An Evaluation of the Measures in Action 14 of the Action Plan of the OECD/G20 BEPS Initiative Intended to Make Dispute Resolution More Effective

Harsh Arora[*]

Issue: Bulletin for International Taxation, 2017 (Volume 71), No. 5
Published online: 21 April 2017

Action 14 of the Action Plan, which is part of the OECD/G20 Base Erosion and Profit Shifting initiative, is intended to strengthen the mutual agreement procedure. This article discusses how these measures propose to minimize the risks of uncertainty and unintended double taxation.

1. The OECD's Role

The OECD is a forum where the governments of 35 member countries[1] and more than 70 non-OECD countries[2] work together to promote economic growth, prosperity and sustainable development.[3] It provides a setting in which governments can compare policy experiences, seek answers to common problems, identify good practice, and coordinate domestic and international policies. The OECD helps both OECD member countries and non-OECD countries to take advantage of the benefits and confront the challenges of a global economy by promoting sound energy policies that further economic growth, free markets and innovation. The OECD Model provides a means of settling the most common problems that arise in the field of international judicial double taxation on a uniform basis.

The rapidly growing internationalization of world trade, the expansion of the digital economy, and the increased fluidity in respect of finance and resources has placed pressure on both domestic and international tax laws.[4] Countries have an inherent interest in protecting their fair share of taxes on international trade and profits. The prevention or the elimination of double taxation is a significant aspect of the investment climate of countries, which is essential for the flow of investment, the exchange of goods and services, the movement of capital and individuals, and the transfer of technology.[5]

Double taxation arises where two countries seek to tax income from the same cross-border transaction or activities. Bilateral tax treaties endeavour to resolve this issue. Most tax treaties are based on the OECD Model, the UN Model[6] or some variation of these two models. The OECD Model and the UN Model are generally used by states as a starting point in negotiating tax treaties.

The international tax system is changing rapidly as a result of coordinated actions by governments and of unilateral measures designed by individual countries, which are both intended to deal with concerns regarding base erosion and profit shifting and the perceived international tax avoidance techniques of high-profile multinational enterprises (MNEs). Base erosion and profit shifting is also becoming more important for the United States. This is because planning structures are required to bring the effective US tax rate down to one that is comparable to foreign competition, as the US tax rate is exceptionally high. This requires the careful designing of foreign-to-foreign cross-border transactions between or among controlled foreign corporations (CFCs) within MNEs. The adoption by foreign companies of the proposals in the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative is, therefore, important for the United States in light of the scrutiny that US MNEs have recently encountered in the European Union.[7]

---

* **Juris Doctor, LLM (Taxation). The author is an international business attorney practicing at Spiegel & Utrera, P.A.'s Miami and New York City offices in the United States. He focuses on tax matters, cross-border transactions and domestic business litigation. The author can be contacted at haroralaw@gmail.com. The views expressed in this article are those of the author and should not be attributed to any institution.**

1. OECD, *Members and Partners*, available at www.oecd.org/about/membersandpartners (accessed 25 July 2016). The OECD member countries are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Rep.), Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.
2. Id. The non-OECD countries include emerging economies, such as Brazil, China and India, and other developing economies in Africa, Asia, Latin America and the Caribbean. *See also* *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD, in relation to which OECD, *Non-OECD Economies' Positions on the OECD Model Tax Convention* lists the following countries in addition to those referred to previously that have provided their positions on the *OECD Model*: Albania, Argentina, Armenia, Azerbaijan, Belarus, Bulgaria, Colombia, Croatia, Congo (Dem. Rep.), Gabon, Georgia, Hong Kong, Indonesia, Ivory Coast, Kazakhstan, Latvia, Lithuania, Malaysia, Morocco, the Philippines, Romania, Russia, Serbia, Singapore, South Africa, Thailand, Tunisia, Ukraine, the United Arab Emirates and Vietnam.
3. OECD, *About the OECD*, available at www.oecd.org (accessed 23 July 2016).
4. J. Spencer & A. Mills, *Improving Treaty Dispute Resolution: An Australian Perspective*, 69 Bull. Intl. Taxn. 6/7 (2015), Journals IBFD.
5. United Nations Department of Economic and Social Affairs, Financing for Development, *UN Model Double Taxation Convention between Developed and Developing Countries*, available at www.un.org/esa/ffd/tax-committee/ta-unmodel.html (accessed 26 July 2016).
6. Most recently, *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2011), Models IBFD, also available at www.un.org/esa/ffd/wp-content/uploads/2014/09/UN_Model_2011_Update.pdf (accessed 26 July 2016). The *UN Model* tends to be relied on more by developing countries, while the *OECD Model* tends to be relied on more by developed countries, though elements of the *UN Model* have influenced the *OECD Model* and the practices of the OECD member countries.
7. *See infra* ns. 148, 149, 150, 151 and 152.

2. The Action Plan of the OECD/G20 BEPS Initiative

The OECD's Action Plan in relation to the OECD/G20 BEPS initiative (the "Action Plan") addresses perceived flaws in international tax rules.[8] The 40-page Action Plan, which was published in July 2013, was negotiated and drafted with the active participation of the OECD member countries and contains 15 separate Action Points, some of which were further split into specific actions.[9] The Action Plan focused on addressing these issues in a coordinated, comprehensive manner and was endorsed by the G20[10] leaders and finance ministers at their summit in St. Petersburg in September 2013.[11] A commitment had been made and the Final Reports on the OECD/G20 BEPS initiative were completed and published in 2015. While OECD follow-up work has continued into 2016 and beyond, attention has now turned to the countries involved as they decide whether and how to implement the OECD recommendations.

The OECD/G20 BEPS initiative provides governments with solutions for closing the lacunae in existing international rules that permit corporate profits to disappear or be artificially transferred to low- or no-tax environments, where little or no economic activity takes place.[12] The 15 Action Points in the Action Plan equip governments with domestic and international instruments to address tax avoidance, thereby ensuring that profits are taxed where economic activities generating the profits are performed in an increasingly globalized and digital economy, and where the value is created. The Action Plan is intended to provide a single set of consensus-based international tax rules to protect tax bases, while, at the same time, offering increased certainty and predictability to taxpayers.[13] It also sets out deadlines to implement the 15 Actions.

Closer international cooperation should close lacunae that, in theory, permit income to disappear for tax purposes by using such techniques as multiple deductions for the same expense and treaty-shopping.[14] Stronger rules on CFCs should permit countries to tax profits located in offshore subsidiaries. However, the drafters of the Action Plan realized that the various Action Points that are contemplated could be a considerable source of dispute between taxpayers and tax administrations, and that such disputes could become multilateral.[15] The Action 14 Final Report 2015 (the "Final Report")[16] of the OECD/G20 BEPS initiative states that the measures developed under Action 14 of the Action Plan should provide solutions to address the obstacles that prevent countries from resolving treaty-related disputes under the mutual agreement procedure (MAP) by way of a minimum standard (*see* section 5.) in this respect as well as a number of best practices (*see* section 6.).[17]

3. The Scope of Action 14

The guidelines provided in the Action Plan are not tested and many concepts are not very well-defined. The interpretation of many of these guidelines and concepts in the Action Plan by the domestic tax authorities is likely to result in tax disputes. Article 25 of the OECD Model provides a mechanism that is independent from the ordinary legal remedies available under domestic law, through which the competent authorities of states that have concluded a tax treaty, i.e. the contracting states, can resolve differences or difficulties regarding the interpretation or application of the OECD Model on a mutually agreed basis. The MAP is very important for the proper application

8. OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD 2013), International Organizations' Documentation IBFD, also available at www.oecd.org/ctp/BEPSActionPlan.pdf (accessed 27 July 2016).
9. Id.
10. K. Amadeo, *What Does the G20 Do?*, The Balance (23 Mar. 2017) , available at www.thebalance.com/what-is-the-g20-3306114/ (accessed 25 Mar. 2017). The G20 is an international forum of the governments and central bank governors from the following 20 major economies: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea (Rep.), Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom and the United States, and the European Union. The G20 was founded in 1999 with the objective of considering, reviewing, and promoting high-level discussion of policy issues relating to the promotion of international financial stability.
11. OECD, *supra* n. 8.
12. *OECD Presents Outputs of OECD/G20 BEPS Project for Discussion at G20 Finance Ministers Meeting* (OECD 10 May 2015), available at www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm (accessed 28 July 2016). The OECD/G20 BEPS initiative is intended to give rise to a single set of international tax rules to address base erosion and profit shifting and to protect tax bases, while, at the same time, offering increased certainty and predictability to taxpayers. It is also intended that the new rules will not result in double taxation or other restrictions on cross-border transactions, as the key focus of the OECD/G20 BEPS initiative is to eliminate double non-taxation. The OECD/G20 BEPS initiative gave rise to important changes in the working methods and composition of the OECD Committee on Fiscal Affairs (CFA). It has seen the involvement of major economies on an equal footing, with all of the G20 member countries that are non-OECD countries by participating as Associates of the OECD/G20 BEPS initiative. In addition, it is intended that an inclusive mechanism will be designed for the monitoring work, with countries participating on an equal footing. The *OECD Model* (2014) and OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010), International Organizations' Documentation IBFD, also available at http://dx.doi.org/10.1787/tpg-2010-en (accessed 5 Aug. 2016), will require revision as a result of the OECD/G20 BEPS initiative. It is anticipated that these revisions will be completed and released by 2017.
13. OECD, *Closing Tax Gaps – OECD Launches Action Plan on Base Erosion and Profit Shifting* (OECD 19 July 2013), available at www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm (accessed 28 July 2016).
14. OECD, *supra* n. 13.
15. J. Malherbe, *The Issues of Dispute Resolution and Introduction of a Multilateral Treaty*, 43 Intertax, Volume 1 (2015), available at www.kluwerlawonline.com/abstract.php?id=TAXI2015008 (accessed 28 July 2016).
16. OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* (OECD 2015), International Organizations' Documentation IBFD, also available at www.oecdilibrary.org/docserver/download/2315391e.pdf?expires=1469757657&id=id&accname=guest&checksum=C37814EA754077979E34DB91FD9056F9 (accessed 28 July 2016).
17. Id., at *Foreword*, where it is stated that: "The BEPS package of measures represents the first substantial renovation of the international tax rules in almost a century … The BEPS package is designed to be implemented via changes in domestic law and practices, and via treaty provisions, with negotiations for a multilateral instrument under way and expected to be finalised in 2016".

