that is more formal than what is typically found necessary to deal with MAP cases.

Despite the flexibility available as regards the manner in which the competent authorities communicate with each other, it is important to remember that to the extent that a MAP case deals with information that is confidential under domestic law, such information may only be exchanged as authorized by provisions similar to those of Article 26 (Exchange of Information) of the UN and OECD models. Since paragraph 1 of Article 26 authorizes the exchange of information that is "foreseeably relevant for carrying out the provisions" of a tax treaty that includes the MAP article, the competent authorities acting in the context of a MAP can directly exchange confidential information.

It is important to remember, however, that paragraph 2 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 states. Thus, information obtained in the context of a MAP must remain confidential. Officials performing competent authority functions should continually keep in mind this confidentiality requirement, which extends the scope of the confidentiality obligations to which they are subject under their domestic law.

5.5 How should the competent authority perform its MAP functions?

5.5.1 Organization of the MAP function

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

123 Paragraph 11 of the Commentary on Article 25 of the UN Model, quoting paragraphs 60 and 62 of the Commentary on Article 25 of the OECD Model.

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,[124] the addition to many treaties of provisions on assistance in collection of taxes[125] and the increased number of MAP cases,[126] the importance of these different roles has increased significantly over the last decades.

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.

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.[134] Also, the BEPS Action 14 minimum standard requires countries that have joined the Inclusive Framework on BEPS to "publish their country MAP profiles on a shared public platform."[135] This means that the contact details of the competent authorities of a large number of countries may be accessed from a single web site.[136]

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, allow the monitoring of the progress of MAP cases, thereby facilitating compliance with the target deadlines for the various actions involved in a MAP case. They should also facilitate the preparation of the MAP statistics that the BEPS Action 14 minimum standard requires from the countries that have joined the Inclusive Framework on BEPS.[137] Internal records of previous MAP cases facilitate the processing of similar cases and contribute to the consistent interpretation of a treaty where the issues and material facts are the same.

Competent authorities, while often part of the tax administration, need a high degree of independence from the audit and review functions to be effective. Competent authorities have to make decisions on both factual and legal questions in the cases they are dealing with and

Given their limited resources, tax administrations of developing countries may be reluctant to divert resources to the competent authority functions, especially since these functions require skilled personnel and may also require financial resources (e.g. travel expenses). The fact that these countries are typically involved in very few MAP cases,[138] however, suggests that an efficient approach would be to allocate the competent authority function to the officials in charge of treaty negotiations, who are familiar with treaty provisions and with dealing with foreign tax officials. Officials involved in MAP cases will learn and develop specific skills most significantly through actual work on such cases. Having no experience in dispute resolution should not result in rejecting the cases for the lack of such experience.

In order for competent authorities of developing countries to have the ability and power to negotiate with other competent authorities and implement mutual agreements domestically, responsible politicians and high-ranking officials may need to back the MAP, recognizing that positive effects on the revenues will mostly materialize indirectly through a better investment climate, even though it will be difficult to measure these effects.

The proper application of transfer pricing rules and tax treaties by the tax administration is important to a successful MAP. The application of domestic law and tax treaties in a manner consistent with global standards will not only reduce disputes but will also facilitate the work of the competent authority. A MAP case involving a transfer pricing dispute is only as strong as the inputs from the domestic transfer pricing team during the transfer pricing audit or study.

5.5.2 How should a competent authority approach a MAP case?

The competent authority of a treaty state that is involved in a MAP represents that state in matters related to the interpretation or application of the relevant tax treaty.

In broad terms, the role of the competent authority in the MAP is to ensure that a tax treaty is properly applied and to endeavor in good faith to resolve any issues that may arise in the application and interpretation of the treaty provisions.

When addressing a MAP case, the competent authority is to be guided first by the terms of the treaty itself and the relevant provisions of domestic law; it should not be influenced by opinions on whether or not the treaty or the law reflects an appropriate tax policy and whether or not these should be amended.

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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

The functioning of the MAP may be improved through the conclusion, under paragraph 3 of Article 25, of "framework agreements" between the competent authorities. Such 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. Thi

Technology now offers a range of tools that could be used to facilitate the contacts between the parties in a way which would make such exchanges more secure, structured and

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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 matter of administrative policy or practice.

9. Countries' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments – i.e. taxpayer-initiated adjustments permitted under the domestic laws of a treaty partner which allow a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust (i) the price for a transaction between associated enterprises or (ii) the profits attributable to a permanent establishment, with a view to reporting a result that is, in the view of the taxpayer, in accordance with the arm's length principle. For such purposes, a taxpayer-initiated foreign adjustment should be considered bona fide where it reflects the good faith effort of the taxpayer to report correctly the taxable income from a controlled transaction or the profits attributable to a permanent establishment and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the tax laws of the two Contracting States.

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

11. Countries' published MAP guidance should provide guidance on multilateral MAPs and advance pricing arrangements (APAs).