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## **Critical Evaluation of Action 14 Recommendations and the Suggested Way Forward for Singapore**

Luis Coronado

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CRITICAL EVALUATION OF ACTION 14  
RECOMMENDATIONS AND THE SUGGESTED  
WAY FORWARD FOR SINGAPORE

(Updated as of 31 December 2016)

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**Abbreviations:**

APA	Advanced Pricing Agreement
BEPS	Base Erosion and Profit Shifting
BEPS report(s)	Final reports issued by the OECD on BEPS on 5 October 2015
CFA	Committee on Fiscal Affairs
DGT	Directorate General of Taxation, Indonesia
ECOFIN	Economic and Financial Affairs Council
EU	European Union
FTA MAP Forum	Forum on Tax Administration for Mutual Agreement Procedures
G20	Group of 20 (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, México, Russia, Saudi Arabia, South Africa, Korea, Turkey, the United Kingdom, United States and European Union)
ICDR	International Centre for Dispute Resolution
IRAS	Inland Revenue Authority of Singapore
IRB	Inland Revenue Board, Malaysia
IRS	Internal Revenue Service, US
JTFP	Joint Transfer Pricing Forum
KPI	Key Performance Indicator
MAP	Mutual Agreement Procedure
MoF	Ministry of Finance
MTC	Model Tax Convention
NTS	National Tax Service, Korea
OECD	Organisation for Economic Co-operation and Development
Para	Paragraph
Proc.	Procedure
SARS	South African Revenue Service
SAT	State Administration of Taxation, China
UN	United Nations
US	The United States of America

## 1. Introduction

On 5 October 2015, the Organisation for Economic Co-operation and Development (OECD) released its final report on improving the effectiveness of dispute resolution mechanisms (Action 14) as part of the package that included final reports on all 15 BEPS actions.

The Action 14 report, *Making Dispute Resolution Mechanisms More Effective* (the report on Action 14) presents a commitment by countries to implement certain “minimum standards” on dispute resolution, according to the OECD. In many ways, Action 14 is the linchpin to the success of the entire BEPS project. To implement the significant changes developed under the BEPS and make certain that there is neither unintended double taxation nor double non-taxation, there must be strong and effective mechanism in place when disputes do (inevitably) arise. While the goal of the BEPS project is to create a more cohesive international tax framework, it would be naïve to assume that governments will suddenly stop having disagreements over how a particular transaction should be taxed or how a treaty provision should be applied. Indeed, we could see more disputes if countries do not implement the BEPS recommendations in their domestic law in a broadly consistent manner. Therefore, it is of utmost importance that the implementation of the suggested BEPS proposals is complemented by stronger and more efficient dispute resolution mechanism to ensure certainty for businesses.

In the first part of our research, we have provided an overview of the existing MAP process in Singapore and the experiences around it. We have further provided an overview of the MAP process in selected Asian countries (Japan, China, Korea, Indonesia and Malaysia), as well as the US and European countries as a whole. In the following, we have provided an overview of the minimum standards according to Action 14, which should be implemented by all the countries that are signatories to the BEPS. This is followed by a gap analysis vis-à-vis the existing MAP process in Singapore and the selected Asian countries. We then describe the best practices, which are not mandatory but would be recommended according to the report on Action 14, followed by a further gap analysis vis-à-vis the existing MAP process in Singapore and the selected Asian countries.

We have also discussed arbitration as recommended under Action 14 including an overview of the already existing arbitration systems. This section also seeks to analyse the practical experience of arbitration in other countries and evaluates arbitration as an additional dispute resolution mechanism for Singapore.

Finally, we analyse implications of the multilateral instrument developed as part of Action 15 and the joint audit as an alternative dispute resolution mechanism.

## 2. MAP process in selected countries

In this section, we have provided an overview of the existing MAP process in Singapore, selected Asian countries as well as Europe (in general) and the US. With regards to the existing treaty network of these countries, we have provided comments on whether these countries have implemented articles corresponding to Article 9 and 25 of the OECD Model Tax Convention (MTC) in their tax treaties. We also referred to the MAP process implemented in the domestic tax law and analysed whether these countries have already established arbitration as an additional way of resolving disputes where MAP does not result in resolution.

