GUIDE TO THE MUTUAL AGREEMENT PROCEDURE UNDER TAX TREATIES

At its meeting of 19-23 October 2009, the UN Committee of Experts on International Cooperation in Tax Matters mandated its Subcommittee on Dispute Resolution "to consider ... [d]ifferent possible ways to improve the mutual agreement procedure (including advance pricing agreements, mediation, conciliation, recommended administrative regulations and prescribed obligations for the taxpayer applying for mutual agreement procedure)." The Subcommittee was also invited to "primarily focus on the specific needs and concerns of developing countries and countries in transition."

The Guide to the Mutual Agreement Procedure was prepared pursuant to that part of the mandate of the Subcommittee. It was approved by the Committee at its meeting of 15-19 October 2012.

This capacity-building initiative seeks to provide countries that have little or no experience with the mutual agreement procedure with a practical guide to that procedure. Whilst this Guide draws on the OECD Manual on Effective Mutual Agreement Procedures (MEMAP), it is based on the provisions of the UN Model Double Taxation Convention between Developed and Developing Countries (update 2011) and seeks to present the various aspects of the mutual agreement procedure from the perspective of countries that have limited experience with that procedure.

PREFACE

1. The main purpose of this Guide is to improve the understanding and functioning of the Mutual Agreement Procedure ("MAP"), which is the procedure, provided for in Article 25[1] of the United Nations Model Double Taxation Convention between Developed and Developing Countries ("UN Model"), that allows the representatives of the States that enter into a bilateral tax treaty to resolve disputes, difficulties or doubts arising in relation to the interpretation or application of the treaty.

2. Such improved understanding should facilitate recourse to the MAP, in particular for tax administrations and taxpayers that have limited experience with that procedure, as well as the effective and efficient operation of the MAP.

3. While this Guide builds on other work that has been done in this area[2], it has been drafted with a primary focus on the specific concerns of developing countries and countries in transition and provides tax administrations and taxpayers with basic information on the MAP and the context in which it operates.

4. This Guide does not purport to propose rules binding upon UN Member countries. It does not modify, restrict, or expand any rights or obligations contained in the provisions of any tax treaty. The information contained in this Guide complements, and should not be considered a substitute for, the guidance found in the UN Model and, in particular, in the Commentary on Article 25 of that Model. To the extent that there are any statements or information in this Guide which are incompatible with the provisions of a tax treaty or with the UN Model, these provisions or the Model will obviously prevail.

5. This Guide includes a number of recommendations. These recommendations are based on international practice and experience and reflect views as to the most appropriate manner to deal with particular MAP processes and procedural issues. Although many tax administrations and taxpayers have found that the implementation of these recommendations has improved the MAP, the appropriateness of these recommendations must be evaluated in light of the specific features and characteristics of each tax system and each treaty.

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[1] Except as otherwise specified, all references to Article 25 in this Guide apply equally with respect to paragraphs 1 through 4 of alternatives A and B.

[2] See, in particular, the OECD's Manual on Effective Mutual Agreement Procedures (MEMAP), which can be consulted at:

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1. INTRODUCTION AND BACKGROUND

1.1 The purpose and importance of the mutual agreement procedure

6. A tax treaty is an official agreement between two countries ("Contracting States") the primary purpose of which is the prevention of the international double taxation that may arise when a specific transaction or taxpayer is subject to tax under the domestic tax laws of both Contracting States. Such double taxation discourages the free flow of international trade and investment and the transfer of technology, all of which play important complementary roles in the economic development process.

7. A tax treaty seeks to prevent international double taxation by providing for a uniform allocation of taxing rights with respect to specific classes of income between the residence State (that is, a taxpayer's State of residence) and the source State (that is, the State where the relevant income is considered to arise). A tax treaty will further provide a method through which double taxation will be eliminated by the resident State in situations in which the treaty permits both the residence State and the source State to tax an item of income.[3]

8. For example, the interest Article of a tax treaty may permit interest arising in one Contracting State and paid to, and beneficially owned by, a resident of the other Contracting State to be taxed in both these States, with the tax charged in the source State limited to an agreed-upon rate. Double taxation is then eliminated by the relief from double taxation Article, under which the residence State will generally allow a deduction or credit against its tax for the tax paid to the source State, to the extent that the source State properly taxed the interest income under the treaty.

9. In certain cases, however, international double taxation may arise even where there is a tax treaty between two countries. Such double taxation may result, for example, from the incorrect application of the treaty by one of the Contracting States, or from differing views between the Contracting States ***(e.g.*** with respect to the relevant facts or the characterisation of an item of income under domestic law) as to how the treaty should apply in a particular situation or context.

10. In order to resolve such issues, tax treaties typically provide for a mutual agreement procedure along the lines of what is provided for in Article 25 (Mutual Agreement Procedure) of the UN Model. Essentially, the negotiation of an agreement pursuant to the MAP is a government-to-government process.

11. The MAP is the mechanism that Contracting States use to resolve any disputes or difficulties that arise in the course of implementing and applying the treaty. The MAP thereby ensures that these disputes will not frustrate the treaty's goal of preventing international double taxation. In order to achieve that goal, the competent authorities should make every effort to reach a timely agreement on each issue submitted to the MAP.

1.2 Typical cases dealt with in the MAP

12. Article 25 of the UN Model sets out two broad areas in which the Contracting States shall

[3] Where the provisions of a tax treaty permit both Contracting States (that is, the residence State and the source State) to tax an item of income, double taxation is eliminated through either the "exemption method" or the "credit method". See Articles 23A (Exemption Method) and 23 B (Credit Method) of the UN Model. Under the exemption method, the residence State will generally exempt from its tax an item of income that, in accordance with the provisions of the treaty, may be taxed in the source State. Under the credit method, where an item of income may, in accordance with the provisions of the treaty, be taxed in the source State, the residence State will generally allow as a deduction from its tax on the item of income an amount equal to the tax paid in the source State (but not exceeding its own tax on that item of income).

endeavour to resolve their differences by mutual agreement:

(1) cases in which a taxpayer considers that the acts of one or both of the Contracting States result or will result for the taxpayer in taxation not in accordance with the provisions of the treaty (covered by paragraphs 1 and 2 of Article 25); and
(2) cases in which there are difficulties or doubts as to the interpretation or application of the treaty (covered by paragraph 3 of Article 25).

13. A MAP article will also generally permit the Contracting States to consult together for the elimination of double taxation in cases not provided for in the treaty. The different types of cases that are dealt with in the MAP are briefly discussed below.

1.2.1 Article 25(1) cases - taxation not in accordance with the treaty

14. Paragraph 1 of Article 25 of the UN Model permits a taxpayer who considers that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the provisions of the treaty to present its case to the Contracting State of which it is a resident. A taxpayer's presentation of such a case to the Contracting State of which it is a resident is often referred to as a "request for MAP assistance" or a "request for competent authority assistance".

15. Most disputes that arise under tax treaties involve "taxation not in accordance with the provisions of the Convention". Paragraph 1 is thus the most commonly referred to provision of the MAP article.

16. A Contracting State's taxation of a person or transaction in a manner inconsistent with provisions of a treaty will in most cases result in international double taxation - that is, either (i) the imposition of tax in both Contracting States on the same taxpayer in respect of the same income ("juridical double taxation") or (ii) the imposition of tax in both Contracting States on the same income in the hands of different taxpayers ("economic double taxation").

17. The MAP may not be used to challenge the application of domestic legislation in cases where there is no alleged violation of the provisions of the treaty.

18. Common examples of MAP cases under paragraph 1 include the following cases.

Transfer pricing cases

19. Historically, a large number of paragraph 1 cases have involved transfer pricing issues and the economic double taxation that may result when a Contracting State makes adjustments to income from related party non-arm's length transactions among and between the members of a multinational group of enterprises.

20. The economic double taxation that may arise in a transfer pricing case can be illustrated by the following example. State A makes an adjustment increasing the taxable profits of a subsidiary company that is resident of that State with respect to a transaction between that company and its parent company resident of State B (e.g. State A reduces the amount of royalties deducted by the subsidiary with respect to a patent licensed to the subsidiary by the parent company). Following the adjustment, State A charges tax on the resulting additional income in the hands of the subsidiary resident of State A. The income reported in State B by the parent company, however, reflected the original (preadjustment) amount of royalties. As a result, State B will have already charged tax on that same income (the amount by which State A reduced the amount of royalties deducted) in the hands of the State B resident.

21. In the factual scenario described in the preceding paragraph, the issue has sometimes

arisen whether State B can provide relief to the parent company resident of State B if there is no provision in State B's domestic law or in Article 9 (Associated Enterprises) of the State A-State B tax treaty to provide such relief (sometimes referred to as a "correlative" or "corresponding" adjustment).

22. Paragraph 2 of Article 9 (Associated Enterprises) of the UN Model provides for such relief as follows:

> Where a Contracting State includes in the profits of an enterprise of that State - and taxes accordingly - profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits.

23. Certain tax treaties, however, may not contain a provision similar to paragraph 2 of Article 9.

24. In this circumstance, it should be noted that the Commentary on Article 25 of the UN Model Tax Convention makes clear that Article 25 provides machinery to enable competent authorities to consult with a view to resolving the economic double taxation that may arise in transfer pricing cases. The Commentary expressly States that "the corresponding adjustments to be made in pursuance of paragraph 2 of [Article 9] ... fall within the scope of the mutual agreement procedure, both as concerns assessing whether they are well-founded and for determining their amount".[4]

25. The Commentary further states that even when a tax treaty does not contain rules similar to those of Article 9(2), the mere fact that the Contracting States have included Article 9(1) in a treaty demonstrates the intent to have economic double taxation covered by the treaty: "As a result, most countries consider that, in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation resulting from adjustments made to profits by reason of transfer pricing falls within the scope of the mutual agreement procedure set up under Article 25 […]. Some countries consider, however, that in the absence of rules similar to those of paragraph 2 of Article 9, economic double taxation arising from transfer pricing adjustments does not fall within the scope of the mutual agreement procedure provided for under paragraphs 1 and 2 of Article 25. Contracting states that do not include paragraph 2 of Article 9 in a convention should therefore clarify during the negotiations the consequences of the absence of paragraph 2 as to the scope of the mutual agreement procedure."[5]

Permanent establishment cases

26. Under Article 7 (Business Profits) of the UN Model, the business profits of an enterprise of a Contracting State are taxable only in that State, unless the enterprise carries on a business in the other Contracting State through a permanent establishment.

27. Taxpayers frequently use the MAP where they disagree with a Contracting State's conclusion that their presence or activities in that State give rise to a permanent establishment - and thus that part of their business profits are taxable in that State. Requests for MAP assistance are also often made in

[4] See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 10 of the Commentary on Article 25 of the OECD Model).

[5] See paragraph 2 of the Commentary on Article 25 of the UN Model Convention.

connection with the determination of the profits attributable to a permanent establishment.

28. Permanent establishment cases may often involve juridical double taxation. For example, consider a State A enterprise that does business in State B. In State B's view, these activities give rise to a State B permanent establishment. State B thus taxes the State A enterprise on the profits it considers attributable to this State B permanent establishment as well as other profits referred to in subparagraphs ***b***) and ***c***) of paragraph 1 of Article 7. State A, on the other hand, does not consider the State A enterprise to have a State B permanent establishment and, accordingly, takes the view that only State A may tax the profits attributable to the State B business. As a result, the State A enterprise is subject to tax in both States on the profits attributable to its State B business.

Dual-residence cases

29. Article 4 (Resident) of the UN Model provides that an individual is a resident of a Contracting State for purposes of the treaty if he is liable to tax in that State by reason of domicile, residence, place of incorporation, place of management or any other criterion of a similar nature. Differences in the domestic law criteria used to determine the comprehensive liability to tax that will give rise to residence for treaty purposes, however, may often cause an individual to be considered a resident under the tax laws of both Contracting States.

30. Paragraph 2 of Article 4 thus sets out a series of tie-breaker tests to determine a single State of residence for purposes of the treaty. Given the fact-intensive nature of many of these tests, requests under the MAP may often arise because an individual disagrees with how the tests have been applied by one (or both) of the Contracting States.

