

SINGAPORE
26 – 29 March 2018

OECD-IRAS WORKSHOP ON TAX CERTAINTY

Experts

Mr Anthony J. Ferrise (Manager, US IRS Treaty Assistance and Interpretation Team)

Ms Silvia Lopez (Tax Auditor, International Taxation Office, Spanish Tax Agency (AEAT))

Ms Lou Wai Ling, Principal Tax Specialist (Accredited), International Tax, Inland Revenue
Authority of Singapore

Ms. Sandra Knaepen (OECD, Head of MAP Unit)



Context and Objectives of the event

- To highlight the impact/ importance of tax certainty for businesses and a sustainable global taxation framework
- To highlight the various work streams of the OECD tax certainty agenda and BEPS Action 14 (Making Dispute Resolution Mechanisms More Effective)

Coverage

A detailed agenda is included below. The workshop is divided into three key parts:

- Day 1 will set out the context of this workshop and the importance of ensuring tax certainty for taxpayers. The topics will cover the various initiatives/ practical tools available to create and enhance tax certainty. Particular attention will be given to BEPS Action 14, the Multilateral Convention and its Commentary and the FTA initiatives such as the International Compliance Assurance Programme (ICAP) and Global Awareness Programme. Participants will also share their experience on the design of their tax policies, legislative framework and implementation of initiatives, including the challenges encountered, in providing tax certainty to taxpayers both in the domestic and international setting.
- Day 2 will focus on dispute prevention in an interactive setting. The topics covered will include the implementation of BEPS Action 14 Minimum Standard and best practices to prevent disputes, and the use of advance pricing arrangements and other mechanisms to help reduce the uncertainties for taxpayers. Participants will participate in a group session focused on Advanced Pricing Arrangements.
- Day 3 will focus on the implementation of BEPS Action 14 Minimum Standard and best practices to facilitate dispute resolution and the various dispute resolution mechanisms that are available (such as domestic appeal mechanisms, mutual agreement procedures (MAP) and arbitration). Participants will be invited to participate in a group session focused on the MAP. Participants will also share how their domestic appeal mechanisms/regime interact with the mutual agreement procedure available under their tax treaties.

Target audience

The workshop will be useful for senior tax officials who are (i) involved in the design of tax policies to provide certainty to businesses; (ii) implementing BEPS Action 14 and/or the FTA initiatives relating to tax certainty; or (iii) working in the area of Mutual Agreement Procedures, arbitration, advanced pricing agreements, and other dispute resolution measures. It is an interactive programme where participants are expected to actively participate in the programme.

Schedule

The workshop will be offered in English during the period from 26 to 28 March 2018, with a public conference “Improving Tax Certainty through Dispute Resolution Mechanisms” on 29 March 2018 that is open for delegates’ participation at no additional cost. The agenda for the public conference is appended.



Tax_Certainty_Flyer_
OECDdelegates.pdf

Facilitators

- Ms Sandra Knaepen, OECD MAP Unit (event leader)
- Mr Anthony J. Ferrise (Manager, US IRS Treaty Assistance and Interpretation Team)
- Ms Silvia Lopez (Tax Auditor, International Taxation Office, Spanish Tax Agency (AEAT))
- Ms Lou Wai Ling, Principal Tax Specialist (Accredited), International Tax, Inland Revenue Authority of Singapore

Costs and participation/Practical Arrangements

No fee is charged for attending the workshop. Participants are required to cover their own travel, accommodation, food and incidental costs. The workshop (26-28 March 2018) will be held in Revenue House, Singapore. The public conference (29 March 2018) will be held at Marriott Singapore Tangs Plaza. The organisers will send participants a logistical note closer to the workshop, which includes additional information on hotel accommodation.



AGENDA

MONDAY 26 MARCH – Initiatives and Programmes on Tax Certainty

Time	Topic
9h00 – 9h30	Welcome / Objectives of the course
9h30 – 10h15	Context setting: The OECD tax certainty agenda and its impact on cross-border trade and investment
10h15 – 10h45	Group photo and Coffee break
10h45 – 12h30	The tax certainty agenda I <ul style="list-style-type: none"> ○ BEPS Action 14 Peer Review and Monitoring <ul style="list-style-type: none"> - Action 14 Minimum Standard - Action 14 Best Practices - MAP Profiles - MAP Statistics ○ The Multilateral Convention and its Commentary <ul style="list-style-type: none"> - Part V – Improving dispute resolution - Part VI – Arbitration
12h30 – 13h30	Lunch break
1330h – 15h00	The tax certainty agenda II - OECD FTA initiatives: <ul style="list-style-type: none"> ○ International Compliance Assurance Programme (ICAP) ○ Global awareness training ○ Risk assessment and audits
15h00 – 15h15	Coffee break
15h15 – 16h30	Tour de table: Sharing of experiences on design of tax policy and legislation in the context of providing tax certainty in both domestic and international settings
1700h – 2100h	Social event and dinner: Transport pick-up at Revenue House (Details to be released via an administrative note through email to all participants in due time)

TUESDAY 27 MARCH – Dispute Prevention

Time	Topic
9h00 – 12h30	Dispute Prevention: Advance Pricing Arrangements (APAs): <ul style="list-style-type: none">○ Section F of Chapter IV of the OECD Transfer Pricing Guidelines *A coffee break will be scheduled in this session
12h30 – 13h30	Official lunch
13h30 – 15h00	Group discussion/Breakout: Case study I (APA related)
15h00 – 15h15	Coffee break
15h15 – 17h00	Group discussion/Breakout: Case study I (APA related) (cont.) Dispute Prevention: Implementation of BEPS Action 14 <ul style="list-style-type: none">○ Preventing Disputes - Elements of the Action 14 Minimum Standard & Best Practices

WEDNESDAY 28 MARCH – Dispute Resolution

Time	Topic
9h00 – 10h30	Dispute Resolution: Implementation of BEPS Action 14 <ul style="list-style-type: none"> ○ Availability and Access to MAP - Elements of the Action 14 Minimum Standard & Best Practices ○ Resolution of MAP Cases - Elements of the Action 14 Minimum Standard & Best Practices ○ Implementation of MAP agreements - Elements of the Action 14 Minimum Standard & Best Practices
10h30 – 10h45	Coffee break
10h45 – 12h30	Group discussion/Breakout: Case study II (MAP related)
12h30 – 13h30	Lunch break
13h30 – 15h00	Group discussion/Breakout: Case study II (MAP related) (cont) <p>Dispute Resolution: Arbitration</p> <ul style="list-style-type: none"> ○ Part VI of the Multilateral Convention (Articles 18 through 26) ○ Article 25 of the OECD Model Tax Convention and its Commentary
15h00 – 15h15	Coffee break
15h15– 16h30	Dispute Resolution: Arbitration (cont) <ul style="list-style-type: none"> ○ Part VI of the Multilateral Convention (Articles 18 through 26) ○ Article 25 of the OECD Model Tax Convention and its Commentary <p>Dispute Resolution: Domestic appeal mechanisms/regime</p> <ul style="list-style-type: none"> ○ Interaction between domestic appeal mechanisms and MAP (Article 25 of the OECD Model Tax Convention and its Commentary)
16h30– 17h30	Tour de table: Sharing on legislative and administrative framework governing the interaction between domestic appeal mechanisms/regime and MAP
Note:	The time allocated to each topic, as well as the timing of breaks, may vary.



THE TAX CERTAINTY AGENDA INITIATIVES AND PROGRAMMES ON TAX CERTAINTY

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



CONTEXT SETTING: THE OECD TAX CERTAINTY AGENDA AND ITS IMPACT ON CROSS-BORDER TRADE AND INVESTMENT

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



Tax certainty

[Tax certainty report](#) delivered to G20 Finance Ministers with IMF, March 2017

- *“We welcome the ... work on tax certainty conducted by the OECD and the IMF. We acknowledge the report on Tax Certainty submitted to us and **encourage jurisdictions to consider voluntarily the practical tools for enhanced tax certainty as proposed in that report**, including with respect to **dispute prevention** and **dispute resolution** to be implemented within domestic legal frameworks and international tax treaties.”*
- *“We ask the OECD and the IMF to assess progress in enhancing tax certainty in 2018”*



Chair of the Inclusive Framework has written to all subsidiary bodies

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The business survey

The OECD Business Tax Certainty Survey

- Between 18 October and 16 December 2016
- 724 completed responses
- From firms with global HQ in 62 different jurisdictions
- And regional HQs in 105 different jurisdictions

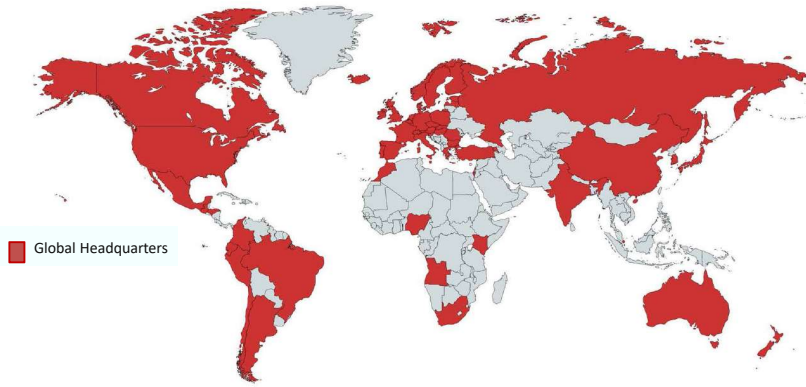
Wide consultation

- Survey was developed on basis of Tax Survey developed by OUCBT and ETPF
- Consultation with business, governments/tax administrations, civil society, academia

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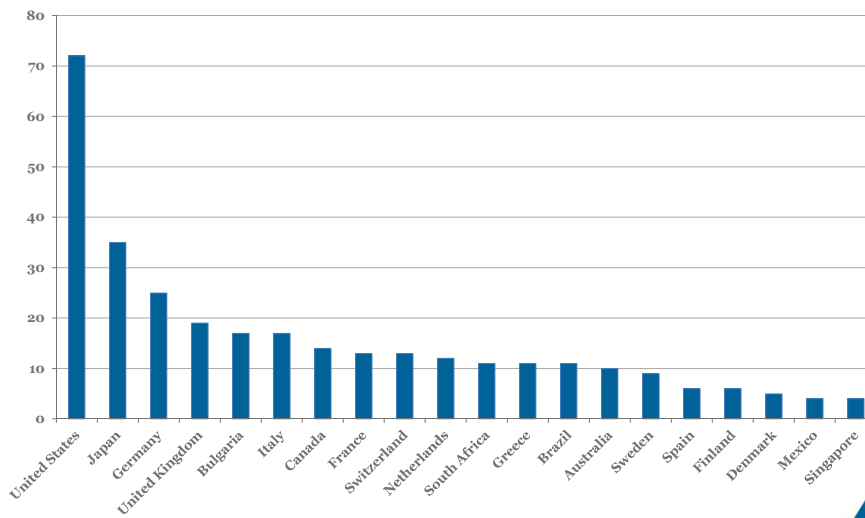
Business survey – global HQs



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Top 20 countries, by HQ of respondents MNEs only



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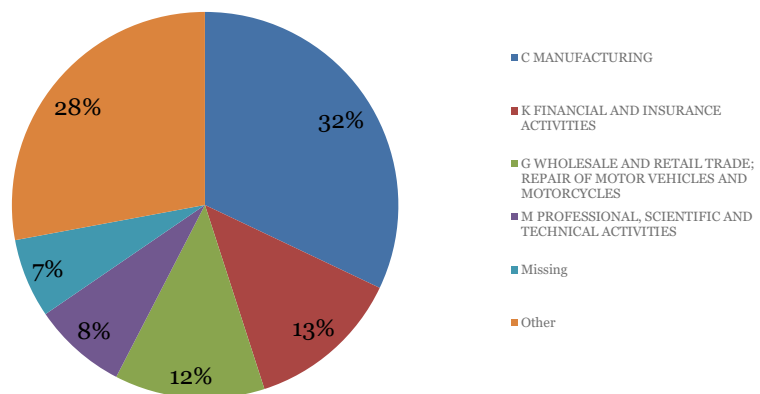
Business survey - regional HQs



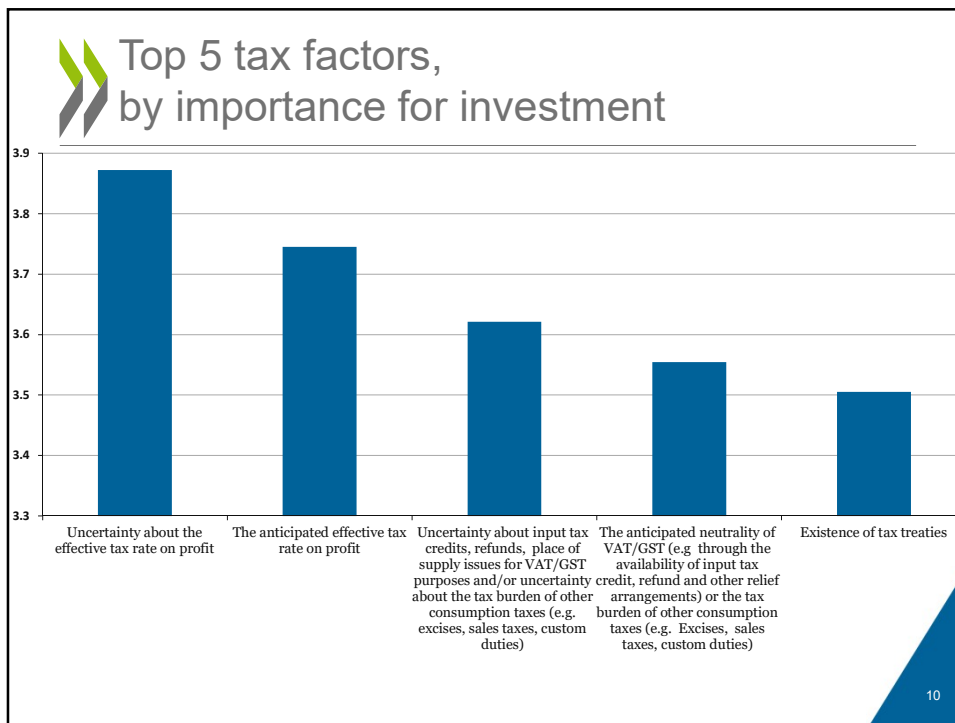
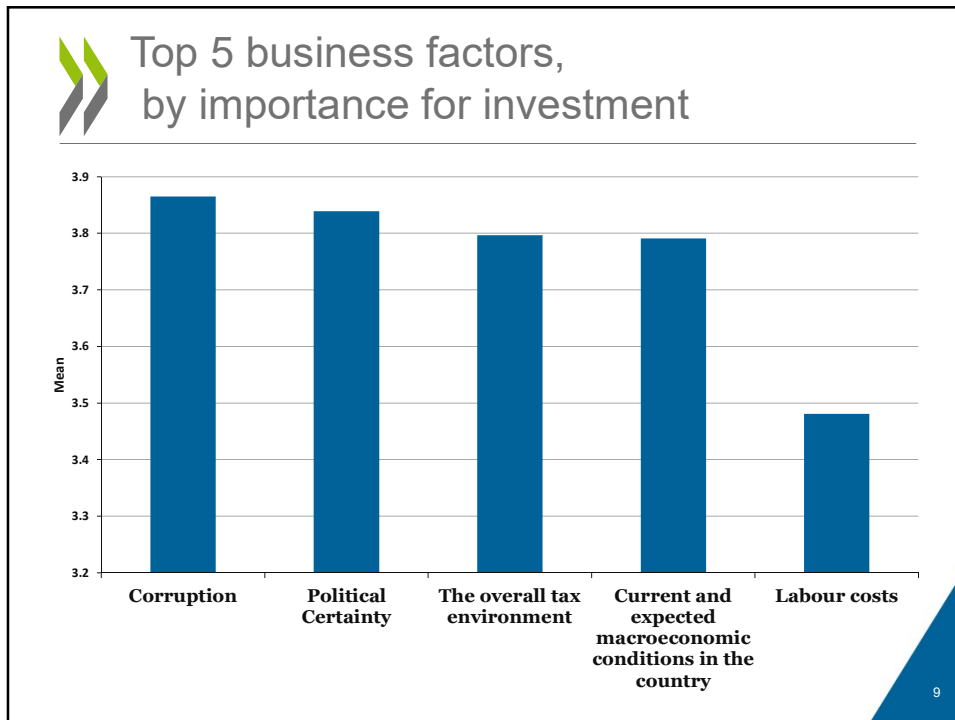
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Respondents by sector

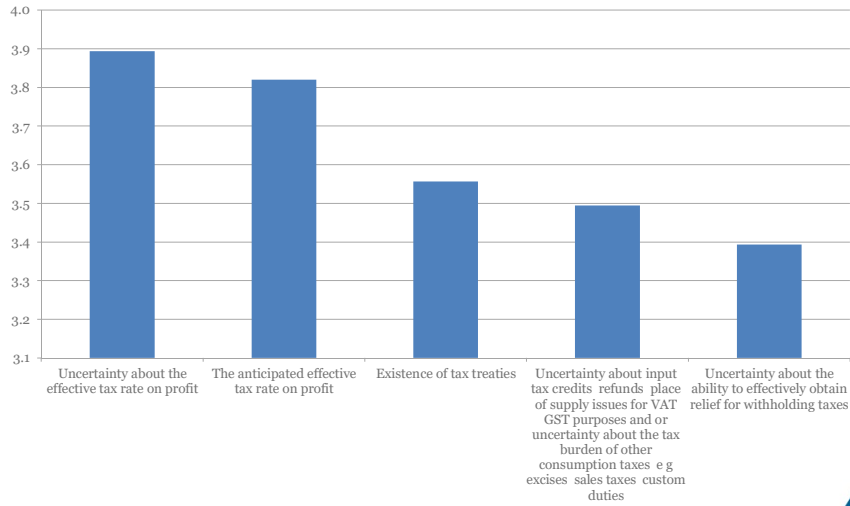


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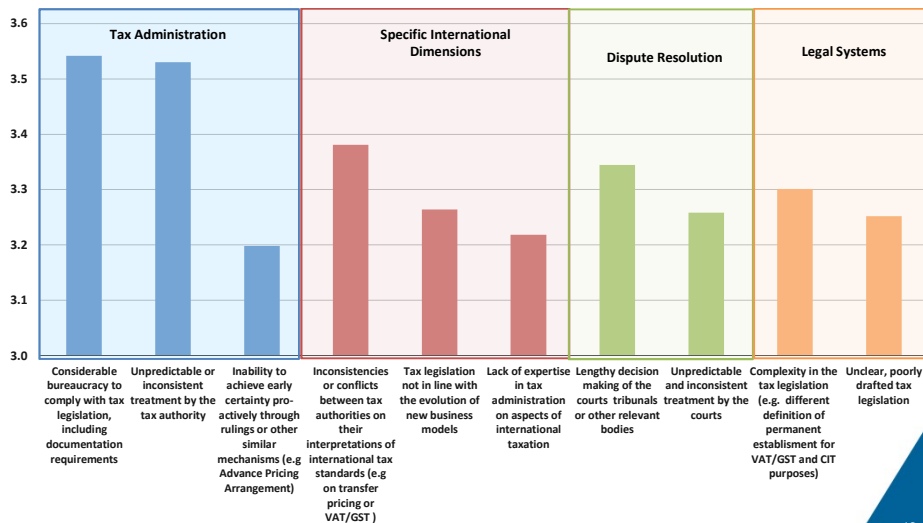




Top 5 tax factors by importance for investment (financial sector only)

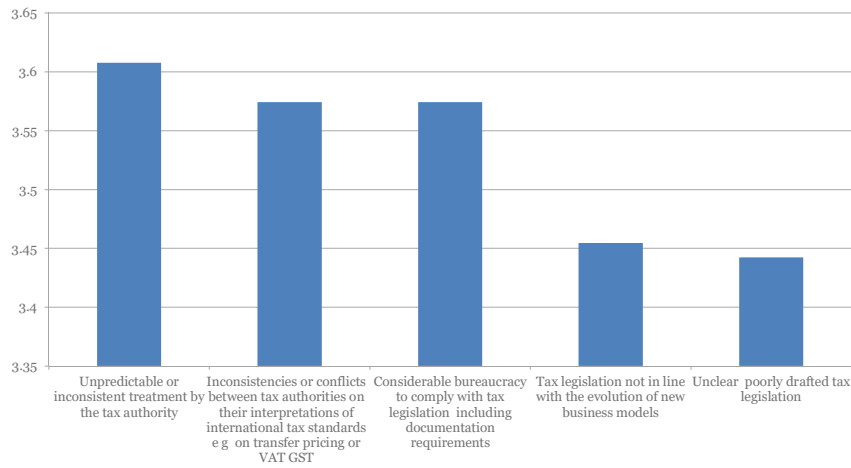


Top 10 sources of tax uncertainty





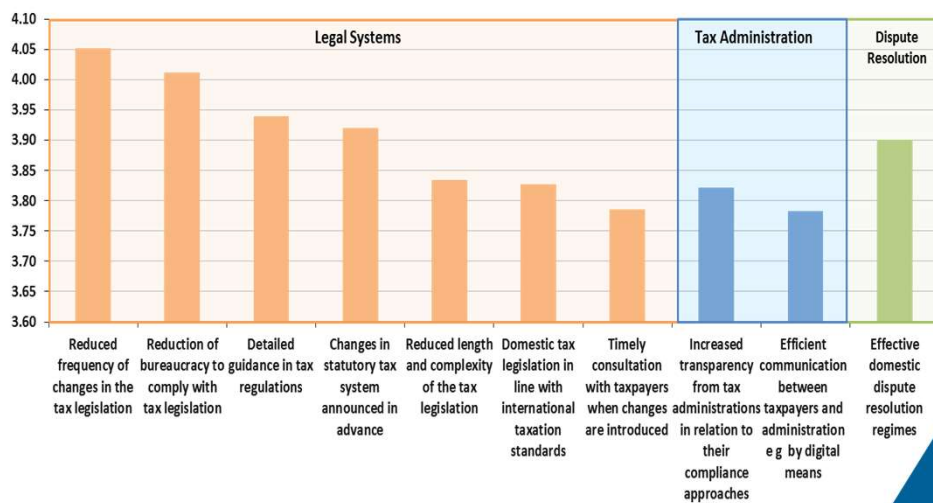
Top 5 sources of tax uncertainty (financial sector only)



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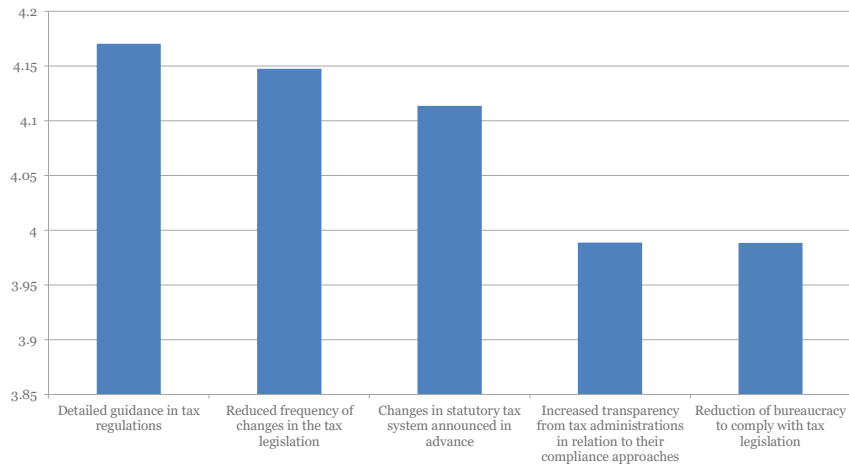
Top 10 tools to enhance tax certainty



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Top 5 tools to enhance tax certainty (financial sector only)



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Tools to support certainty in international tax

Some innovative options received strong support

- Multilateral Advance Pricing Agreements (APAs)
 - 36% of respondents say very important and extremely important
 - This figure is 44% when we only consider MNEs
- Multilateral audits
 - 25% of respondents say very important and extremely important
- Multilateral cooperative compliance programmes
 - 31% of respondents say very important and extremely important
 - This figure is 36% when we only consider MNEs

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The tax administration survey

The OECD/FTA Tax Certainty Survey of Tax Administrations

- Conducted with members of the Forum on Tax Administration (FTA)
- Allow tax administrations to respond to results of business survey
 - Is tax certainty a priority for tax administrations?
 - What creates uncertainty for tax administrations?
 - Which measures effective in increasing certainty?
- 25 OECD and G20 countries

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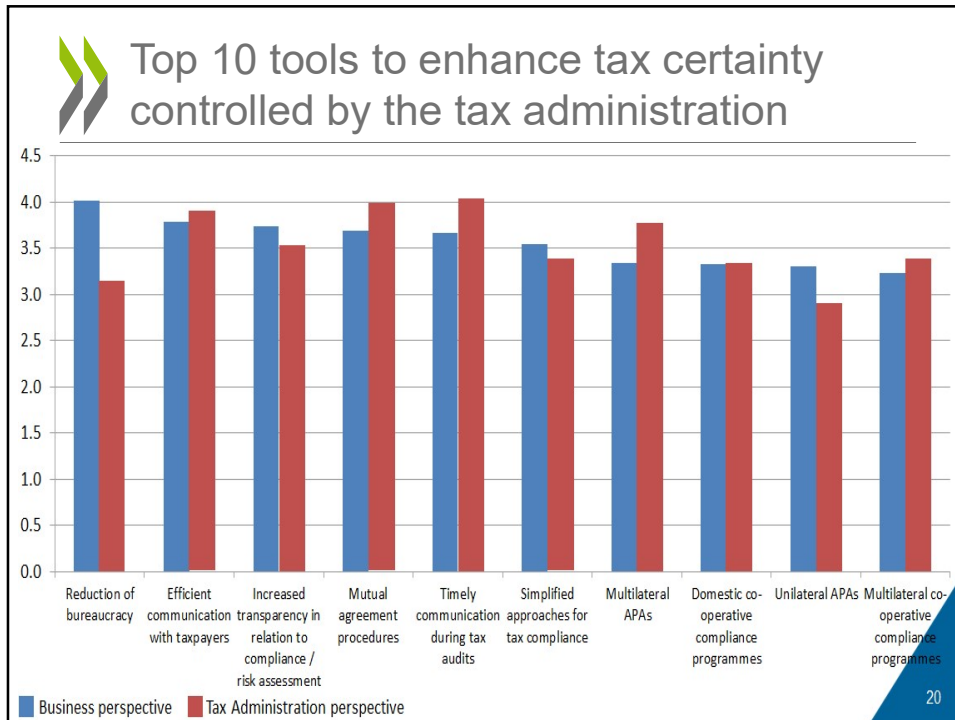
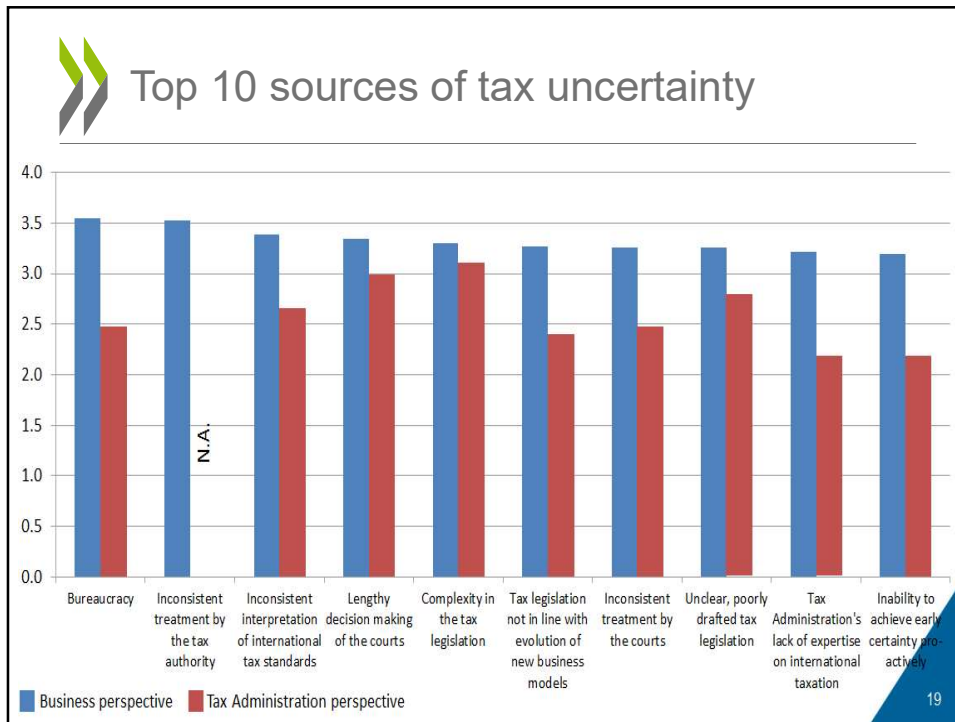