### 2.1 Singapore and selected Asian countries

#### i. Singapore

Singapore is not an OECD member but is a member of the Forum on Tax Administration for Mutual Agreement Procedures (FTA MAP Forum) and insofar fully participates in its work. On 16 June 2016, Singapore announced that it would join the inclusive framework<sup>1</sup> for the global implementation of the OECD BEPS project as a BEPS Associate.<sup>2</sup> As a BEPS Associate, Singapore works with other jurisdictions to help develop the implementation and monitoring phase of the BEPS project. As a participant at the OECD's Committee on Fiscal Affairs since 2013, Singapore has been active in providing input to the design of the BEPS project. Singapore has also worked with the OECD and G20 to ensure that the new framework for implementing the BEPS project is inclusive. Singapore has also played a key role as part of the Global Forum on Transparency and Exchange of Information. Mrs. Chia-Tern Huey Min<sup>3</sup> is the Singapore's representative to OECD's Committee on Fiscal Affairs (CFA). In June 2016, she assumed the role of Chair of the Peer Review Group of the Global Forum on Transparency and Exchange of Information for tax purposes.

Singapore has expressed its commitment to implementing the four minimum standards under the BEPS project, namely, the standards on countering harmful tax practices, preventing treaty abuse, transfer pricing documentation, and enhancing dispute resolution<sup>4</sup>.

#### Tax treaties

Singapore has agreed on MAP in all of its tax treaties and has generally implemented regulations according to Article 25 paragraphs 1 to 3 of the OECD MTC in its tax treaties. However, arbitration (regulation corresponding to Article 25 paragraph 5 of the OECD MTC) is only agreed upon in the tax treaty with Mexico<sup>5</sup>. Nevertheless, there is no established arbitration practice in place and until now Singapore has not had any case of arbitration.

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<sup>1</sup> Under this framework, all state- and non-state jurisdictions that commit to the BEPS project participate as BEPS Associates of the OECD's CFA. BEPS associates have the same rights and obligations as OECD and G20 countries involved in BEPS work. Every jurisdiction that participates in the framework as a BEPS Associate will have an equal voice in reviewing and monitoring the implementation of the BEPS measures.

<sup>2</sup> Press release from Ministry of Finance dated 16 June 2016

<sup>3</sup> Deputy Commissioner (International, Investigation & Indirect Taxes Group)

<sup>4</sup> Press release from Ministry of Finance dated 16 June 2016

<sup>5</sup> Article 25 paragraph 5 of the tax treaty between Singapore and Mexico



The timeline for presenting a MAP case varies in Singapore's tax treaties between two (e.g., tax treaties with Canada, Oman, Philippines) and four and a half years (tax treaty with Mexico) whereby the majority of Singapore's tax treaties provide for a timeline of three years and some do not provide for a special timeline at all (e.g., tax treaties with Australia, Korea and France).

All of the Singapore tax treaties provide for a regulation similar to Article 9 paragraph 1 of the OECD MTC and a majority of those treaties also provide for a regulation similar to Article 9 paragraph 2 of the OECD MTC. MAP access is also granted although the underlying tax treaty does not provide for a regulation in accordance with Article 9 paragraph 2 of the OECD MTC.

The tax treaty signed between Singapore and India originally did not have a provision corresponding to Article 9(2) of the OECD MTC which restricted the taxpayers' access to the MAP in transfer pricing cases and bilateral APAs. This was in view of the position adopted by India that MAP or bilateral APA cannot be proceeded with a treaty partner in the absence of a provision corresponding to Article 9(2) of the OECD MTC. However, recently on 30 December 2016, a protocol has been signed between the two countries which seeks to amend inter alia Article 9 of the treaty to add a provision similar to paragraph 2 of Article 9 of OECD MTC opening up the route of MAP and bilateral APAs for taxpayers. The Protocol shall come into effect on the later of date on which India and Singapore notify the same, failing which it shall come into effect from 1 April 2017.

Further, it is likely that Singapore will provide MAP access in case of a disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a treaty or domestic anti-abuse rule have been met.

#### Domestic tax law

From a national tax law perspective, there is guidance on the MAP process available in Singapore, which is outlined in the transfer pricing guidelines of the Inland Revenue Authority of Singapore (IRAS)<sup>6</sup>. Further, it is also possible to resolve the double taxation through a domestic appeal parallel to the MAP. The guidelines outline the MAP process (dispute resolution for past years) and APA (dispute resolution for future years) in the same sections. A roll-back of bilateral and multilateral APA to prior years is in principle possible but generally limited to a period of two fiscal years<sup>7</sup>. Roll-back is not allowed in case of unilateral APAs.