and interpretation of tax treaties, and to ensure that taxpayers that are entitled to the benefits of tax treaties are not subject to taxation by either of the contracting states, which is not in accordance with the terms of the tax treaties.[18]

Consequently, Action 14 in the Action Plan encourages to countries to:

> [d]evelop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.[19]

4. The Final Report

By adopting the Final Report, OECD member countries and non-OECD countries participating in the OECD/G20 BEPS initiative (the "BEPS Members")[20] agreed to changes in their approach to dispute resolution by developing a minimum standard with regard to the resolution of treaty-related disputes. The objective of developing this minimum standard reflects a political commitment on the part of the G20 and the BEPS Members to improve the efficiency and timeframe for the MAP process. The BEPS Members have also committed themselves to the rapid and effective implementation through a strong peer-based monitoring mechanism that will require regular reporting through the OECD Committee on Fiscal Affairs (CFA) to the G20.[21]

The 17 elements of the minimum standard are set out in relation to three general objectives. The first general objective provides that countries should ensure that their treaty obligations relating to MAPs are fully implemented in good faith and that MAP cases are resolved in a timely manner (*see* section 5.3.). The second general objective provides that countries should ensure the implementation of administrative processes that promote the prevention and timely resolution of disputes relating to tax treaties (*see* section 5.2.). Finally, the third general objective provides that countries should ensure that taxpayers can access MAPs when they are eligible under article

18. Id. The MAP is an administrative procedure between the contracting states with little, if any, involvement from the taxpayer. The OECD's MAP Statistics for 2014 on the MAP caseloads of all the OECD member countries and of its partner economies, Argentina, China, Costa Rica, Latvia and South Africa, reveals that a rising demand for MAPs is anticipated in the future. In 2014, there were 5,423 open MAP cases, which is an increase of 18.77% on open cases in 2013 and an 130.57% increase on the open cases in 2006. It was in 2006 that OECD began to compile annual statistics on the MAP caseloads of all the OECD member countries and of the partner economies that agree to provide such statistics. Among the countries that reported the largest number of MAP cases in their inventory in 2014 was Germany, which ranked first, with 1,029 MAP cases in the 2014 reporting year, being an increase of approximately 20% on the MAP cases reported in 2013 and an, approximately, 116% increase on the MAP cases reported in 2006. The United States ranked second and reported 956 MAP cases in 2014, with an increase of approximately 31% on the MAP cases reported in 2013 and an 122% increase on the MAP cases reported in 2006. France ranked third and reported 549 cases in 2014, being an increase of approximately 11% from the MAP cases reported in 2013 and an, approximately, 116% increase on the MAP cases reported in 2006. (*See* OECD, *Mutual Agreement Procedure Statistics 2006-2014*, available at www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm (accessed 29 July 2016).) It can be estimated that the MAP cases for the OECD member countries and of the partner economies will probably grow to more than 8,000 by the end of 2017, which would be an increase of approximately 55% compared to the statistics provided in respect of the 2014 reporting period and approximately 83% compared to the statistics provided in respect of the 2013 reporting period. (*See* G. Groen et al., *OECD BEPS Project Outcomes Part 8: Dispute Resolution and Action 14*, Ernst & Young LLP, EY Tax Webcast, available at www.ey.com/GL/en/Issues/webcast_2015-12-10-1700_oecd-beps-project-outcomes-dispute-resolution-and-action-14 (accessed 29 July 2016).) The EU Joint Transfer Pricing Forum (EUJTPF) publishes statistics on the inventory of MAP cases in the European Union. These statistics reveal a similar pattern with a potential for a rising demand for MAP in the European Union. Specifically, there were 1,280 MAP cases at the end of the 2014 reporting period, 983 MAP cases at the end of the 2013 reporting period and 848 MAP cases at the end of the 2012 reporting period in the European Union. This is an increase in 2014 of approximately 30% compared to 2013 and approximately 51% compared to 2012. It can, therefore, be estimated that, in the European Union, MAP cases will probably grow to more than 3,586 by the end of 2017 and this will reflect an increase of approximately 265% compared to the numbers that were reported at the end of the 2014 reporting period. (*See* European Commission, Directorate-General, Taxation and Customs Union, EUJTPF, *Statistics on Pending Mutual Agreement Procedures (MPAs) Under the Arbitration Convention at the end of 2012* (Dec. 2013), available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_012_2013_en.pdf (accessed 29 July 2016); European Commission, Directorate-General, Taxation and Customs Union, EUJTPF, *Statistics on Pending Mutual Agreement Procedures (MAPs) Under the Arbitration Convention at the end of 2013*, October 2014, available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2014/jtpf_008_2014_en.pdf (accessed 29 July 2016); and European Commission, Directorate-General, Taxation and Customs Union, EUJTPF, *Statistics on Pending Mutual Agreement Procedures (MAPs) Under the Arbitration Convention at the end of 2014*, October 2015, available at http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf(accessed 29 July 2016).)
19. H.M. Pit, *Arbitration Under the OECD Model Convention: Follow-up Under Double Tax Conventions: An Evaluation*, 42 Intertax 6/7 (2014), available at www.kluwerlawonline.com/abstract.php?id=TAXI2014043 (accessed 29 July 2016). Most of the tax treaties that include an arbitration clause, do not provide for a mandatory arbitration based on the *OECD Model*. The arbitration procedure under these tax treaties can only be initiated at the request of one of the contracting states, both contracting states or both contracting states and the taxpayers involved. This makes the application of these arbitration clauses limited, as, if a contracting state does not want a case to be referred to arbitration, it can easily block such a referral *See* OECD, *supra* n. 8, at p. 11, where it is stated that: "The actions to counter BEPS must be complemented with actions that ensure certainty and predictability for business. Work to improve the effectiveness of the MAP will be an important complement to the work on BEPS issues. The interpretation and application of novel rules resulting from the work described [in the Action Plan] could introduce elements of uncertainty that should be minimised as much as possible. Work will therefore be undertaken in order to examine and address obstacles that prevent countries from solving treaty-related disputes under MAP. Consideration will also be given to supplementing the existing MAP provisions in tax treaties with a mandatory and binding arbitration provision."
20. OECD, *Inclusive Framework Composition* (OECD 15 July 2016), available at www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (accessed 1 Aug. 2016). The BEPS Members as at 15 July 2016 were Angola, Argentina, Aruba, Australia, Austria, Bangladesh, Belgium, Benin, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Congo (Dem. Rep.), Congo (Rep.), Costa Rica, Croatia, Curacao, the Czech Republic, Denmark, Egypt, Eritrea, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guernsey, Haiti, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, the Isle of Man, Israel, Italy, Jamaica, Japan, Jersey, Kenya, Korea (Rep.), Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Poland, Portugal, Romania, Russia, San Marino, Saudi Arabia, Senegal, the Seychelles, Sierra Leone, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, the United Kingdom, the United States and Uruguay.
21. OECD, *supra* n. 16. The detailed Terms of Reference and Assessment Methodology were supposed to have been developed in 2016.

25(1) of the OECD Model (*see* section 5.1.).[22] These general objectives can be regarded as ambitious objectives to be realized by way of the 11 best practices provided in the Final Report (*see* sections 6.2. to 6.12.).