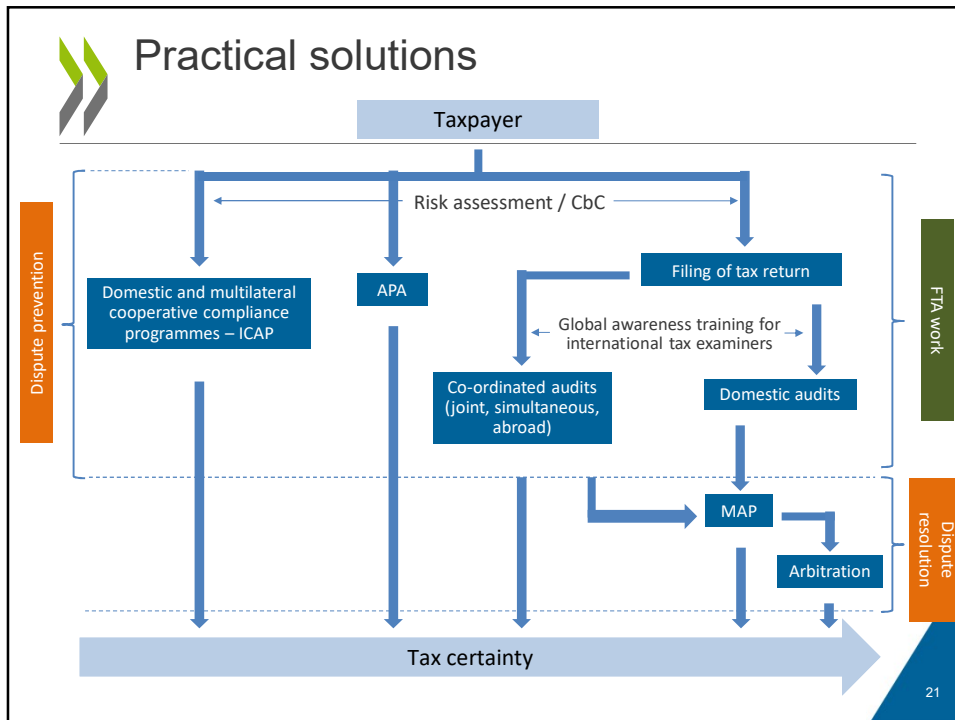
The tax administration survey (2)

The OECD/FTA Tax
Certainty Survey of Tax
Administrations

- **Tax certainty is a high priority for tax administrations too**
 - Over 80% of respondents: very high/extremely high priority for tax administration
- Tax administrations recognise tax uncertainty important concern for business
- For tax administration, an important source of tax uncertainty is taxpayers' behaviour, especially when involving aggressive tax planning

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THE TAX CERTAINTY AGENDA
BEPS ACTION 14 PEER REVIEW AND MONITORING

OECD-IRAS workshop on tax certainty
 Singapore, 26-29 March 2018

OCDE
 DES POLITIQUES MEILLEURES
 POUR UNE VIE MEILLEURE

Purpose of the MAP provision

Tax treaty purpose: allocation of taxing rights

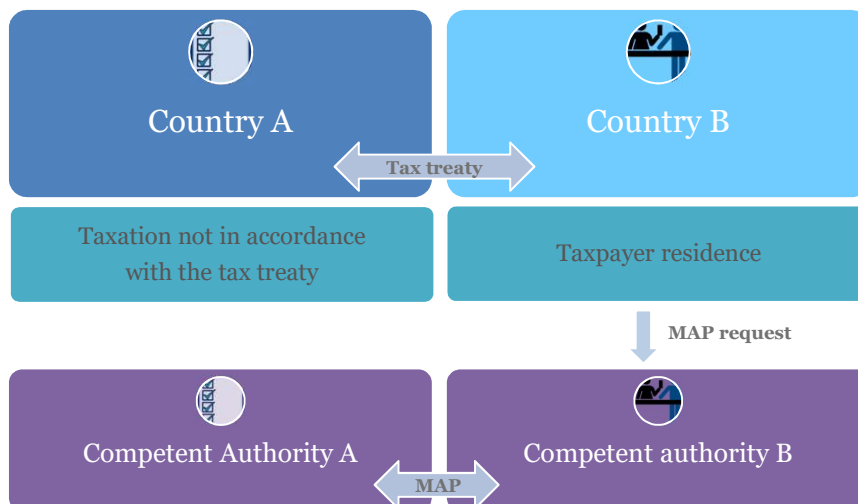
However, taxation may be levied not in accordance with the tax treaty

Transfer pricing	Withholding taxes	Income of individuals	Permanent establishment issues	...
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Mutual agreement procedures enable the competent authorities of each state to find a solution that eliminates taxation not in accordance with the tax treaty

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MAP - Example

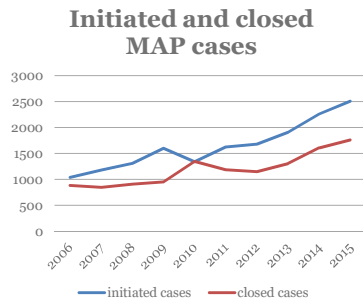


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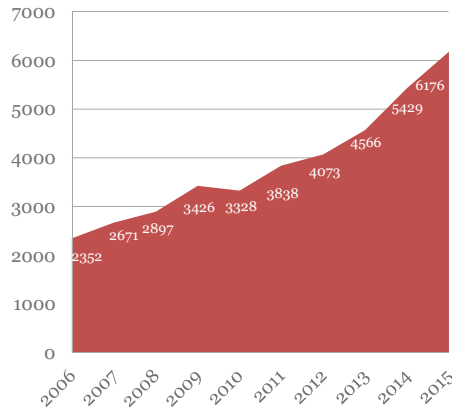


Resolution of MAP cases: the issue before BEPS

Global trends



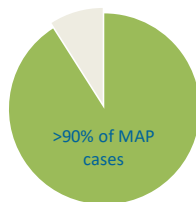
Closing inventory (number of MAP cases)



The new approach to dispute resolution: BEPS Action 14

20 countries

Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.



Action 14 Minimum Standard





ACTION 14 MINIMUM STANDARD AND BEST PRACTICES

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Minimum Standard: three core elements

A

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.

B

Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes.

C

Ensure that taxpayers can access the MAP when eligible.

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Minimum standard: translated into the terms of reference for peer review

Minimum standard in Action 14 Report translated into TOR

TOR: Key features of an efficient & effective MAP process

(A) Preventing disputes

(B) Availability and access to MAP

(C) Resolution of MAP cases

(D) Implementation of MAP agreements

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Preventing disputes

Part A

Article 25(3) – 1st sentence

Tax treaties should contain a provision which requires CAs to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties

roll-back of BAPAs

Bilateral APA programmes should provide for the roll-back of APAs in appropriate cases

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Availability of access to MAP

Part B	Ensuring awareness of MAP requests by both CAs	<p>Tax treaties should contain Article 25(1) of the OECD MTC</p> <hr/> <p>If the tax treaty does not permit a MAP request to be made to either Contracting Party and the CA who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the CA should implement a bilateral consultation or notification process which allows the other CA to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case)</p>
Article 25(3) – 2nd sentence		<p>Tax treaties should contain a provision under which CAs may consult together for the elimination of double taxation in cases not provided for in their tax treaties</p>

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Availability of access to MAP (2)

Part B	Access to MAP	<p>In transfer pricing cases</p> <hr/> <p>In cases in which there is a disagreement between the taxpayer and the tax authorities on the application of treaty / domestic law anti-abuse provision</p> <hr/> <p>In cases where there is an audit settlement between tax authorities and taxpayers (MAP access may be limited with respect matters resolved through an administrative or statutory dispute settlement / resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer)</p> <hr/> <p>If the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP</p>
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Availability of access to MAP (3)

Part B	Publication of clear rules, guidelines and procedures	<p>Clear rules, guidelines and procedures on access to and use of the MAP including the following should be published and be easily accessible to taxpayers:</p> <ul style="list-style-type: none"> - Specific information and documentation that should be submitted in a taxpayer's request for MAP assistance - MAP profiles - Relationship between audit settlements and access to MAP
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Resolution of MAP

Part C	Article 25(2) – 1st sentence	<p>Tax treaties should contain a provision which requires that the CA who receives a MAP request from the taxpayer shall endeavour, if the objection from the taxpayer appears to be justified and the CA is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the other CA, with a view to the avoidance of taxation which is not in accordance with the tax treaty</p>
	Timely resolution	<p>Seek to resolve MAP cases within an average timeframe of 24 months</p> <p>Adequate resources should be provided to the MAP function</p>
	Principled resolution	<p>Staff in charge of MAP processes should have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty</p> <p>Performance indicators for CA functions and staff in charge of MAP processes should not be based on the amount of sustained audit adjustments or maintaining tax revenue</p>
	Arbitration	<p>Transparency with respect to positions on MAP arbitration</p>

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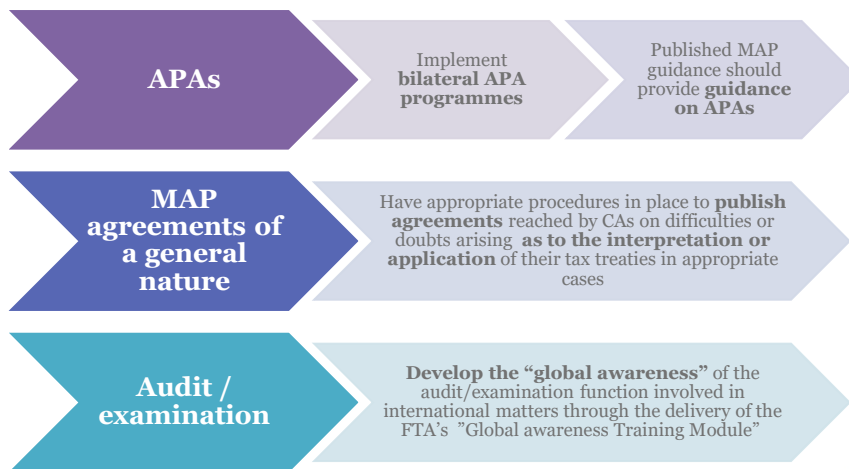


Implementation of MAP agreements

Part D	Timely implementation	Any agreement reached in MAP discussions should be implemented on a timely basis
	Ensuring implementation of all MAP agreements	Tax treaty should contain a provision which require any mutual agreement reached through MAP be implemented notwithstanding any time limits in domestic law, or the time during which an adjustment pursuant to Article 9(1) or Article 7(2) can be made should be limited in order to avoid late adjustments to which MAP relief will not be available



Best practices Preventing disputes





Best practices Availability and access to MAP

Recourse to MAP

- Implement appropriate administrative measures to **facilitate recourse to MAP** to resolve treaty-related issues, recognising the general principle that the choice of remedies should remain with the taxpayer

Suspension of collections procedures during MAP

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

MAP guidance

- provide that taxpayers will be allowed **access to MAP** so that CAs may resolve through consultation the double taxation that can arise **in the case of bona fide taxpayer-initiated foreign adjustments**
- provide **guidance on multilateral MAPs**

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Best practices Resolution of MAP cases

Recourse to MAP

- Implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the **multi-year resolution through the MAP of recurring issues** with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances

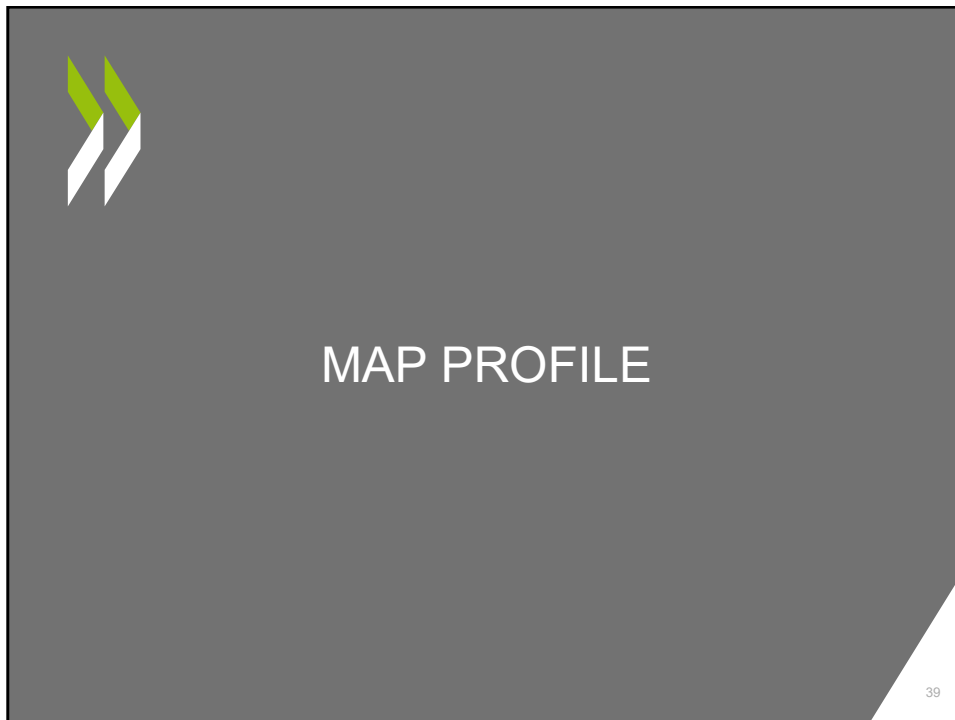
MAP guidance

- Publish an explanation of the **relationship between MAP and domestic law** administrative and judicial remedies
- Provide guidance on the consideration of **interest and penalties** in the MAP

Tax treaties

- **Include art. 9(2)** of the OECD Model Tax Convention in tax treaties

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MAP profile

Element 2.2 of the minimum standard and its commentary:

- “Countries should publish their country MAP profiles on a shared public platform (pursuant to an agreed template to be developed in coordination with the FTA MAP Forum)”
- “... a “country MAP profile” should be understood as a document providing competent authority contact details, links to domestic MAP guidance and other useful country-specific information regarding the MAP process.”
- “The development of this template will take into account the need for transparency with respect to country positions in relation to the best practices contained in this Report.”

B.9 of the ToR:

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

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MAP Profile Template

OECD countries and partner economies already publishing MAP profile.

New template created following the 4 key features of the ToR

Approved by CFA under written procedure 15 July 2016

All jurisdictions that are members of the inclusive framework to submit MAP profile for publication

Published MAP profile:

- a platform for jurisdictions to provide taxpayers with relevant information on dispute resolution mechanisms
- improved to provide greater transparency on the MAP regime of a jurisdiction.

<http://www.oecd.org/ctp/dispute/country-map-profiles.htm>

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MAP STATISTICS

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MAP Statistics

Element 1.5 of the minimum standard & its commentary:

“Countries should provide timely and complete reporting of MAP statistics, pursuant to an agreed reporting framework to be developed in coordination with the FTA MAP Forum”	“In the context of the work on Action 14, MAP statistics should be expected to provide a tangible measure to evaluate the effects of the implementation of the minimum standard set out in this Report and will be an important component of the monitoring mechanism...”	“... the reporting framework will include agreed milestones for the initiation and conclusion/closing of MAP case, as well as for other relevant stages of the MAP process.”
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C.2 of the ToR:

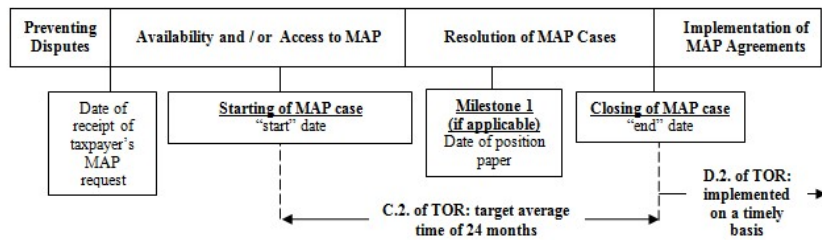
• “Jurisdictions should seek to resolve MAP cases within an average timeframe of 24 months.”

D.2 of the ToR:

• “Agreements reached by competent authority through the MAP process should be implemented on a timely basis.”

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MAP statistics (2)



The « start » date is defined* as:

- 1 week from the date of notification by the competent authority that receives the MAP request from the taxpayer; or
- 5 weeks from the receipt of the taxpayer's MAP request, whichever is the earlier date

* except when the MAP request does not include all the information and documentation required, in such a case another definition applies

The « end » date is defined as:

- the date of an official communication (typically in the form of a letter) from the competent authority to inform the taxpayer of the outcome of its MAP request; or
- the date the competent authority receives a notification from the taxpayer on the withdrawal of its MAP request.

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MAP Statistics Reporting Framework

OECD countries and partner economies already reporting MAP statistics

All members of the inclusive framework to submit yearly MAP statistics based on new reporting framework → improved to reflect:

a collaborative approach between competent authorities to resolving MAP cases on a timely basis

agreed definitions of reported items to ensure consistency and comparability

a balanced approach taking into account the perspective of competent authorities and taxpayers

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MAP Statistics Reporting Framework (2)

Purpose

Consistency

- Common definition of a MAP case
- Common counting of number of MAP cases
- Common definition of MAP outcomes
- Common definition of dates used

Collaborative approach

- Use of common start date regardless of which competent authority receives the MAP request from taxpayer
- Jurisdiction specific reporting (with de minimis rule)
- Jurisdictions should ensure their MAP statistics with a given treaty partner match those of such partner
- Due date: 31 May N+1 (for reporting period N)

Increased transparency

- Publication of the MAP Inventory
- Publication of the outcomes of closed MAP cases
- Publication of the average time taken to close cases, including an intermediary step ("Milestone 1")

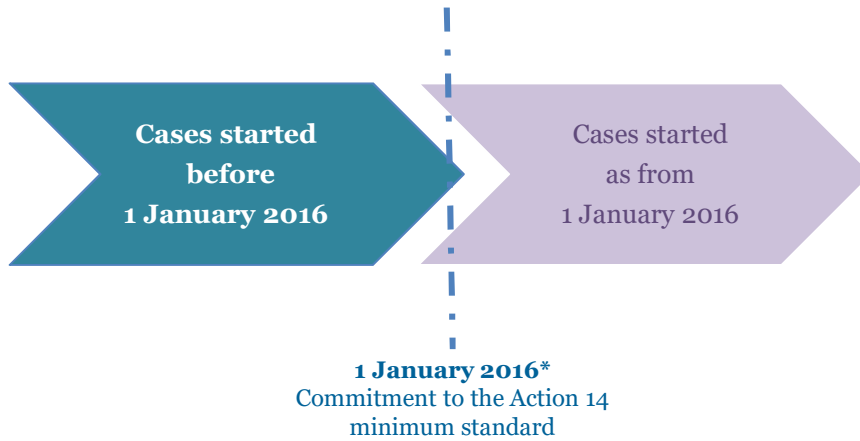
Analytical approach

- Separate reporting of "New" and "old" cases
- Separate reporting of attribution/allocation cases (i.e. TP cases) and other types of cases
- Separate reporting of cases on a jurisdiction basis (except de minimis rule)

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MAP Statistics Reporting Framework (3)



* Applicable for jurisdictions that reported their statistics in 2016, can be later for jurisdictions that will report their statistics in 2017 – the categorisation of cases will follow the actual date of the commitment

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MAP Statistics Reporting Framework (4)

- Each jurisdiction can follow its own computation rules
- No reporting on a jurisdiction-by-jurisdiction basis
- No possibility to identify the cases that are reported twice by jurisdictions that have cases together

Cases started before 1 January 2016

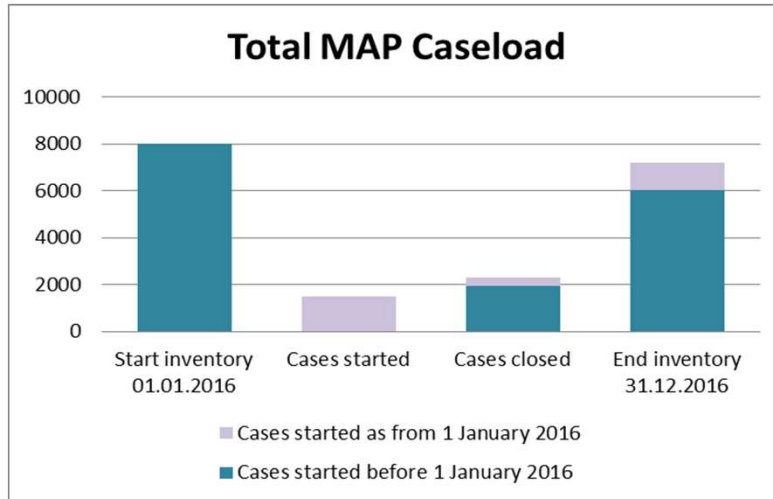
- All reporting jurisdictions follow the computation rules set in the MAP Statistics Reporting Framework
- Reporting on a jurisdiction-by-jurisdiction basis (aggregated for the publication of 2016 MAP statistics)
- All cases initiated in one jurisdiction are also reported in the other jurisdiction involved
- Possibility to avoid double counting by identifying the cases that the reporting jurisdictions have together

Cases started as from 1 January 2016

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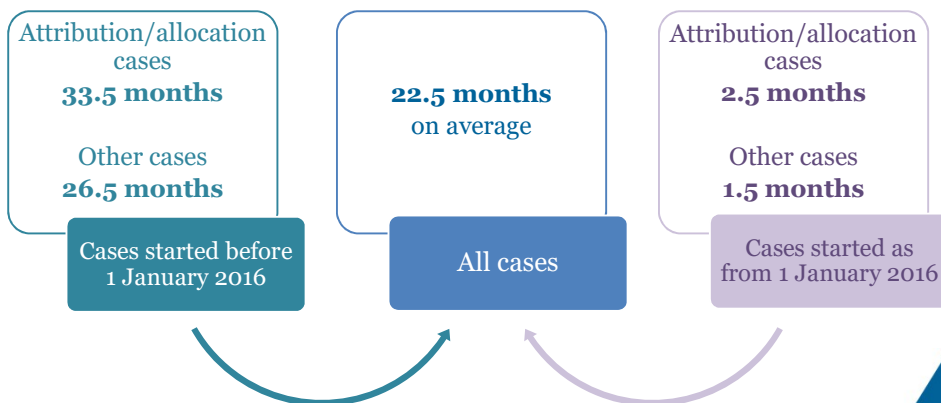
2016 MAP statistics



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Average time to close cases in 2016

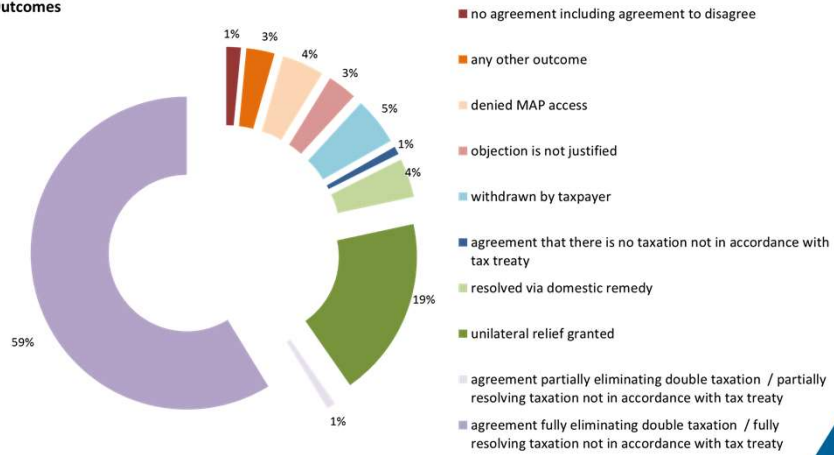


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Outcomes of cases closed in 2016

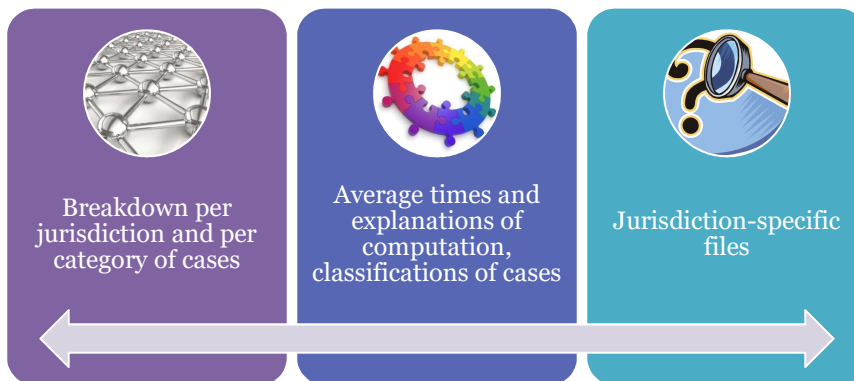
MAP Outcomes



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Available on the [OECD website](#)

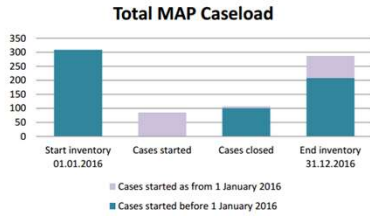


+ Will be available as from 2017 reporting period

- Breakdown of statistics on a jurisdiction-by-jurisdiction for cases started after commitment to the minimum standard

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Country-specific file (1/2)



Cases started before 1 January 2016	Start inventory	Cases started	Cases closed	End inventory
Transfer pricing cases	222	0	74	148
Other cases	87	0	27	60

Cases started as from 1 January 2016	Start inventory	Cases started	Cases closed	End inventory
Transfer pricing cases	0	59	4	55
Other cases	0	26	2	24

Average time needed to close MAP cases

Cases started before 1 January 2016	Average time
Transfer pricing cases	43.00
Other cases	37.00

Note: the average time taken to close MAP cases that started before 1 January 2016 was computed by applying the following rules: (i) start date: the date its competent authority received a complete MAP request; and (ii) end date: the date when the taxpayer accepted the MAP agreement, or differently, the date of closure of the case in case no agreement was reached, or the date when the taxpayer withdrew its MAP request.

Cases started as from 1 January 2016	Start to End	Receipt to Start	Start to Milestone 1	Milestone 1 to End
Transfer pricing cases	5.71	5.10	8.45	2.76
Other cases	4.83	1.15	2.37	5.85

Note: the average times to close MAP cases that started as from 1 January 2016 were computed according to the MAP statistics reporting framework available at <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-reporting-framework.pdf>

Country-specific file (2/2)

MAP Outcomes



Cases closed by outcome	denied MAP access	objection is not justified	withdrawn by taxpayer	unilateral relief granted	resolved via domestic remedy	agreement fully eliminating double taxation / fully resolving taxation not in accordance with tax treaty	agreement partially eliminating double taxation / partially resolving taxation not in accordance with tax treaty	agreement that there is no taxation not in accordance with tax treaty	no agreement including agreement to disagree	any other outcome	Total
Transfer pricing cases (all)	0	0	1	4	0	73	0	0	0	0	78
Cases started before 1 January 2016	0	0	0	3	0	71	0	0	0	0	74
Cases started as from 1 January 2016	0	0	1	1	0	2	0	0	0	0	4
Other cases (all)	1	4	0	4	1	17	0	0	1	1	29
Cases started before 1 January 2016	1	3	0	3	1	17	0	0	1	1	27
Cases started as from 1 January 2016	0	1	0	1	0	0	0	0	0	0	2
All cases	1	4	1	8	1	90	0	0	1	1	107

Note: the MAP statistics previously reported by the jurisdiction are available at <http://www.oecd.org/tax/dispute/map-statistics-2006-2015.htm>



THE TAX CERTAINTY AGENDA THE MULTILATERAL CONVENTION AND ITS COMMENTARY

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



PART V: IMPROVING DISPUTE RESOLUTION

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Article 16: mutual agreement procedure

Article 16(1) through (3) are based on the text of Article 25(1) through (3) of the OECD Model Tax Convention, which incorporate the changes made to Article 25(1) of the 2014 version of the OECD Model Tax Convention under the work of Action 14 to reflect the treaty obligation under element 3.1 of the Action 14 minimum standard to allow a taxpayer to present a case to the competent authority of either Contracting Jurisdiction.

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Compatibility clauses: special cases

First sentence of Art. 16(1) would replace old Art. 25(1) first sentence

Second sentence of Art. 16(1) would replace provisions

- with less than three years
- without delay

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Allowed reservations

Art. 25(1) first sentence:

- Old version is OK if minimum standard is implemented through administrative measures: a bilateral notification or consultation process

Art. 25(1) second sentence:

- No 3-year delay if respective domestic regulations apply automatically and are more favourable in their effects to the taxpayer, either because they allow a longer time for presenting objections or because they do not set any time limits for such purpose

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Allowed reservations (2)

Art. 25(2) second sentence:

- reservation is allowed only on the basis that for the purposes of all of its Covered Tax Agreements, either
 - (i) all agreements reached via mutual agreement procedure shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions; or
 - (ii) it intends to meet the minimum standard by accepting, in its bilateral treaty negotiations, alternative treaty provisions that limit the time during which a Contracting Jurisdiction may make an adjustment pursuant to provisions modelled after Article 9(1) or Article 7(2) of the OECD Model Tax Convention, in order to avoid late adjustments with respect to which mutual agreement procedure relief will not be available

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MLI

Part V: Improving Dispute Resolution

- Substantive provision
(implementing Art. 25(1-3) MTC)

- Compatibility clause

- Reservation clause

- *Clarity*
Parties notify reservations made

- *Certainty*: Notification clause
clarifying existing provisions within scope

16 Country Y – Mutual Agreement Procedure →

1. i. Presentation to either Contracting State
ii. Presentation within three years
2. i. Endeavour to resolve cases through MAP
ii. Implement MAP notwithstanding time limits in domestic law
3. i. Authorities endeavour to resolve MAP
ii. May consult in cases not provided for in DTA
4. Compatibility clauses
5. Reserve on par 1 – 1st sentence
 Reserve on par 1 – 2nd sentence
 Reserve on par 2 – 2nd sentence
6. Notify reservations
Art 25(1) of the Convention with X >

61



PART VI: ARBITRATION

62



Action 14: Making Dispute Resolution Mechanisms More Effective

¶62 of the Action 14 Report

- “The business community and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively resolved through MAP. Whilst there is no consensus among all OECD and G20 countries on the adoption of arbitration as a mechanism to ensure the resolution of MAP cases, a group of countries has committed to adopt an implement mandatory binding arbitration as a way to resolve disputes that otherwise prevent the resolution of cases through the mutual agreement procedure cases.”