Main characteristics of MAP in Singapore are as follows:

- Types: bilateral agreement between IRAS and a foreign competent authority, multilateral agreement between IRAS and two or more foreign competent authorities
- Objective: Eliminate double taxation, provide tax certainty
- Legal basis: Singapore tax treaties
- Availability: Singapore tax resident taxpayers
- Financial Years: Past fiscal years
- Filing fee: Free of charge<sup>8</sup>

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<sup>6</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, first edition on 23 February 2006

<sup>7</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, point 8.17 and 8.18

<sup>8</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, point 8

The guidelines divide the MAP process into 5 steps<sup>9</sup>:

**Step 1: Notification of intent:** The taxpayer has to inform the IRAS of its intent within the time limit specified in the MAP Article of the tax treaty. The notification to the IRAS should be in writing and include a brief description of the cause and circumstances for double taxation.

**Step 2: First pre-filing meeting:** IRAS meets taxpayer within one month upon receiving the notification of intent. During the pre-filing meeting, the taxpayer further outlines the circumstances and reasons for the MAP whereas the IRAS evaluates whether the MAP request is justifiable and indicates whether they will accept the MAP request. One of the conditions for the acceptance of the MAP is that adequate transfer pricing documentation is available and can be provided to the IRAS.

**Step 3: Submission of MAP application:** The taxpayer submits the application upon IRAS indicating that application can be submitted. The IRAS issues the acceptance letter within one month from receipt of application.

**Step 4: Review & negotiation:** IRAS informs the taxpayer of the MAP outcome within one month from reaching the agreement by the competent authorities.

**Step 5 Implementation:** Taxpayer and IRAS implement the MAP outcome.

The guidelines describe the process in detail and even provide for templates / formats in the appendix for the letter of authorisation<sup>10</sup>, minimum information required for pre-filing meeting<sup>11</sup> etc.

There is no specific timeline mentioned in the guidelines for reaching an agreement. From our practical experience, MAP cases are generally resolved within an average period of 24 months, however this is largely dependent on the complexity of the case.

The guidelines clarify that the MAP and APAs do not deprive taxpayers of other remedies available under the domestic tax law and in case of adjudication through any legal and judicial proceedings while the MAP/APA process is still on-going, the competent authorities will discuss and decide if the MAP/APA process should cease or be suspended. The IRAS can also reject a MAP application or can discontinue with a MAP process if the taxpayer is not cooperative (e.g., the tax payer does not provide necessary information). In case of a rejection of MAP by the IRAS, there is no obligation to inform the other country to comment on the case.

The guidelines do not contain specific regulation regarding the consideration of interest and penalties and the suspension of collection procedures during a pending MAP case.

#### Further aspects

Singapore has just started to publish statistics on its MAP and APA cases. There are no administrative processes in place to publish agreements reached as kind of a best practice.

The official in charge of MAP in Singapore has the authority to resolve MAP cases and is principally not dependent on the approval of the direction of the tax administration personnel who made the adjustments.

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<sup>9</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, point 9.2

<sup>10</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, Annex B1

<sup>11</sup> IRAS e-Tax Guide, Transfer Pricing Guidelines (Third edition), published on 4 January 2016, Annex B2

While the Key Performance Indicators (KPI) of the functioning of MAP officials are not publicly available, these are expected to be based on number of cases solved rather than on the amount of revenue.

## ii. China

China is not an OECD member. However, China is a member of the G20 and FTA MAP Forum and regularly participating in its work.

### Tax treaties

In principle, the Chinese tax treaties follow the OECD MTC paragraphs 1 to 3 of Article 25 in relation to MAP. Chinese tax treaties generally do not include any provisions for arbitration.

China generally provides for MAP access in transfer pricing cases (including cases where the tax treaty does not have a regulation in accordance with Article 9 paragraph 2 of the OECD MTC). It further provides for MAP access in case of a disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a treaty or domestic anti-abuse rule have been met.

Since 2005, China has gradually developed MAP relationship with Japan, the US, Korea, Denmark and several other countries. China conducts regular MAP meetings with Japan, three to five times a year on nearly 10 cases.