The Final Report is organized into two sections and there are various subsections to the first section. The first section covers the minimum standard, best practices and the monitoring process with regard to the implementation of Action 14.[23] The elements of the minimum standard are formulated to reflect clear criteria and will be subject to assessment and review in the monitoring process.[24] A future report will develop this work on the elaboration of the Terms of Reference to evaluate implementation of the minimum standard and the Assessment Methodology that will be used for such monitoring.[25] The commitment to MAP arbitration is set out in the second section of the Final Report.[26]

5. The Minimum Standard

5.1. First general objective: Permitting taxpayers access to MAPs when the requirements are met

Element 1.1 of the minimum standard under the first general objective proposes that treaty-related obligations with regard to MAPs should be fully implemented in good faith and that MAP cases should be resolved in a timely manner. In order to do this, the Final Draft provides that countries should include article 25(1), (2) and (3) of the OECD Model in all of their tax treaties, as interpreted in the Commentary on Article 25 of the OECD Model[27] and subject to the variations provided under elements 3.1 and 3.3 of the minimum standard.[28] Article 25(1) and (2) provide that the competent authorities must endeavour by mutual agreement to resolve the situation of taxpayers subjected to taxation that is not in accordance with the OECD Model.[29] Article 25(3) authorizes the competent authorities of two contracting states to resolve by mutual agreement problems relating to the interpretation or application of the OECD Model and to consult with each other to eliminate double taxation in circumstances that are not provided for in the OECD Model.[30] It is also recommended that states should provide access to MAPs in transfer pricing cases to avoid double taxation by making appropriate adjustments to the tax assessed.[31]

There is no general rule denying access to MAPs in cases of perceived abuse.[32] Under element 1.2 of the minimum standard, states should provide access to MAPs when there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or whether the application of a domestic law anti-abuse provision conflicts with the provisions of a tax treaty.[33]

Article 25(1) of the OECD Model requires the contracting states to provide access to MAPs and article 25(2) requires the contracting states to endeavour to resolve such cases. The tax treaties that have an arbitration provision require issues to be submitted for arbitration.[34] Article 26 of the OECD Model and Action 14 of the Action Plan indicate a preference for mandatory arbitration.[35] The OECD Model

22. Id. The Final Report clarifies that its publication means that the G20 and the OECD member countries participating in the OECD/G20 BEPS initiative have agreed to implement the elements that represent a minimum standard with regard to the MAP process by incorporating these principles into their domestic law and/or their treaty interpretation and/or application. The OECD recommended the adoption of 17 specific measures, included in various boxes in the Final Report, which comprise the minimum standard for the resolution of treaty-related disputes, as well as a monitoring mechanism to ensure that the commitments embodied in the minimum standard are fulfilled. *See* M. Corwin & M. Dolan, *The OECD's BEPS Final Report, Part III: Tax Administration*, Tax Executive (29 Dec. 2015), available at http://taxexecutive.org/the-oecds-beps-final-report (accessed 1 Aug. 2016).
23. Id. The changes in the text of the *OECD Model* (2014) are shown in ***bold italics*** with regard to additions and strikethrough with regard to deletions. Other changes to *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* (26 July 2014), Models IBFD will be drafted as part of the next update of the *OECD Model* to reflect the conclusions of the Final Report.
24. Id.
25. Id.
26. Id.
27. Id. Paragraph 55 of the *OECD Model: Commentary on Article 25* (2014) refers to the situation of those contracting states whose domestic law prevents the *OECD Model* from being complemented on issues that are not explicitly, or at least implicitly, dealt with in the *OECD Model*.
28. Id. Element 3.1 of the minimum standard in the Final Report recommends that both of the competent authorities of the contracting states should be made aware of MAP requests being submitted and should be able to give their views as to whether the request is accepted or rejected. It provides two options under which either article 25(1) of the *OECD Model* (2014) could be amended to permit a request for a MAP to be made to the competent authority of either of the contracting states or to implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified. Element 3.3 of the minimum standard also recommends two options, i.e. to add a second sentence to article 25(2) of the *OECD Model* (2014) so that it is expressly agreed that any agreement reached would be implemented notwithstanding any time limits in the domestic law or to accept alternative treaty provisions that limit the time in which a contracting state may make an adjustment to avoid late adjustments with regard to which MAP relief would not be available.
29. Id.
30. Id.
31. Id.
32. Id. Paragraph 26 of the *OECD Model: Commentary on Article 25* (2014) provides that if there are serious violations of domestic law, some states may wish to deny access to a MAP. However, the procedure in such cases should be clear.
33. Id.
34. M. Lennard, *Transfer Pricing Arbitration as an Option for Developing Countries*, 42 Intertax 3 (2014), available at www.kluwerlawonline.com/abstract.php?id=TAXI2014021 (accessed 4 Aug. 2016).
35. Id. Article 25(5) of the *OECD Model* (2014) confirms the preference for a mandatory arbitration that was introduced in *OECD Model Tax Convention on Income and on Capital* art. 25(5) (17 July 2008), Models IBFD . The taxpayer has no involvement in the selection of an arbitrator who is appointed by the competent authorities. The arbitration decision is binding on the competent authorities, unless the taxpayer chooses to reject it. Although there is no consensus between the OECD and G20 member countries on the issue of mandatory arbitration, it is considered to be a preferred choice by the global business community to resolve treaty-related disputes by way of MAPs.

provides that, if a matter is unresolved after two years, at the instance of the taxpayer, mandatory binding arbitration may be instituted on the issues preventing agreement and the competent authorities are then bound by the arbitral decision on those issues.[36]

Under element 1.3 of the minimum standard, states should commit themselves to seek to resolve MAP cases within an average of 24 months and the progress should be periodically reviewed on the basis of the statistics that have been collected from certain OECD member countries and non-OECD countries since 2006.[37] These statistics provided transparency with regard to each reporting country's MAP.[38] The Final Report under element 1.5 of the minimum standard encourages states to provide timely and complete reporting of MAP statistics in accordance with an agreed framework that will be developed by the Forum on Tax Administration (FTA), which is a subsidiary of the CFA.[39]

Element 1.4 of the minimum standard recommends that participating countries should become members of the Forum on Tax Administration MAP Forum (the "FTA MAP Forum") that consists of the competent authorities of FTA participant countries and deliberates on matters to improve the effectiveness of MAP programmes by developing a multilateral strategic plan.[40] Element 1.6 of the minimum standard provides that the countries should also commit to have their compliance with the minimum standard reviewed by the other members of the FTA MAP Forum through an agreed monitoring mechanism that will be developed in coordination with the FTA MAP Forum.[41] The Final Report provides general features of this monitoring mechanism.[42]

This monitoring mechanism will apply to all OECD and G20 member countries and any other countries that commit to the minimum standard (the "Monitored Countries").[43] The Monitored Countries will undertake reviews of their implementation of the minimum standard, which will evaluate their legal framework under the tax treaties and domestic law and regulations, MAP programmes and the implementation of the minimum standard.[44] A report on the peer monitoring will draw attention to the strengths and shortcomings and provide recommendations on how to improve compliance with the minimum standard.[45] The peer monitoring process will be undertaken by way of the Terms of Reference[46] and the Assessment Methodology.[47] [48] These two core documents were intended to have been developed by the CFA through Working Party (WP) No. 1 on Tax Conventions and Related Questions and the FTA MAP Forum by the end of 2016.[49] It is now, however, anticipated that the first reports on peer monitoring by the FTA MAP Forum will be published by the end of 2017.[50]

With regard to the Final Report, element 1.7 of the minimum standard indicates that there is a lack of transparency regarding the positions of states with regard to MAP arbitration.[51] As a result, the Commentary on Article 25 of the OECD Model will be amended in the next update of the OECD Model to include suitable alternative provisions for those states that prefer to limit the scope of MAP arbitration to an appropriately defined subset of MAP cases.[52] The mandatory arbitration model has been widely adopted by developing countries with regard to international tax disputes since the early 2000s, which is the result of the efforts of multilateral organizations, such as the OECD, the World Bank, the Inter-American Development Bank and the International Chamber of Commerce.[53] For instance, in some South American countries, there is tension as a result of the fact that domestic law ensures that tax disputes are resolved internally and not through international alternative dispute resolution.[54] However, mandatory arbitration could be an attractive solution for some South

---

36. Id.
37. OECD, *supra* n. 16.
38. Id.
39. Id.
40. OECD FTA, *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement* (OECD), available at www.oecd.org/site/ctpfta/map-strategic-plan.pdf (accessed 4 Aug. 2016). The FTA was created in 2002 and consists of Commissioners from 46 OECD member countries and non-OECD countries, including members of the G20. The FTA's vision is to create a forum through which Commissioners can identify, discuss and influence relevant global trends and develop new ideas to enhance tax administration around the world. It assists in improving taxpayer services and tax compliance by helping tax administrations increase their efficiency, effectiveness and reduce the costs of their compliance. The FTA publishes the results of its studies in the form of reports and information or guidance notes that are available to tax administrations to help them move away from a confrontational dialogue to a more constructive engagement with taxpayers. OECD, *Tax Administration*, available at www.oecd.org/tax/administration/ (accessed 4 Aug. 2016).
41. OECD, *supra* n. 16.
42. Id.
43. Id.
44. Id.
45. Id.
46. The Terms of Reference will ensure the complete and consistent assessment of the monitoring process and will be based on the elements of the minimum standard and will assess the legal framework, MAP programme guidance and implementation of the minimum standard. Implementing the minimum standard and arbitration mechanisms will most likely be challenging for tax administrations worldwide.
47. The Assessment Methodology will assess the implementation of the minimum standard by establishing detailed procedures and guidelines for peer monitoring of the Monitored Countries by the FTA MAP Forum. In addition, agreeing to submit to peer review will inevitably require interviews, reporting and other transparency tools that will be time-consuming and absorb resources.
48. OECD, *supra* n. 16.
49. Id.
50. Id.
51. Id.
52. Footnote 1 of article 25(5) of the *OECD Model* (2014) provides that national law, policy or administrative considerations cannot permit or justify MAP arbitration and that countries should only include the provision in a tax treaty where they conclude that it can be effectively implemented based on paragraph 65 of the *OECD Model: Commentary on Article 25* (2014). In order to make this more transparent, it is proposed that footnote 1 to paragraph 5 of article 25(5) of the *OECD Model* (2014) be deleted and that paragraph 65 of the *OECD Model: Commentary on Article 25* (2014) should be amended in the next update of the *OECD Model*.
53. N. Quinones Cruz, *International Tax Arbitration and the Sovereignty Objection: The South American Perspective*, 51 Tax Notes Intl. 6, p. 533 (11 Aug. 2008), available at www.taxnotes.com/worldwide-tax-daily/treaties/international-tax-arbitration-and-sovereignty-objection-south-american-perspective/2008/08/13/7950056 (accessed 6 Aug. 2016).
54. Id.