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The Sub-Group on Arbitration

In order to develop a mandatory binding arbitration provision for this purpose, the *ad hoc* Group for the development of the MLI established a Sub-Group on Arbitration.

Twenty seven countries participated as members of the Sub-Group.

The Sub-Group developed the MAP arbitration provision that is included in Part VI of the MLI and the related parts of the Explanatory Statement.

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Part VI and Article 25(5) of the OECD Model Tax Convention

Part VI of the MLI is intended to operate as a single cohesive MAP arbitration provision.

Part VI incorporates a number of provisions on the mode of application of the arbitration process not included in Article 25(5) of the OECD Model –

- Many of these provisions are included in the sample mutual agreement included in the Commentary on Article 25.
- Some countries consider the importance of the relevant structural and procedural issues is such that these issues should be addressed in the Convention and subject to parliamentary approval and/or ratification, or that addressing these issues in the Convention provides greater legal certainty.
- Part VI must be complemented by a competent authority agreement to implement MAP arbitration.

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Overview

Part VI comprises **Articles 18-26 of the MLI**

Article 28 (Reservations) also important as it determines scope of MAP cases that will be eligible for arbitration under Part VI.

Article 36 (Entry into Effect of Part VI) contains special rules for the entry into effect of the arbitration process.

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Article 18: choice to apply part VI

Article 18 provides that a Contracting Jurisdiction must expressly choose to apply Part VI, which will only apply in relation to a Covered Tax Agreement (CTA) where both Contracting Jurisdictions have chosen to apply it.

- “Opt-in” provision.
- No MAP arbitration unless both treaty partners affirmatively choose to apply the provision (by notifying the Depository).

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Article 19: Mandatory Binding Arbitration

Paragraph 1: core arbitration provision –

- where a person has presented a MAP case to the competent authority of a Contracting Jurisdiction on the basis that the actions of one or both of the Contracting Jurisdictions has resulted in taxation not in accordance with the CTA, and
- the competent authorities are unable to reach agreement to resolve the case within a period of two years

any unresolved issues arising from the case shall, upon written request by the person who presented the case, be submitted to arbitration

- provision corresponds to Article 25(5) of the OECD Model

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Article 19: Mandatory Binding Arbitration (2)

- provides for suspension of the two-year period where a case on one or more of the same issues is pending before a court or administrative tribunal until
 - a final decision has been rendered, or
 - the case has been suspended or withdrawn
- the two-year period is also suspended where the person who presented the MAP case and a competent authority agree to suspend the MAP

Paragraph 2

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Article 19: Mandatory Binding Arbitration (3)

Paragraph 3

- Provides for an extension of the two-year period where a person directly affected by the case has failed to provide in a timely manner any additional material information requested by either competent authority (equal to the period beginning on the date on which the information was requested and ending on the date on which the information was provided)

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Article 19: Mandatory Binding Arbitration (4)

Paragraph 4

- provides that the arbitration decision shall be implemented through the mutual agreement concerning the case and shall be final
- provides that the arbitration decision shall be binding except in three circumstances:
 - a person directly affected by the case does not accept the mutual agreement implementing the arbitration decision
 - a final decision of the courts of one of the Contracting Jurisdictions holds that the arbitration decision is invalid, or
 - a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision

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Article 19: Mandatory Binding Arbitration (5)

Paragraph 5

- provides that the competent authority that receives the MAP request shall notify the person who presented the case that it has received the request and send the other competent authority a copy of the request

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Article 19: Mandatory Binding Arbitration (6)

Paragraphs 6-9

- provide timelines for the request of additional information necessary to undertake substantive consideration of the MAP case and consequences of requests for additional information on the start date of the two-year period

Paragraph 10

- provides that the competent authorities shall by mutual agreement settle the mode of application of Part VI

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Article 19: Mandatory Binding Arbitration (7)

Paragraph 11: RESERVATION

A Party may reserve the right to replace the two-year period with a three-year period

Paragraph 12: RESERVATIONS

A Party may reserve the right to provide that any unresolved MAP issue otherwise within the scope of the arbitration process shall not be submitted to arbitration if a decision on the issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction

A Party may reserve the right to provide that the arbitration process shall terminate if, at any time after the request for arbitration and before the arbitration panel has delivered its decision, a decision is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions

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Article 20: appointment of arbitrators

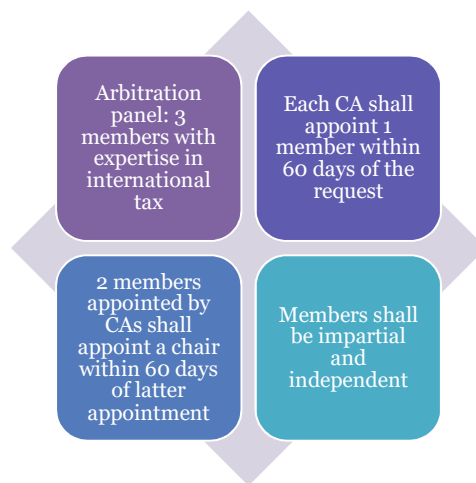
Article 20 contains rules on the composition of an arbitration panel and the appointment and qualifications of arbitrators.

- rules apply by default – that is, except to the extent that the competent authorities of the Contracting Jurisdictions agree to different rules, either generally or with respect to a specific case

75



Article 20: appointment of arbitrators (2)



Director of OECD CTPA shall make appointments if failure to do so by prescribed deadline

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Article 21: confidentiality of proceedings

Article 21 sets out rules to permit disclosure of information to the arbitration panel and to ensure that the arbitration process can accomplish its purpose without undermining the confidentiality and non-disclosure obligations that exist under treaty exchange of information (EOI) provisions and domestic law

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Article 22: resolution of a case prior to conclusion of the arbitration

Article 22 terminates the mutual agreement procedure and arbitration proceeding with respect to a case if, at any time before the arbitration panel has delivered its decision

- the competent authorities reach a mutual agreement to resolve the case, or
- the person who presented the case withdraws the request for arbitration or the underlying MAP request.

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Article 23: type of arbitration process

Article 23 provides default rules for the type of arbitration process that will apply for purposes of Part VI.

Unless the competent authorities mutually agree on different rules, a **“final offer” arbitration process** (also known as “last best offer” arbitration) will apply.

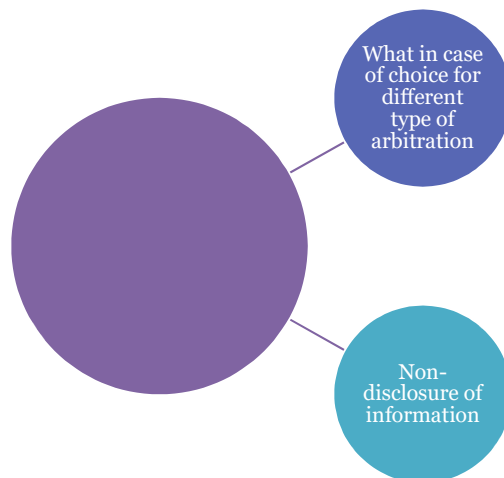
Jurisdictions that are **not** willing to accept the “final offer” approach as a default rule may reserve the right to adopt **“independent opinion” arbitration** as the default form of arbitration process (except to the extent that the competent authorities mutually agree on different rules).

A number of options and reservations are provided that will apply where jurisdictions have made different choices as to the default type of arbitration process.

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Article 23: options and reservations



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Article 24: agreement on a different resolution

Article 24 permits Contracting Jurisdictions to choose to apply a provision pursuant to which the arbitration decision shall not be binding if the competent authorities agree on a different resolution of unresolved issues within three months after the arbitration decision has been communicated to them.

81



Article 25: cost of arbitration proceedings

Article 25 provides that the costs of the arbitration proceedings, such as the fees and expenses of the members of the arbitration panel, shall be borne by the Contracting Jurisdictions in a manner to be settled by mutual agreement. In the absence of such a mutual agreement, the Article provides that each Contracting Jurisdiction shall bear its own expenses and those of its appointed arbitration panel member, with costs of the chair of the arbitration panel and other expenses associated with the proceedings borne by the Contracting Jurisdictions in equal shares.

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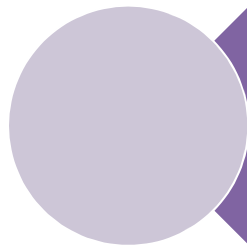
Article 26: compatibility



83

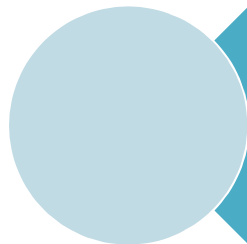


Article 28(2): reservations on scope



Paragraph 2 of **Article 28** permits a Contracting Jurisdiction to make one or more reservations with respect to **the scope of MAP cases that will be eligible for arbitration** under the provisions of Part VI.

- reservations formulated by the Contracting Jurisdictions themselves
- “free-form” reservations provide flexibility to tailor the scope of cases eligible for arbitration to reflect their domestic policies.



Note: The approach taken with respect to Part VI is different from the approach taken with respect to the rest of the MLI, pursuant to which the only reservations that may be made are those specifically authorised – see paragraph 1 of Article 28.

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Article 36: entry into effect of part VI

Article 36 contains special rules for the entry into effect of the provisions of Part VI. In general, Part VI will apply:

- with respect to MAP cases presented to the competent authority of a Contracting Jurisdiction on or after the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to a CTA; and
- with respect to MAP cases presented to the competent authority of a Contracting Jurisdiction prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to a CTA, on the date on which the Contracting Jurisdictions have reached mutual agreement on the mode of application of the arbitration provision (which will include agreement on the date or dates on which such cases will be considered to have been presented to the competent authority of a Contracting Jurisdiction).

Possibility of prior application

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Article 36 (2)

A Contracting Jurisdiction may also reserve the right for Part VI to apply to a MAP case presented to the competent authority of a Contracting Jurisdiction prior to the later of the dates on which the MLI enters into force for each of the Contracting Jurisdictions to the CTA only to the extent that the competent authorities of both Contracting Jurisdictions agree that it will apply to that specific case.

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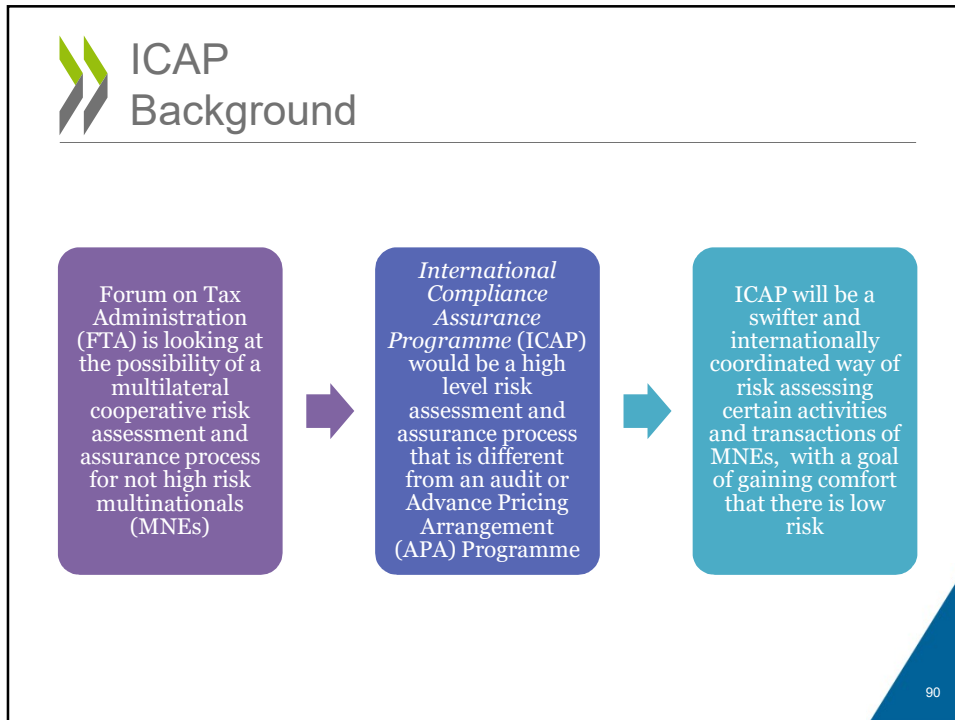
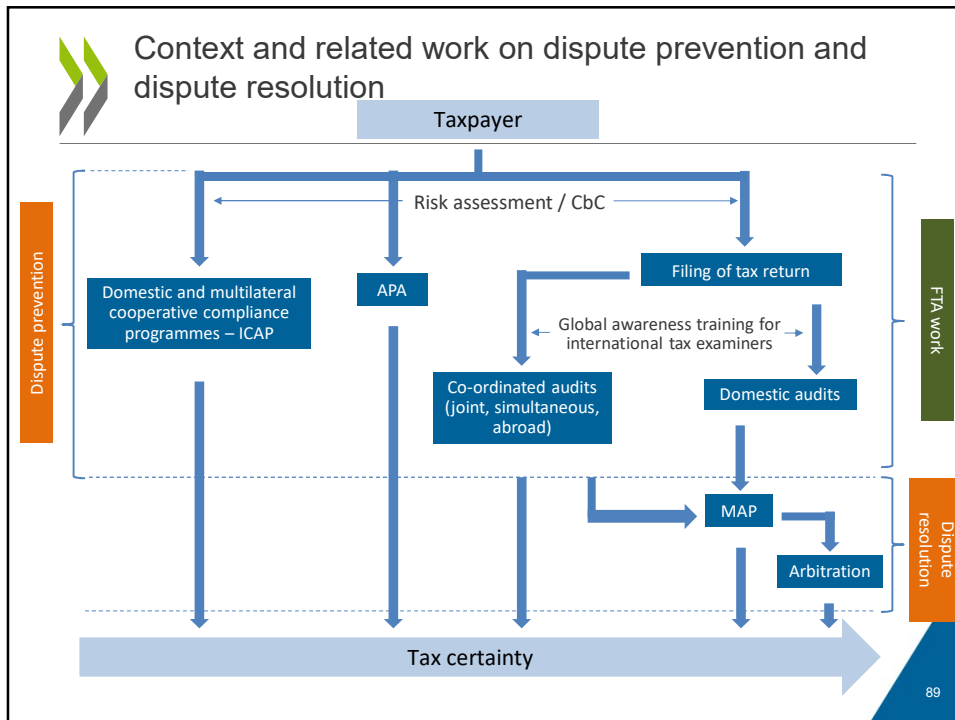
THE TAX CERTAINTY AGENDA OECD FTA INITIATIVES

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



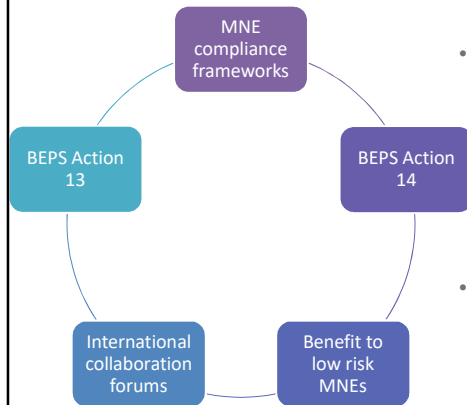
INTERNATIONAL COMPLIANCE ASSURANCE PROGRAMME (ICAP)







ICAP Key drivers



- A multilateral risk assessment and assurance process for “not high risk” MNE groups
 - ICAP will be a voluntary programme using CbC Reports and other information to facilitate open and co-operative multilateral engagements between MNE groups and tax authorities
- Focuses on transfer pricing, permanent establishment and other specific international tax issues
- Provides certainty to MNE groups and assurance to tax authorities

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ICAP Benefits to MNE Groups and tax authorities

Fully informed use of CbCR information

- MNE groups will talk participating tax authorities through their CbC Report

Efficient use of resources

- MNE groups engage simultaneously with multiple tax administrations
- Co-ordinated follow-up via lead tax administration

Faster, clearer route to tax certainty

- Managed process with clear timelines
- MNE groups benefit from fewer or more targeted interventions
- Tax administrations gain assurance that risks areas are identified

Fewer disputes enter into MAP

- Tax administrations will have a better understanding of relevant tax issues
- Differing positions can identified and discussed earlier

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ICAP Overview of the process

- MNE groups admitted into ICAP and participating tax authorities identified
- MNE group provides documentation package and kick-off meeting with all participating tax authorities
- Two-part risk assessment stage (initial and in-depth, if required): tax authorities work collaboratively and MNE group is kept informed via lead tax administration
- Follow-up meeting with MNE group to discuss outcomes of risk assessment
- If a tax administration agrees that an issue covered by ICAP poses no or low risk, an assurance letter will be issued

Timeline will vary, but in most cases the period from the initial meeting to the issuance of assurance letters should be no more than 12 months



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ICAP Pilot programme

The pilot will involve undertaking a coordinated multilateral risk assessment by a restricted number of tax administrations on a small set of non-high level risk multinationals (MNEs)

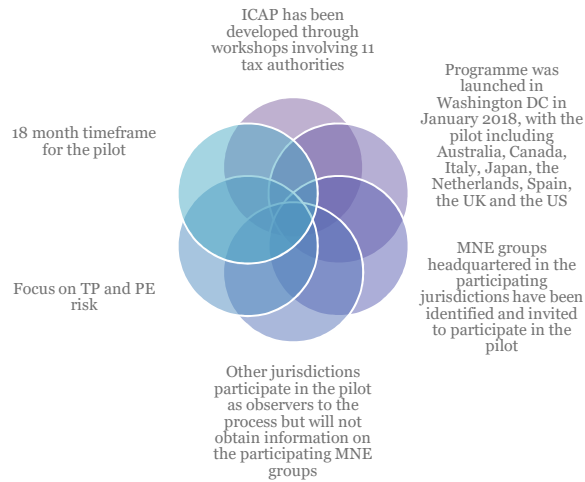
The underlying drivers of this pilot are to test whether this can help minimise disputes going to MAP by increasing collaboration and cooperation between a MNE and multiple tax authorities at an early stage; to increase tax certainty for business; and to positively influence taxpayer behavior

Outcomes will be analysed and used to revise the programme, if required, with a view to a wider roll-out, participation in which would be up to each individual tax administration

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ICAP Pilot programme



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Introduction to the ICAP pilot Documentation package and transmission

Handbook contains documentation package, to be delivered six weeks before kick-off meeting, including (with more detail in Annex 1 of the handbook):

- CbC report
- Master file and local files (or equivalent)
- Tax strategy and tax control framework (or equivalent)
- Group and entity financial statements and global business structure
- Information on uncertain tax positions concerning covered risks
- Description of material book to tax differences relating to international tax risks impacting covered jurisdictions
- Value chain analysis
- PE documentation

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Introduction to the ICAP pilot Documentation package and transmission

The documentation package for the pilot balances:

- the need for information to assess all covered risks, with
- the need to rely on existing documentation wherever possible.

Exploring alternative mechanisms for sharing information

Further documentation may be requested in the course of the pilot, if required

Documentation will be made available only to the tax administrations participating in the particular MNE group's risk assessment

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Global awareness training Background

Strategic plan of the FTA MAP Forum

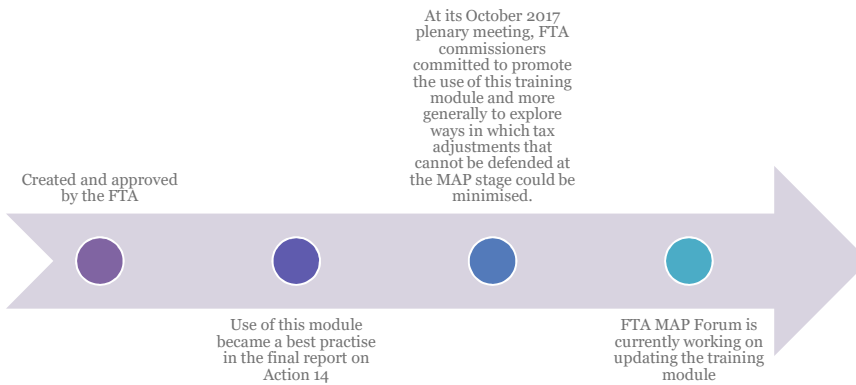
*Increasing the « global awareness » of the audit and examination functions involved in international matters is of central importance in **preventing dysfunctional tax administration behaviours** (e.g. unprincipled adjustments to non-resident companies) and **avoiding the disputes that these behaviours can create***

All audit functions involved in adjusting taxpayer positions on international matters must be aware of

- (1) The potential for creating double taxation*
- (2) The impact of the proposed adjustments on the tax base of one or more other jurisdictions, and*
- (3) The processes and principles by which competing jurisdictional claims are reconciled by competent authorities*



Global awareness training Training module



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Training module Scope

International Tax Examiners (ITEs) working in any country that has entered into bilateral income tax treaties (“double tax conventions”) with other jurisdictions

Important considerations associated with the global tax administration environment in which ITEs participate

Base Erosion Profit Shifting (BEPS) Action 14 Final Report, *Making Dispute Resolution Mechanisms More Effective*:

- Countries agree that the introduction of measures developed to address BEPS should not lead to unnecessary uncertainty for compliant taxpayers and to unintended double taxation

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Training module Key Global Awareness Points

ITEs play an important role in a broader “global tax administration” established through relationships between and among countries that have entered into income tax treaties with one another

The primary goals of tax treaty partners are to

- secure the appropriate tax base in each jurisdiction and
- avoid double taxation and other taxation not in accordance with their treaty, and
- minimize conflicts between tax administrations and promoting international trade and investment

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Training module Overview

- Adjustments resulting in double taxation and adjustments resulting in taxation not in accordance with the treaty and examples
- Purpose and operation of tax treaties
- Relation tax treaties and domestic law
- Resolving double taxation through MAP
- Access to MAP
- Role of CA and tax examiners in MAP
- Global awareness considerations at different stages
- Sources of principles

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Joint audits
 Background - definition

Forum on Tax Administration (FTA) initiated the concept of joint audits consisting of

- two or more countries joining together
- to form a single audit team to examine an issue(s) / transaction(s)
- of one or more related taxable persons (both legal entities and individuals) with cross-border business activities

2010 report on joint audits

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Joint audits How do they work in practice?



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Joint audits Experience from participants

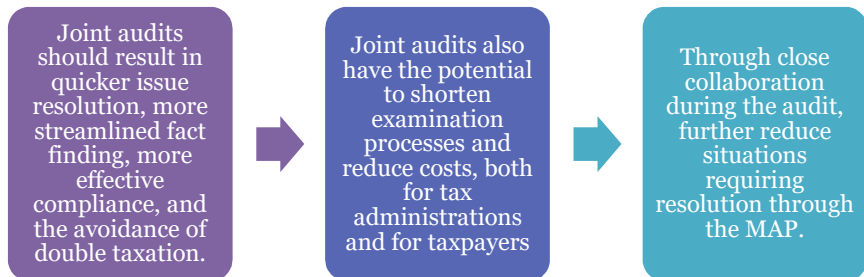
Any experience in:

- Simultaneous audits
- Presence of officials
 - In offices
 - During audit

Lessons learned?

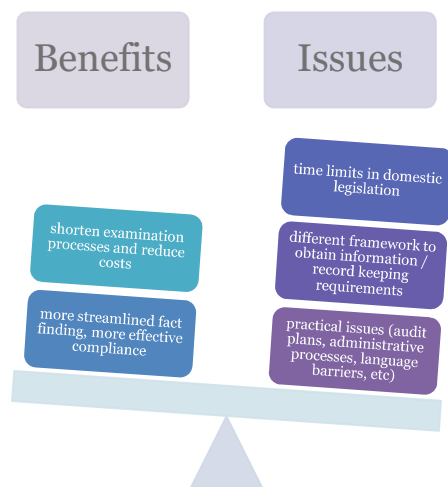
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Joint audits Rationale




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Joint audits in practice experiences thus far



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Joint audit initiative Rationale

The term "joint audit" as such is not a legal term, which means that in order to conduct a joint audit the legal basis has to be found in existing bilateral, multilateral and regional agreements and be supported by domestic law.

In practice "joint audits" to date appear to have followed the same principle as simultaneous audit and the presence of tax officials is often limited to presence in administrative offices and/or connected to a request for information.

If countries want to cooperate more upfront or proactively in specific cases, it is helpful if foreign tax officials can be part of the audit team, for example conducting interviews, although this can raise legal issues.

Partly as a result, across the wider FTA experience with joint audit teams has been relatively limited to date. The FTA has therefore decided to bring together experience, knowledge and lessons learnt to allow an assessment of what has worked well and the common obstacles faced by tax administrations as well as potential solutions.

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RISK ASSESSMENT

Risk assessment Different angles

Improvements in
risk assessment
documentation

Multilateral
approach to risk
assessment

Domestic risk
assessment
practices

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Improvements in risk assessment documentation

The BEPS Action 13 report introduced a three tiered documentation package for MNE's: CbC report, master file and local file

The CbC report must be filed with the tax administration where the MNE is a resident

It will be exchanged with tax administrations in other countries where the MNE has activities

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Country-by-Country Reporting Effective use in tax risk assessment

Within constraints imposed on tax administrations, data contained in CbC Reports will be an important assessment tool for tax administrations, enabling them to:

- identify areas of transfer pricing and BEPS-related risk
- allocate resources to those risky areas more efficiently

CbC Report data is likely to be most effective when used in conjunction with other risk assessment data points e.g. tax return, rulings information, cooperative compliance programs

CbC Reports can be incorporated into a tax authority's risk assessment framework, irrespective of the approach to risk assessment adopted

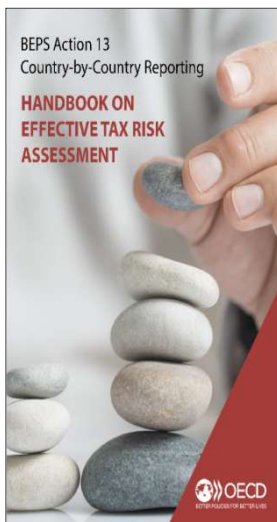
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Country-by-Country Reporting Handbook on effective tax risk assessment

BEPS Action 13
Country-by-Country Reporting

**HANDBOOK ON
EFFECTIVE TAX RISK
ASSESSMENT**



It is essential that tax authorities are able to make effective use of CbC Reports to risk assess large MNE groups

This handbook will support tax authorities in using CbC Reports for tax risk assessment, focussing on:

- core characteristics of effective risk assessment
- advantages CbC Reports have over other sources
- key tax risk indicators that may be identified
- challenges tax authorities may face
- other data that may complement CbC Reports
- how outcomes of an assessment should be used

The handbook will be revised periodically to reflect the experience of tax authorities in using CbC Reports

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Country-by-Country Reporting Examples of potential risk indicators

Activity and earnings may not be aligned

- High profits, but low assets or employees
- High profits, but low tax accrued
- High assets or employees, but low profits
- High proportion of related party revenues
- Mobile activities in a low tax jurisdiction

Structural elements raise questions

- Entities appear or disappear over time
- Changes in the location of assets
- IP is separated from other activities
- Group has operations in a jurisdiction which poses a known BEPS risk
- Dual resident or stateless entities

A group's story seems incomplete

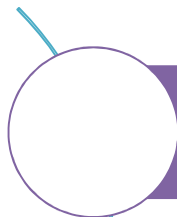
- Results deviate from comparables
- Results do not reflect market trends
- Tax paid is consistently lower than tax accrued
- CbC Report appears inconsistent with information provided by local entities

In all cases further enquiries must be undertaken and additional information gathered before concluding there is evidence of BEPS

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Improvements to domestic risk assessment practices



Work on CBC Reporting handbook and ICAP have shown:

- Differences in the approaches to tax risk assessment
- Gaps in the understanding of how tax risk is assessed elsewhere



FTA will work to map approaches to tax risk assessment in different jurisdictions

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Improvements to domestic risk assessment practices

Possible outcomes

Identify opportunities to benefit from experience of other jurisdictions

Incorporating successful elements in own procedures

Greater convergence in key areas

Exchange of outcomes of risk assessment

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Questions?