### Domestic tax law

According to the report "Mutual Agreement Procedure and Advanced Pricing Agreements: China's Implementation and Application<sup>12</sup>", the legal basis and relevant laws, regulations and implementation rules governing MAP and APA primarily include the following:

- a) Treaty or arrangement for the avoidance of double taxation
- b) The Corporate Income Tax Law
- c) The implementation regulations of the Corporate Income Tax Law
- d) The implementation regulations of tax collection and administration law
- e) The implementation measures of special tax adjustments

China provides for and publishes rules, guidelines and procedures, which are publicly available.

There is no specific timeline mentioned in the tax law for reaching an agreement. From our practical experience, MAP cases are generally resolved within an average period of two years or longer. Further, there are no specific regulations addressing the relationship between MAP and other domestic judicial procedures.

China provides for bilateral APAs and taxpayers can choose to apply a roll-back of an APA to previous years (maximum up to 10 years).

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<sup>12</sup> report.nat.gov.tw/ReportFront/report\_download.aspx?sysId, 2.3 Existing legal basis

There are no specific regulations available regarding the suspension of collection procedures during a pending MAP case. Further, China does not provide for specific regulations regarding the consideration of interest and penalties. However, in practice the Chinese tax authorities refer to the interest provisions for transfer pricing audits.

#### Further aspects

China issues annual reports for APA statistics. For MAP, the State Administration of Taxation, China (SAT) internally issues the statistics regarding the number of MAP cases handled and concluded each year (information is not publicly available). China's MAP cases were included in the MAP Statistics of the OECD for 2013<sup>13</sup> for the first time. Further, there are no administrative processes in place to publish agreements reached as kind of a best practice.

There is a shortage of resources at the SAT level<sup>14</sup>. The SAT has been training up the technical skills of provincial level tax officers. For several provinces / cities with more transfer pricing audit experience, the SAT would rely on the provincial / municipal tax authorities to handle controversy cases.

The officials in charge of MAP in China do not have the authority to resolve MAP cases on their own. There is an approval process in place from the provincial level to the SAT level and also within the SAT. There is no public information available in China about the performance indicators used. The number of cases handled and the amount of tax revenue collected seem to be important considerations.

#### **iii. Japan**

Japan is an OECD member as well as a member of the G20 and FTA MAP Forum and insofar fully participating in its work.

#### Tax treaties

The Japanese tax treaties generally follow the OECD MTC and Japan has generally implemented regulations according to Article 25 paragraphs 1 to 3 of the OECD MTC in its tax treaties. Japan has already introduced MAP arbitration in several tax treaties and has also introduced it into its national law<sup>15</sup>. On 22 January 2016, representatives of Japan and Chile signed an income tax treaty and protocol. The treaty reflects the provisions in the OECD MTC as well as recommendations in the OECD final reports on BEPS including inter alia the provisions of mandatory arbitration under Article 25. Japan also signed a revised income-tax treaty with Germany in December 2015, which includes certain recommendations of the BEPS including inter alia the provisions of mandatory binding arbitration.

The majority of Japan's treaties contain time limits for the presentation of a MAP case. These time limits are also binding from a national tax law perspective<sup>16</sup>.

Japan's DTAs generally provide for a regulation in accordance with Article 9 paragraph 1 and 2 of the OECD MTC in its tax treaties. MAP access is provided even in case a tax treaty does not explicitly refer to a provision corresponding to Article 9 paragraph 2 of the OECD MTC.

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<sup>13</sup> <http://www.oecd.org/ctp/dispute/map-statistics-2013.htm>

<sup>14</sup> [report.nat.gov.tw/ReportFront/report\\_download.aspx?sysld](http://report.nat.gov.tw/ReportFront/report_download.aspx?sysld), 4. Capacity Building Program

<sup>15</sup> Chapter 5 of the Commissioner's Directive on the Mutual Agreement Procedure

<sup>16</sup> Chapter 2, point 4 of the Commissioner's Directive on the Mutual Agreement Procedure

## Domestic tax law

From a domestic tax law perspective, the MAP process is regulated in the Commissioner's Directive on the MAP (Administrative Guidelines). This directive clarifies the procedures with regard to the MAP provided for in tax treaties<sup>17</sup>. The MAP process is described clearly in detail and the underlying rules and guidelines are published and publicly available. Inter alia, it defines examples of cases in which a request for MAP can be made<sup>18</sup>, the pre-filing consultation, including a consultation on an anonymous basis<sup>19</sup> and procedures for requesting for MAP<sup>20</sup>.

