

B.E.P.S. ACTION 14: MAKE DISPUTE RESOLUTION MECHANISMS MORE EFFECTIVE

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INTRODUCTION

The O.E.C.D. has continued to publish discussion drafts under its 15-part action plan (the “B.E.P.S. Action Plan”) for combatting base erosion and profit shifting (“B.E.P.S.”), with Action 14 being the most unique.

Action 14, entitled “*Make Dispute Resolution Mechanisms More Effective*,” provides as follows:

Develop 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.

While most components of the B.E.P.S. Action Plan address the problems caused by base erosion and profit shifting, the recently proposed discussion draft for Action 14 (“Discussion Draft” or “Draft”)¹ addresses the mutual agreement procedures (“M.A.P.”) used to resolve treaty-related disputes. Action 14 addresses the current obstacles faced by taxpayers seeking M.A.P. relief to avoid economic double taxation and provides suggestions as to how to revise provisions in order to improve the integration of M.A.P. dispute resolution mechanisms. The O.E.C.D. describes it as a unique opportunity to overcome traditional obstacles and to provide effective relief through M.A.P. The Discussion Draft proposes complementary solutions that are intended to have a practical and measurable impact, rather than merely providing additional guidance which may not be followed.

The Discussion Draft introduces a three-pronged approach to enhance the M.A.P. program as a means of resolving disputes. The three-pronged approach consists of (i) political commitments to effectively eliminate taxation not in accordance with the Convention, (ii) new measures to improve access to the M.A.P. and procedures for conducting a M.A.P. resolution, and (iii) a monitoring mechanism to check the proper implementation of the political commitment.

This article will look at the obstacles and options suggested to improve implementation of the M.A.P. In particular, it will discuss mandatory binding M.A.P. arbitration as a means of dispute resolution.

¹ O.E.C.D. (2014) “[BEPS Action 14: Make Dispute Resolution Mechanisms More Effective](#).”

BACKGROUND

Any plan to counter B.E.P.S. must be complemented with actions that ensure certainty and predictability for business. The interpretation and application of novel rules resulting from the B.E.P.S. Action Plans could introduce elements of uncertainty which should be minimized as much as possible. As a result, efforts to improve the effectiveness of the M.A.P. are an important complement to the work on B.E.P.S. Specific measures that will result from the work on Action 14 will constitute a minimum standard to which participating countries will commit. Notwithstanding this minimum standard, it is expected that the final results of the work on Action 14 will also include additional measures (such as, for example, M.A.P. arbitration) that some countries may also wish to commit to adopt in order to address obstacles to an effective M.A.P. in a more comprehensive way.

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APPLICABLE PRINCIPLES

The Discussion Draft is guided by four main principles that together ensure the success of the M.A.P.

- Ensuring that treaty obligations related to the M.A.P. are fully implemented in good faith,
- Ensuring that administrative processes promote the prevention and resolution of treaty-related disputes,
- Ensuring that taxpayers can access the M.A.P. when eligible, and
- Ensuring that cases are resolved once they are within the M.A.P.

With these principles stated, the discussion draft identifies obstacles and suggests solutions. Most importantly, it seeks input from the private sector regarding specific solutions.

OBSTACLES TO M.A.P.

Good-Faith Commitment to M.A.P.

Mutual commitment is a cornerstone of a successful M.A.P. process and good faith is key to making sure that the M.A.P. is fully implemented by all member states. Without assured good faith, member states will become wary and profit shifting will continue in some form or the other. Only through good faith implementation can the M.A.P. truly prove to be effective.

Most countries consider economic double taxation resulting from the inclusion of profits of associated enterprises under paragraph 1 of Article 9 of the O.E.C.D. O.E.C.D. Model Tax Convention on Income and Capital (the “Model Treaty”) is not in accordance with the object and purpose of an income tax treaty. However, there are some countries that take the position that they are not obliged to make offsetting adjustments or to grant access to the M.A.P. in the absence of a specific obligation in the relevant treaty. This position frustrates a primary objective of tax treaties – the elimination of double taxation – and prevents bilateral consultation to determine appropriate transfer pricing adjustments.