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THE TAX CERTAINTY AGENDA TOUR DE TABLE

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



SHARING OF EXPERIENCES ON DESIGN OF TAX POLICY AND LEGISLATION IN THE CONTEXT OF PROVIDING TAX CERTAINTY IN BOTH DOMESTIC AND INTERNATIONAL SETTINGS

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THE TAX CERTAINTY AGENDA DISPUTE PREVENTION

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



Dispute prevention Outline



Dispute Prevention: Advance Pricing Arrangements (APAs):

- Section F of Chapter IV of the OECD Transfer Pricing Guidelines



Group discussion/Breakout: Case study I



Dispute Prevention: Implementation of BEPS Action 14

- Elements of the Action 14 Minimum Standard & Best Practices



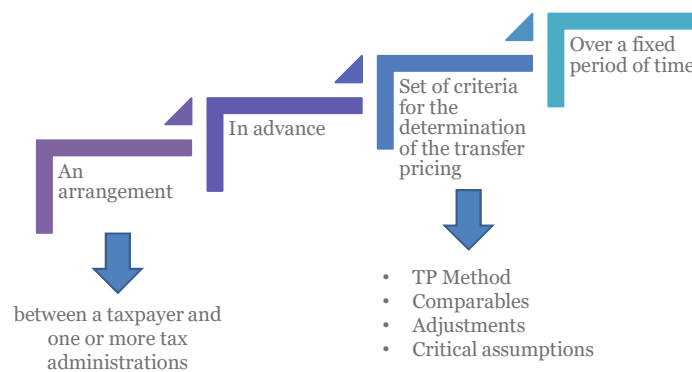
DISPUTE PREVENTION: ADVANCE PRICING ARRANGEMENTS

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



What is an Advance Pricing Arrangement?

“An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing of those transactions over a fixed period of time”





Features of an APA



Arrangement term usually between 3 to 5 years

- “Rollback” to open examination years can resolve other years



Can generally be renewed if no major changes



No TP adjustments or penalties if taxpayer applies the agreed transfer pricing methodology in accordance with the APA



APA administered at the discretion of the relevant tax administration (neither the tax administration nor a taxpayer is obliged to enter into a MAP APA)

5



Legal basis of an APA

Unilateral APA

- Domestic legislation
- Administrative guidelines

Bilateral or multilateral APA

- Article 25(3) of the OECD Model Tax Convention
 - “The competent authorities of the contracting states shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention”
 - “They may also consult together for the elimination of double taxation in cases not provided for in the Convention”
- Article 26 (EOI)
- Domestic and/or regional administrative Guidelines
- Also possible without any treaty (see parag 7 of Annex II to chapter IV)

6



SCOPE OF AN APA

7



When to use an APA

APAs can apply

- to transfer pricing issues between associated enterprises (Article 9 of the OECD Model Tax Convention)
- to the allocation of profits to permanent establishments (Article 7 of the OECD Model Tax Convention)

APA most appropriate

- when transactions are particularly complex
- after a TP examination, to solve future years on the same basis as agreed for the audited years, where audited transactions continue in the future.

8



How to use an APA

An APA typically does not fix the price of transactions but the **methodology** and the factors to apply the methodology



To protect the taxpayer and the tax administration from the uncertainty of future developments, **critical assumptions** are built in APAs

9



TP Methodology vs. Transfer Price and critical assumptions

- How reasonable is an arrangement that interest rate for intra-group borrowings should remain at 6 % during the next 3 years?
- How about an interest rate of LIBOR plus a fixed percentage?
- Greater reliability if an appropriate critical assumption is added, e.g. the company's credit rating (i.e. the addition to LIBOR will change if the credit rating changes)

Example 1

- An arrangement concerning a contract manufacturer provides for the cost-plus method to be applied.
- A critical assumption would be that the allocation of functions, assets and risks is not altered during the term of the APA

Example 2

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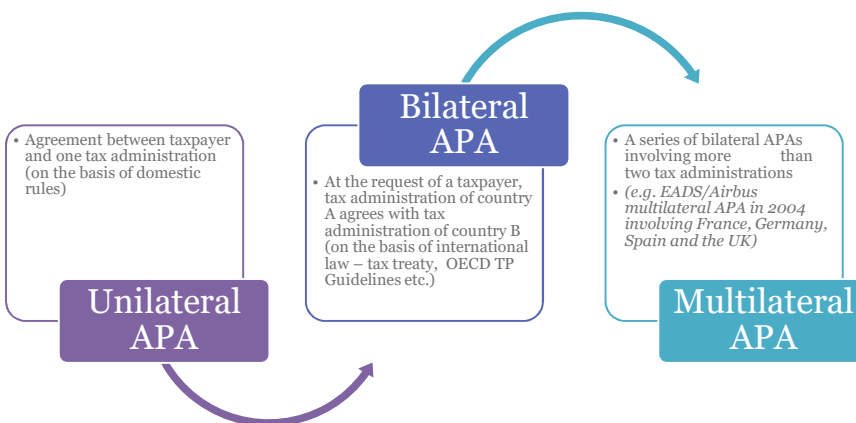


UNILATERAL / BILATERAL / MULTILATERAL APAS?

11



Unilateral/Bilateral/Multilateral APA



12



APA vs. Rulings



Rulings generally limited to questions of a legal nature and binding for a particular transaction

- Facts underlying a ruling are normally not questioned by tax administration



APA generally deals with factual issues and several (types of) transactions

- Facts are thoroughly analysed and examined

13



Unilateral vs. Bilateral/Multilateral APA

Unilateral APA may affect the tax liability of associated enterprises in other tax jurisdictions



CA of other interested jurisdictions should, therefore, be informed about the APA as early as possible to determine whether they are willing and able to consider a bilateral APA



Bilateral APA is equitable to all tax administrations and taxpayers involved and provides greater certainty and reduced risk of double taxation to taxpayer



OECD and European Commission recommend bilateral or multilateral APAs



Some countries, e.g. Germany, do not grant unilateral APAs

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Unilateral vs. Bilateral/Multilateral APA

Unilateral APAs can be useful if

- the other State involved in the transactions does not have an APA programme
- the transactions take place with a large number of other countries and it is not possible to have as many bilateral (or a multilateral) APAs
- the APA is requested by a Small/Medium sized Enterprise (SMEs) for simple transactions
- only a small amount of tax is at stake
- the tax issue is not complex and does not require the heavier and more expensive process of a bilateral or multilateral APA
- a country implements an APA program and wants to gain experience with APAs

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Bilateral vs. Multilateral APA



Benefits of multilateral APA

- Negotiations conducted on a multilateral basis rather than a series of separate negotiations with each tax authority
- Resulting in lower costs and greater certainty for the taxpayer

Drawbacks of multilateral APAs

- No multilateral method of implementing the agreement (=> a series of separate bilateral APAs)
- Exchange of (the same) information between all affected jurisdictions may be problematic in terms of confidentiality if not the same transaction flows

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BENEFITS AND DISADVANTAGES OF APAs

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Major Benefits of APAs

For the taxpayer

- Legal certainty (up to 5 years + possible renewal) and planning reliability
- If bilateral or multilateral: eliminates of risk of double taxation
- Limits costly and time consuming transfer pricing examinations in future tax audits
- Reduction of MAP/litigation risk

For Tax Administrations

- Profits are correctly attributed and taxed
- Enhanced taxpayer compliance
- Shorter time needed to reach agreement as current data are available as opposed to prior year data that may be difficult and time-consuming to produce
- Better insight into complex transactions and improved industry and taxpayer knowledge → development of specialist skills
- Limits costly and time consuming TP examinations in future tax audits
- Reduced risk of time consuming MAP/litigation

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Possible disadvantages of APAs

For the taxpayer

- “Dining with the taxman“
- No firewall between APA teams and tax auditors
- An APA request may be rejected
- Consultancy costs, fees
- Reduction of entrepreneurial flexibility during the APA period
- Renunciation of tax avoidance
- Certainty, but no minimisation of tax liabilities

For Tax Administrations

- Unilateral APAs can be more disadvantageous than bilateral/multilateral APAs
- Risk of corruption
- Disagreements between tax administrations
- Corresponding adjustments difficult
- Initial resource costs can be substantial
- Attractive to compliant taxpayers but can divert resources from less compliant taxpayers
- Specialist area resource

- *APA fees may overcome burden on tax administration's financial resources*

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PROCESS FOR CONDUCTING MAP APAS

20



Process for Conducting MAP APAs

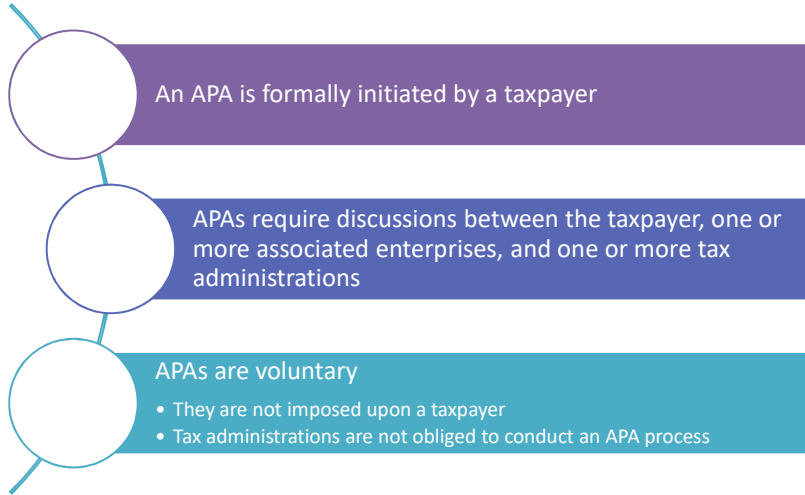
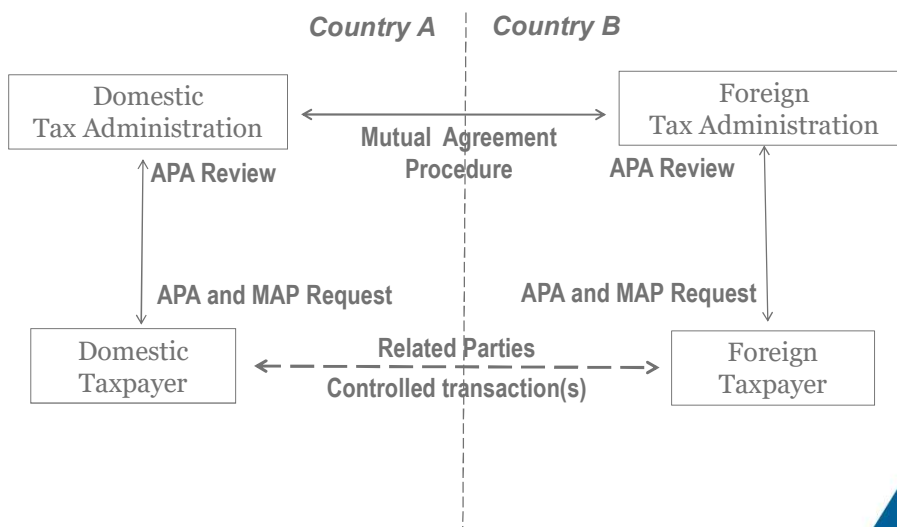


Diagram of the MAP APA Process





Typical Process for Bilateral APAs



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Typical Process for Bilateral APAs



Step 1

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Step 1: Pre-Filing Meeting

Attendees

- Taxpayer and/or taxpayer's consultants
- Tax administration representatives (Competent Authorities / MAP APA Office)

Objectives

- Explore issues and requirements for submission
- Tax administration explains APA process
- Presentation of case, suitability of case for an APA, first information on documentation needed and the scope of the analyses;
 - e.g. extent of functional analysis of affiliated enterprises, selection and adjustments of comparables, need for and scope of market, industry and geographic analyses);
- Opportunity for taxpayer to discuss concerns regarding disclosure and confidentiality of data;
- Determine rough time frame for the APA process

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Step 1: Pre-Filing Meeting

More than one pre-filing meeting may be held

Anonymous pre-filing meetings possible in some countries (e.g. China, Germany, USA, Japan, others)

Competent Authorities involved may consider (informal) early exchange of views whether MAP APA is appropriate.

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Typical Process for Bilateral APAs



Step 2

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Step 2: Formal Application

Written application (APA proposal) by taxpayer to be submitted to local tax office or CA/MAP office

- In some countries (e.g. USA, Germany, Japan, others) APA request must be submitted no later than deadline for filing of taxpayer's tax return for the first year to be covered by APA

Explanation by taxpayer of justifiable interest in the APA

Documentation Review and acceptance of the APA application

Term of the APA

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Step 2: Formal Application



Key elements

- Enterprises, PEs involved
- Transactions and fiscal years covered (and which transactions excluded and why)
- Functional analysis: business description, organisational structure, markets, functions, assets, risks
- Proposed transfer pricing methodology: description and justification
- Availability and identification of internal and/or comparables and expected range of results, comparability adjustments, etc.
- Critical assumptions
- Background factual and legal items
- Financial statements, tax returns

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Step 2: Formal Application

“Content of proposal and extent of necessary supporting information and documentation depends on facts and circumstances of each case and requirements of the individual participating tax administrations.”

30



Step 2: Formal Application



- Taxpayer encouraged to provide same information to evaluate APA proposal and undertake MAP to foreign tax authority



- Taxpayer may submit APA proposal directly to all CAs



- Domestic CA may forward taxpayer's APA application to other CAs involved

31



Typical Process for Bilateral APAs



Step 3

32



Step 3: Evaluation of APA request

Is the MAP APA appropriate?
Advantage to be gained by agreeing a method for avoiding the risk of double taxation in advance?

Requires exercise of judgement and need to balance the efficient use of limited financial and human resources with the desire to reduce likelihood of double taxation

33



Step 3: Evaluation of APA request

Methodology and other terms and conditions of the APA proposal in line with OECD TPG?

- *If not, taxpayer to revise the proposal accordingly, in order to increase the chances of reaching a mutual agreement.*

Are the APA issues likely to significantly increase the risk of double taxation and so justify the use of resources to settle any problems in advance of the proposed transactions?

Are the transactions in question seriously contemplated and not of a purely hypothetical nature?

- *The process should not be used to find out the likely views of the tax administration on a general point of principle - there are other established methods for doing this in many countries.*

34



Step 3: Evaluation of APA request

Audit or examination in progress should be no impediment

- Outcome of TP audit in progress in relation to past years where fact pattern substantially similar to APA proposal may be expedited by MAP APA.
- Terms of APA could be applied to inform or resolve the audit and any unresolved mutual agreement procedures for earlier years.

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Step 3: Discussion

Each tax administration normally forms an “APA-team”

Exchange of position papers between CAs

- Initial position paper based on domestic regulations, OECD TP Guidelines and treaty provisions

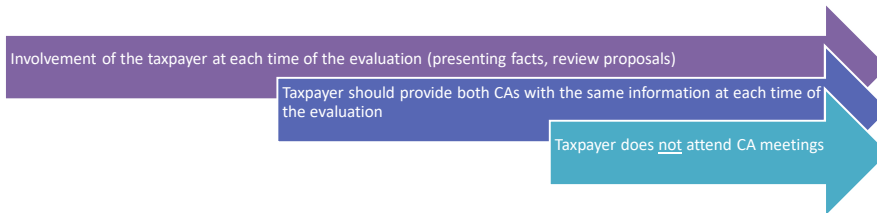
Competent Authority discussions mainly based on OECD TP Guidelines and treaty provisions

Open and simultaneous exchange of information between both CA

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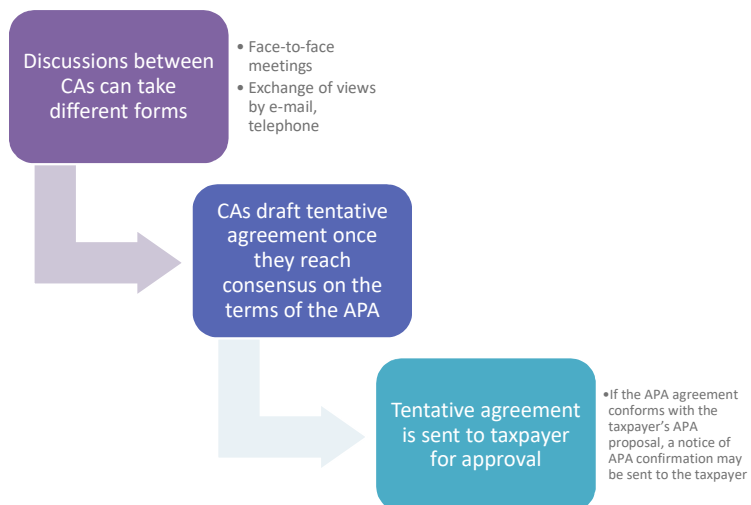
Step 3: Discussion



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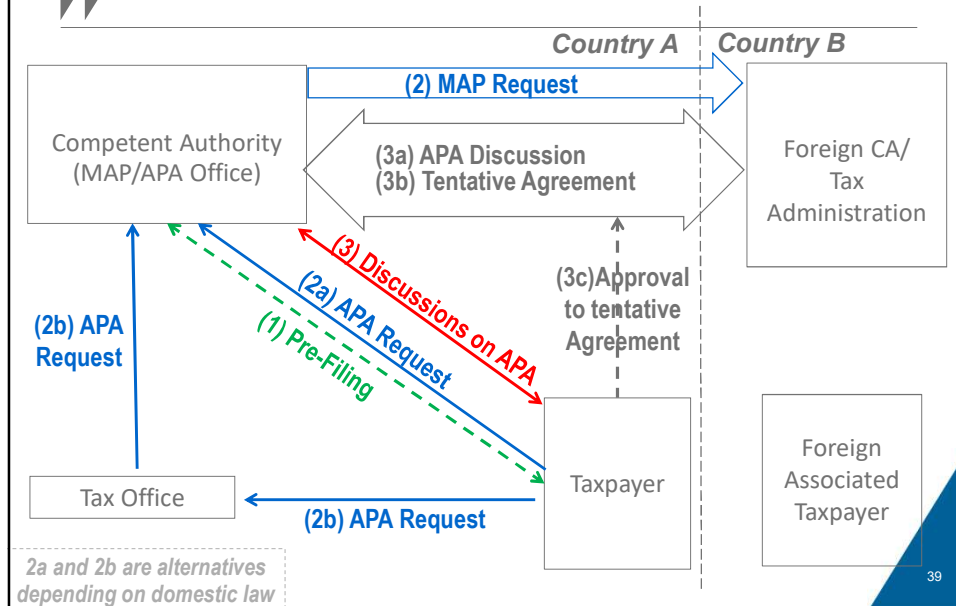
Step 3: Discussion



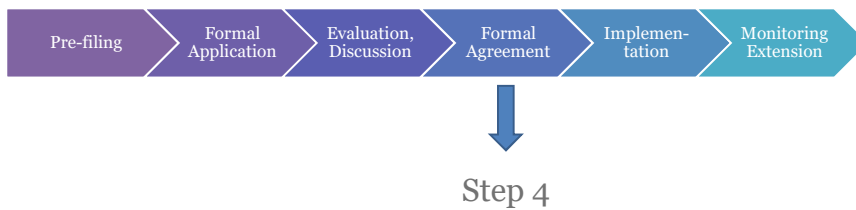
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Recap: Steps 1 - 3

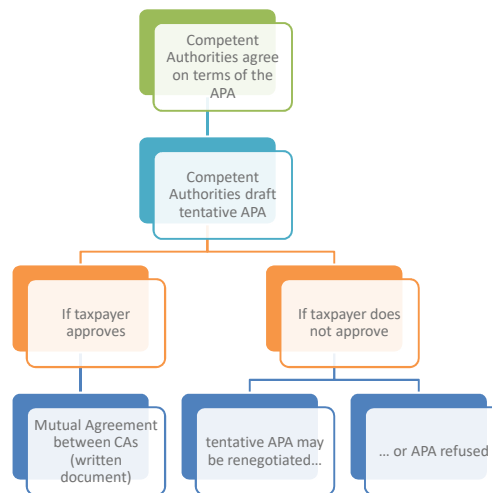


Typical Process for Bilateral APAs





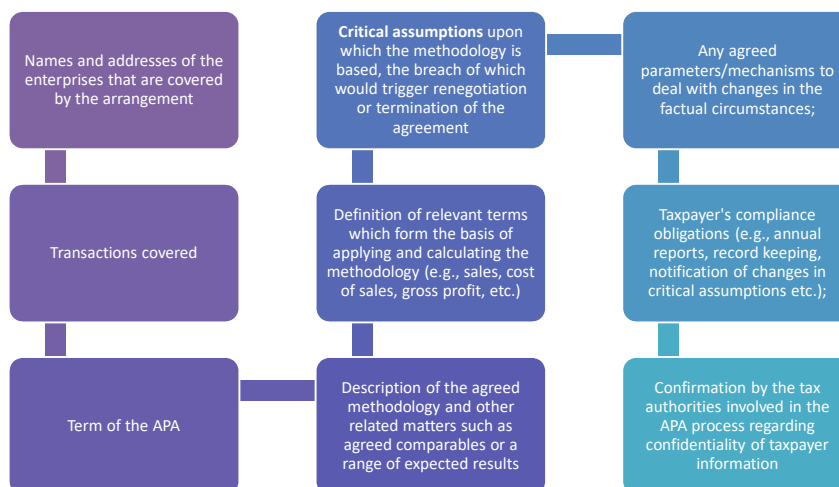
Step 4: Formal Agreement



41



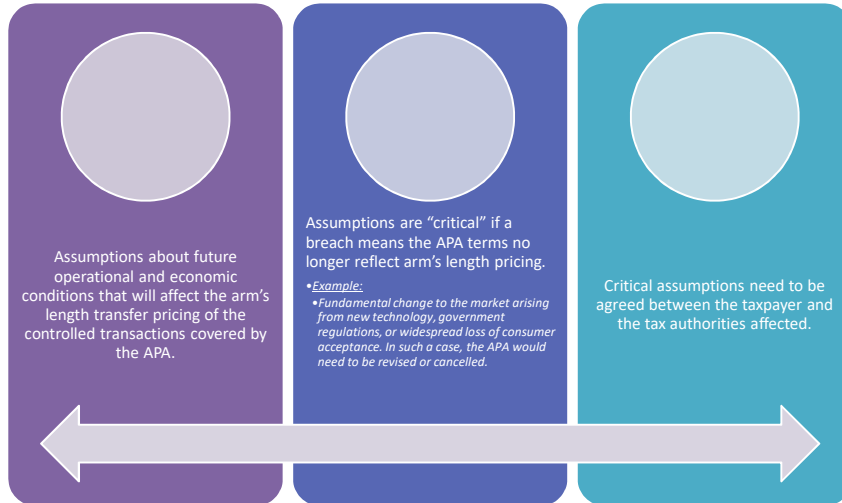
Step 4: Formal Agreement



42



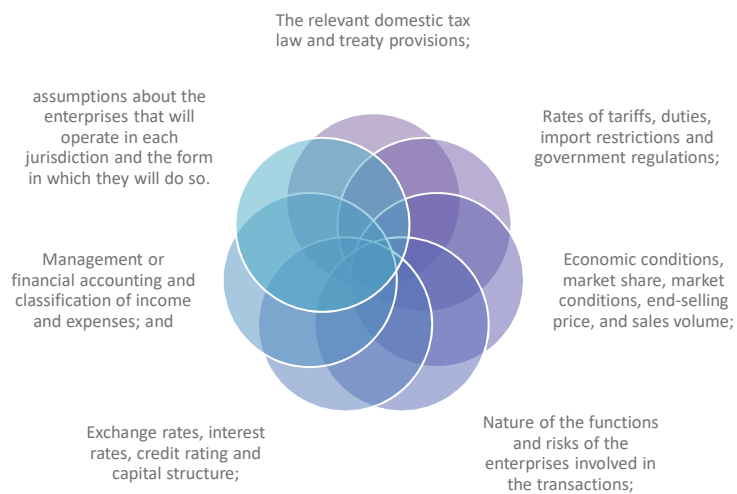
Step 4: Formal Agreement Critical Assumptions



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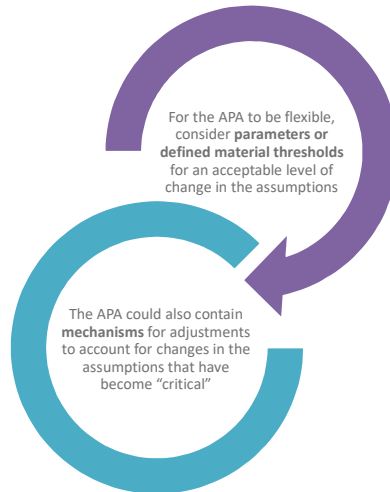
Step 4: Formal Agreement Critical Assumptions – examples



44



Step 4: Formal Agreement Critical Assumptions



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Step 4: Formal Agreement TP methodology

What if results of applying the TP methodology agreed in the MAP APA do not fulfil the expectations of one of the parties?

- That party may question whether the critical assumptions, and the methodology which they support, are still valid.

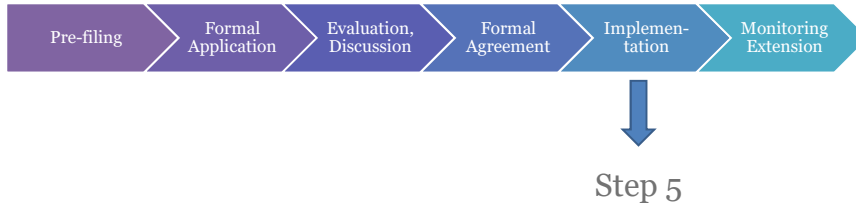
To cope with likely changes in the facts and circumstances the proposed methodology could include, for example:

- price adjustment clauses or allowing prices to vary with volume
- an acceptable range of results in advance
- acceptable royalty as long as it falls within a certain % of profits.

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Typical Process for Bilateral APAs



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Step 5: Implementation of APA

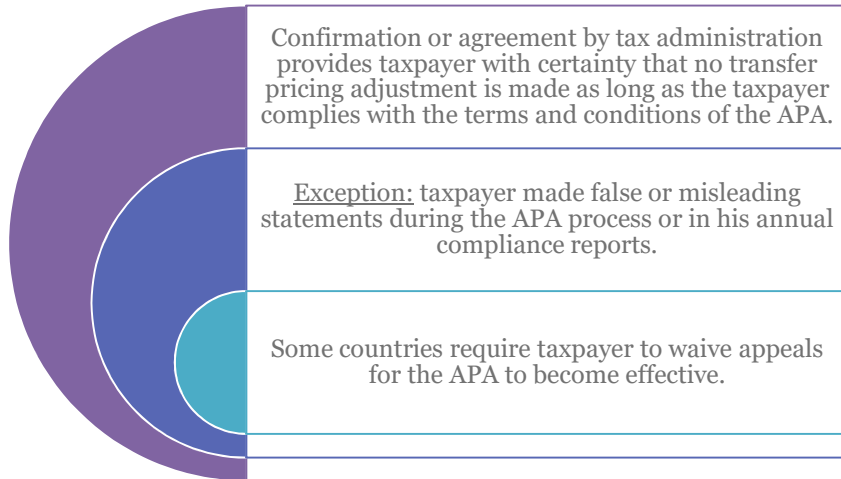
MAP APA has been finally agreed, participating tax administrations need to **give effect** to the agreement in their own jurisdiction.

Confirmation or agreement between tax administration and respective taxpayer varies from country to country and exact form depends on particular domestic law and practice.