31. For example, subparagraph 4(2)(a) provides that an individual with a permanent home in both Contracting States will be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests). The application of this test may require the examination of many factors - family and social relations, occupations, political and cultural activities, place of business, etc. Different views on how these factors should be weighed may lead to different conclusions as to an individual's centre of vital interests, and thus his residence for purposes of the treaty. Through the MAP, the Contracting States may reach agreement on how the test should be applied to a taxpayer's facts.

Withholding tax cases

32. Tax treaties usually permit source State taxation of dividends, interest, and royalties paid to, and beneficially owned by, a resident of the other Contracting State, but limit the tax charged by the source State to an agreed-upon percentage of the gross amount of such payments (see Articles 10 (Dividends), 11 (Interest), and 12 (Royalties) of the UN Model). The tax charged by the source State will typically take the form of a withholding tax.

33. Where the source State levies a withholding tax on a payment to a resident of the other Contracting State in excess of that allowed under the applicable treaty and has failed to refund the excess, the taxpayer may make a request under the MAP to the competent authority of its State of residence to address the taxation not in accordance with the treaty.

34. For example, in a situation in which a company resident of State A pays a dividend to an individual resident of State B, the company withholds State A tax from the dividend at the tax rate provided by State A's domestic law. If the rate of the State A withholding tax is greater than the rate applicable under the dividends article of the tax treaty between State A and State B, the individual may make a MAP request to the State B competent authority in connection with the excess State A withholding.

Taxation of employment income

35. Under Article 15 (Employment income) of the UN Model, remuneration derived by a resident of a Contracting State with respect to employment exercised in the other State may be taxed in that other State unless the person in present therein for 183 days or less and the remuneration is neither paid by, or on behalf of, an employer who is not a resident of that State nor is borne by a permanent establishment situated in that State. Different interpretations of the facts or domestic law differences in the meaning of employment may result in the two States reaching different conclusions as to how the article applies in a given situation.

36. Where the source State levies tax on such remuneration but the residence State considers that such taxation is contrary to the provisions of the convention and does not, therefore, provide relief of double taxation under Article 23, double taxation will likely result from these inconsistent actions. In such a case, the taxpayer may make a request under the MAP to the competent authority of his State of residence in order to address that problem.

1.2.2 Article 25(3) cases - interpretation and application of the treaty/double taxation in cases not provided for in the treaty

37. The first sentence of paragraph 3 of Article 25 of the UN Model provides that the Contracting States will endeavour to resolve by mutual agreement "difficulties or doubts" as to the interpretation or application of the treaty. Pursuant to this provision, the Contracting States undertake to discuss and resolve by mutual agreement any issues or questions related to the treaty that require clarification or interpretation.

38. These issues and questions will often be of a general nature. For example, as discussed below, paragraph 3 of Article 25 may be used to agree on the definition of a specific term used in the treaty, or on procedures to give effect to a specific treaty provision. The resolution reached through the MAP will thus potentially concern a number of taxpayers, rather than solely a specific taxpayer or the parties to a specific transaction (as in a case under paragraph 1 of Article 25).

39. Article 3(2) of the UN Model provides that a term not defined in the treaty will, unless the context requires otherwise, have the meaning that it has under the domestic law of the Contracting State applying the treaty. In some cases, however, a term used in the treaty may not have a precise meaning under a Contracting State's domestic law, or the use of a domestic law meaning may not be appropriate given the context in which the term is used in the treaty. The first sentence of paragraph 3 of Article 25 allows the competent authorities to clarify what meaning should be given to such terms.

40. Some countries have found that the use of the authority provided by Article 25(3) helps the implementation of the provisions of the treaty. In addition, where mutual agreements reached under Article 25(3) apply to all taxpayers or a general category of taxpayers, the publication of such agreements, which are not specific to particular cases and therefore do not mention any taxpayer-specific information, may serve to provide guidance and prevent potential future disputes. Countries are therefore encouraged to follow these practices in order to provide greater guidance in cases that affect a large number of taxpayers.

41. Contracting States may also rely on the first sentence of Article 25(3) to reach agreement on the procedures to be used to apply or otherwise give effect to the treaty. Such agreements could concern, for example, the procedures for confirming a taxpayer's status as a resident of a Contracting State, or the procedures and criteria used to grant treaty benefits to fiscally transparent entities.

42. The second sentence of Article 25(3) provides that the Contracting States may consult

together to eliminate double taxation in cases that are not otherwise provided for in the treaty. The most often cited example arises in the case of a third-country resident that has permanent establishments in both of the Contracting States.

43. In such a context, the Contracting States where the permanent establishments are located (State A and State B) may not agree on the amount of the profits attributable to each of the third-country resident's permanent establishments. Such a disagreement could occur, for example, where State A and State B have differing views on the contributions made by each permanent establishment to the third-country resident's global operations. As a result, there is the potential for juridical double taxation because a portion of the income of the third-country resident may be subject to tax in both State A and State B. Such cases may be addressed under the second sentence of Article 25(3) or through reciprocal mutual agreements between the two permanent establishment States and the third country.

44. The use of Article 25(3) to reach a MAP resolution in cases not otherwise covered by the treaty may be considered to fulfil one of the fundamental purposes of the treaty - the elimination of international double taxation. Countries may accordingly consider it appropriate to make active use of this Article 25(3) authority.

1.3 What is a competent authority?

45. The UN Model uses the term "competent authority" to refer to the person or body within a Contracting State with responsibility for resolving issues that arise in connection with the treaty. Under the terms of Article 25, the competent authority of a Contracting State:

(1) Accepts taxpayer requests for MAP assistance and endeavours (where it is unable itself to arrive at a satisfactory solution) to resolve these cases by mutual agreement with the competent authority of the other Contracting State;

(2) Resolves difficulties or doubts as to the interpretation or application of the treaty by mutual agreement with the competent authority of the other Contracting State; and

(3) May consult with the competent authority of the other Contracting State to eliminate double taxation in cases not covered by the treaty.

46. Other articles of the UN Model also make reference to the competent authorities and specifically provide for competent authority assistance with respect to particular matters; see, for example, paragraph 2 of Article 9 (Associated Enterprises)[6] and subparagraph 2(d) of Article 4 (Resident).[7]

1.3.1 Role of the competent authority and performance of its functions

47. In broad terms, the role of the competent authority is to ensure that a tax treaty is properly applied and to endeavour in good faith to resolve any disputes that may arise in its application or interpretation.

48. In performing its functions, the competent authority is to be guided first by the terms of the treaty itself. The competent authority must then refer to any guidance promulgated under the treaty.

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6 Article 9(2) provides that the competent authorities shall consult, if necessary, to determine the appropriate corresponding adjustment to be made by a Contracting State (see under "Transfer Pricing Cases" in section 1.2.1 above).

7 Article 4(2)(d) of the UN Model Tax Convention provides that the competent authorities shall determine the residence of an individual by mutual agreement where the Article 4 tie-breaker tests do not resolve the matter.

Such guidance may include, for example, an agreed-upon memorandum of understanding or technical explanation to the treaty, or an agreement of general application concluded by the competent authorities pursuant to the MAP. Model tax treaties (such as the UN Model) upon which the treaty was based, and their commentaries, are an additional important source of guidance.

49. Competent authorities should make every effort to resolve cases in a principled, fair, and objective manner, deciding each case on its own merits and not with reference to revenue statistics or an overall balance of results. Moreover, and especially in light of the principle of reciprocity underlying any international agreement, competent authorities should be consistent in their approach to an issue, regardless of the Contracting State that is favoured by that approach in a particular case. Nevertheless, each case must be decided on its own facts, so that even though the same principles apply, different outcomes may be appropriate. Notwithstanding disagreements on facts or principles, competent authorities should seek to compromise in order to reach a mutual agreement that will provide relief from double taxation.

1.3.2 Who is the competent authority?

50. Under subparagraph (1)(e) of Article 3 (General Definitions) of the UN Model, the definition of the term "competent authority" - that is, the designation of a governmental official, agency, or entity as a Contracting State's competent authority - is left to each of the Contracting States. In the typical case, the competent authority will be identified, for example, as "the Minister of Finance or his authorised representative" or "the Secretary of the Treasury or his delegate".

51. In practice, the full powers of the competent authority function, including the legal authority to conclude an agreement under the MAP, will usually be delegated within a national tax administration to the official or body with day-to-day responsibility for the administration of a Contracting State's MAP program or, more generally, of the Contracting State's tax treaties. Whether and how the competent authority designated in Article 3 delegates these powers will, of course, depend on the Contracting State's domestic law and administrative practice.

52. Most often, this delegation occurs in the same manner used to delegate authority to carry out other tax administration functions. The delegation of authority may be made, for example, through an order or directive issued by the competent authority designated in the treaty, or in regulations or other administrative procedures approved by that competent authority.

53. The treaty will usually designate the competent authority by reference to the function of the person who will perform that role ***(e.g.*** the Minister of Finance or his authorised representative). More than one person may be designated as competent authorities by States where certain matters connected with the execution and/or implementation of a tax treaty may not fall within the exclusive jurisdiction of the Contracting State's tax authorities, or may be reserved to the competence of other authorities.

54. It should be noted that, even though the competent authority is expressly designated in the provisions of the treaty, certain other components of a Contracting State's government may play an important role in the application and/or interpretation of the treaty. In some Contracting States, for example, domestic law may give other authorities (such as courts or the Ministry of Foreign Affairs) the right to interpret international treaties and agreements. It is generally essential, however, that the Ministry of Finance be consulted with respect to all treaty-related matters with a view to the consistent application and interpretation of the treaty and, more broadly, to ensure that the objectives of the treaty are achieved consistently with a State's overall domestic tax policy.

1.3.3 Structure of the competent authority function

55. As noted above, the competent authorities designated in a tax treaty are often officials at the highest level of a Contracting State's tax administration ***(e.g.*** the Minister of Finance). For practical

and administrative reasons, the power and authority to perform the competent authority function will typically be delegated to a subordinate official (the "authorised representative") who carries out the day-to-day functions of the competent authority.

56. Practical experience with the MAP process has shown that the efficiency and effectiveness of a MAP program is enhanced if the senior tax officials to whom the competent authority function has been delegated are actively and directly engaged in the MAP process - for example, where officials with decision-making authority with respect to MAP cases remain informed of the details of MAP cases and are closely involved in detailed bilateral MAP discussions.

57. Countries have also found that the functioning of a MAP program is enhanced if the officials performing the competent authority function are known and readily accessible to taxpayers. To this end, Contracting States may consider it useful to publicise the identity of the officials responsible for carrying out the competent authority function, as well as information on how to contact the competent authority. Many countries provide this information to taxpayers as part of their general public guidance on how to seek MAP assistance.

58. Once a Contracting State has determined who will be responsible for the day-to- day activities of the competent authority, it must also determine how the competent authority's work will be structured. The approach chosen will, of course, depend upon the specific circumstances of a Contracting State's tax administration, including the resources available and the present (or anticipated) MAP caseload.

59. A country that is rarely involved in MAP cases may well prefer to delegate the competent authority functions to the officials in charge of the negotiation of tax treaties because these officials will be familiar with the provisions of tax treaties and, often, with the treaty negotiators and competent authorities of other countries with which tax treaties have been concluded. A Contracting State that has to deal with a very large number of MAP cases, however, may want to separate its competent authority function into various groups based on regions, taxpayer industry, or type of taxpayer (individual, corporate, etc.).

60. Regardless of how the competent authority function is organised, it is important that the responsible officials implement a system of recordkeeping with respect to the receipt of requests for MAP assistance. Such records permit monitoring of the progress made in MAP cases ***(i.e.*** the time required to resolve a MAP case) and provide an objective measure to assess the effectiveness of a country's MAP programme.