Japan may limit the access to MAP based on the argument that the taxpayer fails to cooperate faithfully with the request for submission of documents. Further, Japan has a consultation process in place, in which Japan will inform the other country for its comments in case of a rejection of the MAP application.

There is no specific timeline mentioned in the tax law for reaching an agreement. However, on an average, MAP cases are generally resolved within an average period of 22.4 months<sup>21</sup>.

Japan provides for bilateral APAs as well as a roll-back of such APA up to six previous years.

There is guidance available in Japan on the relationship between the MAP and domestic law administrative and judicial remedies and the taxpayers can request suspension of the MAP proceedings for the reasons such as the applicant giving priority to the administrative appeal / litigation. The guidance also states that the arbitration proceedings can be terminated where a decision on the unresolved issues submitted to arbitration has been rendered by a court or administrative tribunal in Japan or its equivalent in the treaty partner country.

Further, there are specific regulations available regarding the suspension of collection procedures during a pending MAP case but there are no specific regulations available for the treatment of interest and penalties.

An important feature of the Japanese domestic law is the "donation rules<sup>22</sup>", which allows powers to the tax authorities to re-characterise any payments made by a corporation that is a "gift" or gratuitous furnishing" as a donation, which are non-deductible when paid to a non-resident related party and are taxable in the hands of the recipient. It is noteworthy that the Japanese transfer pricing regulations clarify that the transactions falling under transfer pricing rules are also subject to donation rules. This could lead to potential issues even in cases where the Japanese taxpayer earns higher than the arm's length price / margin or earns a price / margin which is different from the contractual price / margin. Further, the donation assessments are not eligible for MAP process under the tax treaty which augments the chances of double taxation in such cases.

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<sup>17</sup> Preamble of the Commissioner's Directive on the Mutual Agreement Procedure

<sup>18</sup> Chapter 2, point 3 of the Commissioner's Directive of the Mutual Agreement Procedure

<sup>19</sup> Chapter 2, point 5 of the Commissioner's Directive on the Mutual Agreement Procedure

<sup>20</sup> Chapter 2, point 6 of the Commissioner's Directive on the Mutual Agreement Procedure

<sup>21</sup> MAP Report 2015 of the National Tax Agency, Japan

<sup>22</sup> Article 37 of Corporation Tax Act

### Further aspects

Japan already provides timely and complete reporting of MAP statistics. However, there are no administrative processes in place to publish agreements reached as kind of a best practice.

There are adequate personnel resources deployed for MAP and APAs. Further, the officials in charge of MAP in Japan have the authority to resolve MAP cases and are in principle not dependent on the approval of the direction of the tax administration personnel who made the adjustments. Although their KPIs are not publicly available, the performance indicators of the officials in charge of MAP in Japan is apparently based on the number of cases solved. It is not based on the amount of sustained audit adjustments or maintaining tax revenue.

#### **iv. Korea**

Korea is an OECD member as well as a member of the G20 and FTA MAP Forum and insofar fully participating in its work.

### Tax treaties

In principle, the Korean tax treaties follow the OECD MTC and Korea has generally implemented regulations according to Article 25 paragraphs 1 to 3 of the OECD MTC in its tax treaties. Korean tax treaties generally do not include any provisions for arbitration. Only the tax treaties with Canada and Chile include a provision for consultation, for which the Council for Trade in Services shall refer the matter to arbitration. However, arbitration has not been introduced into national law though it is currently under discussion.

The vast majority of Korea's treaties contain time limits for the presentation of a MAP case. The time limits can vary from two to four and half years whereby most treaties provide for a time limit of three years. Nevertheless, such time limit is restricted to three years even under the domestic tax law<sup>23</sup>.

Korea's tax treaties generally provide for a regulation in accordance with Article 9 paragraph 1 and 2 of the OECD MTC in its tax treaties. MAP access is also provided in case a tax treaty does not explicitly refer to a rule in accordance with Article 9 paragraph 2 of the OECD MTC.

The earlier treaty Korea signed with India did not have a provision corresponding to paragraph 2 of Article 9, which restricted the taxpayers' access to the MAP and bilateral APA in view of the position adopted by India. However, recently a revised tax treaty has been signed between Korea and India in which the said provision has been added opening up the route of MAP and bilateral APA for taxpayers.