Adoption of Effective Administrative Processes

Appropriate tax administration practices are important to ensure an environment in which competent authorities are able to fully and effectively carry out their mandate (*i.e.*, to take an objective view of the provisions of the applicable treaty and apply it to the facts of the taxpayer's case for the purpose of eliminating taxation not in accordance with the terms of the treaty). The effectiveness of the M.A.P. may be undermined where a competent authority is not sufficiently independent, where a competent authority is not provided with adequate resources, or where the competent authority function is evaluated based on inappropriate performance indicators.

Objectivity may be compromised where the competent authority function is not sufficiently independent from a tax administration's audit or examination function. Similarly, issues may arise where the competent authority performs a policy-making function (*e.g.*, tax treaty negotiation) and does not adequately distinguish between the role of administering treaties that have entered into force and that of negotiating changes to these treaties. Challenges to the objective application of existing treaty provisions may also be presented where a competent authority's approach to a M.A.P. case is influenced by the changes it seeks to make regarding its country's treaties.

Problems will likely arise as a result of a lack of sufficient resources (personnel, funding, training, etc.) allocated to a competent authority. Lack of adequate resources is likely to result in an increase in the inventory of M.A.P. cases and increased delays in processing cases.

Administrative processes that promote the prevention of treaty-related disputes and the resolution of disputes that arise are also being examined in work of the Forum on Tax Administration's M.A.P. Forum (the "F.T.A. M.A.P. Forum"). The F.T.A. M.A.P. Forum has recognized that audit programs that are not aligned with international norms significantly hinder the functioning of the M.A.P. process. The evaluation of the competent authority function based on criteria such as sustained audit adjustments or the generation of tax revenue may be expected to create disincentives to the competent authority's objective consideration of M.A.P. cases and to present obstacles to good faith bilateral M.A.P. negotiations.

Effective Access to M.A.P.

On occasion, field auditors in some countries may seek to encourage taxpayers not to utilize their right to initiate a M.A.P. in relation to audit adjustments that result in taxation not in accordance with an applicable tax treaty. Taxpayers may feel pressured into giving up access to the M.A.P. process if they are given the choice between a high assessment with access to M.A.P. but no suspension of collection, or a relatively moderate assessment without access to M.A.P. Alternately, taxpayers may accept such settlements based on broader concerns for their future relationship with the tax administration involved. Such audit settlements may be a significant obstacle to the proper application of the tax treaty as well as to the functioning of the M.A.P. They lead to situations in which taxation not in accordance with the Convention remains in one country while the tax administration in the treaty partner country is not aware of the situation and may be vulnerable to self-help measures taken by the taxpayer.

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Advance pricing agreements (“A.P.A.’s”) concluded bilaterally between treaty partner competent authorities provide an increased level of tax certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes. However, not all countries have implemented bilateral pricing agreement programs, allow a rollback of the agreement to all open years, or have administrative processes in place to allow the programs. Even where A.P.A.’s are reached by a particular country, issues resolved through an advance pricing arrangement may be relevant to earlier years, but those years are not included within the scope of the A.P.A. In a similar vein, decisions reached in a M.A.P. process may affect subsequent years where facts do not change.

In certain countries, the procedures to access the M.A.P. process are not transparent or are unduly complex. This discourages taxpayers from seeking relief under the M.A.P. process, and these taxpayers face double taxation without the opportunity for relief.

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Questions exist regarding the ability of a taxpayer to access the M.A.P. where the tax issue results exclusively from domestic law in one country or general anti-avoidance rules (“G.A.A.R.”) in that country. Under Action 6 of the B.E.P.S. Action Plan, the benefits of a tax treaty will not be available where one of the principal purposes of a transaction is to secure a benefit under a tax treaty and obtaining the benefit would be contrary to the object and purpose of the relevant provisions of the tax treaty. Action 14 states that the interpretation or application of that rule clearly falls within the scope of the M.A.P. process.