61. It is also important that the competent authority keep records of the decisions and resolutions that have been reached though competent authority agreements. Internal records of the outcomes in MAP cases help to guarantee the consistent interpretation of a treaty in similar cases. It should be noted in this regard that countries typically do not publish taxpayer-specific agreements reached through the MAP. Since information received from the other competent authority is subject to the confidentiality requirement of paragraph 2 of Article 26, such information cannot be publicly disclosed (except for the limited purposes provided for in that paragraph).

62. The effectiveness of a MAP program may also be improved if the competent authority function is given a certain degree of independence from the tax officials responsible for taxpayer audits and adjustments (***e.g***. auditors, assessors or inspectors). Such independence may enhance the objectivity of the competent authority and thus its ability to apply the treaty in a fair and impartial manner. An autonomous competent authority should, in addition, be best able to focus on its primary objective - relieving international double taxation.

63. Countries have similarly found it helpful where the measures used to evaluate the performance of the competent authority relate to factors such as the time taken to resolve a case,

consistency, and principled and objective outcomes (and not, for example, on the number of sustained audit adjustments or amount of tax revenue). The use of these criteria reinforces the goals and objectivity of the competent authority function and thereby improves the overall effectiveness of the MAP program.

64. In structuring the competent authority function, countries with significant practical experience with the MAP process have found that it is of fundamental importance to provide the competent authority with adequate resources. Human resources, in the form of skilled personnel, will often be the most crucial factor in operating an efficient and effective MAP program. Maintaining and developing the skills of the competent authority staff also require that a tax administration devote appropriate resources to their training.

65. In addition to skilled personnel, the competent authority should be provided with adequate financial resources to meet its obligations under the treaty. In some cases, expenses related to face-to-face meetings with other competent authorities (such as travel and accommodation expenses) may need to be incurred, although developing countries may prefer to use telecommunications or, if a meeting is necessary, may prefer to host it in order to avoid such costs.

66. The competent authorities of many developed countries may have financial resources to pay for the services of experts or consultants (for example, economists or industry specialists consulted in complex transfer pricing cases) and for the translation of documents (for example, translations of contracts or foreign tax law) and interpretation services (for example, in the context of a face-to-face meeting of competent authorities). Developing countries may not have the financial resources to pay for such services and this should be taken into account in dealing with the competent authorities of these countries.

1.4 *The relationship between the MAP and domestic law (including domestic law recourse provisions)*

67. The mutual agreement procedure provided for by Article 25 of the UN Model is available to taxpayers irrespective of the remedies provided by the domestic law of the Contracting States. The MAP is a special procedure that exists in addition to domestic law remedies. For example, a taxpayer who has the right to request MAP assistance may also have the right to challenge the actions taken by a country's tax administration in a domestic court or through a domestic administrative process.

68. It is important that a taxpayer planning to make a request for MAP assistance inform itself as to, and make appropriate use of, the procedures required to protect its rights to domestic administrative or judicial recourses. Such procedures may include, but are not limited to:

- Filing a waiver of domestic time limits on assessment. Under the domestic laws of many States, the tax administration has a limited period of time within which it may assess tax with respect to a given taxable year (sometimes referred to as a statute of limitations on assessment). Taxpayers similarly have a limited period of time in which they may object to or otherwise challenge the actions of the tax administration in a domestic forum. In many of these States, however, the taxpayer and tax administration may agree to extend the relevant periods. This procedure may involve, for example, filing a request or a specific form with the tax administration.

- Submitting a protective claim. In some States, taxpayers may protect their rights to certain domestic recourse procedures by filing a protective claim before any applicable deadlines. A timely claim may have the effect of keeping any applicable periods of limitations open until the claim is resolved or withdrawn. Protective claims may include, for example, a claim for refund submitted to the appropriate administrative or judicial body.

- Lodging an appeal with the appropriate administrative or judicial body. In some States, taxpayers may protect their rights to certain domestic administrative or judicial procedures by lodging an appeal with the appropriate body before any applicable deadlines. As with a protective claim, a timely appeal may have the effect of keeping any applicable periods of limitations open until the appeal is resolved or withdrawn. Examples of such an appeal may include an application to a tax administration's administrative appeals division or a petition or other challenge filed with a domestic court.

69. Because Article 25, as drafted in most treaties, does not compel the Contracting States to reach agreement in the MAP[8], but only to use their best efforts to do so, there will on occasion be situations in which there is no MAP agreement between the Contracting States. In such a situation, a taxpayer that has not taken appropriate measures to protect its rights under domestic law will have no further recourse.

70. A Contracting State should determine the procedure to be followed when a taxpayer has invoked both the MAP and a domestic recourse procedure. As a general matter, most tax administrations will deal with a taxpayer's case in the MAP or in a domestic forum (usually a court), but not both at the same time: one process will be suspended or put on hold pending the outcome of the other.

71. A competent authority should therefore be able to inform taxpayers as to how it will handle cases where a taxpayer seeks to obtain relief through both the MAP and a domestic recourse procedure.

72. In some countries, a taxpayer may only invoke the mutual agreement procedure once the taxpayer has exhausted all domestic law remedies ***(e.g.*** by waiving its rights of appeal or letting time-limits for appealing lapse). This approach risks putting the taxpayer in a position where no solution will be found to its case if the competent authorities cannot reach an agreement.

73. The practice followed by many countries, however, is to allow the taxpayer to choose whether the MAP or the domestic procedure will proceed first. In this regard, it is important that taxpayers be informed as to the potential consequences of pursuing a recourse through one process rather than the other. The information concerning the procedure to be followed and the consequences of pursuing first either the MAP or domestic recourse will typically be explained in a tax administration's general procedures or instructions for requesting MAP assistance, or in other appropriate public guidance. In particular, as noted below, competent authorities that consider that they cannot deviate from a domestic court decision should ensure that taxpayers are informed of that situation in advance.

74. In many countries, it is preferable to pursue the MAP first and suspend the domestic law recourse procedures. A MAP agreement will generally provide a comprehensive bilateral resolution of the taxpayer's case. A domestic recourse procedure, in contrast, will not provide a resolution in both of the States involved, and may therefore fail to relieve international double taxation. If the competent authorities are able to reach agreement through the MAP and the taxpayer is satisfied with the MAP result, the taxpayer will generally have no further need for domestic recourse procedures and these may then be terminated. If, however, the proposed agreement reached through the MAP is not satisfactory to the taxpayer, the taxpayer may be allowed to reject that proposed agreement and resume the domestic recourse procedure that has been suspended (provided, of course, that the taxpayer has taken appropriate measures to protect its rights to those remedies under the applicable domestic law).

[8] The situation is, however, different for treaties that follow alternative B of Article 25.

75. The case may arise where a taxpayer who has suspended court proceedings in a domestic court requests to defer its decision whether to accept a proposed MAP agreement until the court delivers its decision.[9] Contracting States may be concerned about possible divergences or contradictions between the decision of the court and the MAP agreement. As a result, the implementation of a mutual agreement should be conditional on the taxpayer's express acceptance of the terms of the mutual agreement within a reasonable period as well as the taxpayer's withdrawal of any administrative or judicial proceedings regarding the matters settled through the MAP.[10]

76. Different issues may arise in the reverse situation in which a taxpayer decides to proceed first with domestic recourses and the MAP is suspended or put on hold (or the competent authorities have not otherwise reached a MAP resolution). The most important of these issues is that the tax authorities of a Contracting State may consider that they do not have the legal authority, through the MAP, to deviate from the decision of a domestic court. If this is the case, the decision rendered by the domestic court will bind the tax administration of the State in which the decision was rendered and prevent it from providing greater relief through the MAP. In such circumstances, the competent authority of that State may be restricted, during the subsequent MAP, to trying to obtain relief from the other Contracting State. For example, suppose that, following litigation initiated by a State A company, a court of State A confirms a transfer pricing adjustment made by the State A tax administration that increases the income derived by that company from a non-arm's length transaction with a related company in State B. Following that court decision, the competent authority of State A will consider that the only thing that it can do through the MAP is to seek to have State B decrease the income of the State B company by the amount of the adjustment and refund its tax as appropriate.

77. The tax administration of the other Contracting State will not, of course, be bound by the decision of a foreign court. Any relief provided by the other Contracting State in these circumstances will necessarily depend primarily on the underlying merits of the taxpayer's case, not on the fact that domestic law constraints prevent the first Contracting State from providing relief.

78. If a tax authority takes the position that it is legally bound to follow a domestic court decision in the MAP, or that it will not deviate from a domestic court decision as a matter of administrative policy or practice, it should inform taxpayers of this general policy so that they can make an informed choice between the MAP and domestic recourse procedures.

79. Audit settlements and unilateral Advance Pricing Arrangements may create similar issues for the MAP.

80. Audit settlements are a method used by many tax administrations to close audit files through an agreement with the taxpayer. Because they represent the result of a negotiation process, audit settlements will typically involve concessions by both the tax administration and the taxpayer. In order to ensure that an audit settlement represents a final resolution, one of the concessions sometimes sought by tax administrations is to include in its terms a limit on further recourses by the taxpayer, including recourse to the MAP. As a consequence, the tax administration that entered into the settlement may be precluded from resolving through the MAP any double taxation that

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9 See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 42 of the Commentary on Article 25 of the OECD Model Tax Convention). Paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention sets out in full paragraphs 7 through 49 of the Commentary on Article 25 of the OECD Model Tax Convention, noting their relevance in light of the circumstance that paragraphs 1 and 2 of Article 25 of the UN Model Tax Convention reproduce the full text of paragraphs 1 and 2 of Article 25 of the OECD Model Tax Convention.

10 A Contracting State's implementation of an agreement reached through the MAP is discussed in section 2.4.8 below.

may result from the settlement. In these circumstances, the domestic law of the other Contracting State may also prevent its tax administration from providing any double tax relief to the taxpayer with respect to the tax paid to the first Contracting State upon settlement of the audit.

81. Some tax authorities consider that taxpayers and tax administrations should avoid the inclusion of a waiver of the right to access the MAP in audit settlements, especially where the case involves an activity or transaction with potential tax consequences in more than one jurisdiction. In such circumstances, they are of the view that it is inappropriate to have two parties (the taxpayer and one tax administration) not include the other involved party (the other tax administration) in the final resolution of the case. Some other tax authorities consider, however, that an audit settlement may include in its terms a limit on further recourse to MAP by the taxpayer as the audit settlement is opted for by a taxpayer after informed decision factoring potential risk of tax consequences in the other jurisdiction. In such case, for the sake of certainty, the tax authority should make that policy public.

82. Advance Pricing Arrangements (APAs) are a tool used by tax administrations and taxpayers to agree, in advance, on the tax consequences of a transaction or transactions between the taxpayer and a related party in a different tax jurisdiction. A unilateral APA involves only one of the interested tax administrations and, accordingly, the tax consequences of the relevant transaction(s) in only one jurisdiction. A bilateral APA, in contrast, involves the tax administrations of both jurisdictions and is typically concluded through the MAP article of the relevant bilateral tax treaty. It is therefore able to address the full scope of the transaction with certainty and is more useful in addressing cases of double taxation involving two countries.

83. Unilateral APAs may prove useful in certain contexts (for example, to avoid the cost and risk of future transfer pricing disputes). The certainty they provide, however, is limited, especially if the tax administration of the other jurisdiction would be expected to examine closely the transaction, or type of transaction, at issue. In addition, taxpayers have sometimes found that previously concluded unilateral APAs have precluded them from obtaining relief under the MAP from the country that has granted the APA when they subsequently found themselves subject to double taxation.

84. Like an audit settlement reached in a potential MAP case, a unilateral APA represents a one-sided resolution of issues with tax consequences in two jurisdictions. In order to provide for a bilateral resolution of these issues, where a foreign adjustment is made with respect to a transaction or issue covered by a unilateral APA, some tax authorities consider that it is helpful for the unilateral APA to be treated as the taxpayer's filing position and eligible for MAP, rather than as an irreversible settlement.

2. THE MUTUAL AGREEMENT PROCEDURE

2.1 What is a request for MAP assistance?

85. Under Article 25 of the UN Model, a taxpayer who considers that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty may request the assistance of the competent authority to resolve the case with a view to ensure taxation in accordance with the convention. Such a taxpayer's request is referred to as a request for MAP assistance.