### Domestic tax law

From a domestic tax law perspective, the MAP process is governed by Articles 22-27 of the Act for the Coordination of International Tax Affairs. Detailed information (e.g., which documents need to be filed within the application by the taxpayer<sup>24</sup>) is further outlined in the Presidential Decree of the Act for Coordination of International Tax Affairs. As such, the MAP process is described clearly and in detail and the underlying rules and guidelines are published and publicly available.

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<sup>23</sup> Article 22 paragraph 2 No. 4 of the Act for the Coordination of International Tax Affairs

<sup>24</sup> Article 39 of the Presidential Decree of the Act for the Coordination of International Tax Affairs

Any national, resident or domestic corporation of Korea or any non-resident or foreign corporation having a place of business in Korea may apply for MAP to the Ministry of Strategy and Finance (in case of application and interpretation of a tax treaty) and to the National Tax Service (NTS) (in case of tax assessment not coinciding with a tax treaty and in case where a tax adjustment is needed under a tax treaty<sup>25</sup>). The Ministry of Strategy and Finance as well as the NTS may terminate ex officio the MAP in cases when the taxpayer fails to cooperate faithfully with the request for submission of documents under Article 26 paragraph 1 of the Act for the Coordination of International Tax Affairs.

There is no specific timeline mentioned in the tax law for reaching an agreement. From our practical experience, MAP cases are generally resolved within an average period of two and half years.

Korea provides for bilateral APAs as well as a roll-back of APA to previous years (three years in case of unilateral APA and five years in case of bilateral APA).

Regarding the domestic route of an appeal, a taxpayer is eligible to file an appeal on the tax assessment after the conclusion of the MAP – no matter how long the MAP takes to conclude<sup>26</sup>. In case a MAP is in effect in conjunction with court proceedings, once the court issues the final decision, the court's decision overpowers the MAP. The MAP would end on the date the court decision is issued provided that the MAP is still in progress<sup>27</sup>. On the other hand, if the MAP has been concluded prior to the court's decision, the MAP would be considered to be non-binding once the court decision is issued and if the terms and conditions are different from the MAP outcome.<sup>28</sup>

There are special regulations available regarding the consideration of interest and penalties as well as regarding the suspension of collection procedures during a pending MAP case.

#### Further aspects

Korea's MAP cases are included in the MAP Statistics of the OECD for 2014<sup>29</sup> although Korea has primarily focused on publishing statistics regarding APA. Further, there are no administrative processes in place to publish agreements reached as kind of a best practice.

There are adequate personnel resources deployed in Korea (the former APA team was split into an APA and a separate MAP team). Further, the officials in charge of MAP in Korea have the authority to resolve MAP cases and are in principle not dependent on the approval of the direction of the tax administration personnel who made the adjustments. Although their KPIs are not publicly available, we understand that it is apparently based on the number of cases solved and not on the amount of sustained audit adjustments or maintaining tax revenue.

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<sup>25</sup> Article 22 paragraph 1 of the Act for the Coordination of International Tax Affairs

<sup>26</sup> Article 24 paragraph 1 of the Act for the Coordination of International Tax Affairs

<sup>27</sup> Article 23 paragraph 4 of the Act for the Coordination of International Tax Affairs

<sup>28</sup> Article 27 paragraph 4 of the Act for the Coordination of International Tax Affairs

<sup>29</sup> <http://www.oecd.org/ctp/dispute/map-statistics-2014.htm>

## **v. Indonesia**

Indonesia is not an OECD member. It is however, a member of the G20 and FTA MAP Forum and as such participating in its work on a regular basis.

### Tax treaties

Most of Indonesian tax treaties contain regulations similar to Article 25 paragraph 1 to 3 of the OECD MTC. Indonesian tax treaties do not include any provisions for arbitration except for the treaty with Mexico. Most of the Indonesian tax treaties include provisions similar to paragraph 1 and 2 of Article 9 of the OECD MTC. MAP access is provided even in cases where a tax treaty does not explicitly refer to a rule in accordance with Article 9 paragraph 2 of the OECD MTC.