To be admissible, a case must be presented to the competent authority of the taxpayer’s country of residence within three years following the first notification of an action giving rise to taxation not in accordance with the Model Treaty. A competent authority should consider whether the case is eligible for the M.A.P. This involves a determination of whether the taxpayer’s objection appears to be justified and, if it is, whether the matter can be handled unilaterally. The matter moves to the bilateral stage where unilateral relief is not appropriate.

In some cases, the competent authority in one country may find that the objection presented by the taxpayer is not justified, while the competent authority in the other jurisdiction reaches the opposite conclusion. To illustrate, competent authorities may be hesitant to overturn assessments made by their own tax administrations and, for that reason, may unilaterally determine that the taxpayer’s objection is not justified. This determination may result in a refusal to discuss the case with the competent authority of the other country, even where that other competent authority considers the objection to be justified. The Discussion Draft states that such results raise legitimate concerns as to the bilateral nature of treaty application and implementation.

M.A.P. relief is available irrespective of the judicial and administrative remedies provided by the domestic law of the two states that are parties to the treaty (“the Contracting States”). Generally, a taxpayer’s choice of recourse is only constrained by the condition that most tax administrations will not deal with a taxpayer’s case through M.A.P. while it undergoes domestic court or administrative proceedings. This suggests that it is preferable to pursue the M.A.P. process first and to suspend domestic law procedure because an agreement reached through M.A.P. will typically provide a comprehensive, bilateral resolution of the case. A domestic law recourse procedure, in contrast, will only settle the issues in one State and may consequently

fail to relieve the international issue of double taxation. Of course, the competent authority may only agree to consider a case on the condition that the taxpayer will forego any subsequent appeal in domestic courts.

Where the payment of tax is a requirement to access M.A.P., the taxpayer may face significant financial difficulties: If both Contracting States collect the disputed taxes, double taxation will in fact occur, and resulting cash flow issues may have a substantial impact on a taxpayer's business, at least for the duration of the M.A.P. process. A competent authority may also find it more difficult to enter into good-faith M.A.P. discussions when it considers that it will likely have to refund taxes already collected.

Time limits connected with the M.A.P. present particular obstacles to an effective M.A.P. resolution. In some cases, uncertainty regarding the "first notification of the action resulting in taxation not in accordance with the provisions of the Convention" may present interpretive difficulties. More importantly, some countries may be reluctant to accept "late" cases – *i.e.*, cases initiated by a taxpayer within the deadline but long after the taxable year at issue. Countries have adopted various mechanisms to protect their competent authorities against late objections. These include requirements to present a M.A.P. case to the other competent authority within an agreed-upon period in order for M.A.P. relief to be implemented and treaty provisions limiting the period during which transfer pricing adjustments may be made.

Under the laws of certain countries, a taxpayer may be permitted to amend a previously filed tax return to adjust the price for a controlled transaction between associated enterprises or profits attributable to a permanent establishment ("P.E.") in order to reflect a result that is in accordance with the arm's length principle, at least in the taxpayer's opinion. Any action undertaken at the initiative of the taxpayer to adjust the previously-reported results of controlled transactions in order to reflect an arm's length result is considered a "Self-Initiated Adjustment." Uncertainty exists with respect to the obligation to make a corresponding adjustment in the case of a Self-Initiated Adjustment in a foreign jurisdiction. It is by no means clear that a foreign Self-Initiated Adjustment is considered to be an action by a Contracting State that triggers taxpayer entitlement to request M.A.P. consideration. These issues have become significant as a consequence of increased pressure on transfer pricing outcomes and P.E. issues resulting from the work to combat B.E.P.S.