86. A request for MAP assistance is the primary means by which a taxpayer may make a competent authority aware that the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty. Requests for MAP assistance are thus at the origin of the large majority of MAP cases.

2.2 How does a taxpayer make a MAP request? Format and content

87. A request for MAP assistance generally[11] must be made to the competent authority of a taxpayer's State of residence (see paragraph 1 of Article 25 of the UN Model).

88. In a context in which an adjustment made by one Contracting State may potentially affect taxpayers in both Contracting States, each of the affected taxpayers may want to make a separate request for MAP assistance to the competent authority of its State of residence. For example, where the State A tax administration makes a transfer pricing adjustment with respect to a related party transaction between a resident of State A and a resident of State B, the State A resident and the State B resident may both wish to request MAP assistance from their respective competent authorities. In such cases, the competent authorities may agree to join the cases.

89. A taxpayer may also make a MAP request to the Contracting State of which it is a national in a case that falls under paragraph 1 of Article 24 (Non-Discrimination) of the UN Model. Under Article 24(1), nationals of a Contracting State may not be subjected in the other Contracting State to taxation or any tax-related requirement which is other or more burdensome than the taxation and tax-related requirements to which nationals of that other State in the same circumstances are or may be subjected. Thus, for example, where State A does not allow a deduction to an individual State B national resident of State A in the same manner as that deduction would be allowed to an individual State A national resident of State A, the State B national may typically request MAP assistance from the State B competent authority.

90. Article 25 of the UN Model does not itself set forth rules or other guidelines for the form in which a taxpayer must present a request for MAP assistance. As noted in paragraphs 45 and 46 of the Commentary on the UN Model, each competent authority may prescribe whatever special procedures it feels are appropriate or necessary.

91. In the absence of a special procedure, a taxpayer may present its MAP case to the relevant tax administration in the same manner that it would use to present other tax- related objections to that administration.

92. Countries have found that use of the MAP may be encouraged where the process of making a MAP request is transparent and free of unnecessary formalities. Competent authorities that take appropriate steps to develop guidelines and procedures for a taxpayer's presentation of a MAP case and to publicize this guidance may thereby ensure that taxpayers are able to make full and effective use of the MAP.

93. Competent authorities, in particular in developed countries, may require a great deal of information to consider and resolve appropriately certain of the more common (and fact-intensive) types of MAP cases (for example, transfer pricing, permanent establishment, and residence cases). In developing procedures for the presentation of a MAP request, a competent authority should consider how to balance its need for information with the complexity of the issues in a particular case and the burdens imposed on taxpayers to collect the required information.

94. In a context in which a competent authority has not developed a prescribed format for the presentation of a MAP request, a taxpayer should generally provide the following information (to the extent relevant to the request) (see also paragraphs 22 ff. of the Commentary on Article 25):

1. The name, address, and any taxpayer identification number of the taxpayer;

[11] As noted under paragraph 9 of the Commentary on Article 25 (quoting paragraph 19 of the Commentary on Article 25 of the OECD Model Tax Convention), however, States may give taxpayers the option of presenting their cases to the competent authority of either State.

2. The name, address, and any taxpayer identification number of the related foreign taxpayer(s) involved (for transfer pricing cases);

3. The foreign tax administration involved and, if relevant, the regional or local tax administration office that has made, or is proposing to make, the adjustment(s);

4. The tax treaty article that the taxpayer asserts is not being correctly applied, and the taxpayer's explanation of how it believes the article should be interpreted and/or applied;

5. The taxation years or periods involved;

6. A summary of the facts, including the structure, terms, and timing of all relevant transactions and the relationships between related parties (the taxpayer should advise the competent authority of how the facts may have changed during or after the relevant taxable period, and of any additional facts that come to light after the submission of the MAP request);

7. An analysis of the issues for which competent authority assistance is requested and the relevant legal rules, guidelines or other authorities (including any authorities that may be contrary to the conclusions of the taxpayer's analysis). The analysis should address all specific issues raised by either tax administration as well as the amounts related to the adjustment(s) (in both currencies and supported by calculations, if applicable);

8. For transfer pricing cases, any documentation required to be prepared under the domestic legislation of the taxpayer's State of residence (where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable) and a detailed description of the companies involved, including an analysis of their functions and risks, to the extent relevant;

9. A copy of any other relevant MAP request and the associated documents filed, or to be filed, with the competent authority of the other Contracting State, including copies of correspondence from the other tax administration, copies of briefs, objections, etc., submitted in response to the action or proposed action of the tax administration of the other Contracting State (translations of relevant documents may be helpful, and, where documentation is voluminous, a competent authority may determine that a description or summary of such documentation may be acceptable);

10. A statement indicating whether the taxpayer or a predecessor has made a prior request to the competent authority of either Contracting State with respect to the same or a related issue or issues;

11. A schedule of the relevant time limits and statutes of limitation in each jurisdiction (whether imposed by domestic law or the tax treaty) with respect to the taxable periods for which MAP relief is sought (in cases of multiple taxpayers, a schedule for each taxpayer);

12. A statement indicating whether the taxpayer has filed a notice of objection, notice of appeal, refund claim, or any other comparable document in either of the relevant jurisdictions;

13. A statement indicating whether the taxpayer's request for MAP assistance involves issues that are currently or were previously considered by the tax authorities of either Contracting State as part of an advance pricing arrangement, ruling, or similar proceedings;

14. A copy of any settlement or agreement reached with the other jurisdiction that may affect the MAP process (with a translation, if applicable);

15. If the taxpayer has not already provided consent for a person to act as its authorised representative, a signed statement that a representative is authorised to act for the taxpayer in all matters connected with the MAP request.

16. The taxpayer's view on any possible bases on which to resolve the issues;

17. Any other facts that the taxpayer may consider relevant.

95. The taxpayer should attest to the accuracy and completeness of the facts and information presented in a MAP request in a signed statement accompanying the request.

96. A competent authority will typically not charge a fee for a MAP request, although there may be fees associated with certain competent authority functions or activities, such as Advance Pricing Arrangement programs.

97. To the extent feasible, tax administrations may consider it helpful to allow the electronic submission of documents in the context of the MAP. Electronic submission may facilitate the delivery of information to the two competent authorities as well as the connected burdens on taxpayers.

98. A competent authority's ability to understand, analyse, and respond to a taxpayer's MAP request will of course depend upon the quality of the information available. A taxpayer that provides accurate and complete information in a timely manner will facilitate the resolution of its case.

99. In addition, to the extent that a taxpayer provides information to both competent authorities in the MAP process,[12] the taxpayer should ensure that it provides the same information to the two competent authorities. Providing inconsistent or conflicting information may provoke delays if it is difficult for the two competent authorities to come to agreement on a common understanding of the underlying facts.

100. Some competent authorities may delay the acceptance or consideration of a MAP request where a taxpayer has failed to provide required information. In addition, in some Contracting States the misrepresentation of facts or other material information may result in the denial of competent authority assistance, under a Contracting State's domestic law, regulations, or other guidance.

101. Article 26 (Exchange of Information) of the UN Model authorizes the competent authorities of the Contracting States to exchange such information as is necessary for carrying out the provisions of the treaty. Article 26 thus expressly authorizes the exchange of taxpayer information between competent authorities to carry out the MAP provided for by Article 25.

102. Paragraph 1 of Article 26 provides that any information exchanged between the competent authorities is required to be treated as secret in the same manner as if such information were obtained under the domestic laws of the respective Contracting States. Competent authorities should continually keep in mind their obligations under Article 26, which is intended to supplement the generally applicable confidentiality provisions of Contracting States' domestic tax laws.

[12] As noted in the quotation under paragraph 9 of the Commentary on Article 25, however, States may give taxpayers the option of presenting their cases to the competent authority of either State.

2.3 When can a taxpayer make a MAP request?

2.3.1 When can a taxpayer first make a MAP request?

103. Under paragraph 1 of Article 25 of the UN Model, the triggering event that permits a taxpayer to make a MAP request is the notification to the taxpayer of the action by a Contracting State that results (or will result) in taxation not in accordance with the provisions of the treaty. In contrast, paragraph 3 of Article 25 does not provide a point at which a taxpayer may seek MAP assistance with respect to the interpretation or application of the treaty.[13]

104. The term "action" in Article 25(1) is intended to be interpreted broadly. "Action" refers to any action or decision, whether of a legislative or regulatory nature, and whether taken with reference to the specific taxpayer or of general application, that has as a consequence that the taxpayer is or will be taxed in a manner contrary to the treaty.[14]

105. A taxpayer may seek MAP assistance where taxation not in accordance with the treaty is probable, even if it has not materialised. The taxpayer must demonstrate that such taxation is likely to occur, regardless of whether an actual adjustment has already been made. The benefit of the doubt should be given to the taxpayer.

106. In practice, a tax treaty will generally not provide more specific guidance on the point at which the MAP may be invoked. The broad language of Article 25 of the UN Model appropriately provides each Contracting State with a certain latitude to define this point, taking into account the specific characteristics of its domestic tax system and its judgement regarding how the MAP will best function.

107. As the language of the Commentary makes clear, a competent authority's determination of the point from which the MAP may be invoked must take into account a number of different considerations, including the competent authority's level of experience, its current and anticipated MAP caseload, and the human and other resources available to the competent authority.

108. Many countries believe that MAP requests should be initiated as soon as it appears likely that an issue will result in taxation contrary to the relevant treaty. Relevant tax administration actions in the early stages of a dispute might include, for example, notification of a proposed adjustment or assessment, or the rejection of a taxpayer protest to a proposed adjustment or assessment. Early consideration of MAP cases may facilitate the identification of pragmatic solutions before the tax administration and the taxpayer have devoted significant resources to prepare the case.

109. Developing countries and countries in transition, especially those with more limited MAP experience and/or competent authority resources, may, however, prefer that MAP requests not be made until there is a more concrete possibility of taxation not in accordance with the treaty. Depending on the characteristics of the particular tax system, a concrete possibility of taxation not in accordance with the treaty might be considered to exist, for example, when a taxpayer receives a final notice of adjustment or assessment, or where an adjustment is sustained in an administrative (non-judicial) appeals procedure.

110. In any case, regardless of the point at which the competent authority determines it is

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13 Given the nature of MAP requests under Article 25(3), taxpayers may reasonably be expected to make such requests before or soon after the taxpayer has taken a filing position with respect to the transaction, activity, or situation affected by the relevant provision of the treaty.

14 See paragraph 9 of the Commentary on Article 25 of the UN Model Tax Convention (quoting paragraph 21 of the Commentary on Article 25 of the OECD Model Tax Convention).

appropriate for a taxpayer to invoke the MAP, a tax administration should provide guidance to taxpayers on this issue, preferably as part of more general public guidance on the MAP process.

2.3.2 Are there time limits to request access to the MAP?

111. Under Article 25(1) of the UN Model, a taxpayer must present its request for MAP assistance to the competent authority within three years from the notification of the action resulting in taxation not in accordance with the treaty. Article 25(3) does not provide any time limit for a taxpayer to seek MAP assistance with respect to the interpretation or application of the treaty, but, as noted above, such requests may likely occur before or soon after the taxpayer has taken a filing position based on the relevant treaty provision.

112. A taxpayer may thus be denied access to the MAP in an Article 25(1) case if the taxpayer does not meet the timeliness requirement. Although the specific time limit(s) for making a MAP request may vary from tax treaty to tax treaty, some general observations on the timeliness of MAP requests under treaties based on the UN Model are nonetheless appropriate.

113. The three-year time limit for presenting a MAP request is intended to establish a minimum time period within which taxpayers must present their MAP requests. Contracting States may, of course, agree to longer periods, or to forgo time limits, in the interest of taxpayers.

114. Determining whether a MAP request is timely requires a competent authority to decide what constitutes the first notification of the action resulting in taxation not in accordance with the treaty. The term "notification" should typically be interpreted in the manner most favourable to the taxpayer.