American countries and developing countries in attracting international investment, as it can provide certainty and predictability for foreign investors from developed countries, such as the United States.[55] [56] Tax administrations in developing countries lack experience and the material and human resources to deal with MAP cases and tight budgets affect the performance of competent authorities to be able to agree to, or be involved in, international dispute resolution.[57] [58] In this context, it should be noted the Final Report lists a group of 20 countries that have declared their commitment to provide for mandatory binding MAP arbitration.[59]

5.2. Second general objective: Ensuring that domestic administrative procedures do not prevent access to MAPs

According to element 2.1 of the minimum standard, states should develop and publish rules, guidelines and procedures for their MAP programmes by different means, such as on websites of their tax administration authorities and/or ministries of finance, and provide guidance on how assistance can be requested from competent authorities.[60] Element 2.2 recommends that states should publish MAP profiles that provide competent authority details, links to domestic MAP guidelines and other useful country-specific information in respect of the MAP process.[61] It is intended that a template for a country MAP profile will be developed with the assistance of the FTA MAP Forum to assure transparency in accordance with the best practices that are covered in the Final Report and discussed subsequently in this section.[62]

Element 2.3 of the minimum standard indicates that states should provide internal guidance and procedures for their MAP programmes which establish that the staff in charge of the MAP should have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty.[63] The competent authority should not require any approval of, or direction from, the tax administration personnel who made the tax adjustments in question to resolve the MAP case.[64] In resolving the MAP case, the competent authority should not be influenced by any other considerations, including any policy-based decisions that reflect future amendments that a state would like to see in the relevant tax treaty to secure a better negotiating position.[65]

Element 2.4 of the minimum standard also provides that, in setting performance indicators for competent authorities and staff in charge of the MAP processes, states must not set any criteria, such as the amount of sustained audit adjustments or the maintenance of tax revenue.[66] However, any evaluation based on the number of MAP cases resolved, consistency in the application of tax treaties involving the same facts and similarly situated taxpayers, and the time taken to resolve MAP cases are considered appropriate as performance indicators.[67] Element 2.5 of the minimum standard recommends that adequate resources, including personnel, funding, training and other programme needs can enable the competent authorities to undertake MAP functions in a timely and effective manner.[68]

When a state has in place an administrative or statutory dispute resolution or settlement procedure (the “Domestic DRP”) that is independent of tax audit and examination functions and which can only be accessed at the request of the taxpayer, that state may limit access to MAPs with regard to the matters resolved through the Domestic DRP.[69]

In this respect, element 2.6 of the minimum standard recommends that states should notify their treaty partners of such Domestic DRPs and expressly address the effects of these Domestic DRPs on MAPs in public guidance in respect of both the Domestic DRPs and MAPs.[70] This should ensure that the taxpayers who elect to use the Domestic DRPs are fully informed of the consequences as far as their access to MAPs is concerned.[71] It is anticipated that amendments to the Commentary on Article 25 of the OECD Model in the next update of the OECD Model will address policy considerations that support the provision of MAP access in such circumstances,

---

55. OECD, *supra* n. 16 and Quinones Cruz, *supra* n. 53. The United States has a preference for including mandatory arbitration clauses in its tax treaties and it has endorsed such international dispute resolution mechanism in the income tax treaties with *Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (27 Nov. 2006), Treaties IBFD, *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (as amended through 2007) (26 Sept. 1980), Treaties IBFD and *Convention between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes* (29 Aug. 1989), Treaties IBFD. On the other hand, there are non-OECD countries, such as Brazil, China and India, which are unwilling to implement mandatory MAP arbitration as they consider that it would infringe on their sovereignty and would limit the ability to apply domestic laws to determine the tax base of non-residents and foreign companies.
56. C. Protto, *Mutual Agreement Procedures in Tax Treaties: Problems and Needs in Developing Countries and Countries in Transition*, 42 Intertax 3 (2014), available at www.kluwerlawonline.com/abstract.php?id=TAXI2014020 (accessed 6 Aug. 2016).
57. Lennard, *supra* n. 34.
58. Protto, *supra* n. 56.
59. OECD, *supra* n. 16. The relevant countries are Australia, Austria, Belgium, Canada, France, Germany, Ireland, Israel, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States, which together form a coalition of the willing and which have committed to mandatory binding MAP arbitration.
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id.
70. Id.
71. Id.

specifically with regard to the double taxation that may result where a taxpayer is required to give up the right to have questions relating to the interpretation and application of a tax treaty resolved bilaterally through a MAP.[72]

States that have implemented bilateral advance pricing arrangements (APAs) [73] may encounter situations in which the issues resolved through the APA are relevant regarding previously filed tax years, which are not included in the original scope of the APA.[74] In this context, element 2.7 of the minimum standard provides that the roll-back of an APA to such previous years may prevent or resolve transfer pricing disputes, subject to the applicable time limits where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances on audit.[75]

5.3. Third general objective: Implementing article 25 of the OECD Model in good faith

The third general objective ensures that the taxpayers that meet the requirements of article 25(1) of the OECD Model can access MAPs.[76] Under element 3.1 of the minimum standard, the competent authorities of both contracting states should be made aware of the MAP request and have an opportunity to provide their views as to whether to accept or reject the MAP request and if the taxpayer's objection can be considered to be justified.[77] The Final Report encourages adopting one of the following two alternative approaches: (1) amend article 25(1) of the OECD Model to permit a request for a MAP to be made to the competent authority of either of the contracting states; or (2) implement a process for cases in which the competent authority to which the case is presented does not consider the taxpayer's objection to be justified.[78]

Element 3.2 of the minimum standard provides that the published MAP guidance should identify the specific information and documentation that a taxpayer must submit with a request for a MAP.[79] The FTA MAP Forum has proposed developing such guidance for states to follow regarding the specific information and documentation that a taxpayer must submit with a request for a MAP.[80] When a taxpayer provides the required information and documentation consistent with such guidance, a competent authority should not be able to deny the taxpayer access to a MAP based on the argument that the taxpayer has provided insufficient information.[81]

According to element 3.3 of the minimum standard, states should include the second sentence of article 25(2) of the OECD Model in their tax treaties to ensure that domestic law limits do not prevent the implementation of mutual agreements by competent authorities, which could, otherwise, frustrate the objective of resolving cases in accordance with the OECD Model.[82] The Final Report also provides that if a state has a reservation or position with regard to the second sentence of article 25(2) of the OECD Model, it should accept alternative treaty provisions that limit the time in which a contracting state may make an adjustment under article 7(2) relating to the business profits attributable to a permanent establishment (PE) or article 9(1) relating to the profits between associated enterprises, so

72. Id.
73. Ernst & Young LLP, *Guide to Advance Pricing Agreements (APAs)*, available at www.ey.com/GL/en/Services/Tax/International-Tax/Guide-to-advance-pricing-agreements--APA----Managing-Global-Transfer-Pricing-Issues-with-APA (accessed 6 Aug. 2016). APAs are agreements between a taxpayer and one or more foreign tax administrations under the authority of MAPs specified in the tax treaties involved. They are formally initiated by the taxpayer and require negotiations between the taxpayer, one or more associated enterprises, and one or more tax administrations. APAs benefit the taxpayers, as taxpayers are assured through APAs, as income associated with covered transactions is not subject to double taxation by foreign tax administrations. OECD, *The Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010), available at http://dx.doi.org/10.1787/tpg-2010-en (accessed 5 Aug. 2016) ("Transfer Pricing Guidelines"). The Transfer Pricing Guidelines provide guidance on the application of the "arm's-length principle" for the valuation, in respect of tax purposes, of cross-border transactions between associated enterprises. The Transfer Pricing Guidelines also indicate that APAs are arrangements that determine, in advance of controlled transactions, an appropriate set of criteria for determination of the transfer pricing regarding those transactions over a fixed period of time, i.e.: "APAs are intended to supplement the traditional administrative, judicial, and treaty mechanisms for resolving transfer pricing issues. They may be most useful when traditional mechanisms fail or are difficult to apply".
74. OECD, *supra* n. 16.
75. Id.
76. Id. Article 25(1) of the *OECD Model* (2014) states that: "[w]here 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."
77. Id.
78. Id. Article 25(1) of the *OECD Model* (2014) requires a taxpayer to present the case to the competent authority of the contracting state of which the taxpayer is a resident or a national where the dispute arose under article 24(1). It is proposed to resolve this issue by amending article 25(1) of the *OECD Model* (2014) to involve the competent authorities of both of the contracting states and to be reflected in the proposed revisions to the paragraphs 7, 16, 17, 18, 19, 31, 32, 33, 34 and 35 of the *OECD Model: Commentary on Article 25* (2014).
79. Id. Element 2.1 of the minimum standard, as discussed in section 5.2., provides that the states should develop and publish rules, guidelines and procedures in respect of their MAP programmes, which should include guidance on how taxpayers may request for assistance from competent authorities.
80. Id.
81. Id.
82. Id. The second sentence of article 25(2) of the *OECD Model* (2014) states that: "[a]ny agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States". Some non-OECD countries, such as Argentina, Brazil, Bulgaria, the Philippines and Thailand, have reserved their positions on the second sentence of article 25(2) of the *OECD Model* (2014), as they consider that the implementation of reliefs and refunds following a mutual agreement should remain linked to the time limits provided in their domestic laws.

that late adjustments can be avoided with regard to which a MAP would not be available.[83] The alternative provisions proposed in the Final Report are set out below:[84]

For 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.