Case Resolution

As previously stated, in M.A.P. cases, the competent authority is expected to take an objective view of the provisions of the applicable treaty and apply it in good faith with a view to eliminating taxation not in accordance with the treaty. Where one or both competent authorities do not follow that approach, the resolution of M.A.P. cases becomes difficult and risks of inappropriate results exist. To avoid these problems, a competent authority should engage in discussions with other competent authorities in a fair and principled manner. As part of a principled approach, each M.A.P. case should be approached on its own merits and not by reference to any balance of results in other cases. A principled approach also requires that competent authorities take a consistent approach to the same or similar issues and not change positions from case to case based on considerations that are irrelevant to the legal or factual issues, such as the amount of the tax revenue that may be lost and a view that both Contracting States should win and lose the same percentage of cases.

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A lack of cooperation, transparency or of a good working relationship between competent authorities also creates difficulties for the resolution of M.A.P. cases. A good competent authority working relationship is a fundamental part of an effective mutual agreement procedure.

Mandatory binding M.A.P. arbitration has been included in a number of bilateral treaties following its introduction in the Model Treaty in 2008. Nonetheless, the adoption of M.A.P. arbitration has not been as broad as expected and acknowledges that the absence of arbitration provisions in most treaties and the fact that access to arbitration may be denied in certain cases are obstacles that prevent countries from resolving disputes through the M.A.P.

One of the main policy concerns with mandatory binding M.A.P. arbitration relates to national sovereignty. In some States, national law, policy, or administrative considerations are considered obstacles to the adoption of mandatory binding M.A.P. arbitration. This is particularly the case where competent authorities are concerned about the risk of conflict between the decision of a court and the decision of an arbitration panel. Some countries may restrict access to arbitration to a specific range of issues such as residence, P.E. status, business profits, arm's length transfer pricing, and royalties.

There are two principal approaches to decision-making in the arbitration process. The format most commonly used in commercial matters is the "conventional" or "independent opinion" approach, in which the arbitrators are presented with a *de novo* presentation of the facts and arguments of the parties based on applicable law and then reach an independent decision, typically in the form of a written, reasoned analysis. This approach strongly resembles a judicial proceeding and is the model for the E.U. Arbitration Convention as well as the default approach reflected in the Model Treaty. The other main format is the "last best offer" approach, often referred to as "baseball arbitration" because in a salary dispute between baseball players in the U.S. and their ball clubs, arbitration is allowed and the arbitrator must approve the position of the player or the club and cannot choose a result in between the two. This approach is reflected in a number of bilateral tax treaties signed by O.E.C.D. member countries. Under this approach, the competent authorities submit to the arbitration panel a proposed resolution together with a position paper in support of that position. The arbitration panel is required to adopt one of the proposed resolutions submitted by the competent authorities. The determination by the arbitration panel does not state a rationale and has no precedential value.

The evidence considered by the arbitration panel may largely be determined by the form of the decision-making process. The independent opinion approach ordinarily envisions a formal evidentiary process involving testimony, the *de novo* presentation of evidence to the arbitration panel and possibly taxpayer presentations. The Final Offer approach, on the other hand, generally contemplates that the arbitration panel will make a decision based on the facts and arguments as presented in the competent authorities' submissions to the arbitration panel. The most important principle relating to evidence is that there be no opportunity or incentive for the taxpayer to undermine the M.A.P. negotiation process by seeking to have the arbitration panel consider information which was previously withheld or otherwise not provided to the competent authorities. Consistent with the nature of the mutual agreement procedure as a government-to-government activity in which taxpayers play no direct role, M.A.P. arbitration processes do not require direct taxpayer input to, or appearance



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before, the arbitration panel, although such taxpayer participation is not precluded. While the arbitration panel might benefit from direct interaction with taxpayers, there is a concern that taxpayer involvement in the M.A.P. arbitration procedure could result in a lengthier, more expensive and more complicated process, and thus undermine the effectiveness of M.A.P. arbitration.