115. In general, the time for presentation of a MAP request should begin to run only when the taxpayer is notified of the tax administration action that gives rise to the taxation at issue - that is, when the taxpayer receives a notice of assessment or adjustment, an official tax bill, or any other official demand for the collection or levy of tax.

116. If the relevant tax is levied by the deduction of a withholding tax at source, the time for presentation of a MAP request should generally begin to run upon the payment of the income. If, however, the taxpayer can demonstrate that it first became aware of the deduction at a later date, the time limit for the taxpayer's presentation of a MAP request should be determined with reference to that later date.

117. In contrast, where the relevant tax is levied through a self-assessment system, there will typically be some form of notification effecting the assessment, such as a notice of liability or of denial or adjustment of a claim for refund. In such cases, the time for presentation of a MAP request should begin to run upon such notification, rather than beginning at the time when the taxpayer lodges its self-assessed return. Where there is no such notification, the time of "notification" should generally be considered to be the time when the taxpayer would be reasonably be regarded as having been made aware of the taxation that is not in accordance with the treaty.

118. Finally, in the case where the taxation not in accordance with the treaty is the result of a combination of actions or decisions taken in both Contracting States, the time limit for presenting a request for MAP assistance should generally be determined with reference to the notification to the taxpayer of the last of the relevant actions or decisions taken by either Contracting State.

2.4 How does the MAP work?

2.4.1 Basics: A typical MAP case

119. The first stage of a typical MAP case begins when a taxpayer contacts the competent authority of its State of residence to request assistance where the action of one or both of the Contracting States results in taxation not in accordance with the applicable tax treaty.[15] In a transfer pricing case, the taxpayer (or the related party in the other Contracting State) is also encouraged to contact the competent authority of the other Contracting State and to provide it with the relevant details of the MAP request.

120. The taxpayer's request must be prepared and presented in accordance with the instructions and other guidance provided for this purpose by the relevant competent authority. In the absence of any such guidance, the taxpayer should generally present its request to the competent authority of its State of residence in the same manner as it would present any other objection or protest to the tax administration.

121. The taxpayer's MAP request should in all cases describe in detail the relevant facts and circumstances, the procedural situation of the case, and the issue(s) in connection with which competent authority assistance is requested.

122. Following the submission of the MAP request, the residence State competent authority should confirm to the taxpayer that the request has been received and advise the other competent authority of the request.

123. The competent authority must also examine the request to assure that it is acceptable before any consideration of the substantive issue(s) raised by the taxpayer. This initial review will involve the following determinations:

- Was the MAP request submitted in accordance with applicable guidance?

  Although competent authorities should ideally seek to avoid undue formality in the MAP process (especially in the case of an unsophisticated taxpayer), a taxpayer should prepare and submit its MAP request according to the procedures established by a Contracting State's domestic law, regulations, and/or any other applicable guidance. Such procedures may include, for example, guidelines for the format of a MAP request or the requirement of a signed taxpayer statement that the MAP request was prepared under penalties of law.

- Does the MAP request contain sufficient facts and other information to understand and evaluate the taxpayer's claim?

  The MAP request should, at a minimum, present a full description of the relevant facts and circumstances and the basis for the taxpayer's claim of taxation not in accordance with the treaty. Although a competent authority may frequently ask a taxpayer to provide additional information, the MAP process is most efficient if a taxpayer submits a complete initial request. To this end, it is useful for competent authority guidance regarding the MAP to include a description of the information required to be submitted in a MAP request (for example, in the form of a checklist).[16]

- Is the taxpayer's claim timely?

  As discussed above, a competent authority should define (within the framework of

[15] As noted in section 1.2.1 above, most disputes that arise under tax treaties are Article 25(1) cases.

[16] See section 2.2 above.

Article 25 of the relevant tax treaty) the specific point from which a taxpayer may invoke the MAP - that is, when a taxpayer's case may be brought to the MAP. A competent authority may determine that the taxpayer's MAP request is premature - and thus unacceptable - if, for example, international double taxation will arise only upon the occurrence of uncertain or remote future events. Also, Article 25(1) of the UN Model requires that a taxpayer file a MAP request within three years of the notification to the taxpayer of the action that results in taxation not in accordance with the treaty. The MAP request should accordingly set forth facts to demonstrate that the request was made within the applicable time limit(s), if any, provided by the treaty and/or by a Contracting State's domestic law and regulations.

124. The competent authority should promptly notify the taxpayer whether its MAP request will be accepted. In the event that the MAP request is not accepted, the competent authority should ideally inform the taxpayer of the reason(s) for the rejection.

125. In a scenario in which a rejected MAP request is not barred altogether (for example, by a time limit), the competent authority should indicate to the taxpayer how it might perfect its MAP request and/or invite the taxpayer to re-submit its MAP request at a later time (for example, when the taxpayer's claim is timely).

126. The competent authority must then answer some additional questions to determine how it will approach the taxpayer's case:

- Has the taxpayer pursued domestic law remedies in addition to the MAP?

  As discussed above, how domestic law remedies and the MAP interact is generally determined in each Contracting State by that State's domestic law and administrative procedures. The tax treaty itself is typically silent on this point. A MAP request should accordingly indicate whether the taxpayer has pursued other administrative or judicial remedies, in either Contracting State, in addition to the MAP.

  The competent authority uses this information to determine how the taxpayer's case will move forward from a procedural perspective. Thus, for example, where a Contracting State does not allow the simultaneous consideration of a taxpayer's case in both the MAP and a domestic forum, the competent authority can determine whether one process should be suspended or put on hold pending the outcome of the other process.

- Has there been a decision, a settlement, or any other resolution with respect to the taxpayer's case in any domestic forum utilized by the taxpayer?

  The information recommended to be provided with a MAP request includes an indication whether domestic law remedies pursued by the taxpayer have resulted in a decision, a settlement, or any other resolution. As discussed above, a tax administration may consider that it does not have the legal authority to deviate from the decision of a domestic court in the MAP. Accordingly, depending on a Contracting State's domestic law and procedure, a court decision (or other similar resolution of a taxpayer's case in a domestic forum) may limit the scope of the relief a competent authority is able to provide in a particular case.

127. After answering these questions regarding the procedural situation of the taxpayer's case and the limits (if any) on the scope of possible MAP relief, the competent authority of the taxpayer's State of residence will proceed to consider the substantive issue(s) presented in the MAP request.

128. Where the competent authority determines that the taxpayer has a valid claim and that the taxation not in accordance with the treaty is (in whole or in part) the result of the action of the State

of residence, the competent authority may be able to provide relief unilaterally - that is, without involving the other competent authority. In this scenario, the competent authority should provide the appropriate relief with all possible speed.

129. Where the taxation not in accordance with the treaty is the result of the action of the other Contracting State (or the competent authority of the taxpayer's State of residence is otherwise unable itself to provide satisfactory relief), the second stage of the MAP process begins. The competent authority of the taxpayer's State of residence initiates contact with the other competent authority to endeavour to resolve the matter by mutual agreement.

130. This contact with the other competent authority should take place as soon as practically possible. It may typically occur using an opening letter or other similar document containing basic information about the MAP case. The other competent authority should confirm its receipt of the opening letter and, after a preliminary review, indicate whether it agrees to initiate MAP discussions.

131. Where the competent authority of the other Contracting State agrees to discuss the case in the MAP, both competent authorities will proceed to an in-depth analysis of the merits of the case and the issues presented, in preparation for the bilateral discussion of the case.

132. The framework for this analysis and discussion is generally provided by a position paper prepared by one of the competent authorities. The position paper is typically prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that is alleged to be contrary to the treaty. In a more complex MAP case, the other competent authority should prepare and present a reasoned rebuttal to the initial position paper.

133. When the competent authorities are ready to discuss a MAP case, their discussions may take place using a great variety of methods - for example, by correspondence, by telephone or video conference, or in face-to-face meetings. Depending on the complexity of the issues involved, the competent authority negotiations may occur in a series of meetings or other consultations. The MAP discussions may also lead to requests for additional information or other clarification from the taxpayer.

134. As with other aspects of the MAP, Article 25 of the UN Model is silent with respect to how Contracting States will conduct their MAP negotiations. Under Article 25(4), the Contracting States are directed to develop appropriate bilateral procedures to implement the MAP. Such procedures include procedures for the notification and discussion of MAP cases.

135. As explained in paragraphs 20 to 46 of the Commentary on Article 25 of the UN Model, the procedures developed for the conduct of the MAP should take into account, among other considerations, the experience of the respective competent authorities, their current and anticipated MAP caseload, and the resources available to the competent authorities. The MAP process should avoid unnecessary formality and promote forthright discussion and a collaborative approach to issue resolution. Competent authorities should also inform taxpayers of the procedural details of the MAP, ideally as part of more general public guidance on the MAP.

136. Following a thorough discussion, the competent authorities will generally come to an agreement on a mutually acceptable resolution. Upon reaching an agreement, the competent authorities usually memorialise its details in an initialled summary record that describes the method of relief (for example, an adjustment to income or credit), the extent to which each Contracting State will provide relief, the timing of relief, and any other important details (such as the treatment of amounts repatriated in connection with an adjustment to income).

137. The residence State competent authority then notifies the taxpayer that a MAP agreement has been reached and provides the taxpayer with an explanation of its details. Depending on the

effect of invoking the MAP in the relevant Contracting State,[17] the taxpayer may have the option to accept or reject the MAP resolution. In the typical case in which the taxpayer accepts the MAP resolution, the summary record is generally followed by an exchange of letters that formalises the agreement between the competent authorities.

138. Following the formal exchange of letters, the competent authorities take steps as appropriate to implement the relief provided for in their agreement.

139. In a simple case in which the competent authority of one Contracting State agrees to provide correlative relief with respect to an adjustment initiated by the other Contracting State, such relief will generally be provided in the first Contracting State through a corresponding adjustment - that is, an adjustment by the first Contracting State that offsets, in whole or in part, the other Contracting State's initial adjustment.

2.4.2 Other barriers to access to the MAP: fraud, gross negligence, wilful default and tax avoidance

140. Paragraph 3 of Article 9 is relevant in discussing barriers to MAP. That paragraph provides:

> The provisions of paragraph 2 [of Article 9] shall not apply where judicial, administrative or other legal proceedings have resulted in a final ruling that by actions giving rise to an adjustment of profits under paragraph 1, one of the enterprises concerned is liable to penalty with respect to fraud, gross negligence or wilful default.

141. Under specific conditions, paragraph 2 of Article 9 obliges one Contracting State (State A) to make a correlative adjustment with respect to a State A enterprise where the other Contracting State (State B) has made a transfer pricing adjustment with respect to a related State B enterprise. Where paragraph 3 of Article 9 applies, however, State A no longer has an obligation to make such an adjustment with respect to the State A enterprise and the taxpayer may not initiate the mutual agreement procedure under Article 25, paragraph 1 in order to request such corresponding adjustment. However, the taxpayer may initiate the mutual agreement procedure where the taxpayer considers that all the conditions provided for in paragraph 3 are not met or that the adjustment of profits is not in accordance with paragraph 1.

142. State A may determine in particular circumstances that it is appropriate to consider providing MAP relief even in a case where paragraph 3 applies. Consistent with the Commentary on Article 25 noted above, many countries would consider the provision of such relief to be within the scope of, and authorized generally by, Article 25. Paragraph 8 of the Commentary on Article 9 states that Member countries may consider the double penalties that apply in Article 9(3) cases to be too harsh, a factor that could make them consider MAP access potentially appropriate. In any case, this paragraph of the Commentary on Article 9 also notes that these cases "are likely to be exceptional and there would be no application of [Article 9(3)] in a routine manner".

143. In practice, some competent authorities have refused to provide relief where the adjustment underlying a taxpayer's MAP request is based upon an anti-avoidance provision in their countries' domestic laws (for example, a thin capitalisation provision) even where a tax convention does not provide expressly that MAP assistance will not be provided in such circumstances. If such cases are accepted for MAP consideration, these competent authorities may do no more than forward the cases to the other competent authority, which may then provide correlative relief at its discretion.