48



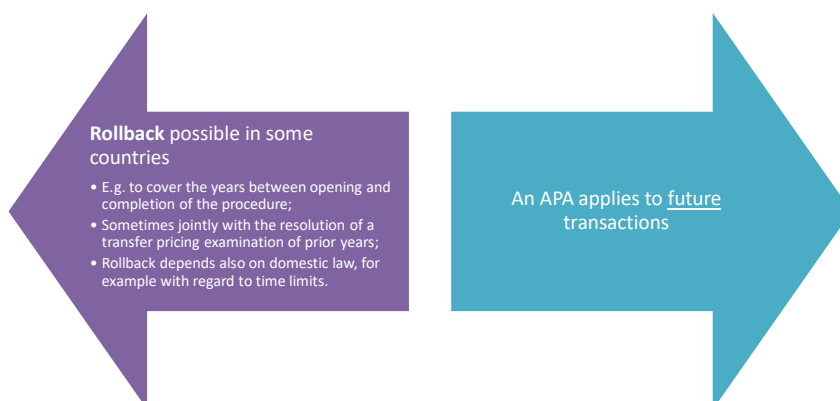
Step 5: Implementation of APA



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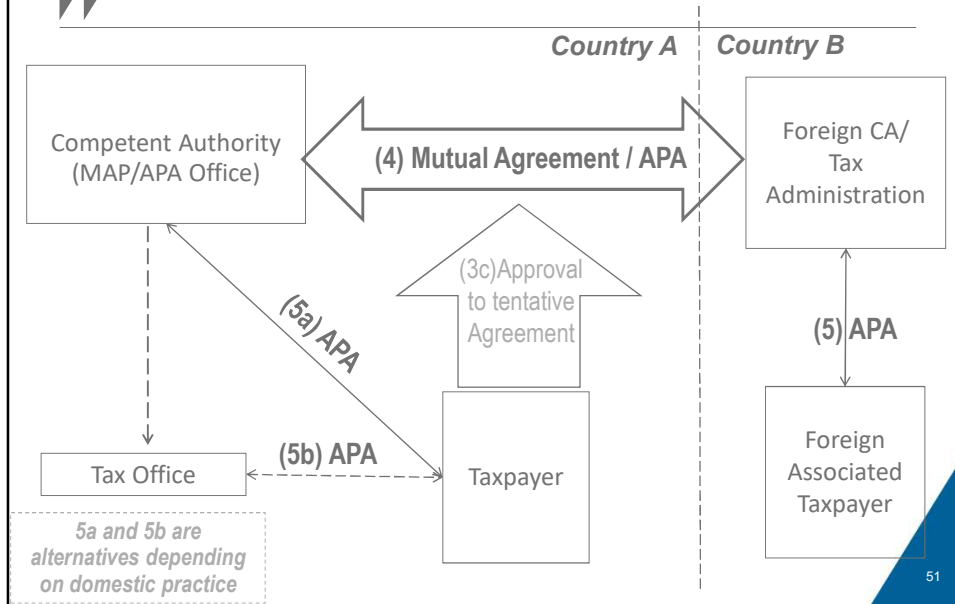
Step 5: Implementation of APA Rollback



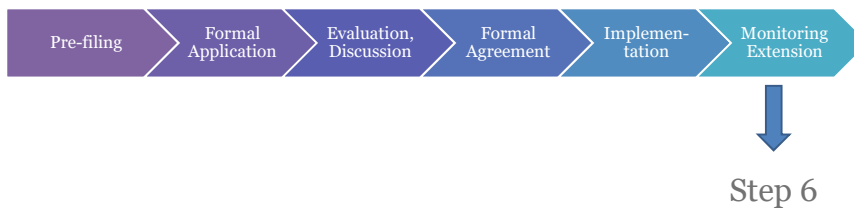
50



Recap: Steps 4-5



Typical Process for Bilateral APAs





Step 6: Monitoring

Monitoring is an essential feature of the MAP APA procedure.

- Record keeping and annual reports required from taxpayers;
- Examinations limited to whether the terms of the APA were respected and critical assumptions still valid.

Consequences of non compliance or changes in circumstances:

- *Revoking a MAP APA (retrospectively)*
- *Cancelling a MAP APA (for the future)*
- *Revising a MAP APA*

53



Step 6: Monitoring



Taxpayer provides tax administration with **annual compliance reports** (fulfilment of the transfer pricing conditions and the critical assumptions)

Compliance reports are examined

- In cases of deviation of critical assumptions:
- Re-negotiation or termination of the APA
- Tax authorities not allowed to make TP adjustment if taxpayer applied TP methodology as agreed in the APA and critical assumptions do not exceed agreed level.



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Step 6: Monitoring Examinations/Audits

Tax administration may require the taxpayer to establish that:

- Taxpayer has complied with the terms and conditions of the MAP APA;
- Representations in the proposal, the annual reports and in any supporting documentation, remain valid and that any material changes in facts or circumstances have been included in the annual reports;
- TP methodology has been accurately and consistently applied in accordance with the terms and conditions of the MAP APA; and
- Critical assumptions underlying the transfer pricing methodology remain valid.

Consequences of Non-Compliance or Changes in Circumstances:

- Tax administrations may agree to continue applying the MAP APA even in case of non-compliance or changes in critical assumptions, for example where the effect of the failure to comply is not material.

55



Step 6: Monitoring

Consequences of non compliance or changes in circumstances

Revocation: the MAP APA never existed. The revocation is retroactive to the beginning of MAP APA period.

Cancellation: the MAP APA is cancelled prospectively from a certain date. The MAP APA will no longer have any further force on the affected taxpayer(s) and the other tax administration from the date of cancellation.

Revision: the MAP APA remains effective for the whole period but its terms may be changed prospectively.

Action to be taken is depends on seriousness of the non-compliance

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Step 6: Renewal of APA

- Format, processing, and evaluation of renewal application usually similar to initial MAP APA application.

- Level of detail may however be reduced with the agreement of the participating tax administrations, particularly if there have not been material changes in the facts and circumstances of the case.

- Renewal of a MAP APA is not automatic and depends on the consent of all parties concerned and on the taxpayer demonstrating compliance with the terms and conditions of the existing MAP APA.

- Methodology and terms and conditions of the renewed MAP APA may differ from those of the previous MAP APA.

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DISPUTE PREVENTION: ADVANCE PRICING ARRANGEMENTS: CASE STUDY

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018

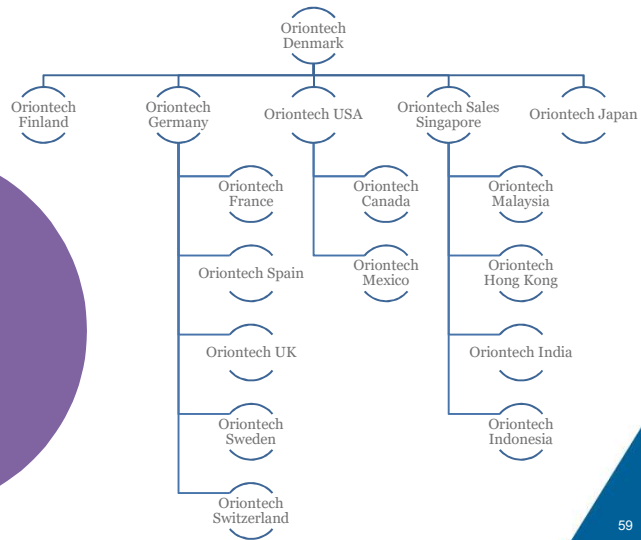




Oriontech group

High-quality mobile phone handsets under the 'Orion' brand

- Development
- Manufacturing
- Distribution
- Retail



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DISPUTE PREVENTION: IMPLEMENTATION OF BEPS ACTION 14

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018





ELEMENTS OF THE MINIMUM STANDARD

61



Minimum standard: translated into the terms of reference for peer review

(A) Preventing disputes

(B) Availability and access to MAP

Key features of an efficient &
effective MAP process

(D) Implementation
of MAP agreements

(C) Resolution of MAP cases

62



Terms of reference regarding dispute prevention

Part A

Article 25(3) – 1st sentence

Tax treaties should contain a provision which requires CAs to endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of their tax treaties

roll-back of BAPAs

Bilateral APA programmes should provide for the roll-back of APAs in appropriate cases

63



TOR A.1.

64



Article 25 (3), first sentence of the OECD Model Tax Convention

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

65




Article 25(3), first sentence of the OECD Model Tax Convention (2)

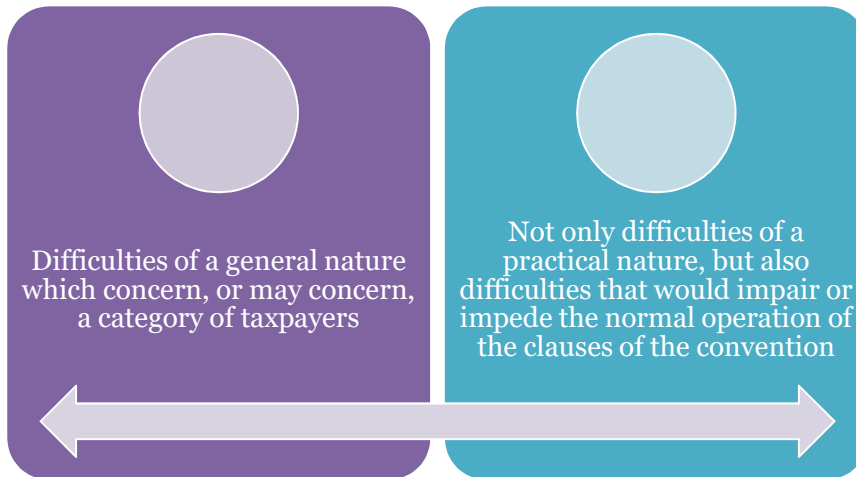
First sentence: four potential items to resolve

- *resolve by mutual agreement any*
- *difficulties or*
- *doubts*
- *arising as to*
- *the interpretation or*
- *application of the Convention*


The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

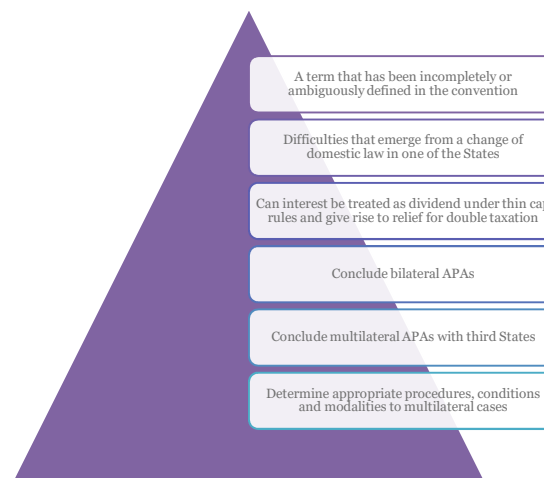
66

 Art. 25(3),1
Scope



67

 Art. 25(3),1
Examples



68



Question

Is the following text in line with the Action 14 Minimum Standard?

“Where a taxpayer of one of the Contracting States shows proof that taxes assessed or likely to be assessed against him have resulted or will result in double taxation prohibited by the Convention, he may submit to the tax authorities of the State in which he has his domicile a written application for the review of the said taxes.

If the application is upheld by the tax authorities to which it is submitted, the latter shall come to an understanding with the tax authorities of the other State with a view to the avoidance of the double taxation. Any agreement reached shall be implemented within time limits in the domestic law of the Contracting States.

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties arising as to the interpretation or application of the Convention.”

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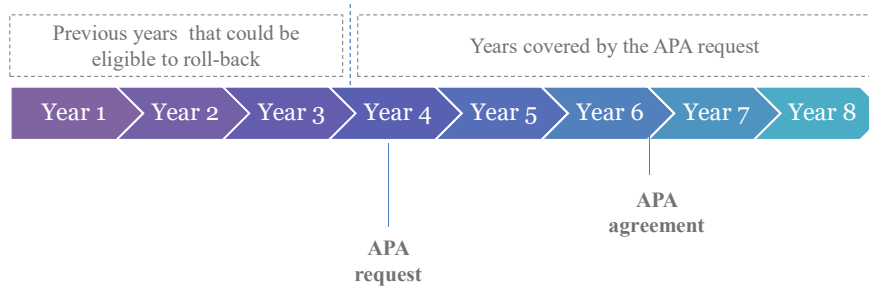
TOR A.2.

70



Preventing disputes Roll-back of bilateral APAs

“Bilateral APA programmes should provide for the roll-back of APAs in appropriate cases”



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Situation



72



Questions

An agreement is reached in 2019

1. Should A and B provide for roll-back, and if yes, for which years?
2. What if the facts and circumstances were the same for 2015-2017?
3. What if both have a statute of limitation of 7 years?

73



Answers

1

- Facts and circumstances are not the same so no obligation to provide roll-back

2

- Is 2015 still covered or is it already barred?

3

- 2015 is covered

74

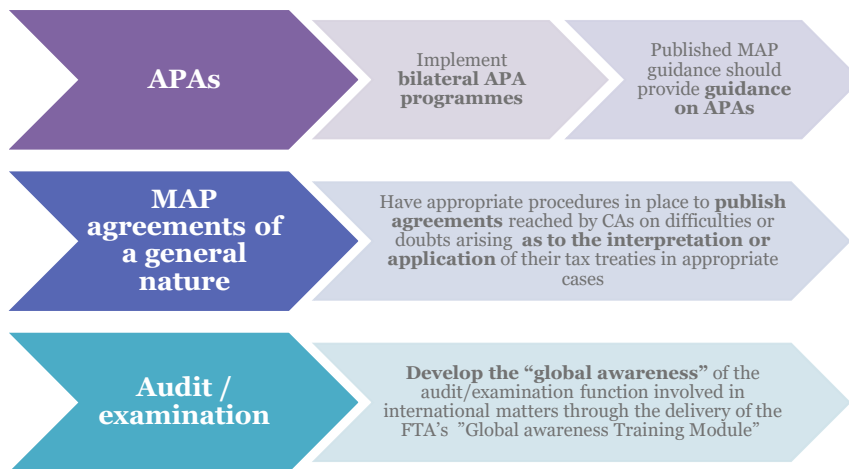


BEST PRACTICES

75



Best practices Preventing disputes



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B.P. 1.

77



Implement bilateral APA programme



78



B.P. 2.

79



Publish agreements of a general nature

Agreements which relate to general matters that affect the application of a treaty for all taxpayers or a category of taxpayers

- Where these agreements provide guidance that would be useful to prevent future disputes
- Where CAs agree that publication is consistent with principles of sound tax administration

80



Publish agreements of a general nature



The use of the authority provided by art. 25(3), 1 may be an effective tool to reinforce consistent bilateral application of the treaties



≈ CA should be encouraged to make use of that authority



≈ countries should have appropriate procedures in place to publish such agreements

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B.P. 3.

82



Published MAP guidance should provide guidance on APAs

Guidance on APAs should be published

As APA is a mean to prevent dispute, should be included in MAP guidance

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MAP guidance should provide guidance on APAs

Possible items

- Legal basis
- Persons to contact
- Necessary documentation
- Steps in process
- Role of taxpayer and CA
- Covered years, including roll-back
- Multilateral APAs

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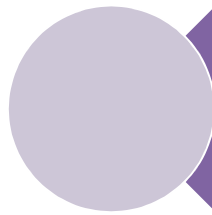


B.P. 4.

85

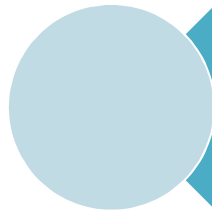


Develop “global awareness”



Increasing the « global awareness » of the audit and examination functions involved in international matters is of central importance in

- preventing dysfunctional tax administration behaviours
- Avoiding disputes that these behaviours can create




≈ countries should seek to develop the « global awareness » by making appropriate use of the FTA’s Global Awareness Training Module

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THE TAX CERTAINTY AGENDA DISPUTE RESOLUTION

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018





Dispute resolution Outline




Dispute Resolution: Implementation of BEPS Action 14


- Elements of the Action 14 Minimum Standard & Best Practices
- Availability and Access to MAP
- Resolution of MAP Cases
- Implementation of MAP Agreements



Group discussion/Breakout: Case study II




Dispute resolution: Arbitration



Dispute Resolution: Domestic appeal mechanisms/regime:



- Interaction between domestic appeal mechanisms and MAP
- Tour the table: Sharing on legislative and administrative framework governing the interaction between domestic appeal mechanisms/regime and MAP

2

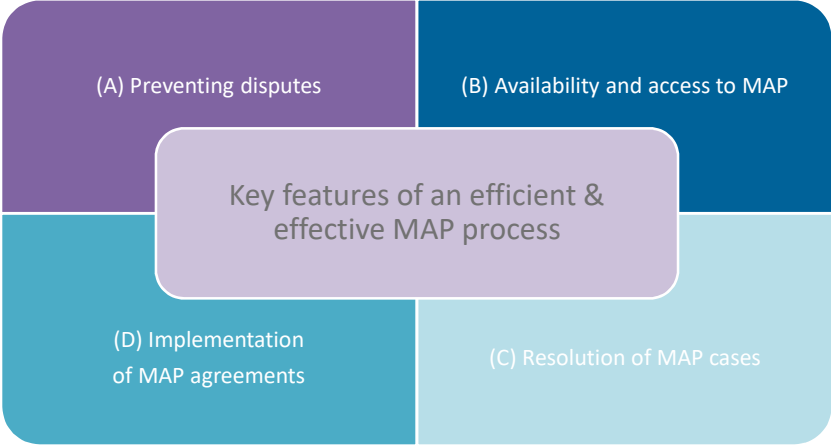


DISPUTE RESOLUTION: IMPLEMENTATION OF BEPS ACTION 14

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



Minimum standard: translated into the terms of reference for peer review



(A) Preventing disputes


(B) Availability and access to MAP

Key features of an efficient &
effective MAP process

(C) Resolution of MAP cases


(D) Implementation
of MAP agreements

4



**DISPUTE RESOLUTION:
IMPLEMENTATION OF BEPS
ACTION 14:
AVAILABILITY AND ACCESS
TO MAP**

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



**ELEMENTS OF THE
MINIMUM STANDARD**

6



Terms of reference regarding availability and access to MAP

Part B Ensuring awareness of MAP requests by both CAs

Tax treaties should contain Article 25(1) of the OECD MTC

If the tax treaty does not permit a MAP request to be made to either Contracting Party and the CA who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the CA should implement a bilateral consultation or notification process which allows the other CA to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case)

Article 25(3) – 2nd sentence

Tax treaties should contain a provision under which CAs may consult together for the elimination of double taxation in cases not provided for in their tax treaties

7



Terms of reference regarding availability and access to MAP (2)

Part B Access to MAP

In **transfer pricing** cases

In cases in which there is a disagreement between the taxpayer and the tax authorities on the **application** of treaty / domestic law **anti-abuse provision**

In cases where there is an **audit settlement** between tax authorities and taxpayers (MAP access may be limited with respect matters resolved through an administrative or statutory dispute settlement / resolution process independent from the audit and examination functions and that can only be accessed through a request by the taxpayer)

If the taxpayer has **provided the required information** based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP

8



Terms of reference regarding availability and access to MAP (3)

Part B

Publication of clear rules, guidelines and procedures

Clear rules, guidelines and procedures on access to and use of the MAP including the following should be published and be easily accessible to taxpayers:

- Specific information and documentation that should be submitted in a taxpayer's request for MAP assistance
- MAP profiles
- Relationship between audit settlements and access to MAP



TOR B.1.



Article 25 (1) of the OECD Model Tax Convention*

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national.

The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

* as it read on 15 July 2014

11



Article 25(1) of the OECD Model Tax Convention (2)

First sentence: right for taxpayers to submit a MAP request


- when they consider that there is or will be taxation not in accordance with the convention,
- irrespective of domestic available remedies,
- [to the state of residence, or, in case of the application of the non-discrimination article, to the state where they are a national].

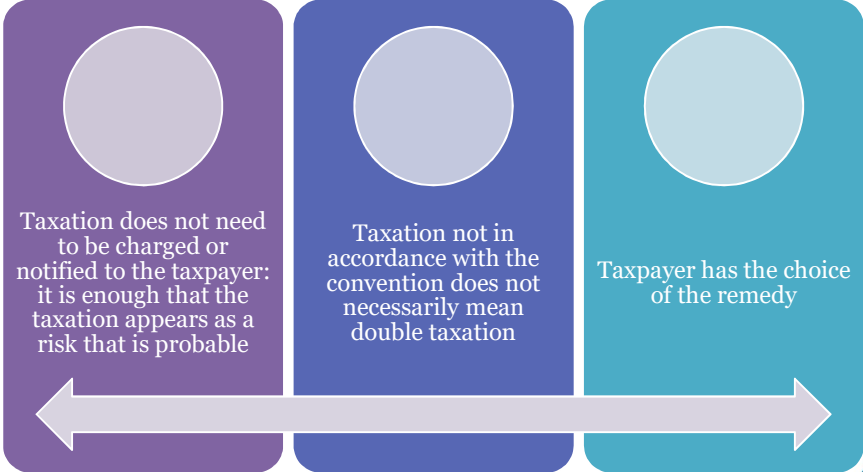
Second sentence: timeline to submit a MAP request

- within 3 years (at least)
- starting point: as from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

12

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




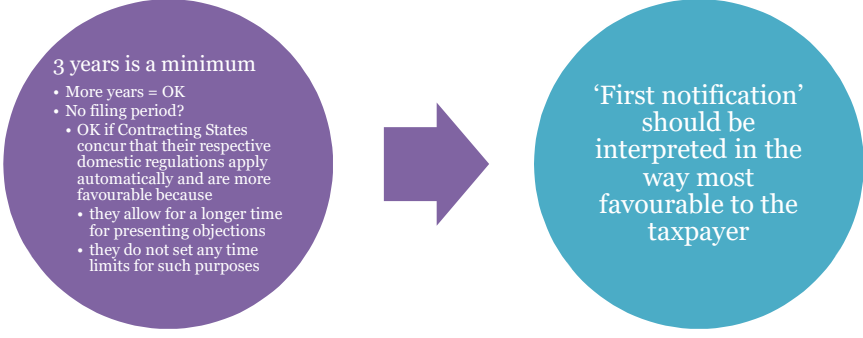
Taxation does not need to be charged or notified to the taxpayer: it is enough that the taxation appears as a risk that is probable

Taxation not in accordance with the convention does not necessarily mean double taxation

Taxpayer has the choice of the remedy

13

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



3 years is a minimum

- More years = OK
- No filing period?
- OK if Contracting States concur that their respective domestic regulations apply automatically and are more favourable because
 - they allow for a longer time for presenting objections
 - they do not set any time limits for such purposes

'First notification' should be interpreted in the way most favourable to the taxpayer

14



Question

Is the following text in line with the Action 14 Minimum Standard?

“Where a taxpayer of one of the Contracting States shows proof that taxes assessed or likely to be assessed against him have resulted or will result in double taxation prohibited by the Convention, he may submit to the tax authorities of the State in which he has his domicile a written application for the review of the said taxes.

If the application is upheld by the tax authorities to which it is submitted, the latter shall come to an understanding with the tax authorities of the other State with a view to the avoidance of the double taxation. Any agreement reached shall be implemented within time limits in the domestic law of the Contracting States.

The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties arising as to the interpretation or application of the Convention.”

15



TOR B.2.

16



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

Text provision – 2014 version:

*Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority **of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national***

Text provision – 2017 version

*Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority **of either Contracting State***



Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process

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

- When the taxpayer is not able to submit its MAP request to the competent authorities of either contracting state; and
- If the competent authority considers the objection not to be justified

Notification or bilateral consultation process



Purpose

Allow the other competent authority to provide its view on the case



Allow submission of MAP requests to the competent authority of either treaty partner, or, alternatively, introduce a bilateral consultation or notification process (2)

Relevance of the Term of reference

- At this stage, significant portion of treaties that do not allow taxpayers to submit their MAP request to competent authority of either treaty partner

Use of the process in practice

- No need for a formal process but it needs to be documented
- Only in case the competent authority considers an objection not to be justified => If this did not happen during the period under review, not possible to assess whether the process is used in practice

19



TOR B.3. – B.5.

20



Providing access to MAP

- Transfer pricing cases
- Cases discussing the application of anti-abuse provisions
- Cases where audit settlements were reached

Should not be denied access to the MAP per se (when eligible)



21



Transfer pricing cases

Economic double taxation resulting from a TP adjustment under art. 9(1) is not in accordance with the object and the purpose of the Convention

Failure to grant access to MAP will frustrate a primary objective of tax treaties

≈ access to MAP should be provided in TP cases, even in the absence of art. 9(2)

22



Cases regarding the application of an anti-abuse provision

Envisaged situations: disagreement between the taxpayer and the tax authorities making the adjustment as to whether

the conditions for the application of a treaty anti-abuse provision have been met

the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty

23



Treaty abuse

There is no general rule denying MAP access in cases of perceived abuse

Treaty benefits may be denied through the application of an anti-abuse provision where obtaining a more favourable treatment based on the treaty would be contrary to the object and purpose of the relevant treaty provisions (commentary on Art. 1)

This principle will be incorporated via a PPT

≈ the interpretation and application of that rule falls within the scope of MAP

24

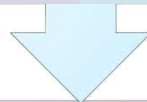


Access to MAP

Obligation to provide access to MAP ≠

obligation to endeavour
to resolve the case

obligation to submit an
issue to arbitration



The case must be admissible before the
obligation to endeavour to resolve the
case applies

25



Cases where there is an audit settlement between the taxpayer and the tax authority

CAs should independently
consider whether the audit
settlement would result for the
taxpayer in taxation not in
accordance with the provisions
of the treaty

Access to MAP ≠ availability of
arbitration

26



Special situation: administrative or statutory dispute settlement or resolution process

If independent from the audit and examination functions

that can only be accessed through a request by the taxpayer

≈ access to MAP may be limited with respect to matters resolved through that process but

- Treaty partners should be notified of such processes
- Taxpayers should be informed in MAP guidance and guidance on the process

27



TOR B.6.

28



Provide access to MAP if required information is submitted

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

Use of the process in practice

- How does the assessed jurisdiction ask for additional information?
- What is the timeline?
- Are taxpayers given enough information and time to provide such required information?
- Has the assessed jurisdiction denied access to MAP in cases such as these?

29



TOR B.7.

30



Article 25(3), second sentence

They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

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Art. 25(3), second sentence Example

Resident of a
third state
having PEs in
both
contracting
states

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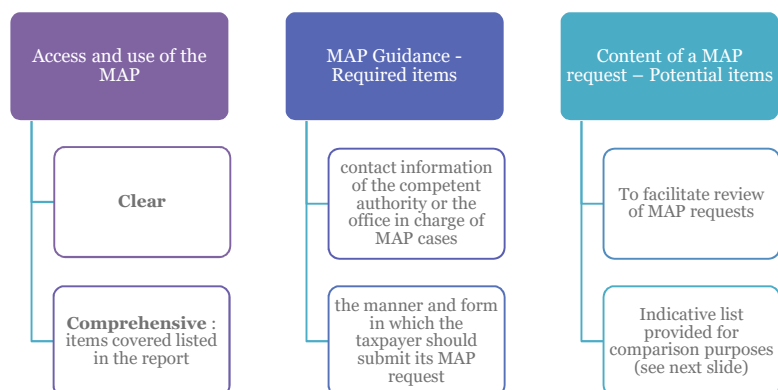
TOR B.8.

33



Publish clear and comprehensive MAP guidance

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



34

Publish clear and comprehensive MAP guidance (2)



Content of a MAP request

Guidance on specific information and documentation required to be submitted with a request for MAP assistance (CTPA/CFA/NOE2(2016)49)

- Identification of the taxpayer(s) covered
- The basis for the request
- Facts of the case
- Analysis of the issue(s) requested to be resolved via MAP
- Whether MAP request was also submitted to the CA of the other Contracting Party
- Whether the MAP request was also submitted to another authority under another Instrument that provides for a mechanism to resolve treaty-related disputes
- Whether the issue(s) involved were previously dealt with
- A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the CA in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the CA in a timely manner

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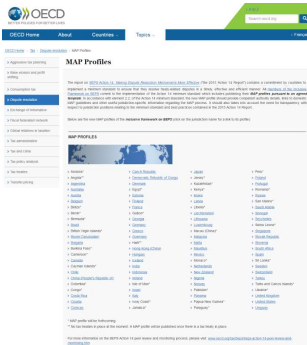
TOR B.9.

36



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

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



- Guidance publicly available

 - Published on the Internet
 - Updated if necessary

- Guidance easily accessible

 - Search for « double taxation » or « mutual agreement procedure » on the government's website

- MAP profile

 - Check of the consistency of information provided with actual practice
 - Check of the links



TOR B.10.



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

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

Review process

- Is the relationship between MAP and (i) audit settlements and (ii) other administrative or statutory dispute settlement/resolution processes addressed in publically available MAP guidance?
- Does the assessed jurisdiction notify its treaty partners of any existing statutory dispute settlement/resolution process?

39



BEST PRACTICES

40



Best practices Availability and access to MAP

Recourse to MAP

- Implement appropriate administrative measures to **facilitate recourse to MAP** to resolve treaty-related issues, recognising the general principle that the choice of remedies should remain with the taxpayer

Suspension of collections procedures during MAP

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

MAP guidance

- provide that taxpayers will be allowed **access to MAP** so that CAs may resolve through consultation the double taxation that can arise **in the case of bona fide taxpayer-initiated foreign adjustments**
- provide **guidance on multilateral MAPs**

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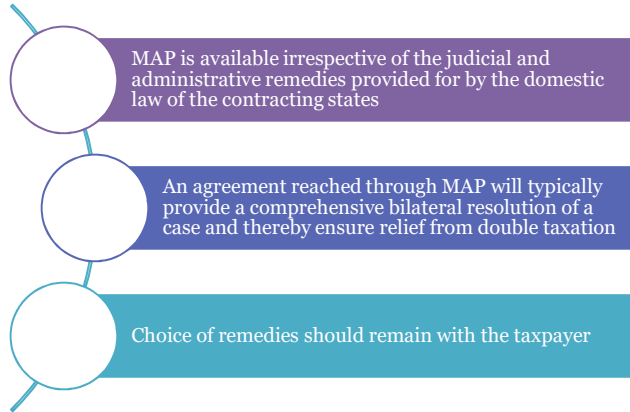
B.P. 5.

42



Implement appropriate measures to facilitate recourse to MAP

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



B.P. 6.



Info on access to MAP for cases of double taxation that can arise from bona fide taxpayer-initiated foreign adjustments in MAP guidance

Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to 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.

Which adjustments?

- Taxpayer initiated adjustments permitted under the domestic law of a treaty partner which allow a taxpayer under appropriate circumstances to amend a previously-filed tax return to adjust
 - The price for a transaction between associated enterprises
 - The profits attributable to a PE
- With a view to reporting a result that is, in the view of the taxpayer, in accordance with the ALP.