In light of the significant resource constraints experienced by many countries in recent years, concerns about the potential costs of M.A.P. arbitration are an important consideration in designing the format of the arbitration process. The costs associated with arbitration fall into three categories:

- Costs related to engaging the arbitration panel, consisting principally of the fees paid to the arbitrators;
- Costs related to each competent authority’s participation in the arbitration procedure, which include, for example, costs related to the preparation and presentation of proposed resolutions and position papers; and
- Administrative costs, such as telecommunications and secretarial expenses, miscellaneous expenses (e.g., translation or interpretation) and, possibly, travel costs (airfare, lodging, etc.).

Depending upon the evidentiary procedures established, the compensation of the arbitration panel can constitute the most significant cost of arbitration. The costs of M.A.P. arbitration, however, do not have to be significant, and various design features such as a streamlined evidentiary process or a time limit for the arbitration can significantly reduce the time and other resources necessary for the arbitration process.

M.A.P. OPTIONS

Good-Faith Commitment to M.A.P.

- Clarify in the Commentary the importance of resolving cases. The following paragraph could be added to the Commentary on Article 25 in order to emphasize that the mutual agreement procedure is an integral part of the obligations that follow from concluding a tax treaty:

The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention is an integral part of the obligations assumed by a Contracting State in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority “shall endeavour” to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities are obliged to seek to resolve the case in a principled, fair and objective manner, on its merits, in accordance with the terms of the Convention and applicable principles of international law.

- Ensure that the obligation to make offsetting adjustments is included in tax treaties. Participating countries could commit to making offsetting adjustments in the event of a primary transfer pricing adjustment by the competent authority of the other State. This change does not create a negative inference with respect to treaties that do not currently contain the provision.

Adoption of Effective Administrative Processes

- Ensure the independence of a competent authority. Participating countries could commit to adopt the best practices currently included in the O.E.C.D. Manual on Effective Mutual Agreement Procedures (“M.E.M.A.P.”) concerning the independence of a competent authority. Necessary steps should be taken to ensure the autonomy of the competent authority from the audit and examination functions, as well as to guarantee, in practice, an appropriate distinction between the objective application of existing treaties and the forward-looking determination of the policy to be adopted and reflected in future treaties.
- Provide sufficient resources to a competent authority. They could commit to provide their competent authorities with sufficient resources in terms of personnel, funding, and training to carry out their mandate to resolve cases in a timely and efficient manner.
- Use of appropriate performance indicators. Participating countries could commit to adopt the best practices currently included in the M.E.M.A.P. concerning the use of appropriate performance indicators for their competent authority functions and staffs. These would be based on factors such as consistency of position, time to resolve cases, and principled and objective M.A.P. outcomes and not on factors such as sustained audit adjustments or maintaining tax revenues already collected.
- Better use of M.A.P. process. Participating countries could commit to make more use of M.A.P. processes, and where an agreement in a M.A.P. case relates to a general matter that affects a wide group of taxpayers, to publish the agreement in order to provide guidance and prevent future disputes.
- Wider use of M.A.P. process. Participating countries could commit to adopt the best practices currently included in the M.E.M.A.P. to relieve double taxation in cases not provided for in the Convention (e.g., in the case of a resident of a third country having P.E.’s in both Contracting States).

Effective Access to M.A.P.

- Ensure that audit settlements do not block access to the mutual agreement procedure. Participating countries that allow their tax administrations to conclude audit settlements with respect to treaty-related disputes which preclude a taxpayer’s access to the mutual agreement procedure could commit to take appropriate steps to discontinue that practice or to implement procedures for the spontaneous notification of the competent authorities of both Contracting States of the details of such settlements.
- Implement bilateral A.P.A. programs. Participating countries could commit to implement bilateral Advance Pricing Agreements.