144. This approach may likely not lead to a satisfactory resolution. Moreover, even where a tax treaty specifically provides for the application of a Contracting State's anti-avoidance provisions, Contracting States should carefully examine whether their application in a particular case is in

[17] See the discussion in section 2.4.3., below.

conflict with other provisions of the relevant tax treaty.

145. Competent authorities may also decide not to accept a taxpayer's MAP request (or not to provide relief) for other policy reasons, or because a tax administration would like a judicial precedent with respect to a specific issue.

146. Some of these barriers to the MAP may be inconsistent with a Contracting State's obligation under Article 25 of the UN Model to endeavour to resolve through the MAP all "justified" taxpayer objections to taxation not in accordance with the treaty. These barriers may also likely conflict with a Contracting State's more general obligations under the international law of treaties.[18] They are certainly inconsistent with the general spirit and purpose of the MAP. Contracting States should accordingly not raise such barriers to access to the MAP without careful consideration.

2.4.3 What is the effect of invoking the MAP?

147. An aspect of the MAP that is closely linked to the relationship between the MAP and domestic law[19] - and with respect to which Article 25 of the UN Model is silent - is the legal effect of the taxpayer's invocation of the MAP.

148. In general, a mutual agreement is conditioned on the acceptance by the taxpayer of the mutual agreement. If the taxpayer does not accept it, the mutual agreement does not come into effect and each Contracting State will tax according to its understanding of the relevant facts and how it understands the treaty to apply with respect to those facts.

2.4.4 What is the taxpayer's role in the MAP?

149. Article 25 of the UN Model provides that a taxpayer may present a MAP request, but does not otherwise provide for taxpayer participation in the MAP. Contracting States may, however, provide for a taxpayer role in the MAP pursuant to the directive contained in paragraph 4 of Article 25 to develop, through competent authority consultations, "appropriate bilateral procedures, conditions, methods, and techniques" for the implementation of the MAP.

150. In practice, the taxpayer's role in the MAP is typically determined by domestic law (or other guidance) in the taxpayer's State of residence, on how to seek MAP assistance.[20] Although domestic procedures for MAP access will necessarily vary to a greater or lesser degree, the following general comments may be made with respect to the taxpayer's role in the MAP.

151. The taxpayer's primary role in the MAP is to provide the competent authority of its State of residence with complete and accurate information and documentation in a timely manner. The taxpayer should promptly advise its competent authority of any material changes in the facts and circumstances relevant to its case, as well as any new facts and information that emerge subsequent to the taxpayer's prior submissions. The taxpayer should similarly provide complete and timely responses to any competent authority requests for additional information. The competent authority

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18 See Articles 26 *("Pacta sunt servanda")* and 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331). Article 26 of the Vienna Convention provides that every treaty is binding on the parties thereto and must be performed by them in good faith. Article 27 of the Vienna Convention provides that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform under a treaty.

19 See section 1.4 above.

20 A Contracting State may generally prefer to apply the same procedures to all resident taxpayers seeking MAP assistance, regardless of the applicable tax treaty, rather than to develop specific procedures for MAP access under each individual tax treaty. This policy may facilitate the administration of a competent authority's MAP function and assure the uniform treatment of taxpayers (with respect to access to the MAP).

may also ask the taxpayer for assistance in interpreting the information provided including: economic models and legal memoranda justifying the taxpayer's application of the arm's length standard.

152. The taxpayer should additionally make certain that the information provided to both competent authorities is consistent and free of conflicts. A taxpayer will generally not itself provide information connected with a MAP request directly to the competent authority of the other Contracting State. Rather, the competent authority of the State of residence will typically provide such information to the competent authority of the other Contracting State, under the authority of Article 26 (Exchange of Information) and as part of the bilateral procedures developed for the conduct of the MAP.

153. Circumstances may arise, however, where a taxpayer is involved in the preparation of information that is provided separately to both competent authorities. For example, where a MAP request regards a transaction with a related party in the other Contracting State, and the related foreign party itself makes a MAP request to the other competent authority, the taxpayer may often be involved in the preparation of information or documents that are presented to the other competent authority.

154. Competent authorities may permit taxpayers to present briefs or make presentations to both competent authorities as part of the MAP process. The material presented may in some cases also include taxpayer proposals for the resolution of a MAP case. Providing taxpayers with appropriate opportunities to present relevant information may help both competent authorities to reach a common understanding of the facts and issues, especially in particularly complex MAP cases, and thereby improve the functioning of the MAP.

155. In general, taxpayers have no further direct involvement in the consultation between the two competent authorities. Many Contracting States regard MAP consultations as a confidential, government-to-government process in which taxpayer participation would be barred or otherwise inappropriate.

156. In addition, the MAP is a bilateral process in which both parties share common interests: the resolution of international double taxation and the correct interpretation and application of the tax treaty. A taxpayer's main interest, in contrast, will generally be to minimize, over time, its worldwide tax liability. Direct taxpayer involvement in competent authority negotiations could thus reasonably be expected to extend or distort the MAP process.

157. Even though a taxpayer will usually not be directly involved in MAP discussions, the competent authority to which its MAP request was submitted should regularly communicate with the taxpayer regarding the status of its case and the relevant consultations. Such communications may encourage taxpayer cooperation with the MAP (for example, the prompt submission of additional information or documentation, when necessary) and should also improve the overall transparency of the MAP process.

2.4.5 How does the competent authority analyse and evaluate a MAP case?

158. A competent authority's evaluation of a MAP case will usually begin when the competent authority receives the taxpayer's MAP request and the supporting documentation. As discussed above, the competent authority must first make a threshold determination whether it will accept the case for MAP consideration. The competent authority then evaluates the procedural situation of the case and the scope of the relief potentially available to the taxpayer. Following these first steps, the competent authority proceeds to a substantive analysis of the facts and issues presented in the MAP request.

159. Where the competent authority is able to resolve the MAP case unilaterally, there is, of

course, no need to involve the competent authority of the other Contracting State.

160. Where, on the other hand, it is necessary to initiate bilateral consideration of the case in the MAP, the competent authorities of both Contracting States must necessarily conduct their own substantive analyses. For this purpose, it is of fundamental importance that both competent authorities are working with the same set of facts.

161. The competent authority that initiates the MAP consultation process should provide the other competent authority with all of the relevant facts and information submitted by the taxpayer with the MAP request. Taxpayer involvement (for example, in the form of a presentation to both competent authorities) may also assist the competent authorities in arriving at a common understanding of the facts. Once the competent authorities agree on the facts of a MAP case, their analysis will turn to the proper interpretation of the tax treaty and its application to the taxpayer's facts.

162. The end result of each competent authority's analysis is a reasoned and principled position on how the MAP case should be resolved. Each competent authority should be prepared to articulate in a clear manner the domestic law basis for any relevant tax administration's action taken with respect to the taxpayer and, more importantly, how such action is consistent with the terms of the tax treaty.

163. The key point of reference for purposes of the competent authorities' analysis is the body of law that the two Contracting States have in common: the tax treaty itself; any agreed-upon memorandum of understanding or joint technical explanation of the treaty; and any relevant model tax treaties (such as the UN Model), together with their commentaries.

164. Although the specific manner in which each competent authority presents its respective position will be determined by the bilateral procedures developed by the Contracting States for the implementation of the MAP, at least one of the competent authorities will typically prepare a position paper setting forth its analysis and conclusions.

2.4.6 How do the competent authorities interact in a MAP case?

165. How the competent authorities interact in a MAP case is for the most part determined by the specific bilateral procedures they develop to carry out their MAP function. Article 25 of the UN Model does not provide guidance on how MAP consultations should be conducted although, as noted above, paragraph 4 of Article 25 directs the competent authorities of the Contracting States jointly to develop appropriate bilateral procedures to implement the MAP.

166. Article 25 provides considerable latitude to the Contracting States to create a procedural framework for the MAP that takes into account their specific circumstances and preferences. The Commentary on Article 25 of the UN Model contains the following useful discussion in this regard:

> 36. The competent authorities will have to decide how their consultation should proceed once that part of the procedure comes into operation. Presumably, the nature of the consultation will depend on the number and character of the cases involved. The competent authorities should keep the consultation procedure flexible and leave every method of communication open, so that the method appropriate to the matter at hand can be used.
>
> 37. Various alternatives are available, such as informal consultation by telecommunication or in person; meetings between technical personnel or auditors of each country, whose conclusions are to be accepted or ratified by the competent authorities; appointment of a joint commission for a complicated case or series of

cases; formal meetings of the competent authorities in person etc. It does not seem desirable to place a time limit on when the competent authorities must conclude a matter, since the complexities of particular cases may differ. Nevertheless, competent authorities should develop working habits that are conducive to prompt disposition of cases and should endeavour not to allow undue delay.

167. As noted in paragraph 42 of the Commentary on Article 25 of the UN Model, the competent authorities should make public, in as complete a manner as possible, the procedures they have adopted for the conduct of the mutual agreement procedure.

168. The framework for the MAP consultation in a specific case is typically provided by a position paper prepared by one of the Contracting States. As already explained, a position paper is a document that sets out a detailed description of the relevant facts and issues, frames the questions to be resolved, and presents reasoned proposals for their resolution.

169. The position paper will generally be prepared by the competent authority of the Contracting State that took the action(s) that led to the taxation that the taxpayer alleges to be contrary to the treaty, regardless of the competent authority to which the taxpayer made its MAP request. The preparation and transmission of position papers is generally regarded as a matter of priority because of their important role in facilitating meaningful MAP discussions - and thus the timely resolution of a MAP case.

170. A position paper should generally contain the following relevant information:

1. The name, address, and taxpayer identification number (if any) of the taxpayer making the MAP request and of related persons in the other Contracting State (if relevant), and the basis for determining the association;

2. Contact information for the competent authority official in charge of the MAP case;

3. A summary of the issue(s) presented, the relevant facts, and the basis for the tax administration action that is the subject of the MAP request;

4. The taxation years or periods involved;

5. The amount of income and the relevant tax for each taxable year, if applicable;

6. A complete description of the issue(s) presented, the relevant tax administration actions and adjustments, and the relevant domestic laws and treaty articles;

7. To the extent relevant and appropriate, calculations and supporting data (which may include financial and economic data and reports relied upon by the tax administration, as well as relevant taxpayer documents and records); and

8. For transfer pricing cases,[21]

    (i) An analysis of characteristics of property or services, of functions and risks, of contractual terms, of economic circumstances and of business strategies;

    (ii) An outline of comparable transactions and methods of adjusting for differences, if relevant;

[21] Where the volume of a taxpayer's transfer pricing documentation is large, a competent authority may determine that a description or summary of the relevant documentation is acceptable.

(iii) A description of the methodology used to make the adjustment(s); and

(iv) An explanation of the choice of the methodology used to make the adjustment(s), including why the tax administration believes the methodology chosen is best-suited to achieve an arm's length result; identification of the tested party, if applicable; and an industry and functional analysis (to the extent that the relevant studies are not included in taxpayer documentation required to be prepared under the domestic legislation of the taxpayer's State of residence).

171. Following its review of the position paper, the other competent authority may request additional information and/or clarification with respect to the information presented.

172. In addition, depending on the complexity of the issue(s), the other competent authority may itself prepare a rebuttal or response paper. The written exchange of positions may help to focus the competent authorities on the precise area(s) of disagreement and thereby make their MAP consultations more productive.

173. Where the other competent authority prepares a rebuttal or response paper, the paper may be most useful if it contains the following information:

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

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

3. Requests for any required additional information or clarification;

4. Other or additional information considered relevant to the case but not presented in the initial position paper; and

5. Alternative reasoned proposals for resolution.

174. In practice, competent authorities may conduct their discussions and consultations using many different means, including letters, facsimiles, electronic mail, telephone and video conferences, and face-to-face meetings.

175. Face-to-face meetings may in many circumstances be the most effective manner to reach a resolution in a MAP case because they oblige each competent authority to develop and present a reasoned position by a set deadline. They may also foster a more candid and collegial discussion. The effectiveness of face-to-face meetings is further enhanced when such meetings involve competent authority officials who are themselves authorized to resolve MAP cases.