Bona fide?

- 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 PE 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



Practical issue

Starting point of 3-year period

Notice of assessment or liability resulting from the amended return or

Time when taxpayer would be regarded as having been made aware of the taxation that is in fact not in accordance with treaty



B.P. 7.

47



Guidance on multilateral MAPs in MAP guidance

Substantial increase in the pace of globalisation

Unique challenges for existing tax treaty dispute resolution mechanisms

Regional and global business models and accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes

≈ countries should develop and include in their MAP guidance appropriate guidance on multilateral MAPs

48



B.P. 8.

49



Provide for suspension of collections procedures during the period a MAP case is pending

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

If payment is required for MAP access

- the taxpayer may face significant financial difficulties


If both administrations collect

- double taxation occurs and can result in cash flow problems with substantial impact on a taxpayers' business

≈ countries should take appropriate measures


- For a suspension, at least under the same conditions as apply to a person pursuing a domestic remedy

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DISPUTE RESOLUTION: IMPLEMENTATION OF BEPS ACTION 14: RESOLUTION OF MAP CASES

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



ELEMENTS OF THE MINIMUM STANDARD

52



Terms of reference regarding availability and access to MAP

Part C	Article 25(2) – 1st sentence	Tax treaties should contain a provision which requires that the CA who receives a MAP request from the taxpayer shall endeavour, if the objection from the taxpayer appears to be justified and the CA is not itself able to arrive at a satisfactory solution, to resolve the MAP case by mutual agreement with the other CA, with a view to the avoidance of taxation which is not in accordance with the tax treaty
	Timely resolution	Seek to resolve MAP cases within an average timeframe of 24 months Adequate resources should be provided to the MAP function
	Principled resolution	Staff in charge of MAP processes should have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty Performance indicators for CA functions and staff in charge of MAP processes should not be based on the amount of sustained audit adjustments or maintaining tax revenue
	Arbitration	Transparency with respect to positions on MAP arbitration

53



TOR C.1.

54



Article 25(2), first sentence of the OECD Model Tax Convention

The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.

55



Article 25(2), first sentence of the OECD Model Tax Convention (2)

First sentence: the competent authorities mandate

- Preliminary: possibility for the competent authority to arrive itself (unilaterally) at a satisfactory solution (stage 1)
- Bilateral discussions should be held with a view to avoid taxation not in accordance with the convention (stage 2)


The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention.

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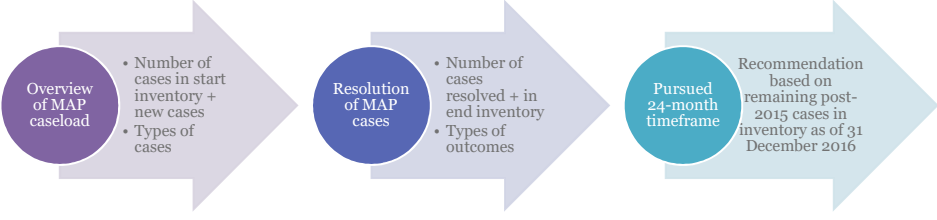
TOR C.2.

57



Seek to resolve MAP cases within a 24-month average timeframe

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



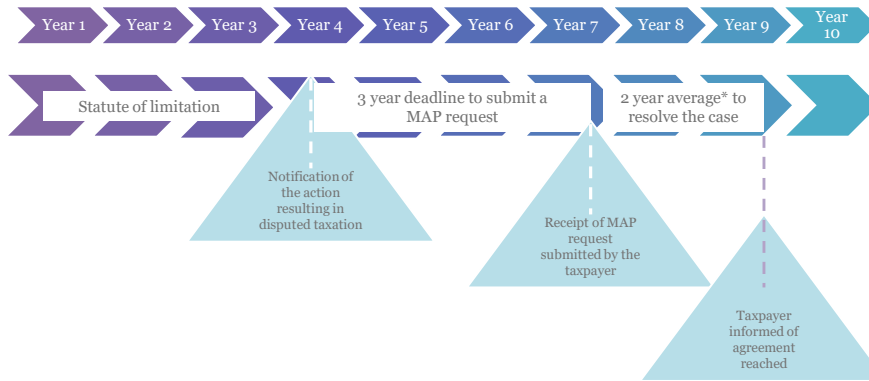
- Overview of MAP caseload**
 - Number of cases in start inventory + new cases
 - Types of cases
- Resolution of MAP cases**
 - Number of cases resolved + in end inventory
 - Types of outcomes
- Pursued 24-month timeframe**
 - Recommendation based on remaining post-2015 cases in inventory as of 31 December 2016

58



Resolution of MAP cases Timeline: pursued 24-month average

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



* Measuring average timeframe on the basis of a new MAP Statistics Reporting Framework

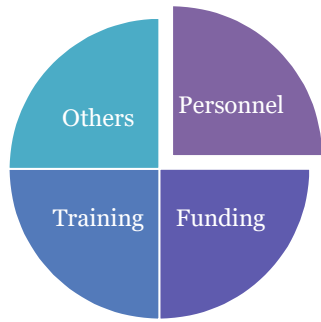


TOR C.3.



Resolution of MAP cases Performance of MAP function

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



Adequate resources

- For the period under review; and
- Monitoring mechanism to cope with evolution of caseload

Taking into account average timeframe

- No conclusion directly drawn from average timeframe
- Average timeframe split per type of case
- Median average timeframe
- Analysis of the time taken performed by the assessed jurisdiction

61



TOR C.4.

62



Resolution of MAP cases Performance of MAP function

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

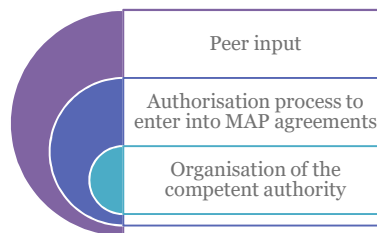
Authority to resolve MAP cases



Without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue



Without being influenced by considerations of the policy that the jurisdiction would like to see reflected in future amendments to the treaty



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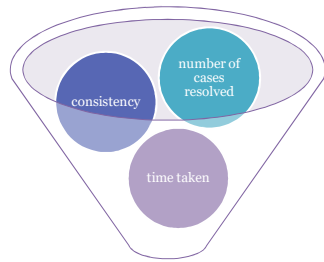
TOR C.5.

64



Resolution of MAP cases Performance of MAP function

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



Examples of performance indicators

Use of specific performance indicators?

If yes, see if appropriate

If not: indirect use of performance indicators?

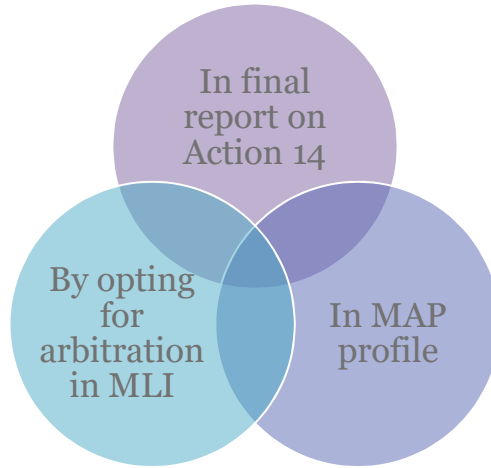


TOR C.6.



Resolution of MAP cases transparency on MAP arbitration

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



67



BEST PRACTICES

68



Best practices Resolution of MAP cases

Recourse to MAP

- Implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the **multi-year resolution through the MAP of recurring issues** with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances

MAP guidance

- Publish an explanation of the **relationship between MAP and domestic law** administrative and judicial remedies
- Provide guidance on the consideration of **interest and penalties** in the MAP

Tax treaties

- **Include art. 9(2)** of the OECD Model Tax Convention in tax treaties

69



B.P. 9.

70



Multi-year resolution of recurring issues

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer which are within the time period provided for in the tax treaty for the multi-year resolution through 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.

Underlying principle

- In certain cases, a request for CA assistance in respect of a specific adjustment to income may present recurring issues which will also be relevant in previous or subsequent filed tax years.

71



Multi-year resolution of recurring issues (2)

MAP procedures that allow a taxpayer also to request MAP assistance with respect to such recurring issues for these other **filed** tax years

may help to avoid duplicative MAP requests and

permit a more efficient use of CA resources.

≈ Countries should seek to implement appropriate procedures to permit, in certain cases and after an initial tax assessment, such taxpayer requests, 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

72



B.P. 10.

73



Guidance on relationship between MAP and domestic law remedies

Jurisdictions should publish an explanation of the relationship between MAP and domestic law administrative and judicial remedies.

Uncertainty

- Interaction is generally governed by a contracting state's domestic law and/or administrative procedures
- Different approaches in different jurisdictions
- The continued availability of other remedies where a taxpayer has chosen first to pursue the MAP and the extent to which a CA may depart from a decision by a domestic court

74



Guidance on relationship between MAP and domestic law remedies (2)

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.

75



B.P. 11.

76



Guidance on the consideration of interest and penalties in MAP

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

Significant importance, particularly in light of the potential for the work on BEPS to increase pressure on MAP

As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

77



B.P. 12.

78



Include Art. 9(2) OECD Model Tax Convention in tax treaties

‘Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other’

79



Include Art. 9(2) OECD Model Tax Convention in tax treaties (2)

Economic double taxation resulting from a transfer pricing adjustment (Art. 9(1) OECD MTC) is


not in accordance with the object and the purpose of tax treaties

falls within the scope of MAP under Art. 25

Access to MAP should be granted in the absence of Art. 9(2) but


being able to make unilaterally a corresponding adjustment would be more efficient

80



DISPUTE RESOLUTION: IMPLEMENTATION OF BEPS ACTION 14: IMPLEMENTATION OF MAP AGREEMENTS

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



ELEMENTS OF THE MINIMUM STANDARD

82



D. Implementation of MAP agreements

Part D

Timely implementation

Any agreement reached in MAP discussions should be implemented on a timely basis

Ensuring implementation of all MAP agreements

Tax treaty should contain a provision which require any mutual agreement reached through MAP be implemented notwithstanding any time limits in domestic law, or the time during which an adjustment pursuant to Article 9(1) or Article 7(2) can be made should be limited in order to avoid late adjustments to which MAP relief will not be available



TOR D.1. – D.2.



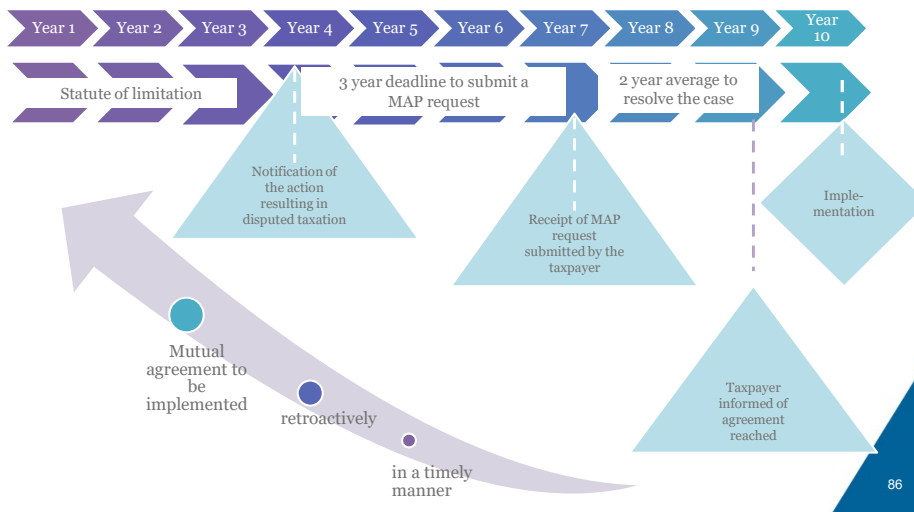
Implementation of MAP agreements

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

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



Implementation of MAP agreements Timeline





TOR D.3.

87



Article 25(2), second sentence of the
OECD Model Tax Convention

‘Any agreement reached shall be
implemented notwithstanding
any time limits in the domestic
law of the Contracting States’

88

Article 25(2), second sentence of the OECD Model Tax Convention (2)

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

Second sentence: implementation of MAP agreements

- All agreements reached should be implemented, irrespective of time limits provided in domestic law
- Alternative to such a provision in the Action 14 Minimum Standard: provide a time limitation for making primary adjustments pursuant to Articles 7 and 9

Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

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Alternatives


In Article 7

- *A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after [bilaterally agreed period] from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.*

In Article 9


- *A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after [bilaterally agreed period] from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, gross negligence or wilful default.*

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DISPUTE RESOLUTION: MAP CASE STUDIES

OECD-IRAS workshop on tax certainty
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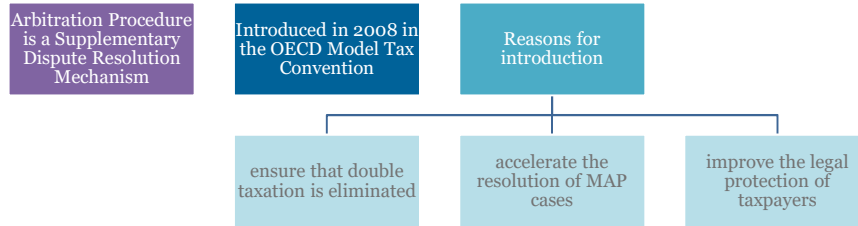
THE TAX CERTAINTY AGENDA DISPUTE RESOLUTION: ARBITRATION

OECD-IRAS workshop on tax certainty
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Purpose of an arbitration provision



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Article 25 (5) of the OECD Model Tax Convention

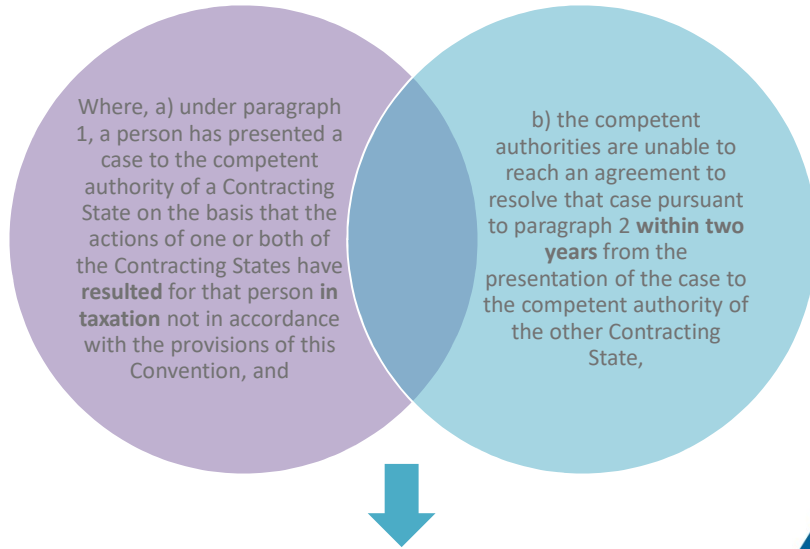
Mandatory, binding arbitration of unresolved issues in Article 25(1) cases after 2-year MAP

- Flexible – mode of application left to mutual agreement of Contracting States
- Sample mutual agreement on procedures included in proposal
- OECD recognises not all countries are in a position to include this procedure

94



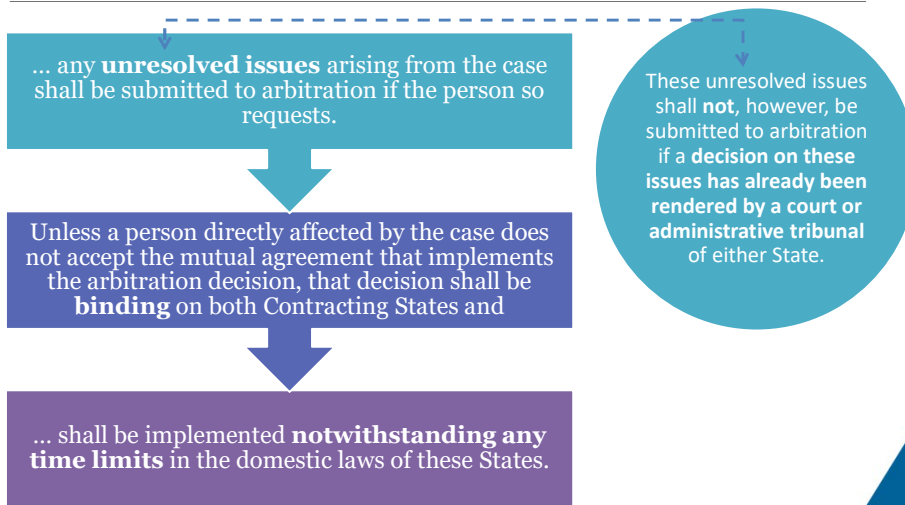
Article 25 (5) of the OECD Model Tax Convention



95



Article 25 (5) of the OECD Model Tax Convention



96



Scope of arbitration

Commentary Para 66:

- “[S]ome States may wish to include paragraph 5 but limit its application to a more restricted range of cases.” Eg:
 - Cases involving issues which are primarily factual in nature
 - Certain classes of cases, e.g. those related to transfer pricing or the question of the existence of a permanent establishment
 - Other issues on a case-by-case basis.

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Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25

Request for submission of case to arbitration

Time for submission of the case to arbitration

Terms of Reference

Failure to communicate the Terms of Reference

Selection of arbitrators

Streamlined arbitration process

Eligibility and appointment of arbitrators

Communication of information and confidentiality

98



Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25 (2)

Failure to provide information in a timely manner

Procedural and evidentiary rules

Participation of the person who requested the arbitration

Logistical arrangements

Costs

Applicable legal principles

Arbitration decision

99



Sample Mutual Agreement on Arbitration Annex to Commentary on Article 25 (3)

Time allowed for communicating the arbitration decision

Failure to communicate the decision within the required period

Final decision

Implementing the arbitration decision

Where no arbitration decision will be provided

100



Arbitration – Key Issues

Scope of issues subject to arbitration

- All “**unresolved**” Article 25(1) issues, unless States provide in treaty for more limited scope
- States may not “agree to disagree” if there is still taxation not in accordance with Convention
- Taxation must already have resulted (e.g. been paid, assessed, determined, or specifically notified)

Two-year period

- from when “sufficient information” presented to the relieving CA to allow it to decide whether the objection underlying the case appears to be justified.

101



Arbitration – Key Issues (2)

Interaction with domestic remedies

- No access to arbitration if court or administrative tribunal has already rendered a decision on the issues (unless States agree otherwise)
- No requirement to waive domestic remedies to access arbitration

102



Arbitration – Key Issues (3)

Binding nature of arbitration decision

- Under “no waiver” approach, binding on governments once taxpayer agrees to be bound
- Enforcement through domestic courts

Forms of arbitration procedure

- Variety of possible approaches
- Determined by competent authorities in enabling agreements and terms of reference

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Arbitration – Key Issues (4)

Selection of arbitrators (sample agreement)

- Each competent authority selects one arbitrator, and they select a third “neutral” arbitrator by mutual consent
- OECD CTPA Director to appoint “neutral” arbitrator if arbitrators cannot agree
- Participation of government officials as arbitrators?

104



Arbitration – Key Issues (5)

Procedural issues (sample agreement)

- Rules of evidence to be agreed by arbitrators
- Participation of the taxpayer (written submission, possible oral presentation)
- Applicable legal principles (double tax treaty, domestic laws, Vienna Convention on the Law of Treaties, Commentaries, Transfer Pricing Guidelines)
- Reasonableness of suggested time periods (e.g. 8 months from appointment of last arbitrator to decision)

105



Arbitration – Key Issues (6)

Implementing the arbitral decision (sample agreement)

- Implemented by CAs as a MAP agreement

Publication of arbitral decisions (sample agreement)

- Specific consent of all parties (including taxpayer) required
- In any event, reasoned opinion in writing required, unless streamlined option chosen

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Design aspects

The provision is flexible:

- The Commentary includes many possible variations
- Practical application details can be modified by changing the procedural mutual agreement; no need to amend the convention
- Most procedural rules can be adapted to each case through the terms of reference
- Streamlined and normal procedures
- Default rules help provide certainty

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Arbitration clauses in tax treaties

Provided for in more than 200 tax treaties

Mandatory arbitration

- Based or not on Art 25(5) of OECD MTC)

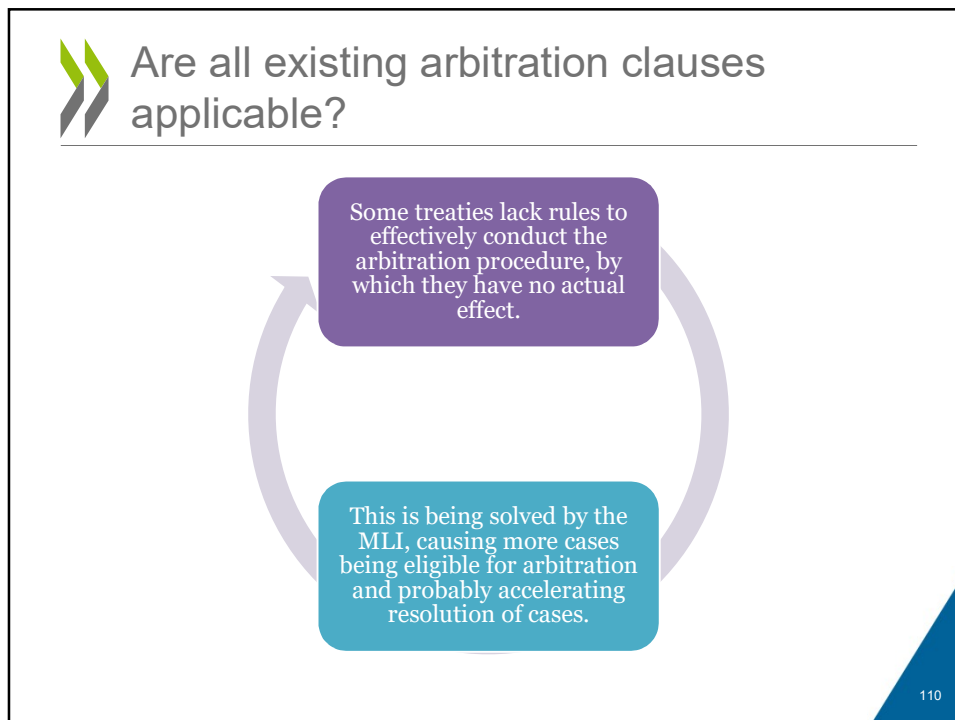
Voluntary arbitration

- *"If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities it may, if both competent authorities agree, be submitted for arbitration" (e.g. Netherlands Canada tax treaty)*

Most Favoured Nation clause

- *"If at any time after the date of signature of this Convention, Norway includes a provision on arbitration in any of its double taxation conventions, the Government of Norway shall inform the Government of Belgium in writing and shall enter into negotiations with Belgium with a view to include a provision on arbitration in the present Convention" . (Protocol Belgium- Norway tax treaty)*

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Article 25 (5) of the OECD Model Tax Convention - summary

- Only the unresolved issues are arbitrated, not the whole case
- CAs can reach an agreement at any time before the decision is rendered
- The arbitration decision is implemented through a mutual agreement

The arbitration process is part of the MAP

- Alleviates weaknesses of MAP
- Increased resolution of cases before arbitration
- Thereby legal protection of taxpayer is improved
- Thereby quality of treaty network is improved

Arbitration supplements MAP

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BEPS & Arbitration

No consensus among all OECD and G20 countries to include arbitration in Action 14 Minimum Standard

Multilateral Instrument:

- Part VI: Mandatory and Binding Arbitration procedure
- Optional for states, no obligation
- Includes rules on
 - Appointment of Arbitrators
 - Confidentiality of Arbitration Proceedings
 - Type of Arbitration Process
 - Deadlines for the procedure
 - Agreement on a different resolution
 - Cost of proceedings

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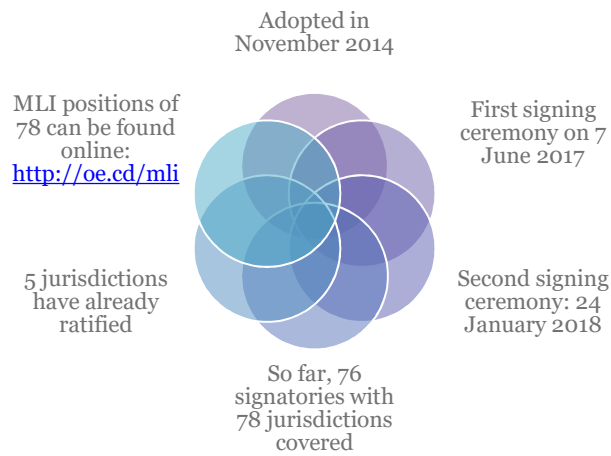
Additional commitment to include arbitration: Final report on BEPS action 14

Australia	Austria	Belgium	Canada	France
Germany	Ireland	Italy	Japan	Luxembourg
Netherlands	New Zealand	Norway	Poland	Slovenia
Spain	Sweden	Switzerland	United Kingdom	United States

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MLI Where are we now?



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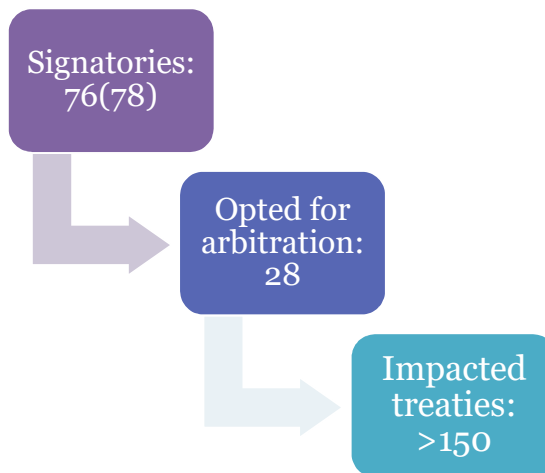
MLI Entry into force



- Entry into force of the MLI
 - Ratification by 5 signatories required
- Entry into force for each other signatory

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MLI AND ARBITRATION Numbers



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MLI AND ARBITRATION

Opting jurisdictions

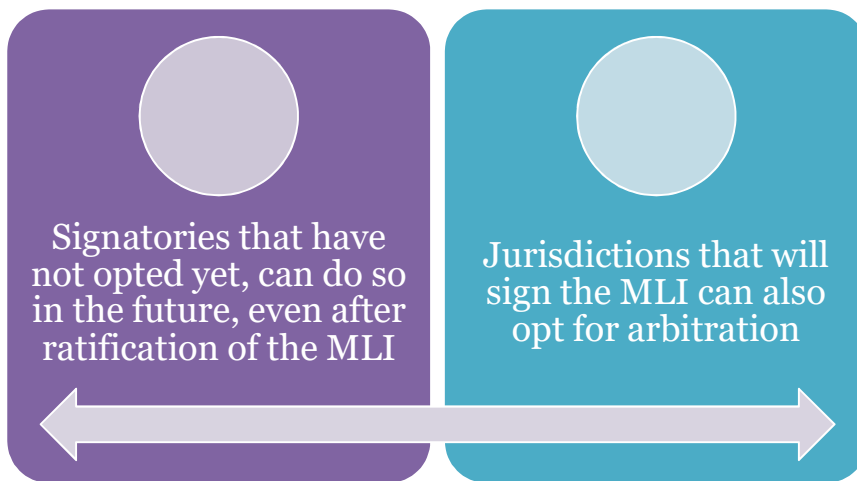
Andorra	Australia	Austria	Barbados
Belgium	Canada	Curacao	Fiji
Finland	France	Germany	Greece
Ireland	Italy	Japan	Liechtenstein
Luxembourg	Malta	Mauritius	Netherlands
New Zealand	Portugal	Singapore	Slovenia
Spain	Sweden	Switzerland	United Kingdom

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MLI AND ARBITRATION

Additional options in the future?