- Implement administrative procedures to permit taxpayer requests for M.A.P. assistance with respect to recurring or multi-year issues. Participating countries could commit after an initial tax assessment to implement appropriate procedures to permit taxpayer requests for the multi-year resolution of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances.
- Implement administrative procedures to permit taxpayer requests for M.A.P. assistance with respect to roll-back of A.P.A.'s. Participating countries that have implemented A.P.A. programs could similarly commit to provide for the roll-back of advance pricing arrangements in appropriate cases, subject to the applicable time limits provided by domestic law such as statutes of limitation for assessment where the relevant facts and circumstances in the earlier tax years are the same and subject to the verification of these facts and circumstances.
- Improve the transparency and simplicity of the procedures to access and use the M.A.P. Participating countries could commit to adopt the best practices currently included in the M.E.M.A.P. concerning the transparency and simplicity of the procedures to access and use the mutual agreement procedure, which should minimize the formalities involved in the M.A.P. process taking into account the challenges that may be faced by taxpayers. This would include a commitment to (i) develop and publicize rules, guidelines and procedures for the use of the M.A.P. and (ii) identify the office that has been delegated the responsibility to carry out the competent authority function and its contact details.
- Provide additional guidance on the minimum contents of a request for M.A.P. assistance. Participating countries could commit to adopt the best practices currently included in the M.E.M.A.P. concerning the minimum contents of a request for M.A.P. assistance. This would include a commitment to (i) identify, in public guidance, the specific information and documentation that a taxpayer is required to submit with a request for M.A.P. assistance, seeking to balance the burdens involved in supplying such information with the complexity of the issues the competent authority is called upon to resolve and (ii) avoid denying access to the M.A.P. process on the basis of insufficient information without consulting the other competent authority where a country has not yet provided any guidance.
- Clarify the availability of M.A.P. access where an anti-abuse provision is applied. Where there is a disagreement between the taxpayer and the competent authority to which its M.A.P. case is presented as to whether the conditions for the application of a treaty anti-abuse rule have been met or whether the application of a domestic anti-abuse rule conflicts with the provisions of a treaty, participating countries could commit to provide access to the mutual agreement procedure, provided the requirements of the M.A.P. article of the applicable treaty is met. In addition, (i) a participating country seeking to limit or deny M.A.P. access in all or certain of these cases could commit to agree upon such limitations with treaty partners and (ii) where a participating country would deny M.A.P. access based on the application of domestic law or treaty anti-abuse provisions, the treaty partner should be notified.

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- Ensure that whether the taxpayer’s objection is justified is evaluated *prima facie* by both competent authorities. Where the competent authority to which a M.A.P. case is presented does not consider the taxpayer’s objection to be justified, participating countries could commit to a bilateral notification or a consultation process.
- Clarification of the term “justification.” Participating countries could commit to clarify the Commentary on the meaning of the phrase “if the taxpayer’s objection appears to it to be justified.”
- Permit a request for M.A.P. assistance to be made to the competent authority of either Contracting State.
- Clarify the relationship between the M.A.P. and domestic law remedies. Participating countries could commit to clarify the relationship between the mutual agreement procedure and domestic law remedies to facilitate recourse to the mutual agreement procedure as a first option to resolve treaty-related disputes through appropriate adaptations to their domestic legislation and administrative procedures, which may include provision for the suspension of domestic law proceedings as long as a M.A.P. case is pending.
- Publish guidelines on the relationship between the M.A.P. and domestic law remedies. Clear guidance could be provided on the relationship between the M.A.P. and domestic law remedies, the processes involved and the conditions and rules underlying these processes. Such guidance could address whether the competent authority considers itself to be legally bound to follow a domestic court decision in the M.A.P., or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice so that taxpayers may make an informed choice between the M.A.P. process and domestic law remedies.

Case Resolution

- Clarify issues connected with time limits to access the mutual agreement procedure. Participating countries could adopt the best practices currently included in the M.E.M.A.P. concerning time limits to access the mutual agreement procedure to facilitate early resolution of M.A.P. cases. When interpreting a tax treaty’s time limitation for requesting M.A.P. relief, requests in borderline cases should give the benefit of the doubt to taxpayers.
- Clarify implementation of M.A.P. relief. Participating countries could include in treaties a provision calling for the implementation of M.A.P. relief notwithstanding any time limits in domestic law. Where that provision is not included, a participating country should ensure that its audit practices do not unduly create the risk of late adjustments for which taxpayers may not be able to seek M.A.P. relief.
- Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure. Clarify the circumstances where double taxation may be resolved under the M.A.P. process in the case of self-initiated foreign adjustments. The clarification should emphasize the importance of bilateral competent authority consultation to determine appropriate corresponding adjustments and to ensure the relief of double taxation.