For 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.

Some states may be willing to include the second sentence of article 25(2) of the OECD Model in the tax treaties that they conclude, subject to an agreement to limit the time in which a contracting state may make an adjustment based on article 9(1) or article 7(2) of the OECD Model.[85] This would indicate that some states think that an open-ended commitment to make a corresponding adjustment is unreasonable, but that double taxation may be avoided if appropriate adjustments are made within a reasonable time under article 9(1) or article 7(2) of the OECD Model.[86]

6. Best Practices

6.1. In general

The Final Report introduces 11 best practices that complement the minimum standard principles (*see* sections 6.2. to 6.12.).[87] While the minimum standards reflect consensus by the participating states to adopt specific measures that are intended to resolve treaty-based disputes in a timely manner, the best practices have not been approved by all of the OECD and G20 member countries.[88] The best practices have a more subjective and qualitative character, but emphasize the OECD's concern that these issues should be reviewed to improve the MAP process.[89]

6.2. Best practice 1: Corresponding transfer pricing adjustments

Article 9(2) of the OECD Model deals with the obligation of the other contracting state to make appropriate adjustments if a transfer pricing adjustment is made in the other contracting state to reflect the arm's length standard.[90] Best practice 1 provides that states should include article 9(2) of the OECD Model in the tax treaties that they conclude, as some states consider that without such an inclusion, they cannot make a corresponding adjustment or grant access to MAPs with regard to the double taxation that may otherwise result from a primary

83. Id. Article 7(2) of the *OECD Model* (2014) reads as follows: "[f]or the purposes of this Article and Article [23 A] [23 B], the profits that are attributable in each Contracting State to the permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise". The proposed amendment is reflected in the Final Report to the effect that is to be made in paragraph 62 of the *OECD Model; Commentary on Article 7* (2014). Article 9(2) of the *OECD Model* (2014) states that: "[w]here a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly". The proposed amendment is again reflected in the Final Report to the effect that is to be made in paragraph 10 of the *OECD Model: Commentary on Article 9* (2014).
84. Id.
85. Id.
86. Id.
87. Id. These best practices are related to the elements of the minimum standard but are not part of them.
88. Ernst & Young LLP, *OECD Releases Final Report on Improving the Effectiveness of Dispute Resolution Mechanisms under Action 14*, Global Tax Alert (2015), available at www.ey.com/Publication/vwLUAssets/OECD_releases_final_report_on_improving_the_effectiveness_of_dispute_resolution_mechanisms_under_Action_14/$FILE/2015G_CM5830_OECD%20releases%20final%20report%20on%20Action%2014.pdf (accessed 11 Aug. 2016).
89. Id. There appears to be no political agreement between all of the OECD and G20 member countries regarding these best practices.
90. OECD, *supra* n. 16. Article 9(2) of the *OECD Model* (2014) reads as follows; "[w]here 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." Non-OECD countries, such as Brazil and India, maintain their position that economic double taxation arising from transfer pricing adjustments does not fall within the scope of a MAP established under article 25 of the *OECD Model* (2014). In the light of its commitment to adopt recommendations of Action 14, it is likely India will revisit its position on article 9(2) of the *OECD Model* (2014).

transfer pricing adjustment.[91] The Final Report suggests that this is not intended to give rise to any negative inference with regard to the tax treaties that do not currently include a provision based on article 9(2) of the OECD Model.[92]

6.3. Best practice 2: Consistent bilateral application of tax treaties

The first sentence of article 25(3) of the OECD Model provides that:

> [t]he 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.

Best practice 2 encourages countries to ensure that their administrative processes promote the prevention and timely resolution of disputes relating to the tax treaties that they have concluded.[93] The Final Report notes that appropriate procedures should be put in place and published by states on an anonymous basis to encourage the consistent bilateral application of tax treaties and to provide guidance in similar disputes in the future, but that all confidential information relating to the taxpayers should be protected.[94] These changes will be reflected in the Commentary on Article 25 of the OECD Model as part of the next update of the OECD Model.[95]

6.4. Best practice 3: Global awareness of audit and examination functions through the FTA's "Global Awareness Training Module"

The FTA encourages global awareness of audit functions, including awareness of the potential for giving rise to double taxation, the effect of proposed adjustments on the tax base of one or more tax jurisdictions, and the processes and the principles that competent authorities should consider to reconcile competing jurisdictional claims.[96] Best practice 3 encourages states to develop global awareness of the audit and examination functions involved in international matters through the delivery of the FTA's "Global Awareness Training Module"[97] to appropriate personnel.[98] The participation of countries in the FTA MAP Forum is encouraged, as their competent authorities can advance the objectives of the FTA's Multilateral Strategic Plan on Mutual Agreement Procedures (the "Strategic Plan") and remain accountable to others that are involved in this process.

6.5. Best practice 4: Implementation of bilateral APAs

APAs that are concluded bilaterally between the competent authorities of treaty partners provide certainty in both jurisdictions with regard to the tax consequences of the subject transactions, reduce the likelihood of double taxation and may prevent transfer pricing disputes.[99] Best practice 4, therefore, encourages countries to implement bilateral APA programmes.[100]

6.6. Best practice 5: Multi-year resolution of recurring issues

It is a more efficient use of a competent authority's resources if MAP assistance is provided with regard to recurring issues in other filed tax years to avoid duplicating request for MAPs.[101] Best practice 5 provides that states should seek to implement appropriate procedures to permit such multi-year resolution of recurring issues in respect of filed tax years through MAPs if the relevant facts and circumstances are the same and subject to verification of such facts and circumstances.[102] The Final Report stipulates that the implemented procedures should remain subject to requirements of article 25(1) of the OECD Model,[103] where a MAP request to resolve an issue subject to a particular tax year would only be permitted where the case has been presented within three years of the first notification of the action resulting in taxation not in accordance with the OECD Model with regard to the tax year in question.[104]

6.7. Best practice 6: Suspension of collection procedures

If a taxpayer must pay disputed taxes to both contracting states, the taxpayer will probably face cash flow problems and there may be an adverse effect on the taxpayer's business during the time it takes for the MAP case to be resolved.[105] This also results in double taxation

---

91. Id. Ernst & Young, *Why Action 14 is Vital to the BEPS Project*, EY Tax Insights (2015), available at http://taxinsights.ey.com/archive/archive-articles/why-action-14-is-vital-to-the-beps-project.aspx (accessed 11 Aug. 2016).
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. OECD, *supra* n. 16 and OECD, *supra* n. 40. The Strategic Plan identifies number of specific initiatives to address challenges faced by competent authorities relating to resources, empowerment, process improvements, the relationship with the audit function and responsibility and accountability among others. The Strategic Plan provides that increasing global awareness of the audit and examination functions involved in international matters is important in preventing dysfunctional tax administration actions, such as unprincipled adjustments to non-resident companies and avoiding disputes that these actions can create. The FTA's "Global Awareness Training Module" was created to train competent authorities on how to avoid such disputes through the training of the appropriate personnel.
98. OECD, *supra* n. 16.
99. Ernst & Young, *supra* n. 73.
100. OECD, *supra* n. 16.
101. Id.
102. OECD, *supra* n. 16 and Ernst & Young, *supra* n. 88.
103. OECD, *supra* n. 16, and *see also supra* n. 76.
104. OECD, *supra* n. 16.
105. Id.

during the time it takes for resolution of the MAP case.[106] The competent authorities that have already collected taxes may not be able to engage in negotiations in good faith with the taxpayer when they may have to refund the taxes that have been previously collected.[107]

Best practice 6 proposes that the states should ensure that appropriate measures are taken to suspend collection procedures while a case is pending in a MAP.[108] The conditions to suspend the collection procedures should, minimally, be the same as those available under domestic administrative procedures or available under the judicial remedies provided by the contracting states.[109] In the next update of the OECD Model, the Commentary on Article 25 of the OECD Model will be widened to describe the policy considerations that support such suspension of collection procedures during the period in which a MAP is pending.[110]

6.8. Best practice 7: Choice of remedies should remain with taxpayers

A MAP is available to taxpayers regardless of the judicial and administrative remedies that are also available under the domestic law of the contracting states in question.[111] Typically, a taxpayer's choice of recourse is constrained by the statute of limitations under domestic law or time limits that are available under article 25(1) of the OECD Model, which, as currently provided, is presenting a case within three years to the competent authority of the state of which the taxpayer is a resident.[112] A MAP is a process between the competent authorities of the contracting states. The involvement of a taxpayer can assist the competent authorities in delivering the best result, as the taxpayers can communicate with the competent authorities in advance regarding their commercial background, maintain clear communications and follow the rules that make the process accessible to taxpayers.

Best practice 7 provides that the states should implement appropriate administrative measures to facilitate recourse to MAPs to resolve treaty-related disputes and that the taxpayers should be able to choose whether to opt for procedures under a MAP or other dispute resolution forum to resolve the treaty-related disputes.[113] Tax disputes directly affect cross-border investments, as they significantly affect the perception of legal certainty.[114] States have been struggling to cope with the increasing number of cases and the rising tax cost of doing business.[115]

Although the OECD/G20 BEPS initiative is at the forefront of establishing a single set of international tax rules to address base erosion and profit shifting and to protect tax bases, while offering increased certainty and predictability to taxpayers, it remains important that taxpayers should retain their autonomy to select between MAPs or other dispute resolution mechanisms provided under the domestic law of the contracting state in question to resolve their treaty-related disputes.