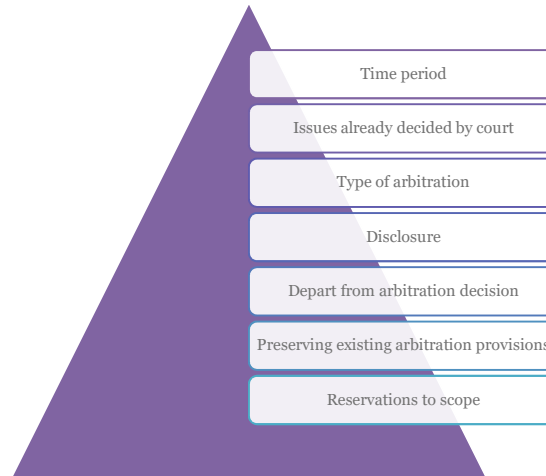


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MLI AND ARBITRATION

Choices and options to be made



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MLI AND ARBITRATION

Options (1)



Art. 19, 11: 3-year period instead of 2-year period: 9 jurisdictions opted so 3-year period for the treaties of these 9 jurisdictions

Art. 19, 12: exclude from arbitration issues with respect to which a decision has been rendered by a court or administrative tribunal of either Contracting Jurisdiction: 19 opted so this applies for all treaties of these 19 jurisdictions



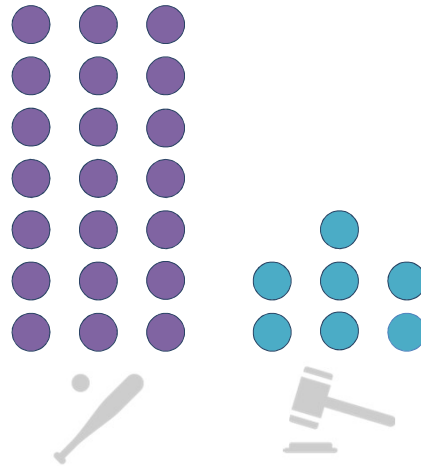
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MLI AND ARBITRATION

Options (2)

- **Art. 23, 2:** type of arbitration



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MLI AND ARBITRATION

Options (3)

- **Art. 23, 4:** opting for non-disclosure: 17 did opt
- **Art. 23, 6:** opting out of non-disclosure: 1 opted out
- **Art. 23, 7:** no arbitration when treaty partner opted out of non-disclosure rule: 6 opted

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MLI AND ARBITRATION

Options (4)

Art. 24, 1: allows the competent authorities to depart from the arbitration decision and to agree on a different resolution within three calendar months after the decision has been delivered to them: 22 did opt

Art. 24, 3: depart from the decision only in case of independent opinion: 4 did opt

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MLI AND ARBITRATION

Options (5)

Art 26, 4: preserve existing mandatory binding arbitration provisions: 12

Art. 28, 2, a: reservations to scope: 16 did make reservations

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MLI AND ARBITRATION

Reservations to the scope



Most frequent reservations:

- Application of anti-avoidance rules
- No double taxation
- Dual residence issues for companies



Less frequent reservations:

- Agreement 2 competent authorities
- AC cases
- Limitation to certain treaty articles

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DISPUTE RESOLUTION: INTERACTION BETWEEN DOMESTIC APPEAL MECHANISMS/REGIME AND MAP

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



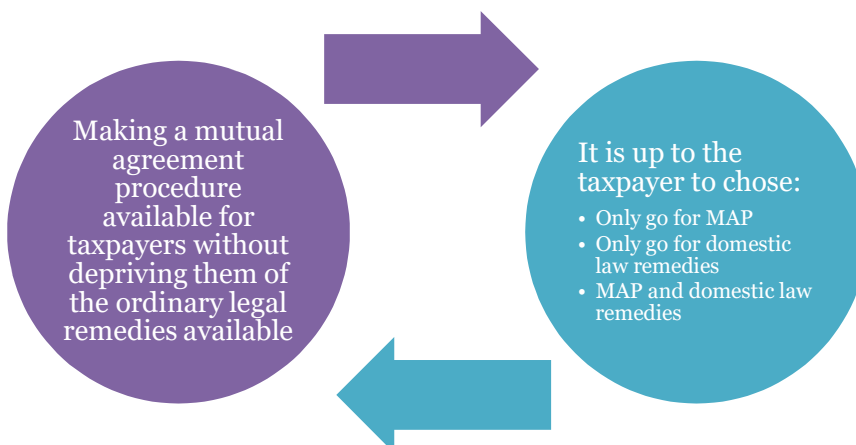
Article 25 (1), first sentence of the OECD Model Tax Convention

Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, **irrespective of the remedies provided by the domestic law of those States**, present his case to the competent authority of either Contracting State.

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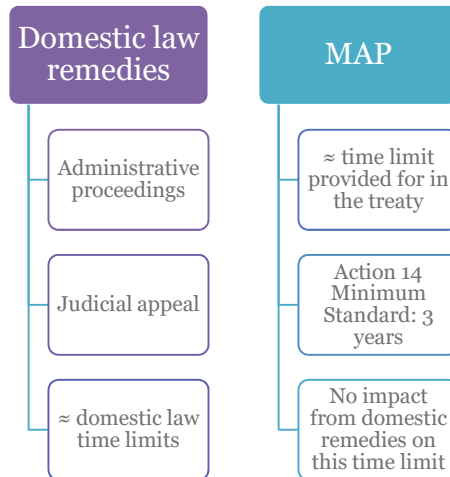
Purpose



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Timing



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Recourse to Domestic Courts and/or MAP?

Commentary para. 25:

- Some States may wish to allow suspension of the three-year period during the course of domestic law proceedings.
 - Not seen a lot in practice
- If no suspension, approaches may be that MAP request is made but:
 - CAs do not discuss or
 - CAs do not settle unless and until the taxpayer agrees to withdraw domestic law actions.
 - In practice, some jurisdictions suspend the court case until MAP is finalised
- “The preferred approach for all parties is often that the mutual agreement procedure should be the initial focus for resolving the taxpayer’s issues, and for doing so on a bilateral basis.”

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Approach 1: suspension of MAP

Initiative

- CAs
- Taxpayer: protective MAP claim

Goal

- Await decision of domestic law proceedings

Possible outcomes

- Case solved by domestic law proceeding
- No more MAP necessary*
- Taxation not in accordance with convention remains after finalisation
- Risk only a 'light' MAP is possible

*4% of cases closed in 2016 had the outcome "resolved via domestic remedy"

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Approach 2: start with MAP discussions

Initiative

- CAs
- [taxpayer]

Goal

- Find a solution as soon as possible

Possible outcomes

- Solution found in MAP first
- If taxpayer agrees and withdraws domestic remedy: implementation
- Domestic remedy decision comes first
- Case is resolved
- Case is not resolved

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Final Court Decision during MAP

Commentary Para. 35:

- “**In some States**, the competent authority may be able to arrive at a satisfactory solution which **departs** from the court decision.
- **In other States**, the competent authority is **bound** by the court decision **or will not depart from it** as a matter of administrative policy or practice. It may nevertheless present the case to the competent authority of the other Contracting State and ask the latter to take measures for avoiding double taxation.”

Commentary para. 39:

“Apart from time limits there may exist other obstacles such as “final court decisions” to giving effect to an agreement. Contracting States are free to agree on firm provisions for the removal of such obstacles.”

No arbitration anymore

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Implementation of MAP during pending Court Proceedings

Commentary para. 42:

- “There would be no ground for rejecting a request by taxpayer that he be allowed to defer acceptance of the solution agreed upon as a result of MAP until the court has delivered its judgement in that suit”
- Practice: some CAs close the MAP case when taxpayer does not accept the agreement

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Implementation of MAP during pending Court Proceedings

Commentary para. 45:

- “The implementation of a MAP should normally be made subject:
 - to the **acceptance of such mutual agreement** by the taxpayer, and
 - to the taxpayer’s **withdrawal of the law suit** concerning those points settled in the mutual agreement.”

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DISPUTE RESOLUTION TOUR DE TABLE

OECD-IRAS workshop on tax certainty
Singapore, 26-29 March 2018



SHARING ON LEGISLATIVE
AND ADMINISTRATIVE
FRAMEWORK GOVERNING
THE INTERACTION
BETWEEN DOMESTIC
APPEAL
MECHANISMS/REGIME AND
MAP

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Case Study
Role Play on MAP APA

I. Background and facts of the case

Oriontech A/S is a Danish based high-tech company operating in a number of countries.

Oriontech group's main business consists of developing, manufacturing, distributing and retailing high-quality mobile phone handsets under the 'Orion' brand.

Oriontech A/S has five subsidiaries in Finland, Germany, the USA, Singapore and Japan. Oriontech A/S produces and sells the products to these subsidiaries. The subsidiaries in Germany, the USA and Singapore are regional distributors for the European, North American and Asian markets. The subsidiary in Japan distributes Oriontech products in Japan only.

Oriontech Finland undertakes the R&D activity generating the patents (manufacturing intangibles) installed on the handsets and manufactures the handsets. Oriontech Finland employs IT engineers and designers. Two types of handsets are developed each year ("Orion Communicator" and "Orion Wireless").

The group's CEO asserts that the group seeks to repatriate funds to Denmark.

II. Further factual information

Sales

- a) The regional distributor subsidiaries in Germany, the USA, and Singapore each use two distribution channels:
 1. Sales through subsidiaries which act as local distributors (*i.e.* the German regional distributor has subsidiaries in Europe, the US regional distributor has subsidiaries in the Americas, and the Singapore regional distributor has subsidiaries in Asia – see Annex 1). The subsidiaries in turn sell to independent franchised stores, multibrand retailers and department stores in their countries;
 2. Direct sales to third party franchised stores, multibrand retailers and department stores in Europe, Americas and Asia (with the exception of Japan).
- b) Oriontech Japan sells directly to third party franchised stores, multibrand retailers and department stores (wholesale sales) in Japan.

Competitors

Oriontech's key competitors include Apple, Samsung, Nokia and LG, amongst others.

Trademarks

All 'Orion' and 'Oriontech' registered trade names and trademarks are owned by Oriontech A/S.

Marketing

Marketing involves collecting and analysing customer, market and competitor information, and utilising this information to determine the strategic direction of product design and new season trends.

Advertising

Advertising involves the group-wide advertising strategy and implementation of the strategy through internet advertising, as well as advertising on television, in newspapers and on bill boards.

III. Tax examination

The accounts 2011 - 2013 of Oriontech A/S are being audited and the auditor requests from the company a first general overview (description) of the group's transfer pricing policy, its transfer pricing documentation and its financial accounts for the years 2011-2013.

The CFO presents some information and asks whether the group's inter-company transactions could also be considered for an APA.

She provides the following information and documents:

- The group legal structure (Annex 1).
- Notes of the discussions between the auditor and the CFO (Annex 2).
- Financial accounts (for simplicity reasons, only the accounts for 2013 are attached; no major changes in the years 2014 and 2015) (Annex 3).

Instructions:

Groups 1 and 2: Tax administration (Competent Authority) of Denmark

Group 3: Tax administration (Competent Authority) of Singapore

Group 4: Tax administrations (Competent Authorities) of Germany, USA or Japan (select one)

Issues to consider

All groups to consider the taxpayer's position:

- a) What type of tax risks may the above described transactions of the Oriontech group pose?
- b) In light of a prior risk assessment analysis performed internally, you may consider entering into an Advance Pricing Arrangement (APA). To this end, please (i) list which transaction(s) may be considered for purposes of the APA, (ii) what type of TP method you would adopt for the selected transactions and (iii) what type of comparability factors you would deem important in this case.
- c) What type of information is likely to be required by the tax authorities and what information would you consider not necessary to disclose?
- d) What type of APA would you look for (unilateral/bilateral/multilateral)?
- e) Which countries should participate in the APA?

Groups 1 and 2. Tax administration (Competent Authority) of Denmark

- a) What are your initial thoughts when looking at the structure and transactions of Oriontech group?
- b) What type of information, documents and analysis would you require from the taxpayer in order to audit Oriontech A/S's transfer pricing?
- c) On the assumption that you consider it reasonable entering into an APA, which country/countries should participate in the APA. Would you advise the taxpayer to request trilateral APAs (Oriontech A/S, central (regional) distributors, local (country) distributors)?
- d) Would you consider legitimate a request by the taxpayer of entering into a "rollback clause" within the APA covering the years under audit?
- e) What procedural steps you would follow to reach an agreement with the taxpayer on the possible scope and contents of the APA?
- f) How would you secure that the APA is properly implemented by the taxpayer?

Group 3. Tax authority (Competent Authority) of Singapore

Assume you receive a request from the Danish competent authority to enter into a multilateral APA between Singapore and Denmark, Malaysia, Hong Kong, India and Indonesia.

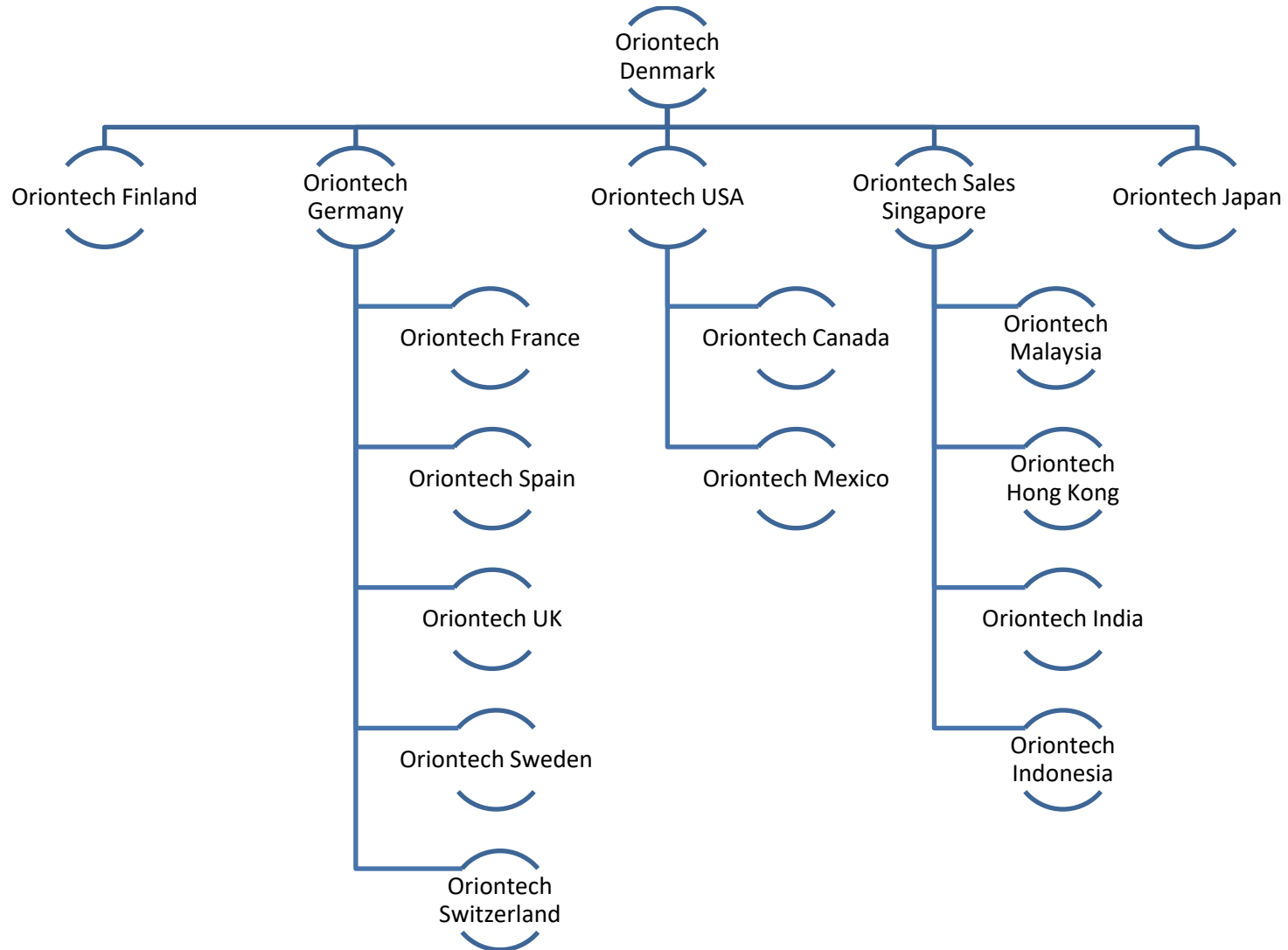
- a) What are your initial thoughts when looking at the request and the structure of transactions of Oriontech group?
- b) What type of information, documents and analysis would you require from the Singapore taxpayer in order to evaluate and assess the APA request?
- c) On the assumption that you consider it reasonable entering into an APA, which country/countries should participate in the APA. Would you agree to enter into the multilateral APA?
- d) Would you consider legitimate a request by the taxpayer of entering into a “rollback clause” within the APA covering the years under audit?
- e) What procedural steps you would follow to reach an agreement with the taxpayer on the possible scope and contents of the APA?
- f) How would you secure that the APA is properly implemented by the taxpayer?

Group 4. Tax administrations of Germany, USA or Japan

Assume you are the German, USA or Japanese competent authority and you receive a request from the Danish competent authority to enter into a multilateral APA with Denmark, the USA, Germany and Japan:

- a) What are your initial thoughts when looking at the request and the structure of transactions of Oriontech group?
- b) What type of information, documents and analysis would you require from your taxpayer in order to evaluate and assess the APA request?
- c) On the assumption that you consider it reasonable entering into an APA, which country/countries should participate in the APA.
- d) Would you consider legitimate a request by the taxpayer of entering into a “rollback clause” within the APA covering the years under audit?
- e) What procedural steps you would follow to reach an agreement with the taxpayer on the possible scope and contents of the APA?
- f) How would you secure that the APA is properly implemented by the taxpayer?

Annex 1: Oriotech Group Structure



NB: All subsidiaries are 100% owned

Annex 2: Notes of meeting with CFO

Background

Orientech A/S designs, manufactures, distributes and retails high quality mobile phone handsets under the 'Orion' brand. The Orientech AB name is associated with Scandinavian high quality products, featured by the use of the latest technologies applied in the field of telecommunications.

Orientech A/S has subsidiaries based in various countries worldwide (see group chart). Orientech A/S acts as the main trading company. It sells to the various affiliates and to third party wholesale customers. Orientech A/S buys finished goods primarily (i) from a manufacturing affiliate based in Finland (where almost the whole R&D activities is carried out) and (ii) from third party manufacturers located in Asia.

Supply chain model

Orientech Manufacturing Finland manufactures in Finland and undertakes the R&D activity generating the patents and intellectual property installed on the handsets. Finished goods are also purchased from third parties in the Asia. Because of the introduction of favourable R&D tax incentives in Italy, Orientech A/S is considering this country as a favourable jurisdiction in which to set up a plant to carry on research activities for its new high-tech devices. Accordingly, the Orientech group is about to incorporate a wholly owned subsidiary in Italy, Orientech SpA.

Finished products are stored in a warehouse in Copenhagen. The warehouse is run by a third party individual who is a relative of the marketing manager of Orientech A/S.

Orientech Singapore Sales undertakes procurement for the distribution of products in Asia.

Design

Orientech Finland employs IT engineers and designers. Additional design is carried out by third party contract designers in Italy. Orientech US also design some products for its markets.

Two types of handsets are developed each year ("Orion Communicator" and "Orion Wireless").

Sales

Orientech AB has two routes to market:

- Retail sales through Oriontech stores; and
- Sales to third party franchised stores, multibrand retailers and department stores (Wholesale sales).

The main sales channel is through retail shops owned by affiliates. Some affiliates pay a franchise fee.

Independent retailers operate some of the "Oriontech" retail stores. These franchisees pay franchise fees of 5% of sales.

Designer shops

Significant investment is required in respect of each Oriontech store. Long lease terms can be restrictive for the group.

France

In France, Oriontech has had difficulties in growing its brand, as French consumers do not readily accept non-French handsets products. For over a year Oriontech has been seeking to restructure the business in France. However, due to French employment regulations, restructuring cannot take place until court approval is obtained. The French business is in a loss-making situation.

Competitors

Oriontech's key competitors include Apple, Samsung, Nokia and LG, amongst others.

Trademarks

All 'Orion' and 'Oriontech' registered trade names and trademarks are owned by Oriontech A/S.

Merchandising

Merchandising involves collecting and analysing customer, market and competitor information, and utilising this information to determine the strategic direction of product design and new season trends.

Merchandising also involves arranging mark-downs. Mark-downs are done for several reasons, including 'sell through' mark-downs which are usually done at the end of a season.

Transfer Pricing Policy

Orientech A/S's transfer pricing policy is to sell its products to its subsidiaries at cost plus a 20% to 25% profit mark-up. The sales managers of the German, Singaporean and Japanese subsidiaries determine wholesale prices for the group's sales to franchisees and multibrand retailers in their respective markets. The CEO of the US subsidiary determines the wholesale prices in the North American market.

Transfer pricing documentation was prepared for Orientech US some years ago. There is no documentation elsewhere although the CFO is aware of the need for documentation in Denmark. There are formal agreements for the management service charges and franchise fee but not for the product purchases and sales.

Orientech's tax objectives

Broadly, the group seeks to repatriate funds to Denmark and is conservative in its tax planning.

Annex 3 Oriontech Group										
Profit and loss accounts 2013										
(in € million)										
	Oriontech A/S Denmark	Oriontech Mfg Finland	Oriontech Germany	Oriontech USA	Oriontech Sales Singapore	Oriontech Hong Kong	Oriontech Japan	Consol.	Total	
Sales										
Product sales	278	81	66.2	160	27.5		31.9	-295	349.6	
Franchise fees	4.2							-1.6	2.6	
Management fees	7.3					4.8		-12.1	0	
Total sales	289.5	81	66.2	160	27.5	4.8	31.9	-308.7	352.2	
COGS										
Product COGS	216	64	36.4	101	15.7		19.2	-294	158.3	
Gross profit	73.5	17	29.8	59	11.8	4.8	12.7	-14.7	193.9	
Gross Margin	25%	21%	45%	37%	43%		40%			
Operating expenses										
Marketing & advertising	29.7		1.5	3	1.3		5.2		40.7	
Design services		12							12	
Purchasing & logistics	6.3	1.6		0.6		2.3		-3.8	7	
Retailing costs			20.6	38.7	6		9		74.3	
Wholesaling costs	8		7.5	6.1	1.3		1.1		24	
Management and administrative costs	22.3	2	3.1	5.5	0.3	0.9	2.1	-8.3	27.9	
Total operating expenses	66.3	15.6	32.7	53.9	8.9	3.2	17.4	-12.1	185.9	
Operating profit	7.2	1.4	-2.9	5.1	2.9	1.6	-4.7		10.6	
Non operating income (expenses)	3.1	0.1	-0.9	-1	0.6	1.1	-0.8		2.2	
Profit before tax	10.3	1.5	-3.8	4.1	3.5	2.7	-5.5		12.8	
Tax rate	25%	24.50%	29.60%	39.10%	16.50%	16.50%	38%			
Tax	2.6	0.4	0.0	1.6	0.6	0.4	0.0		5.6	

BEPS Action 14 Minimum Standard
Case studies

Case study 1

Venus Mars is a resident of Mizar. She worked for 40 years in Merak. She receives a pension from Merak. This pension is for fiscal year 2013 taxed both in Mizar (assessment notice sent on 24 April 2014) and in Merak (assessment notice sent on 31 May 2015).

There is a double tax treaty between Mizar and Merak. The MAP article reads:

ARTICLE 25
MUTUAL AGREEMENT PROCEDURE

1. Where a resident considers that the actions of one or both of the Contracting States result or will result for him in double taxation, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within two years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of double taxation. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Venus introduces a MAP request to the competent authority of Merak on 30 february 2017.

1. How will the competent authority of Merak react?
2. Suppose now that Mizar and Merak joined the Inclusive Framework on BEPS in 2016. What observations can be made regarding these facts looking at them from a BEPS Action 14 perspective?

Case study 2

Neptune is a MNE operating worldwide. The head office is situated in Phad. One of the subsidiaries is located in Alcor. A tax audit was conducted in Alcor and led to an upward adjustment of the profits of Neptune's subsidiary.

There is a double tax treaty between Phad and Alcor. The MAP article reads:

ARTICLE 25 MUTUAL AGREEMENT PROCEDURE

- 1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within four years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.*
- 2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the convention.*
- 3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.*

Alcor has published a MAP guidance which provides details on how taxpayers can access to and use the MAP. In this respect, Alcor merely requires from taxpayers that they provide their identity and the basis for the request (the nature of the action giving rise to, or expected to give rise to, taxation not in accordance with the convention). Phad has not published any MAP guidance and no information on how taxpayers can access the MAP in Phad is published.

Neptune submitted two MAP requests, one in Alcor and one in Phad, through a one page document where Neptune refers to the adjustment of profits that was imposed in Alcor and the request for elimination of double taxation. Although the MAP request is submitted within the time limits provided by the treaty, Phad's competent authority decided to deny access to MAP, on the grounds that Neptune did not justify why the adjustment suffered in Alcor is appropriate. Within two months after receiving the MAP request, Alcor asked Neptune to provide a detailed explanation of the facts of the case and a proposal on how the case should be resolved. Neptune complies with this requirement 6 months later. After receiving all information from Neptune, Alcor's competent authority is of the opinion that it cannot grant a unilateral relief for the disputed taxation. It therefore contacts Phad's competent authority and convinces the latter to enter into discussions about the case. After several rounds of discussion, Alcor's and Phad's competent authorities enter into a MAP agreement that results in a refund of taxes in both countries. The MAP agreement is notified to Neptune 25 months after it submitted its initial MAP requests. The subsequent refund is obtained in Alcor after 2 months while no refund can actually be obtained in Phad, due to domestic time limits of three years that apply.

Analyse both jurisdictions' situation in light of the terms B.2, B.3, B.6, B.8, C.2, D.1, D.2 of the Terms of reference.

- B.2. Jurisdictions should ensure that either (i) their tax treaties contain a provision which provides that the taxpayer can make a request for MAP assistance to the competent authority of either Contracting Party¹, or (ii) where the treaty does not permit a MAP request to be made to either Contracting Party and the competent authority who received the MAP request from the taxpayer does not consider the taxpayer's objection to be justified, the competent authority should implement a bilateral consultation or notification process which allows the other competent authority to provide its views on the case (such consultation shall not be interpreted as consultation as to how to resolve the case).
- B.3. Jurisdictions should provide access to MAP in transfer pricing cases.
- B.6. Jurisdictions should not limit access to MAP based on the argument that insufficient information was provided if the taxpayer has provided the required information based on the rules, guidelines and procedures made available to taxpayers on access to and the use of MAP.
- B.8. Jurisdictions should publish clear rules, guidelines and procedures on access to and use of the MAP and include the specific information and documentation that should be submitted in a taxpayer's request for MAP assistance.
- C.2. Jurisdictions should seek to resolve MAP cases² within an average time frame of 24 months³. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner)⁴.
- D.1. Jurisdictions should implement any agreement reached in MAP discussions, including by making appropriate adjustments to the tax assessed in transfer pricing cases.
- D.2. Agreements reached by competent authorities through the MAP process should be implemented on a timely basis.

¹ See paragraph 1 of Article 25 and its Commentary.

² A MAP case for this purpose refers to a MAP case that is received by a competent authority from the taxpayer on or after 1 January 2016 and is defined in Annex D of the MAP Statistics Reporting Framework.

³ The average time frame to resolve MAP cases shall be computed in accordance with the method of computation provided in the MAP Statistics Reporting Framework. The "start date" and "end date" for purposes of computing the time taken to resolve a MAP case is defined in the MAP Statistics Reporting Framework. These statistical purposes should be distinguished from the purposes of time frames in arbitration provisions; the time frames relevant in that latter context must be determined based on the provisions of the relevant arbitration clause and/or relevant competent authority agreements on the application of such clause.

⁴ Given that the average time frame in element C.2. applies to both jurisdictions, in the review of an assessed jurisdiction, if the average time taken to resolve MAP cases exceeds 24 months arising from delays caused by its treaty partners, such delays shall not lead to a recommendation that the assessed jurisdiction needs to improve the average time taken to resolve MAP cases.

Case study 3

The competent authority function in Gacrux is performed by 9 staff and a manager, handling MAP cases along with other tasks, including treaty negotiation and support to the audit teams in terms of interpretation of tax treaties. The performance of the staff is evaluated annually based on qualitative criteria. When dealing with MAP cases, the competent authority only involves the audit personnel for fact-finding, but also sometimes to prepare position papers when needed and to participate in competent authority meetings if such meetings are held in Gacrux. Gacrux submitted the following statistics for the year 2016.

Type of cases	Start inventory	Number of cases started	Number of cases closed	End inventory	Average time taken to close MAP cases
Attribution / allocation cases ⁵	16	7	1	22	35
Other cases	11	5	6	10	21

Cases closed in 2016	denied MAP access	objection is not justified	withdrawn by taxpayer	unilateral relief granted	resolved via domestic remedy	agreement fully eliminating double taxation / fully resolving taxation not in accordance with tax treaty	agreement partially eliminating double taxation / partially resolving taxation not in accordance with tax treaty	agreement that there is no taxation not in accordance with tax treaty	no agreement including agreement to disagree	any other outcome
Attribution / allocation cases			1							
Other cases	1			2		2	1	1		

Analyse Gacrux' situation in light of the terms C.2 to C.5 of the Terms of reference.

- C.2. Jurisdictions should seek to resolve MAP cases within an average time frame of 24 months. This time frame applies to both jurisdictions (i.e. the jurisdiction which receives the MAP request from the taxpayer and its treaty partner).
- C.3. Jurisdictions should ensure that adequate resources are provided to the MAP function.
- C.4. Jurisdictions should ensure that the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty, in particular without being dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the jurisdictions would like to see reflected in future amendments to the treaty.
- C.5. Jurisdictions should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining tax revenue.

⁵ These are MAP cases where the taxpayer's MAP request relates to either:

- the attribution of profits to a permanent establishment (see e.g. Article 7 of the OECD Model Tax Convention); or
- the determination of profits between associated enterprises (see e.g. Article 9 of the OECD Model Tax Convention).