- Ensure a principled approach to the resolution of M.A.P. cases. Participating countries should ensure a principled approach to the resolution of M.A.P. cases. Best practices currently included in the M.E.M.A.P. should be adopted concerning fair and objective M.A.P. negotiations based on a good faith application of the treaty and the resolution of M.A.P. cases on their merits. Where the interpretation of a treaty provision is likely to be difficult or controversial, participating countries could agree on guidance in the form of a protocol or exchange of notes.
- Improve competent authority cooperation, transparency and working relationships. Participating countries could adopt the relevant best practices currently included in the M.E.M.A.P., including a cooperative and fully transparent M.A.P. process in which documentation and information are exchanged in a timely manner and regular communications, including meetings, are used to reinforce a collaborative working relationship. Competent authorities could agree to allow taxpayers to make presentations in order to facilitate a shared understanding of the relevant facts.
- Increase transparency with respect to M.A.P. arbitration and tailor the scope of M.A.P. arbitration.
- Facilitate the adoption of M.A.P. arbitration. Most favored nation provisions could be used as an elective mechanism for the quick implementation of M.A.P. arbitration between a country and its treaty partners where that country determines that M.A.P. arbitration should be included as part of its treaty policy.
- Clarify the co-ordination of M.A.P. arbitration and domestic legal remedies. Participating countries could commit to provide guidance on the interaction between the mutual agreement implementing the decision of the arbitration panel and pending litigation on the issues resolved through the mutual agreement procedure.
- Appointment of arbitrators. Participating countries could develop mutually agreed criteria for the appointment and qualifications of arbitrators. To ensure that prospective arbitrators are impartial and independent, participating countries may also wish to develop a standardized declaration attesting to fitness and to possible conflicts of interest.
- Confidentiality and communications. The disclosure of taxpayer information by a competent authority to the members of the arbitration panel would be made pursuant to the authority of the Convention and subject to confidentiality requirements that are at least as strong as those applicable to the competent authorities.
- Default form of decision-making in M.A.P. arbitration. Participating countries could develop additional guidance on the use of different decision-making mechanisms as default approaches in M.A.P. arbitration.
- Evidence in M.A.P. arbitration. Guidance could be developed to address particular evidentiary issues that may arise in connection with different forms of arbitral decision-making. Where the format is the independent opinion approach, standards should be established for allowance of taxpayer presentations.

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- Multiple, contingent, and integrated issues. Participating countries could establish mutually-agreed guidance for arbitrators on how to deal with multiple, contingent and integrated issues.
- Costs and administration. Participating countries could consider ways to reduce the costs of M.A.P. arbitration procedures.
- Multilateral maps and advance pricing. The Model Treaty could be revised to address multilateral M.A.P.'s and A.P.A.'s to address the arbitration process used in a multilateral M.A.P. and to address issues connected with time limits and notification of third-State competent authorities.
- Provide guidance on consideration of interest and penalties in the mutual agreement procedure. The guidance would address the treatment of interest and penalties in the M.A.P. so that where interest and penalties are computed with reference to the amount of the underlying tax and the underlying tax is found not to have been levied in accordance with the provisions of the Convention, the penalties and interest could be addressed in the relief.

CONCLUSION

In Action 14, the O.E.C.D. extends its inquiry into the behaviors of tax authorities that result in economic double taxation. The goal is to provide an objective M.A.P. process that addresses issues in a fair manner based on the rule of law rather than selfish interests. Whether Action 14 will succeed is an open question. In comparison to the other components of the B.E.P.S. Action Plan, the targets of Action 14 are the authorities that set the rules. It is not clear that these officials will have the political commitment to promote fairness over collection of tax revenue.