6.9. Best practice 8: Explaining in published MAP guidance on the relationship between MAPs and domestic law remedies

In general, tax treaties do not contain any provisions regarding the interaction between domestic law remedies and MAPs.[116] These issues are usually governed by a contracting state's domestic law and/or administrative procedures.[117] Best practice 8 provides that a state's published MAP guidance should include an explanation of the relationship between MAPs and domestic law administrative and judicial remedies.[118] Specifically, it should be clarified if the competent authority in question considers itself legally bound by a domestic court decision when handling a MAP case or the competent authority may deviate from a domestic court decision.[119] [120] The Final Report proposes amendments to the Commentary of Article 25 of the OECD Model[121] to reflect the changes in accordance with best practice 8.[122]

---

106. Id. Non-OECD countries including Brazil, Thailand, Tunisia and Ukraine, have reserved their position on the second sentence of article 25(3), which states that the competent authorities of the treaty states may consult with each other on elimination of double tax in cases that are not provided for in the *OECD Model* (2014). These non-OECD countries maintain their position that they have no authority under their laws to eliminate double taxation in the cases that are not provided for in the *OECD Model* (2014).
107. Id.
108. Id.
109. Id.
110. Id.
111. Id.
112. OECD, *supra* n. 16 and Ernst & Young, *supra* n. 88. As discussed in section 5.3. with regard to element 3.1 of the minimum standard, it is necessary for states to ensure that both competent authorities are aware of any MAP requests that are filed. This means that a taxpayer should be able to file a request in either of the contracting states, which would require an amendment to the language of article 25(1) of the *OECD Model* (2014) or, alternatively, that a bilateral notification or consultation process should be implemented to allow the other competent authority to be informed in case one competent authority considers that the taxpayer's objection not justified.
113. OECD, *supra* n. 16.
114. P.K. Sidhu, *Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?*, 68 Bull. Intl. Taxn. 11 (2014), Journals IBFD.
115. Id.
116. OECD, *supra* n. 16.
117. Id.
118. Ernst & Young, *supra* n. 88.
119. OECD, *supra* n. 16.
120. India, which is a non-OECD country, adopts the position that the competent authorities can reach an agreement under article 25 of the *OECD Model* (2014) while domestic law actions are pending. However, India maintains that a taxpayer can opt to either accept or reject the resolution order. In the event that taxpayer accepts the resolution order, the taxpayer must withdraw the pending domestic law action. India also does not agree with paragraph 42 of the *OECD Model: Commentary on Article 25* (2014) that a taxpayer may be permitted to defer the acceptance of the solution agreed on as a result of MAP until the court in question has delivered its judgement in the domestic law action.
121. In paras. 35 and 42 *OECD Model: Commentary on Article 25* (2014).

6.10. Best practice 9: Access to MAPs to resolve by consultation double taxation arising in bona fide taxpayer-initiated foreign adjustments

A taxpayer may file an amended tax return to reflect the arm's length price of a controlled transaction or to adjust a previously reported attribution of profits to a PE to conform such attribution with the separate entity in accordance with the arm's length principle.[123] Best practice 9 provides that, in respect of such bona fide taxpayer-initiated adjustments, the published MAP guidance of states should provide that taxpayers can file for a MAP as permitted under the domestic law of a treaty partner.[124] As long as there is a good faith on the part of a taxpayer to ensure compliance in one state, taxpayers should be able to file for a MAP in the other state to avoid any resulting double taxation.[125]

If taxpayer-initiated foreign adjustments reflect the fact that a taxpayer has acted in good faith to correctly report the taxable income arising from a controlled transaction or the profits attributable to a PE and where the taxpayer has timely and properly fulfilled the obligations under the tax laws of both contracting states, such adjustments should be considered to be bona fide.[126] Best practice 9, therefore, proposes additions and/or amendments to the Commentaries on Articles 7,[127] 9[128] and 25[129] [130] of the OECD Model.

6.11. Best practice 10: Guidance on interest and penalties and MAPs

The issues relating to the consideration of interest and penalties by competent authorities in the context of MAP are very important in light of the ongoing work of the OECD/G20 BEPS initiative to increase the pressure on MAPs.[131] In states in which penalties are relatively high and the fact that these can be equal or greater than the amount of the adjusted tax, it would be desirable that domestic provisions should eliminate the trade-off between a domestic settlement and a MAP to give a taxpayer the option to select the most effective procedure for the case in question without being driven by the savings constituted by different penalty regimes between settlement and MAPs.[132] Taxpayers opting for a MAP should have access to the same penalties reduction provided under domestic settlement procedures.[133] Best practice 10 encourages the published MAP guidance of states to include a consideration of interest and penalties in MAPs.[134] It is intended that the Commentary on Article 25 of the OECD Model will be updated in relation to the issues concerning the consideration of interest and penalties in MAPs in the next update of the OECD Model.[135]

6.12. Best practice 11: Guidance on multilateral MAPs and APAs

The Final Report notes that, while MAPs, as provided for in article 25 of the OECD Model, have traditionally focused on the resolution of bilateral disputes, the issues of multi-jurisdictional tax disputes should be addressed in accordance with the growing global business climate.[136] Best practice 11, therefore, suggests that the MAP guidance of states should provide direction on multilateral MAPs and APAs.[137]

---

122. OECD, *supra* n. 16. Appropriate amendments will be made in paragraph 35 of the *OECD Model: Commentary on Article 25* (2014) to stipulate that in states in which the competent authority is bound by the court decision is a result of either an obligation to follow the court decision in accordance with the domestic law or as a result of administrative policy or practice. Paragraph 42 of the *OECD Model: Commentary on Article 25* (2014) will also be amended to provide that a competent authority may be precluded from maintaining taxation where a domestic court has decided that such taxation is not in accordance with a tax treaty. However, in other states where a competent authority is not precluded from granting relief from taxation notwithstanding a court decision to the effect that such taxation accords with a tax treaty; in such case, nothing should prevent the competent authorities from reaching a mutual agreement that relieves the taxpayer from such an obligation.
123. Id.
124. Id.
125. Id.
126. Id.
127. Id. Paragraph 59.1 of the *OECD Model: Commentary on Article 7* (2014) will, on this addition, provide that, where adjustments are made in good faith to the profits attributable to a PE, such adjustments may facilitate the proper attribution of profits to a PE. However, double taxation may arise if taxpayer-initiated adjustments increase the profits attributed to a PE located in one contracting state, but there is no appropriate corresponding adjustment in the other contracting state. The amended article 25 of the *OECD Model* (2014) will enable the competent authorities of the contracting states to consult with each other and eliminate double taxation.
128. Id. Paragraph 6.1 of the *OECD Model: Commentary on Article 9* (2014) will, on addition, provide that, where adjustments are made in good faith to a price in respect of a transaction between associated enterprises to report a price that is the arm's length price. However, double taxation may arise if taxpayer-initiated adjustments increase the profits of an enterprise of one contracting state, but there is no appropriate corresponding adjustment to the profits of the associated enterprise in the other contracting state. The amended article 25 of the *OECD Model* (2014) will enable the competent authorities of the contracting states to consult with each other and eliminate double taxation.
129. Id. Paragraph 23 of the *OECD Model: Commentary on Article 25* (2014) will, on amendment, provide that, where a taxpayer pays additional tax on filing of an amended tax return, the starting point of the three-year limit will generally be the notice of assessment or liability that results from the amended return, rather than when the additional tax was paid.
130. Id. Paragraph 14 of the *OECD Model: Commentary on Article 25* (2014) will, on amendment, provide instances when MAPs can be initiated by taxpayers and that such instances will include bona fide taxpayer-initiated adjustments, including the filing of amended tax returns to report a price in a controlled transaction or an attribution of profits to a PE, which, in the taxpayer's opinion, is in accordance with the arm's length principle, and will also be in line with the additions proposed to paragraph 59.1 of the *OECD Model: Commentary on Article 7* (2014) (*see supra* n. 127) and paragraph 6.1 of the *OECD Model: Commentary on Article 9* (2014) (*see supra* n. 128).
131. OECD, *supra* n. 16.
132. G. Maisto, *BEPS Action 14 vs Treaty Obligations and State Aids*, Kluwer Tax Blog (4 Mar. 2015), available at http://kluwertaxblog.com/2015/03/04/beps-action-14-vs-treaty-obligations-and-state-aids/ (accessed 14 Aug. 2016).
133. Id.
134. OECD, *supra* n. 16.
135. Id.
136. Id.
137. Id.