176. Of course, Contracting States must determine how best to conduct their MAP consultations in the context of their bilateral relationship, taking into account factors such as the specific characteristics and experience of each competent authority, available resources, and the expected MAP caseload. Regardless of the means of consultation chosen, competent authorities should be encouraged to maintain open lines of communication throughout the MAP process, with a view to clarifying issues and facts and thereby moving MAP cases to resolution with all possible speed.

177. In some circumstances, the competent authorities may wish to memorialize the bilateral procedures they develop for the conduct of the MAP in the form of a memorandum of understanding (MOU) or other published guidance. This guidance may be broadly applicable (for example, establishing general objectives or timelines for all MAP cases) or concern a specific sub-set of MAP cases (for example, clarifying documentation requirements for transfer pricing cases).

178. MOUs promote a consistent approach to MAP cases and advance the MAP process, especially where they free the competent authorities to focus on substantive (rather than procedural) issues or provide guidelines for further process improvements. In addition, the publication of MOUs or other similar guidance enhances transparency and improves taxpayer understanding of the MAP process.

2.4.7 What happens when the competent authorities reach an agreement?

179. As noted above, when the competent authorities reach agreement in a MAP case, they will typically memorialise its details in a written summary describing the method of relief, the extent to which each Contracting State will provide relief, the timing of relief, and any other details.

180. The relevant competent authority - that is, the competent authority to which the taxpayer presented its MAP request - then notifies the taxpayer that a MAP agreement has been reached and explains the details of the MAP resolution.

181. A competent authority must determine for itself the manner in which it informs a taxpayer that a MAP agreement has been reached, as well as the level of detail provided in its explanation of the proposed resolution. The summary of the MAP agreement provided to the taxpayer may typically take the form of a closing letter and/or an oral presentation in the context of a closing meeting. Regardless of the method chosen, the competent authority should ideally explain to the taxpayer the rationale for the MAP resolution.

182. Once presented with the terms of the agreement reached in the MAP, the taxpayer may have the option to accept or reject the MAP resolution.[22]

183. Although taxpayers may often be permitted to reject a MAP agreement, they are generally not permitted to accept the MAP agreement only in part - that is, only with respect to certain issues or certain taxable periods - unless both competent authorities agree to such a partial acceptance. Particularly in more complex cases, it may be unacceptable to the competent authorities to separate a MAP resolution into its component parts, given that the resolution, as a whole, represents a series of compromises and concessions by both competent authorities based on the totality of the facts and circumstances.

184. Where the taxpayer accepts the MAP resolution, such acceptance must typically be communicated to the competent authority in writing. The relevant competent authority may also ask the taxpayer to withdraw formally any domestic objections that were suspended or put on hold pending the outcome of the MAP process and/or to agree not to pursue any other forms of relief with respect to the same issue(s) and taxable period(s).

185. The competent authorities' initial summary record is then generally followed by an exchange of letters formalising the MAP agreement. Depending on the specific procedure developed between the two competent authorities, this exchange of letters may occur before, or following, the taxpayer's acceptance of the terms of the MAP resolution.

186. In all cases, the exchange of letters should ideally occur shortly following the conclusion of the MAP discussions. This will assure that the letters accurately reflect the competent authorities' agreement. Then, as discussed below, the competent authorities will arrange as appropriate to give effect to the MAP agreement in their respective jurisdictions.

187. Where the taxpayer rejects the MAP resolution, the competent authorities may consider the

[22] See the discussion of the effect of invoking the MAP in section 2.4.3 above.

case closed. At this point of the MAP, the competent authorities may also determine that it is appropriate to consider any alternative proposal(s) for resolution presented by the taxpayer before the MAP case is definitively closed.

188. The competent authority to which the MAP request was submitted should formally advise a taxpayer that has rejected a MAP resolution when its MAP case has been closed. To the extent that the taxpayer has taken steps to protect its rights to seek relief in a domestic court or administrative appeals process, the taxpayer may then proceed to avail itself of those procedures. There is, of course, no guarantee that any domestic law recourse procedure will relieve international double taxation or otherwise resolve the issue(s) that prompted the MAP request in a taxpayer-favourable manner.

189. In some circumstances, a competent authority agreement in an important area may reasonably be considered to provide a more general indication of the Contracting States' views on a particular issue. Paragraph 43 of the Commentary on Article 25 of the UN Model advises that competent authorities should develop appropriate procedures to publish such determinations (keeping in mind the need to maintain the confidentiality of taxpayer-specific information).

190. The MAP is most likely to produce an agreement that is susceptible to providing public guidance when the matter resolved is a general question of interpretation or application (that is, a case described in the first sentence of Article 25(3)). Such a MAP agreement might concern, for example, the definition of a term used in the treaty, or a process used to apply the treaty (for example, a certification process used to determine whether a person is a resident of a Contracting State or otherwise entitled to the benefits of the treaty).

191. In the majority of MAP cases, however, the agreement reached by the competent authorities is based on a taxpayer's specific facts and circumstances and is generally not intended to establish a precedent, whether with respect to other taxpayers or even with respect to the same taxpayer in different taxable years. In practice, the letters exchanged by the competent authorities to formalise a MAP agreement may often contain an express Statement that the agreement has no precedential value.

2.4.8 How is relief implemented?

192. Following the competent authorities' exchange of letters and the taxpayer's acceptance of the MAP agreement, each competent authority must take the appropriate steps to implement the relief provided for in the MAP agreement, pursuant to the authority granted by Article 25 and any applicable provisions of a Contracting State's domestic law. The implementation of the MAP agreement should take place with all possible speed.

193. The specific steps taken to implement a MAP agreement will, of course, depend upon the nature of the relief to be provided to the taxpayer.

194. In certain MAP cases, implementation of relief may require no more than a refund of tax by one of the Contracting States.

195. For example, a MAP case may concern the proper rate of withholding tax on a dividend, interest, or royalty payment made by a resident of State A to a resident of State B. The competent authorities may agree in the MAP that State A should not have levied withholding tax at the rate provided by State A domestic law, but rather at the lower rate provided in the applicable article of the State A-State B tax treaty. Relief would be provided to the State B resident through a refund by State A of the tax withheld in excess of the rate provided in the treaty.

196. A second example is provided by a permanent establishment case. The competent authorities may agree in the MAP that a State A enterprise did not have a permanent establishment

in State B and, accordingly, that the State A enterprise should not have been subject to State B tax with respect to certain business income, under the business profits article of the State A-State B tax treaty. Relief would be provided to the State A enterprise through a refund of the State B tax on the relevant business income.

197. In other MAP cases, the competent authority of one Contracting State agrees to provide correlative relief with respect to an adjustment initiated by the other Contracting State. Such relief will generally be provided in the first Contracting State through a corresponding adjustment - that is, an adjustment by the first Contracting State that offsets, in whole or in part, the other Contracting State's initial adjustment.

198. For example, assume a State A transfer pricing adjustment that increases the income derived by a State A company from a non-arm's length transaction with a related company in State B. If the State B competent authority agrees through the MAP to provide correlative relief with respect to the State A adjustment, it will typically provide such relief though a corresponding adjustment that decreases the income of the State B company, for the relevant taxable period, in the amount of the State A adjustment. In this context, the State B corresponding adjustment may result in a refund of State B tax.

199. Paragraph 44 of the Commentary on Article 25 of the UN Model provides additional examples of the procedures required to implement different types of MAP relief in connection with a transfer pricing adjustment. If we again assume a State A transfer pricing adjustment that increases the income derived by a State A company from a non-arm's length transaction with a related company in State B, these examples may be illustrated as follows:

(i) State A may consider deferring the tax payment due as a result of its adjustment or even waiving the payment if, for example, payment or reimbursement of an expense charge by the State B company is prohibited at the time because of currency or other restrictions imposed by State B.

(ii) State A may consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. For example, the State B company may be allowed, for State A tax purposes, to establish in its books an account payable in favour of the State A company in the amount of the State A adjustment, and the State A company will not be subject to a second State A tax on the establishment or payment of the amount receivable. The payment of the account receivable by the State B company should also not be considered a dividend by State B.

(iii) State B may also consider steps to facilitate carrying out the adjustment and payment of a reallocated amount. This may, for example, involve recognition of the payment made as a deductible item for State B tax purposes. Such steps are generally a part of the State B correlative adjustment.

200. From a practical standpoint, the implementation of MAP relief will generally require the competent authority to direct the appropriate component of the tax administration to take one or more specific actions with respect to the taxpayer, such the payment of a refund or the adjustment of the amount of tax due from the taxpayer or a related party. How this will occur will depend upon the specific unilateral procedures developed by the competent authority for this purpose, as well as the division of responsibilities and functions within the tax administration.

201. Paragraph 2 of Article 25 of the UN Model provides that any agreement reached through the MAP shall be implemented notwithstanding any time limits in the domestic law of the Contracting States, such as time limits relating to adjustments of assessments and tax refunds.

202. In practice, however, the domestic laws of certain Contracting States may limit the ability

of the competent authority to implement MAP relief in disregard of domestic law time limits. As a result, some tax treaties do not contain a provision similar to the second sentence of Article 25(2).

203. Some tax treaties may, for example, provide that MAP relief will only be implemented to the extent consistent with domestic law time limits. Certain other tax treaties provide that a Contracting State will be obliged to implement a MAP agreement after a domestic law time limit has passed only if the Contracting State has been notified of the MAP case within a specified time period (for example, within a specific number of years from the end of the relevant taxable period).

204. In light of these potential differences from the UN Model, taxpayers should pay close attention to the relevant language of the applicable tax treaty and timely take all protective measures required to preserve the possibility of MAP relief in both Contracting States.

205. Because treaty-based or domestic law time limits may limit the effectiveness of the MAP, it is also helpful for a competent authority to remind the taxpayer when its MAP request is accepted of any time limits for the implementation of MAP relief that are applicable in the taxpayer's specific case. In any case, the overly strict interpretation of such time limits is seen by many countries as contrary to the spirit of the MAP.

2.4.9 What is the recommended timeline for the MAP?

206. The time required to complete a MAP case will depend on a number of factors, including the complexity of the case, the resources available to the competent authorities, and their overall caseloads. In general, however, most competent authorities will endeavour to complete a MAP case within three years of the date of its acceptance. It should also be noted that the time required to complete a case may be longer between countries using different languages because of the necessity of translation. In order to alleviate such difficulty, the CAs are encouraged to use a common language in all communication that do not legally require the formal use of an official language by one or both States. The following table illustrates an ideal timeline for a typical Article 25(1) MAP case:

Action			
Taxpayer	***State A Competent Authority (Taxpayer's State of Residence)***	***State B Competent Authority***	***Target Time Frame or Deadline***
	STAGE ONE		
• Submit MAP request to State A Competent Authority (CA). • If a transfer pricing case, Taxpayer (or the associated enterprise in State B) is encouraged to contact State B CA and to provide it with the relevant details of the MAP request.			Under Article 25(1) of the UN Model: "within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention"
	• Confirm receipt of MAP request.		Within one month of Taxpayer's submission of the MAP request to State A CA.
	• In transfer pricing cases, Advise State B CA of MAP request[23].		Within three months of Taxpayer's submission of the MAP request to State A CA.
	• Preliminary review of MAP request. • Where necessary, request additional information from Taxpayer.		Within four months of Taxpayer's submission of the MAP request to State A CA.

[23] Early consideration of transfer pricing cases by State B CA may facilitate the progress of stage two of MAP.

	• Determine whether MAP request will be accepted. • If case accepted, determine whether unilateral relief is possible and appropriate. • Notify Taxpayer whether MAP request will be accepted and whether unilateral relief is possible and appropriate. • In transfer pricing cases, inform State B CA that MAP request is not accepted or that unilateral relief is possible and appropriate.		Within three months of Taxpayer's submission of all information required by State A CA to determine whether the MAP request will be accepted and whether unilateral relief is possible and appropriate.
	STAGE TWO		
	• If no unilateral relief possible, propose to State B CA to initiate MAP discussions - issue opening letter to State B CA and communicate all relevant information in order to allow State B CA to examine the case.		Within three month of the notification to the taxpayer that MAP request is accepted and unilateral relief is not possible and appropriate.
		• Confirm receipt of State A CA request to initiate MAP discussions. • Preliminary review of MAP request. • Where necessary, request that State A CA obtain additional information from Taxpayer.	Within one months of State B CA's receipt of State A CA's opening letter.