Improving Tax Certainty through Dispute Resolution Mechanisms

29 March 2018 | Marriott Tangs Plaza

Ballroom II and III, Level 3, 320 Orchard Road, Singapore 238865



1.30pm **Registration**

2.00pm **Welcome**

2.15pm **The Importance of Tax Certainty**

Ms Sandra Knaepen

Head, Mutual Agreement Procedure Unit, OECD

2.45pm **Operating under the new Arbitration System**

Prof Hans Mooij

TRIBUTE, Netherlands

3.15pm **Coffee Break**

3.30pm **The Singapore Experience in Dispute Resolution**

Ms Balbir Kaur

Group Tax Specialist

Tax Policy and International Tax Division, IRAS

4.00pm **Panel Discussion**

Improving Dispute Resolution through MAP and MLI

Facilitator:

Mr Leon Kwong Wing

Partner

Head, Tax & Private Client, Withers KhattarWong

Members:

Prof Hans Mooij

TRIBUTE, Netherlands

Mr Tang Siau Yan

Assistant Commissioner

Tax Policy and International Tax Division,
IRAS

Ms Sandra Knaepen

Head

Mutual Agreement Procedure Unit, OECD

Mr Luis Coronado

Partner

ASEAN International Tax Leader

Ernst & Young

Mr Anthony Ferrise

Manager

US IRS Treaty Assistance
and Interpretation Team (TAIT)

Prof Jeffrey Waincymer

Adjunct Professor, Faculty of Law

National University of Singapore

5.00pm

End of Seminar



ABOUT THE SPEAKERS

Ms Sandra Knaepen

Head

Mutual Agreement Procedure Unit, OECD

Sandra Knaepen has more than 20 years of experience with international taxation and dispute resolution. She was until September 2016 head of the International Relations Division within the Belgian Ministry of Finance where dealing amongst other things with treaty interpretation, exchange of information and MAP and APA. She was for many years the Belgian delegate to the EU Joint Transfer Pricing Forum and she attended Working Party 6 meetings and the meetings of the FTA MAP Forum at the OECD. In September 2016, she joined the OECD as head of the MAP Unit, i.a. responsible for the coordination of the BEPS Action 14 MAP peer reviews.

Prof Hans Mooij

TRIBUTE, Netherlands

Hans Mooij is chairman of the TRIBUTE Foundation for improvement of international tax dispute resolution. TRIBUTE is an independent, global initiative of leading experts in international taxation and arbitration. Hans is a former tax treaty negotiator, Competent Authority, and delegate to the OECD for the Netherlands Government. His present profession is independent consultant, specialised in mediating between tax payers and tax authorities in matters of international tax compliance and controversy. He is visiting Professor at the International Tax Center of Leiden University (The Netherlands).

Mr Tang Siau Yan

Assistant Commissioner

Tax Policy & International Tax Division, IRAS

Siau Yan is the Assistant Commissioner of the Tax Policy and International Tax Division of the Inland Revenue Authority of Singapore (IRAS). The Tax Policy and International Tax Division is responsible for reviewing changes to income tax rules and policies and providing technical guidance to other divisions in IRAS. The Division also represents Singapore in various international taxation matters, including the negotiation of tax treaties and advance pricing agreements. Siau Yan is a lawyer by training and read law at the London School of Economics and Cambridge University.

Mr Leon Kwong Wing

Partner

Head, Tax & Private Client, Withers KhattarWong

Leon Kwong Wing is head of the Tax & Private Client department of KhattarWong LLP, a full-service law firm in Singapore, and has been with the firm for 20 years. He is ranked in Who's Who Legal, The Legal 500 Asia Pacific, the Tax Directors Handbook, and the CityWealth Leaders List.

Kwong Wing advises on tax, immigration, trusts and inheritance. He represents companies and individuals in objections against tax assessments and valuations, acts as counsel in appeals before the Review Boards and the Courts, and represents taxpayers under audit or investigation.

Kwong Wing is a tutor for the Singapore Bar Course; general editor of Income Tax in Halsbury's Laws of Singapore; co-author of Stamp Duties in Halsbury's Laws of Singapore; and a contributor to The Law and Practice of Singapore Income Tax, The World Trust Survey (OUP), The Corporate Immigration Review (Law Business Research), Immigration Law (European Lawyer), and the Global Business Immigration Practice Guide (LexisNexis-ABIL).



ABOUT THE SPEAKERS

Mr Luis Coronado
Partner
ASEAN International Tax Leader, Ernst & Young

Luis is a Partner based in Singapore and is the ASEAN International Tax Leader. Luis has worked in Asia since 2005 as part of his more than 20 years advisory experience in international tax and transfer pricing issues.

Luis is a frequent speaker at tax seminars and universities in the Americas, Asia, and Europe. He has been an instructor at the International Bureau of Fiscal Documentation's program for introducing transfer pricing to Latin American governments, as well as in their programs in Amsterdam, Kuala Lumpur and Singapore. He has also taught at the Yangzhou Taxation Institute of China's State Administration of Taxation. He is currently part of the Accountancy Faculty at Singapore Management University.

Prof Jeffrey Waincymer
Adjunct Professor, Faculty of Law
National University of Singapore

Jeff Waincymer is a legal practitioner, arbitrator and mediator, practicing in the fields of arbitration, international trade and investment, trade remedies, taxation and mediation. He is also an Adjunct Professor at the Faculty of Law, NUS. Jeff was previously an Australian Government Nominee as a panelist for the WTO and ICSID.

His publications include Procedure and Evidence in International Arbitration; WTO Litigation: Procedural Aspects of Formal Dispute Settlement; Australian Income Tax: Principles and Policy; A Guide to the New UNCITRAL Arbitration Rules; A Practical Guide to International Commercial Arbitration and International Trade Law: Commentary and Materials.

Mr Anthony Ferrise
Manager, Team 1
US IRS Treaty Assistance and Interpretation Team

Tony Ferrise is a Manager with the IRS Treaty Assistance and Interpretation Team, a group within IRS providing competent authority assistance on a wide range of tax treaty issues. He has served as an Acting Assistant Director, APMA and recently completed an assignment as an Attorney-Advisor in the Office of the International Tax Counsel at Treasury. Tony has worked with a broad variety of treaty issues including discretionary limitation on benefits requests; foreign tax credits; arbitration, and treaty notification provisions. Tony was a primary contributor to Rev. Proc. 2015-40 which provides procedures for requesting U.S. MAP assistance and has worked closely on issues related to MAP access and dispute resolution.

Ms Balbir Kaur
Group Tax Specialist
Tax Policy and International Tax Division, IRAS

Balbir Kaur is a Group Tax Specialist from the International Tax Branch of the Inland Revenue Authority of Singapore. She does transfer pricing policy formulation and Advance Pricing Agreement and Mutual Agreement Procedure negotiation with foreign tax authorities.

The importance of Tax Certainty

Sandra KNAEPEN
Head Mutual Agreement
Procedure Unit
OECD



Tax Certainty. Why does it matter?

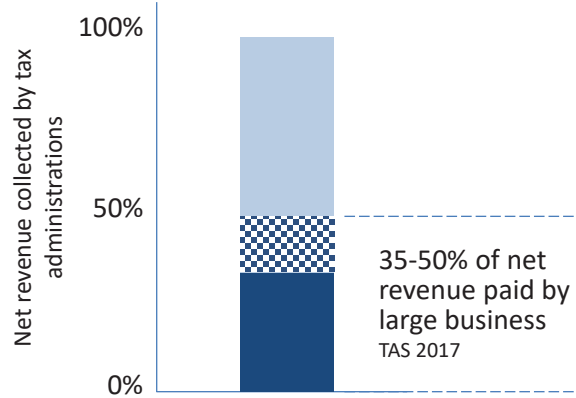
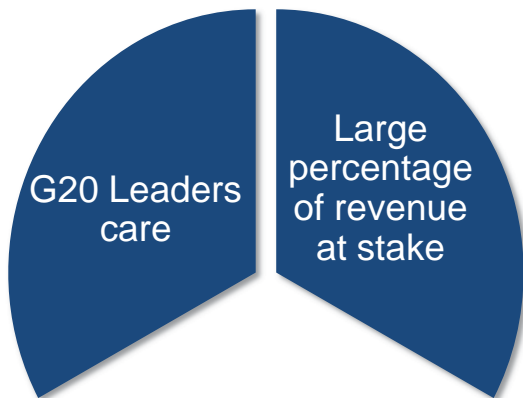


G20 Leaders
care

“We are also working on *enhancing tax certainty...*”

G20 Leaders' Communiqué, Hamburg, 8 July 2017

Tax Certainty. Why does it matter?



Tax Certainty. Why does it matter?



Uncertainty about effective tax rates is the **top tax factor** influencing FDI

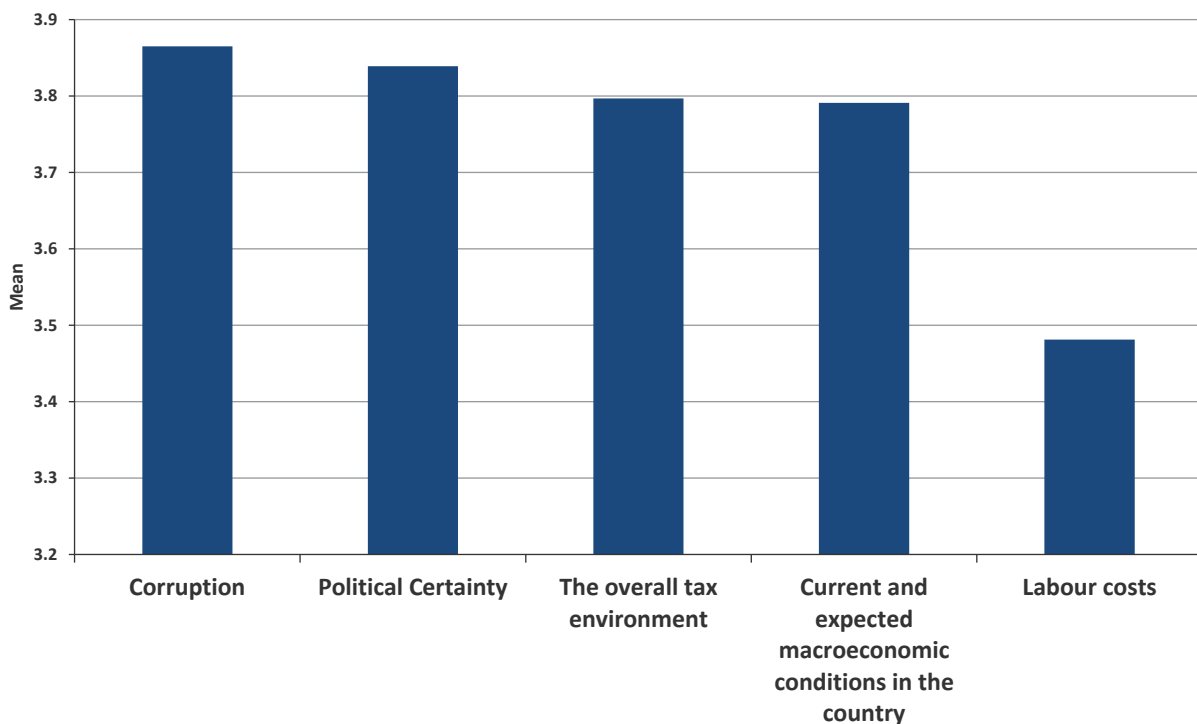
IMF/OECD Tax Certainty Report, March 2017

Tax certainty report delivered to G20 Finance Ministers with IMF, March 2017

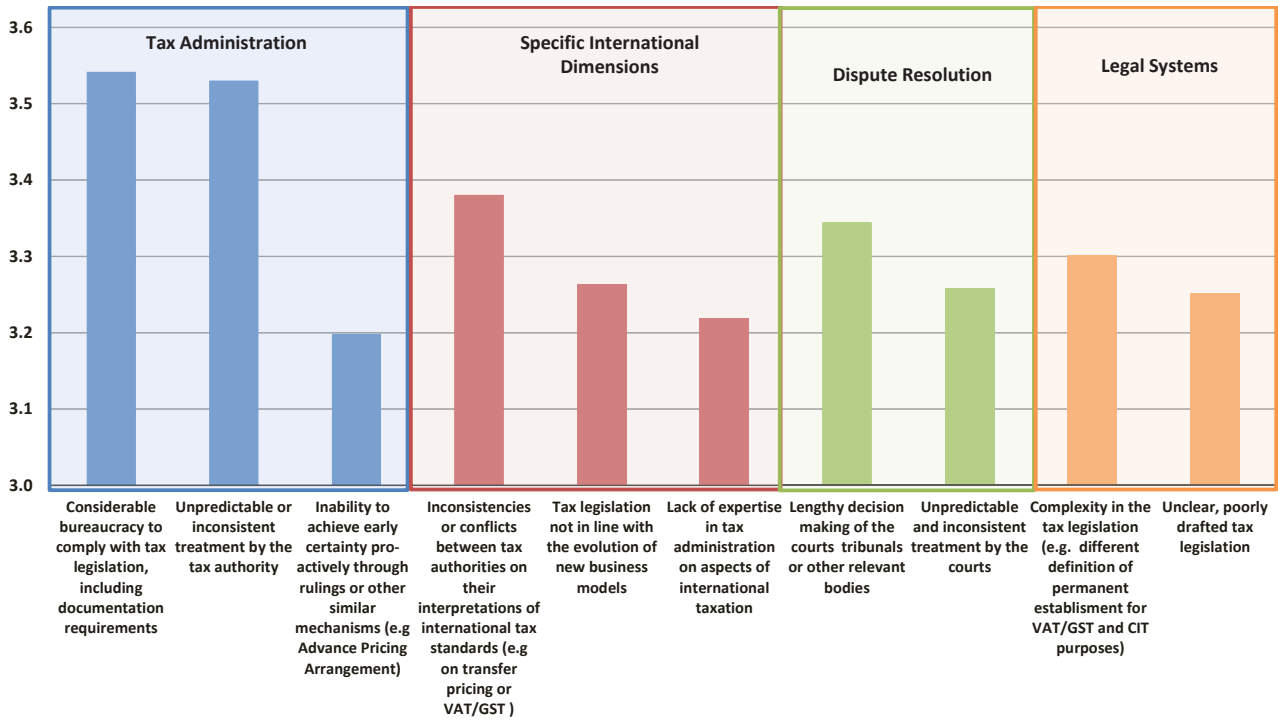
- “We welcome the ... work on tax certainty conducted by the OECD and the IMF. We acknowledge the report on Tax Certainty submitted to us and **encourage jurisdictions to consider voluntarily the practical tools for enhanced tax certainty as proposed in that report, including with respect to dispute prevention and dispute resolution to be implemented within domestic legal frameworks and international tax treaties.**”
- “We ask the OECD and the IMF to assess progress in enhancing tax certainty in 2018”



Top 5 business factors by importance for investment

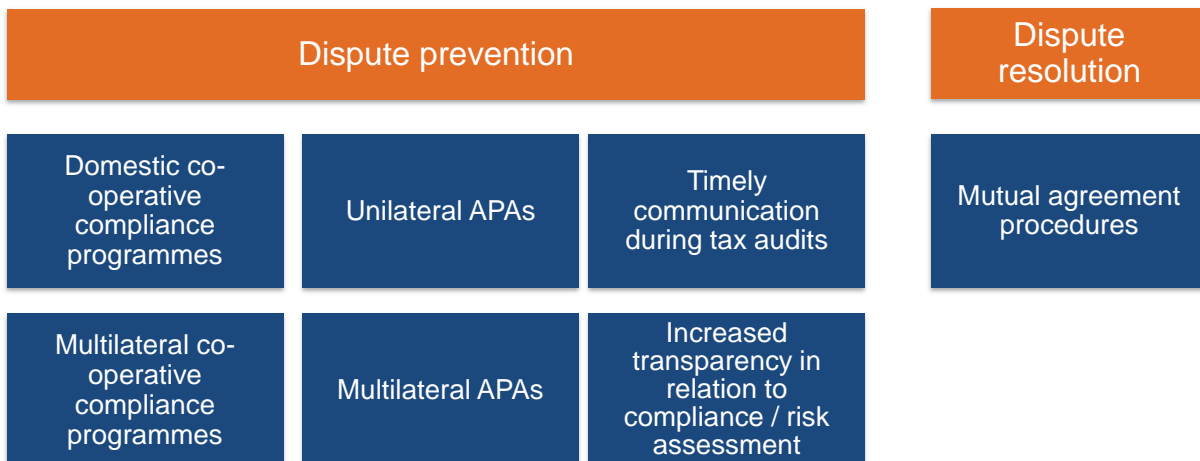


Top 10 sources of tax uncertainty



Tools for enhancing Tax Certainty

- IMF/OECD Tax Certainty Report identifies the Top 10 tools for enhancing tax certainty
- Seven relate to dispute prevention and dispute resolution



The OECD/FTA Tax Certainty Survey of Tax Administrations

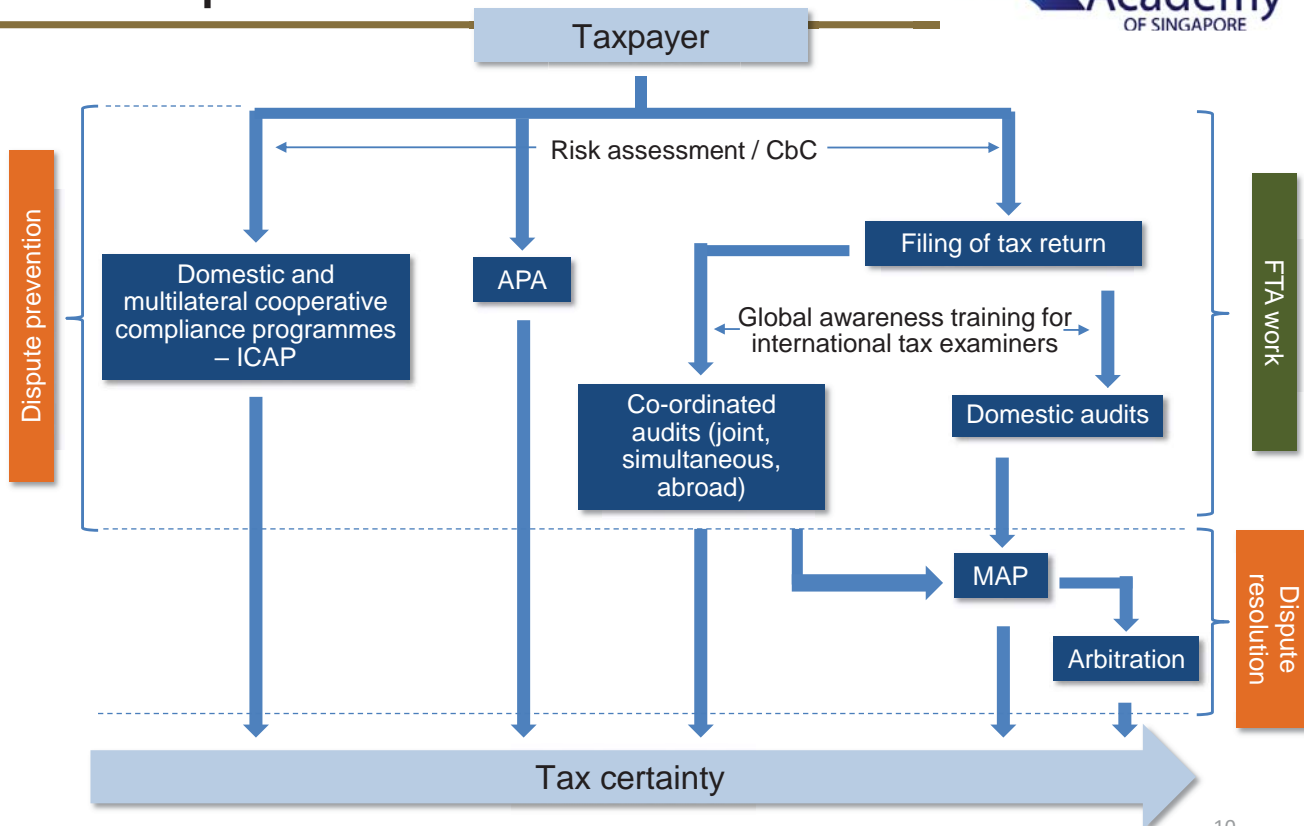
Tax certainty is a high priority for tax administrations too

- Over 80% of respondents: very high/ extremely high priority for tax administration

Tax administrations recognise tax uncertainty important concern for business

For tax administration, an important source of tax uncertainty is taxpayers' behaviour, especially when involving aggressive tax planning

Context and related work on dispute prevention and dispute resolution



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Operating under the New Arbitration System

Prof Hans Mooij LL.M.
(The Netherlands)
International Tax Centre
Leiden/Tribute Foundation



The Cause for Tax Treaty Arbitration



Arbitration improves MAP

End to continuous growth of number and duration of pending MAP cases

Relief for competent authorities' capacity issues, and from having to settle purely for the sake of settlement

MLI default arbitration mechanisms

Sanction on authorities forsaking their obligation to arbitrate

At the same time, relief for authorities incapable of organizing themselves arbitrations

Art. 23 MLI: arbitration process by default, either art. 23(1): 'final offer' or art. 23(2): 'reasoned opinion' arbitration

Art. 20(3) and (4) MLI: OECD as authority appointing arbitrators by default

MLI does not expressly permit tax payers to call on the appointing authority, unlike art. 3(3) OECD Model 2017 Update Sample MoU

Proper dispute management

Choice of equal tools: prevention, settlement, or arbitration

Concern to authorities and tax payers alike



Type of Arbitration Process

Does Singapore reject 'reasoned opinion' arbitration?

Art. 23(3) MLI: reservation not to apply 'reasoned opinion' as default

Need for additional bilateral agreements with countries having rejected 'final offer' arbitration as default under art. 23(2) MLI

May 'final offer' and 'reasoned opinion' be reconciled?

What has priority: a decision or a due process?

'Reasoned opinion' can be time and cost efficient as well

No hearings requires proper preparation at prior MAP stage

Tax payer witness testimony serves arbitrators ('*amicus curiae*')

Extreme positions seldom win, also under 'reasoned opinion'

'Final offer', too, aims to force a principled decision

Desire for at least some reasons, with arbitrators and losing parties as well

'Law-making' may be avoided by imposing terms of reference

No one size has to fit all

Determination may be per type of case, or even case-by-case

As ultimate solution, discretion for arbitrators

Other Arbitration Essentials To Address

How to find suitable arbitrators?

Art. 20(2)(a) MLI only requires 'expertise or experience in international tax matters'

EU and some countries (e.g. USA) use small compulsory lists of candidate presiding arbitrators

Tribute offers a non-compulsory, large and diverse list of experts

Para. 38 OECD Model Update 2017 Sample MoU: fees should be large enough to enable recruitment of qualified experts

ICSID and EU fee schedules are generally considered as low

Who is going to administrate arbitrations?

MLI does not address issues of case administration

Policing of arbitrators' impartiality and independence conditions of art. 20(2)(c) MLI?

Advising of arbitrators on procedural issues?

Alternative appointing authority where OECD is not acceptable?

Advantages of neutrality and expertise of external arbitration institutes over authorities or arbitrators

Art. 21(1) MLI provides for exchange of information only to arbitrators and their staff, not to any externals

Does the MLI actually preclude any publication?

Art. 23(2)(c) MLI: 'The arbitration decision shall have no precedential value.'

What is the idea: new rounds, new chances?

Precedential value: what is wrong with that?

Efficiency gain for authorities

Legal certainty for tax payers (but what about binding effect?)

Guidance for arbitrators (similar to courts)

Whose confidentiality at stake: tax payer or authorities?

Limited publication: procedural issues only; or decision and supporting considerations?

Non-publication may jeopardize public recognition

Recent EU developments re ISDS investment arbitration: ECJ *Achmea* and *CETA* cases; proposal for a permanent investment court to replace ad hoc arbitrations

Improving Tax Certainty through Dispute Resolution Mechanisms | 29 March 2018 | Singapore

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The Singapore Experience in Dispute Resolution

Balbir Kaur
Group Tax Specialist –
International Tax
IRAS



Mechanism for dispute prevention & resolution



	Domestic	International
Prevention of dispute	Transfer Pricing only: Unilateral APA	Transfer Pricing only: Bilateral or Multilateral APA
Resolution of dispute	Litigation	MAP
	Appeal <i>No domestic appeals for TP/treaty related issues in Singapore so far</i>	Arbitration <i>(currently not applicable in Singapore)</i>

What is MAP?

MAP is a mechanism, independent from ordinary legal remedies available under domestic law, through which Contracting States resolve differences of difficulties regarding the interpretation or application of the treaty on a mutually agreed basis.

Who can apply for MAP?

- MAP is available to:
 - A taxpayer who is resident in Singapore; and
 - A taxpayer who is not resident in Singapore but has a branch in Singapore. However, such an application should be made by the taxpayer in the jurisdiction in which it is tax resident and with which Singapore has a DTA

When to apply for MAP?

- Taxpayers should only initiate MAP when double taxation has occurred or is almost certain.
- MAP should be initiated within the time limit specified in the MAP article of the relevant DTA (e.g. three years). Failure to do so may result in the Competent Authorities (CAs) rejecting the MAP request.

Possible outcomes of MAP

- CAs to determine position in light of rules of respective tax laws and provision of DTA.
- CAs have duty to negotiate with best endeavours but it is not a must to achieve results.
- At the end of process, double taxation may be completely eliminated, partially eliminated or not eliminated.

Interaction of domestic law remedies and MAP

- Taxpayers have the right to determine their choice of redress i.e. domestic law remedies or MAP.
 - Taxpayers would need to consider if they are within time limits should they decide to pursue one remedy over the other and change their minds subsequently.

- Taxpayers may pursue both remedies simultaneously.
 - Taxpayers may need to consider if both processes should run in parallel or one remedy should be suspended while the other remedy is in process.

The Singapore Experience

Four-step MAP process:			
		Step 3	Step 4
	Step 2	Review & negotiation	Implementation
Step 1	Evaluation		
MAP application			
Taxpayer submits MAP application to IRAS within the time limit specified in the MAP Article of the DTA.	IRAS evaluates taxpayer’s MAP application and may contact taxpayer for more information. Where the application is acceptable, an acceptance letter will be issued within one month from the date of receipt of all the required information.	IRAS informs taxpayer of the MAP outcome within one month from reaching agreement by the competent authorities.	Taxpayer and IRAS implements the MAP outcome.

- IRAS does not impose any fee for MAP.

The Singapore Experience



- For more details relating to Singapore's MAP Administrative processes, please refer to:
 - Matters other than transfer pricing: e-Tax Guide "Avoidance of Double Taxation Agreements (DTAs)"
 - Transfer pricing: e-Tax Guide "Transfer Pricing Guidelines"
 - Singapore MAP profile

The Singapore Experience



Number of Transfer Pricing MAP Cases				
	FY2013/14	FY2014/15	FY2015/16	FY2016/17
Bal b/f	11	12	11	11
Received	3	3	2	2
Completed	0	-2	-1	-2
Withdrawn/Rejected	-2	-2	-1	-1
	12	11	11	10

Time Taken to Complete				
	FY2013/14	FY2014/15	FY2015/16	FY2016/17
<1 year	0	0	1	0
1-2 years	0	0	0	0
>2 years	0	2	0	2
Total	0	2	1	2

*Information can be found on IRAS' website

Aim

- Strengthen the effectiveness and efficiency of the mutual agreement procedure (MAP).*
- Minimize risks of uncertainty and unintended double taxation.

How it is done

- Countries commit to the following minimum standard:
 - Implement MAP in good faith and resolve cases in a timely manner
 - Implement administrative processes to promote the prevention and timely resolution of treaty-related disputes
 - Provide access to MAP for eligible taxpayers
- Minimum standard is complemented by a set of best practices

Implementation

- Robust peer-based monitoring mechanism at the FTA-MAP forum that reports regularly through the Committee on Fiscal Affairs to the G20.

Peer Review

- Peer Review will focus on the following areas:
 - Preventing disputes
 - Availability and access to MAP
 - Resolution of MAP cases
 - Implementation of MAP agreements
- The Review is desk based. Inputs are sought from assessed jurisdiction, peers and taxpayers.
- The Peer Review is done in batches.
 - The first batch started in December 2016 and was completed in July 2017.

- Singapore's Peer Review
 - We are in the third batch. The review is in respect of the period 1 January 2016 to 31 July 2017.

 - Singapore has cleared the peer review i.e. we meet the Action 14 Minimum standard concerning:
 - Prevention of disputes
 - Availability and access to MAP under Action 14 Minimum Standard
 - Other requirements in relation to the resolution of MAP cases
 - Implementation of MAP agreements

2016	Opening Inventory	Cases started	Cases closed	End Inventory	Average time to close cases (in months)
Attribution/ allocation cases	10	3	3	10	54.95
Other cases	8	5	2	11	36.05
Total	18	8	5	21	47.39

Information can be found on Singapore's Peer Review Report that is available on OECD's website

- Singapore signed the MLI on 7 June 2017 in Paris.
- Singapore's positions to the MLI for dispute resolution:
 - Except for first sentence of paragraph 1, we adopted the full text of the MAP article
 - we allow MAP application to the residence state only
 - we will notify our treaty partner when a MAP application is not justified
 - Opted in to mandatory binding arbitration

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Thank You

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ARTICLE 25

MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5. Where,

a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests in writing. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.