Multilateral APAs have recently fallen under scrutiny in various EU State aid cases that have resulted in adverse determinations by the Commission against the EU Member States ("Member States") engaged in distorting competition within the single market by benefiting certain MNEs.[138] State aid is an EU concept that prohibits the Member States from providing impermissible aid to companies that may take the form of tax treatment or benefits.[139] The Commission has made it clear that its State aid investigations are focused not only on whether a tax ruling or an APA process constitutes State aid, but also on whether the substantive tax treatment applied to particular taxpayers is State aid.[140] The State aid cases, inter alia, involve the Commission imposing its determination on the proper application of the OECD Transfer Pricing Guidance on a Member State.[141] In effect, the Commission informs the Member State in question to adjust the tax base to which the otherwise applicable corporate tax regime of that Member State would apply under its domestic tax law.[142]

The Commission has not challenged the overall ruling regimes, but has, rather, instead challenged the use of APAs.[143] In this context, the Commission's investigations are aimed against the Member States and not against taxpayers. However, the Commission's determination that an APA constitutes State aid directly affects taxpayers.[144] If a taxpayer wishes to appeal an adverse decision, the appeal process in the European Union can be lengthy and the issue in question may take several years to resolve.[145]

Some Member States, such as Belgium, Luxembourg and the Netherlands, have recently criticized the Commission's adverse determinations.[146] These State aid decisions have given rise to confusion and uncertainty with regard to the proper application of transfer pricing rulings. The State aid decisions are also regarded as a hindrance in the efforts of some of the Member States that are trying to counter abusive tax practices and, at the same time, attempting to provide taxpayers with legal certainty so that they can enter into APAs with the tax authorities with confidence.

The United States has also criticized the Commission's adverse determinations.[147] Recently, numerous US MNEs, such as Amazon,[148] Apple in Ireland,[149] McDonalds[150] in Luxembourg and Starbucks in the Netherlands,[151] have come under scrutiny as a result of State

---

138. N.J. DeNovio, E. Righini & N. Nonken Gibbs, *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments, European Commission's Actions Against Member States Bear Close Scrutiny*, Tax Executive, (6 Apr. 2016), available at http://taxexecutive.org/state-aid-what-it-is-and-how-it-may-affect-multinationals-and-tax-departments/ (accessed 16 Aug. 2016). Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), art. 107(1), OJ C 115 (2008), EU Law IBFD provides that State aid which affects trade between the Member States and threatens to distort competition by favouring certain undertakings is, in principle, incompatible with the single market. The single market refers to the European Union as one territory without any internal borders or other regulatory obstacles to, inter alia, the free movement of goods and the free provision of services. (*See* European Commission, *The European Single Market*, available at https://ec.europa.eu/growth/single-market_en (accessed 17 Aug. 2016).) APAs that confer a selective tax advantage to specific entities and, therefore, in effect, provide such entities with a subsidy, can significantly distort competition within the single market and violate the TFEU.
139. Id.
140. Id.
141. Id.
142. Id.
143. Id.
144. Id. A taxpayer may challenge the validity of the European Commission's decisions on State aid before the General Court ("General Court"), which is part of the Court of Justice of the European Union (ECJ). The judgement of the General Court may be appealed to the ECJ for a review of legal issues only and not factual issues. As such, the General Court and the ECJ review the legality of the State aid decision and can annul the decision. Taxpayers who have received an adverse tax ruling, i.e. determination that an APA is State aid, in a final decision issued by the European Commission must challenge such a final decision to preserve their right to contest the Member State's recovery order before that Member State's domestic courts. (*See* CVRIA, General Court, *Presentation*, available at http://curia.europa.eu/jcms/jcms/Jo2_7033/en/ (accessed 17 Aug. 2016).)
145. Id. In 2002, Spain adopted legislation that permitted Spanish companies to deduct from their taxable base the difference between the acquisition cost of a 5% or greater stake in a foreign company and the net book value of the company up to a specified amount. In 2009 and 2011, the European Commission determined that the measure constituted unlawful State aid, as it resulted in an advantage for Spanish companies over their competitors when acquiring shares in foreign companies. In 2014, the European Commission found that there was also unlawful State aid when the acquisition was an indirect one, in respect of which the Spanish entity acquired shares in a holding company which then purchased the shares in the foreign company. However, it was not until 2014 that the General Court annulled both of the 2009 and 2011 decisions of the European Commission.
146. Id., citing European Commission, *Commission Decides Selective Tax Advantages for Fiat in Luxembourg and Starbucks in the Netherlands Are Illegal Under EU State Aid Rules*, Press Release IP/15/5880 (21 Oct. 2015), available at http://europa.eu/rapid/press-release_IP-15-5880_en.htm (accessed 17 Aug. 2016). The Netherlands formally appealed the decision on 23 December 2015. *See* NL: ECJ, Case T-760/15, *Netherlands v. Commission*. *See also* action undertaken by Luxembourg on 30 December 2015 in LU: ECJ, Case T-755/15, *Luxembourg v. Commission* and Luxembourg Ministry of Finance, Luxembourg *Commission/Luxembourg to Appeal the Commission's Fiat Decision*, Press Release (4 Dec. 2015), available at www.mf.public.lu/actualites/2015/12/fiat_041215/index.html (accessed 17. Aug. 2016). *See* yet again A. Hope, *Belgium Will Appeal EU Decision on Excess Profits*, Flanders Today (8 Feb. 2016), available at www.flanderstoday.eu/politics/belgium-will-appeal-eu-decision-excess-profits (accessed 17 Aug. 2016).
147. OECD, *supra* n. 16, in citing *U.S. Chamber Statement on EU State Aid Decisions* (21 Oct. 2015), available at www.uschamber.com/press-release/us-chamber-statement-eu-state-aid-decisions (accessed 17 Aug. 2016). *See also* M.J. Graetz, *Behind the European Raid on McDonald's*, The Wall Str. J. (3 Dec. 2015), available at www.wsj.com/articles/behind-the-european-raid-on-mcdonalds-1449187952 (accessed 17 Aug. 2016).
148. European Commission, *State Aid: Commission Investigates Transfer Pricing Arrangements on Corporate Taxation of Amazon in Luxembourg*, Press Release IP/14/1105 (7 Oct. 2014), available at http://europa.eu/rapid/press-release_IP-14-1105_en.htm (accessed 19 Aug. 2016). In this case, the tax authorities approved, inter alia, the APA between Lux SCS, a subsidiary of Amazon and a Luxembourg limited liability partnership (LLP), which held all the shares in Amazon EU Sàrl, and Amazon EU Sàrl, the head office of Amazon for Europe and a principal operator of the retail and business services offered through Amazon's European websites, for Luxembourg corporate income tax purposes. The key part of the APA was to provide a method for calculating the licence fee that Amazon EU Sàrl would have to pay to Lux SCS. The proposed method was supported by an economic analysis, but Luxembourg did not submit this to the European Commission when asked to do so. According to the APA that was finally approved, the licence fee would be computed annually and would amount to a percentage of all of the revenue received by Amazon EU Sàrl in connection with its operation of its European websites. The European Commission determined that the APA did not comply with the arm's-length principle. Consequently, the tax treatment of Amazon EU Sàrl deviated from normal market conditions and, therefore, by validating the APA, Luxembourg had conferred an advantage on the company. *See* D. Kyriazis, *Luxembourg, Amazon, and the State Aid Connection*, Tax Justice Network (23 Jan. 2015), available at www.taxjustice.net/2015/01/23/luxembourg-amazon-state-aid-connection/ (accessed 19 Aug. 2016).
149. S. Bodoni, D. Doyle & A. White, *What to do with Apple Cash? Irish Dilemma as EU Ruling Looms*, Bloomberg (8 June 2016), available at https://www.bloomberg.com/news/articles/2016-06-08/irish-wonder-what-to-do-with-apple-tax-if-eu-orders-a-clawback (accessed 18 Aug. 2016).

aid investigations by the Commission. The presence of these US MNEs in the Member States and the Commission's challenge to the APAs agreed have given rise to a significant degree of uncertainty with regard to doing business, retroactively calling into question APAs that were previously understood to be legal and appropriate. It is likely that US MNEs will continue to encounter such scrutiny by the Commission as they are suspected of distorting competition with the single market.[152] The issues relating to base erosion and profit shifting will remain important for US MNEs, as their structures that are related to tax planning are effective in light of the recent State aid investigations undertaken by the Commission.

Consequently, clearly there are multi-jurisdictional disputes from the perspective of US MNEs and the Member States relating to APAs that will require sound dispute resolution mechanisms in the near future and the taxpayers will have to be able to access clear guidance on how to effectively engage in such dispute resolution. The Commentary on Article 25 of the OECD Model is intended to be updated regarding multilateral MAPs and APAs in the next update of the OECD Model. This should provide additional guidance for states as to what changes should be made to their domestic laws and procedures.[153]

7. Conclusions

The existing tax rules exhibit flaws that give rise to opportunities for base erosion and profit shifting that must be dealt with. The Action Plan with its 15 Actions encompasses elements used in corporate tax avoidance practices and aggressive tax planning schemes. Consequently, Action 14 reflects the commitment of participating countries to implement substantial changes in their approach to dispute resolution.[154]

The OECD Public Discussion Draft (the "Discussion Draft")[155] on Action 14 extensively deal with dispute resolution mechanisms and ways to make them more effective, and offered arbitration as an option for willing countries. The Final Report did not deliver on certain specific dispute resolution solutions that were requested in the Discussion Draft, including some form of mediation as part of the MAP process.[156] Arbitration was also not prescribed as a preferred dispute resolution solution in the Discussion Draft, which only required states to provide or to clarify whether they would permit MAP arbitration.[157] However, as noted in section 5.2., 20 countries have declared their commitment to mandatory binding MAP arbitration.[158] It appears that the OECD's view is that the proposals in the Discussion Draft can best be addressed by the FTA MAP Forum or through FTA's "Global Awareness Training Module".[159]