		• Notify State A CA whether request to initiate MAP discussions is accepted.	Within three months of State B CA's confirmation
	If State B CA agrees to MAP discussions, the CA of the Contracting State that initiated the adjustment or, in the absence of an adjustment, of the Contracting State the taxation of which is considered not in accordance with the Convention (whether State A CA or State B CA) analyses and evaluates the MAP case and prepares a position paper for the other CA.		Within six months of State B CA's agreement to enter into MAP discussions.
	• Review of MAP case by the other CA. • Where necessary, the other CA may request that the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention, provide additional information or explanation. • Determination by the other CA whether unilateral relief is possible and appropriate. • Where appropriate, preparation of rebuttal paper or other response to the position paper by the other CA.		Within six months of the other CA's receipt of the position paper prepared by the CA of the Contracting State that initiated the adjustment or, in the absence of adjustment, of the Contracting State where the taxation is considered not in accordance with the Convention.
	Negotiation between State A CA and State B CA.		
	STAGE THREE		
	• MAP agreement between State A CA and State B CA. • Memorialise MAP agreement in summary record.		Within 36 months of the acceptance date of Taxpayer's MAP request by State A CA. Within one month after MAP agreement has been memorialised.
	• Notify Taxpayer that MAP agreement has been reached and explain its terms. • Where relevant, request that Taxpayer indicate whether it accepts MAP agreement.		

Notify State A CA whether it accepts the MAP agreement.			Within one month of notification of the MAP agreement.
	If Taxpayer accepts the MAP agreement, State A CA and State B CA confirm and formalise MAP agreement through exchange of letters.		Within one month of the Taxpayer's acceptance of the MAP agreement.
	Implementation of the MAP agreement.		No later than three months after the exchange of letters formalising the MAP agreement.

207. Throughout the consideration of a MAP case, the competent authority that received the MAP request may consider it a useful practice to provide periodic, informal status updates to the taxpayer.

208. It may also be valuable for the competent authorities to advise each other on a regular basis (for example, every three months) of their progress on a MAP case. Such updates should keep both competent authorities focused on the details of the case and its overall progress, and should thereby facilitate its timely resolution.

209. Requests for additional information or clarification (whether competent authority-to-taxpayer or competent authority-to-competent authority) should not, however, be deferred until these periodic MAP case status updates. Such requests should be made as soon as practically possible, given that delays in receiving additional information or clarification may delay the substantive consideration (and thus the resolution) of a MAP case.

210. As discussed above, the framework for analysis and discussion in a MAP case is generally provided by a position paper. In most contexts, it is considered realistic and appropriate for the position paper to be prepared by the responsible competent authority within four to six months of the latter of (i) receipt of a complete submission of all relevant information, or (ii) notification by the other competent authority that it agrees to discuss the case in the MAP.

211. It is similarly reasonable to expect the other competent authority to complete its evaluation and response (if any) to the position paper within six months of its receipt of the position paper.

212. If it is not possible for a competent authority to respect this timetable for the preparation or review of the position paper, the relevant competent authority should timely advise its counterpart of the reasons for the delay and provide a projected timeframe for completion. Of course, the competent authorities should endeavour promptly to raise, and respond to, supplementary questions that arise during the review of the position paper, in order to clarify any issues before their formal MAP negotiations.

213. More generally, the competent authorities should endeavour to exchange all relevant information well in advance of their meetings. Where both competent authorities have adequate time prior to a meeting to review the materials and to consider fully the case and issues, the competent authorities can make the most effective use of their meeting time and the MAP consultations will be more productive.

214. Certain MAP cases will not be resolved within three years of the date of their acceptance

(or any other similar deadline determined or recommended by the Contracting States). Delays may arise where a taxpayer does not timely provide necessary information or where a MAP case is particularly complex.

215. In circumstances in which a MAP case is not resolved by a generally applicable deadline, the competent authorities may agree to continue their discussions, to extend the time frame for discussion and resolution, or take other appropriate action, which may include invoking alternative dispute resolution procedures such as arbitration or mediation.

216. It may also be advisable for senior competent authority officials to review such MAP cases to determine the causes of the delay and to agree on any necessary steps to move these cases forward to resolution. Such review may also permit the competent authorities to identify more general issues with the handling of MAP cases and areas where broader improvements may be made to their MAP programs. In addition, the competent authorities should maintain a list of their MAP caseload in which each case is included and each action taken in relation to the case is indicated with the date on which the action occurred. Such a list provides competent authorities, especially those that handle a large number of cases, a general view of the progress made and the delays incurred with respect to all the cases.

2.4.10 What is the relationship between the MAP and domestic law penalties, interest, and collections?

217. Contracting States may have different views on whether a tax treaty applies with respect to interest and penalties on a tax adjustment that is the object of a MAP request. Contracting States may similarly take different positions with respect to whether their domestic collection procedures should apply to tax adjustments that are the object of MAP discussions.

218. As with many other areas of the MAP, Article 25 of the UN Model is silent on these issues. Contracting States must accordingly reach their own conclusions regarding the interaction of the MAP and the relevant domestic law provisions. The Contracting States should also ideally discuss these issues in the context of their tax treaty negotiations and/or during their development of bilateral procedures for the conduct of the MAP.

219. In certain circumstances, a Contracting State may take the position that interest and penalties are outside the scope of a tax treaty because they are not expressly referred to in the treaty. In such a case, the Contracting State may conclude that its competent authority cannot or should not waive or otherwise consider interest and penalties as part of the MAP.

220. A Contracting State's views on the relationship between the MAP and domestic law penalty provisions may also depend on the nature of a specific penalty. Certain penalties - for example, a penalty for failure to maintain proper transfer pricing documentation - may concern domestic law compliance issues that are outside the scope of the MAP and the tax treaty. The competent authority may as a result be unable or unwilling to discuss them in the MAP.

221. In contrast, other penalties (such as certain transfer pricing penalties) may be linked to the amount of an adjustment that is itself the object of a MAP request. In a case in which a Contracting State that has applied such a penalty agrees in the MAP to reduce the amount of the underlying adjustment, that State should appropriately reduce the amount of the penalty, regardless of its view as to whether the treaty covers penalties.

222. Some Contracting States may also be willing to provide relief from penalties through the MAP even where the adjustment that gave rise to the MAP is fully or partially sustained in the MAP. A Contracting State may feel that such relief is appropriate, for example, if it appears after MAP review that the application of the penalty is no longer justified.

223. Differences between domestic law provisions on the accrual of interest on tax liabilities and refunds may create other issues for the MAP. Even if the MAP eliminates the international double tax that was the object of the MAP request, the taxpayer may still suffer a significant and equivalent economic burden if there are asymmetries with respect to how interest accrues on tax liabilities and refunds in the two Contracting States.

224. For example, a MAP agreement may often result in an additional tax liability in one Contracting State and a corresponding refund of tax in the other Contracting State. In a scenario in which the first Contracting State charges interest on the tax deficiency (or collects tax prior to the MAP resolution) and the second Contracting State does not pay interest on the amount refunded to the taxpayer, this may result in a substantial economic burden on the taxpayer.

225. In light of this burden, it is desirable for Contracting States to adopt flexible approaches to provide for relief of interest in the MAP, where they consider that their competent authorities are permitted to do so and where such relief is appropriate. Some Contracting States may feel that relief from interest is especially appropriate for the period in which the taxpayer is in the MAP process, given that the amount of time it takes to resolve a case through the MAP is, for the most part, outside the taxpayer's control. In many cases, however, changes to the domestic law of a Contracting State may be required to permit the competent authority to provide interest relief.

226. Contracting States should also consider how their collection procedures will apply with respect to a tax adjustment that is the object of a MAP request. Some countries consider providing for the suspension or deferral of the requirement to pay a tax liability and/or collection action to be a best practice for tax administrations.

227. There are a number of reasons why a suspension or deferral of collection procedures may be considered a desirable and appropriate policy. As a threshold matter, requiring a taxpayer to pay a tax assessment as a condition to request MAP assistance with respect to the tax that is being assessed is viewed by some countries as inconsistent with the goal of making the MAP broadly accessible.

228. A requirement to pay tax prior to a MAP resolution may also impose significant costs on a taxpayer. Even where the competent authorities eliminate double taxation through the MAP, the taxpayer will still lose the time value of any amounts that are ultimately refunded to it in the common case in which there are asymmetries between the interest policies of the two Contracting States involved. In addition, even where the economic burden of the taxpayer's pre-MAP tax payment is removed, the taxpayer may face significant cash flow burdens connected with the payment that are inconsistent with the tax treaty goal of promoting cross-border trade and investment.

229. As in the case of interest relief, changes to the domestic law of a Contracting State may be required to permit the competent authority to suspend or defer the payment of tax and/or collection action.

2.5 Other MAP programs: Advance Pricing Arrangements

230. Advance Pricing Arrangements (APAs) are an additional important component of the MAP program in many Contracting States. The implementation and promotion of APA programs is seen by many jurisdictions as a desirable goal given the certainty they provide to both taxpayers and tax administrations and because they offer a cost-effective method to reduce the number of future transfer pricing disputes.

231. An APA is a bilateral agreement through which the tax authorities of two Contracting States determine, upon application by the taxpayer and in advance of the relevant taxable period,

the tax consequences in both States of specific related party transactions and/or activities. In an APA, the competent authorities prospectively agree on a transfer pricing methodology and its application to identified non-arm's length transactions and/or activities, with the objective of avoiding the potential international double taxation that may often arise in transfer pricing cases.

232. Of course, an APA will only be available to a taxpayer if a Contracting State has instituted an APA program. As with many other aspects of the MAP, Article 25 of the UN Model is silent with respect to APAs. A Contracting State that wishes to establish an APA program must accordingly develop its own procedures for the conduct of the APA program.

233. As an initial matter, a Contracting State that institutes an APA program must determine how a taxpayer requests an APA, including, for example, the format of an APA request and related documentation requirements. The Contracting State must also determine how APA requests will be processed, and, more generally, how its APA program will be administered. This information and other guidance should be made readily available to the public to promote transparency and to encourage taxpayer use of the APA program.[24]

234. Contracting States must also jointly determine how bilateral APA negotiations will be conducted. The generally applicable MAP procedures may provide some guidance in this regard, but certain modifications or adaptations may be appropriate in light of the unique characteristics and complexity of transfer pricing cases. In particular, in developing bilateral procedures for APA negotiations, the Contracting States should take into account the specific requirements of their domestic transfer pricing laws, including, for example, their requirements with respect to documentation.

235. Although APA negotiations are conducted pursuant to the general authority of the MAP article, the Contracting States must also determine the interaction of their domestic laws with an APA. A Contracting State should clarify the legal effect of an APA under its domestic law, preferably in the public guidance promulgated with respect to its APA program. A Contracting State should also examine whether changes to its domestic law are necessary to implement an APA program, which may include an examination of issues such as the scope of the competent authority's legal authority and the ability of a tax administration to enter into an agreement with a taxpayer with respect to prospective tax liabilities.

2.6 Resolving issues that may prevent a mutual agreement

236. Given the scope and complexity of the issues that a tax treaty must address, Contracting States will inevitably have occasional differences of view on how the treaty should be applied in specific cases. Alternative B of Article 25 seeks to address situations where such differences would otherwise prevent an agreement. The Commentary on paragraph 5 of that alternative as well as the Annex on that Commentary contain useful guidance to implement the arbitration process provided for in the alternative.

[24] One example of comprehensive taxpayer guidance on the domestic conduct of an APA program is provided in the case of the United States by Revenue Procedure 2006-9, 2006-2 C.B. 278 (January 9, 2006; available at http://www.irs.gov/pub/irs-drop/rp-06-9.pdf.