150. The European Commission's position is that McDonald's Europe Franchising has virtually not paid any corporate income tax in Luxembourg or in the United States on its profits since 2009. The European Commission has, therefore, assessed whether the Luxembourg authorities selectively deviated from the provisions of their national tax law and the *Convention between the Government of the United States of America and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital* (3 Apr. 1996), Treaties IBFD and whether the Luxembourg authorities thereby gave McDonald's an advantage not available to other companies in a comparable factual and legal situations. McDonald's head office in Luxembourg is responsible for its strategic decision-making; but it also has two branches, i.e. a Swiss branch, which has limited activities related to the franchising rights, and a branch in the United States, which does not have any real activities. The royalties received in Europe and Russia are transferred internally to the branch in the United States. McDonald's has maintained its position that its branch in the United States of McDonald's Europe Franchising constitutes a PE under Luxembourg law, as it has sufficient activities to constitute a real presence in the United States. Simultaneously, McDonald's also maintain that its branch in the United States was not a PE under US law, as, from the perspective of the US tax authorities, its branch in the United States did not undertake sufficient business or trade in the United States. Consequently, McDonald's Europe Franchising paid no corporate income tax in Luxembourg, although it derived significant profits, i.e. more than EUR 250 million in 2013, from royalties paid by franchisees operating restaurants in Europe and Russia for the right to use the McDonald's brand and associated services. (*See* European Commission, *State Aid: Commission Opens Formal Investigation Into Luxembourg's Tax Treatment of McDonald's*, Press Release IP/15/6221 (3 Dec. 2015, available at http://europa.eu/rapid/press-release_IP-15-6221_en.htm (accessed 19 Aug. 2016).) On 6 June 2016, the European Commission published a non-confidential version of its decision of 3 December 2015 so as to open a formal investigation with regard to the two tax rulings that were issued by the Luxembourg tax administration, with the objective of determining whether the second of these constitutes State aid. It is expected that both Luxembourg and McDonald's will oppose the arguments of the European Commission. (*See* European Commission, *State aid SA. 38945 (2015/C) (ex 2015/NN) – Luxembourg, Alleged Aid to McDonald's,* Letter to the Member State – Working Language (6 June 2016), available at http://ec.europa.eu/competition/state_aid/cases/261647/261647_1756438_84_2.pdf (accessed 19 Aug. 2016)).

151. The European Commission determined that the tax rulings that the Netherlands agreed with Starbucks were illegal, as the Netherlands endorsed artificial and complex methods to establish taxable profits for Starbucks, which do not reflect economic reality. (*See* A. van Riemsdijk, *Netherlands to Appeal EU Decision that Starbucks Tax Deal is Illegal State Aid*, The Wall Str. J. (30 Nov. 2015), available at www.wsj.com/articles/netherlands-to-appeal-eu-decision-that-starbucks-tax-deal-is-illegal-state-aid-1448653827 (accessed 19 Aug. 2016) and *Starbucks Response to European Commission State Aid Decision on the Netherlands*, Starbucks Newsroom (2015), available at https://news.starbucks.com/views/response-to-european-commission-state-aid-decision-on-the-netherlands (accessed 19 Aug. 2016).) On its website, Starbucks has maintained its position that "[t]he dispute between the European Commission and the Netherlands as to which OECD rules we and others should follow will require us to pay about €20m to €30m on top of the $3 billion in global taxes we have already paid over the seven years in question (2008-2014)". It is further insisted that "Starbucks complies with all OECD rules, guidelines and laws and supports its tax reform process. Starbucks has paid an average global effective tax rate of roughly 33 percent, well above the 18.5 percent average rate paid by other large US companies".

152. DeNovio, E. Righini & Nonken Gibb, *supra* n. 138.

153. OECD, *supra* n. 16. On 12 August 2015, the US Internal Revenue Service (IRS) released the final revenue procedures explaining the process for MNEs seeking APAs or treaty assistance from the US competent authority. (*See* I.R.S, REV. PROC. 2015-41, 2015-35 I.R.B. 263, Administrative Documentation (incl. US IRS) IBFD, also available at www.irs.gov/pub/irs-drop/rp-15-41.pdf (accessed 20 Aug. 2016).)

154. D.L. Marco-Go, *BEPS Action Plan 14: Making Dispute Resolution Mechanisms More Effective*, Bus. World Online (1 Feb. 2016), available at www.bworldonline.com/content.php?section=Economy&title=beps-action-plan-14-making-dispute-resolution-mechanisms-more-effective&id=122382 (accessed 20 Aug. 2016).

155. OECD, *BEPS Action 14: Make Dispute Resolution Mechanisms More Effective*, *Public Discussion Draft*, 18 December 2014-16 January 2016 (OECD 2014), available at www.oecd.org/tax/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf (accessed 20 Aug. 2016).

156. Id. The CFA invited interested parties to send comments on the Discussion Draft and it noted that there was no consensus among the OECD member countries and non-OECD countries on moving towards a universal mandatory binding MAP arbitration.

157. Ernst & Young, *supra* n. 88.

158. *See supra* n. 59. A mandatory binding arbitration provision is proposed to be developed as part of the negotiation of *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties IBFD contemplated by Action 15 of the Action Plan.

159. Ernst & Young, *supra* n. 88.

The OECD has indicated that approximately five more years may be required to complete the work on OECD/G20 BEPS initiative[160] and that Action 14 requires additional work by those states that are willing and committed to amend their local laws, regulations and/or tax treaties in accordance with the guidance provided by the OECD/G20 BEPS initiative. Through the adoption of Action 14, BEPS Members and the G20 member countries have agreed to the minimum standard in respect of the MAP process and the peer monitoring mechanism. The guidance provided by the OECD/G20 BEPS initiative will have to be effectively adopted and implemented, and there may be challenges and push-backs due to the political nature of the recommendations that may conflict with the domestic interests of some countries. The OECD's ongoing efforts to bring together a diverse range of countries with competing objectives gives rise to the risk that the implementation of recommendations will be fragmented among individual jurisdictions.[161] In addition, as the recommendations in the OECD/G20 BEPS initiative are broad and vaguely worded, it is probable that it will give rise to increased uncertainty for global businesses once implemented, thereby resulting in controversy and double taxation. Consequently, there will, most likely, be added pressure to streamline the dispute resolution mechanisms as discussed in relation to Action 14. It cannot be known at this stage if the participating countries will have the necessary resources and experience to resolve the increased number of MAP cases. Consequently, a proactive review of APAs and the MAP process will become critical in relation to tax planning by MNEs so that potential controversy can be managed in advance through formal engagement before the commencement of any audits or disputes with the tax authorities.

Moving to a single set of global standards would, most likely, reduce unnecessary complexity in global operations.[162] The OECD/G20 BEPS initiative is intended to provide greater transparency regarding such complex structures and is a step in the right direction. The underlying spirit with regard to cross-border investment is cooperation and collaboration. However, different standards, laws or rules for dispute resolution involving confrontation, court cases and adversarial litigation could damage relations between taxpayers and countries where taxpayers intend or have invested their monies or resources.[163] Taxpayers seek certainty and the timely resolution of controversies that relate to double taxation with transparent and reliable dispute resolution mechanisms.

Finally, the improvement of the existing dispute resolution mechanisms, as proposed under Action 14 in accordance with the objectives of the OECD/G20 BEPS initiative is what is required to implement an efficient, transparent and fair tax dispute resolution system. However, most importantly, the participating countries will have to make an ongoing and active effort so as to be able to realize a harmonious coherence in their domestic rules to avoid treaty-related disputes in a joint effort to improve mechanisms to counter base erosion and profit shifting.

160. Ernst & Young LLP, *The G20/OECD BEPS Project is Nearing Completion, What Executives Need to Know Now,* EY Ctr. Tax Policy (2015), available at www.ey.com/Publication/vwLUAssets/ey-the-g20-oecd-beps-project-is-nearing-completion-what-executives-need-to-know-about-beps/$FILE/ey-the-g20-oecd-beps-project-is-nearing-completion.pdf (accessed 20 Aug. 2016). The OECD's follow-up work will continue through 2016 and beyond. In the course of OECD/G20 BEPS initiative, the OECD has issued voluminous informational documents and discussion drafts, held public consultations, set up webcasts, and sought public input.

161. V. Kalloe, *OECD BEPS Action Plan, Taking the Pulse in the Americas Region*, KPMG Intl. (Feb. 2016), available at https://assets.kpmg.com/content/dam/kpmg/pdf/2016/02/beps-update-americas.pdf (accessed 20 Aug. 2016). Many countries have already started changing their tax legislation or administration in response to the Action Plan. However, there has been no unilateral action taken among the countries in the Americas with regard to Action 14. It is expected that, as the work of OECD/G20 BEPS initiative progresses in coming years, willing countries will take steps to adopt recommendations under Action 14. In general, it may be expected that countries, such as Canada, Chile, Colombia, Mexico and the United States, may take further steps in accordance with their active participation and/or interest in other action items. Countries that aspire to become OECD member countries, such as Costa Rica and Peru, will probably follow the recommendations as part of their efforts to develop their tax and financial systems. Interestingly, countries, such as Brazil, have shown interest only in those aspects of proposals in the Action Plan that suit their own domestic purposes. Other low-tax jurisdictions, such as Barbados and Curacao, have remained silent and are probably evaluating on how the new international tax principles will affect their tax regimes.

162. Sidhu, *supra* n. 114.

163. Id.