### Domestic tax law

From a domestic tax law perspective, the MAP guidance has been introduced in the Guidelines for Implementation of MAP dated 22 December 2014<sup>30</sup>. These guidelines aim to renew the existing MAP process. This was in particular important as there were no guidelines on how the Directorate General of Taxation (DGT) was to implement agreements arising from these competent authority negotiations. The new guidelines now reinforce the flexibility for taxpayers to apply for a MAP and to continue domestic resolution at the same time. This includes applying for a tax objection, appealing to the Court, and requesting reduction or cancellation of an incorrect tax assessment. A MAP request can no longer be submitted after the last hearing is concluded by the Tax Court.

According to domestic regulations, MAP cases should generally be resolved within three years. However, based on our practical experience, past Indonesian MAP cases have been pending resolution for several years. Only few cases (with Japan and Korea) have been resolved during the past five years.

Indonesia provides for bilateral APAs as well as a roll-back of APA to previous years (subject to certain conditions). However, an APA does not provide an exemption to the taxpayer from general audits or initial findings audit. Further, there could also be a possible exchange of notes and information between the APA and audit teams.

There are no special regulations regarding the suspension of collection procedures available during a pending MAP case. Rather, the underlying taxes have to be paid in a first place (according to the regular income tax provisions). There are also no special regulations available regarding the consideration of interest and penalties in Indonesia in the course of a MAP case.

### Further aspects

There are no statistics available in public on MAP cases filed and resolved by the competent authorities of Indonesia. Further, there are no administrative processes in place to publish agreements reached as kind of a best practice.

When it comes to adequate personnel resources, it can be stated that the competent authority team is reasonably skilled and they attend trainings provided by the OECD and other organisations. However, given the aggressive nature of tax audits in Indonesia, there are several cases that have now reached the MAP stage, which has made the team a bit stretched. Further, the officials in charge of MAP (Director of

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<sup>30</sup> Regulation of the Ministry of Finance of the Republic of Indonesia Number 240/PMK.03/2014 ("PMK-240")



Tax Regulations II) in Indonesia have the authority to resolve MAP cases. Their KPIs are not publicly available.

#### **vi. Malaysia**

Malaysia is not an OECD member. It is, however, a member of the FTA MAP Forum and as such, it is participating on a regular basis. On 17 November 2015, during the Commonwealth Association of Tax Administrators meeting in Malaysia, the Inland Revenue Board of Malaysia (IRBM) announced that it has set up the BEPS Action Committee to act as the coordinating forum to discuss results from various OECD BEPS meetings, study the implications for domestic law, and provide recommendations to the Government. The IRBM indicated that they are in the process of reviewing current tax legislation in light of the OECD's recommendations. They commented further that not all of the BEPS recommendations may be relevant to Malaysia, but due to the country's reliance largely on corporate income tax, they would closely monitor the relevant BEPS and transfer pricing issues in order to reduce leakages in tax collection.

#### Tax treaties

In principle, the Malaysian tax treaties follow the OECD MTC. In particular, Malaysia has not made any reservations or comments in respect of the MAP article in the OECD MTC and has generally implemented regulations according to Article 25 paragraphs 1 to 3 of the OECD MTC in its tax treaties. Malaysian tax treaties generally do not include any provisions for arbitration.

The majority of Malaysia's tax treaties contain time limits for the presentation of a MAP case (mostly three years). Where the time limit for presenting a case is not specified in the relevant tax treaty, the Malaysian competent authority will follow the time limit specified under Article 25 of the OECD MTC (i.e., three years from the first notification of the action resulting in taxation not in accordance with the provision of the convention).

Most of Malaysia's tax treaties provide for a regulation in accordance with Article 9 paragraph 1 of the OECD MTC and some of them include a provision similar to Article 9 paragraph 2 of the OECD MTC.

#### Domestic tax law

From a domestic tax law perspective, the MAP process is rather new. It has been introduced in the MAP Guidelines dated 5 December 2014. In its introduction, the guideline states that the MAP Article in the Malaysian tax treaties allows the Malaysian competent authority to interact with competent authorities of the treaty partners with the intent to resolve international disputes involving double taxation and inconsistencies in the interpretation and application of a tax treaty. It further allows the Malaysian competent authority to negotiate bilateral APAs and multilateral APAs with competent authorities of the treaty partners<sup>31</sup>. The MAP process is described clearly and in detail and the underlying rules and guidelines are published. In particular, the guidelines define the typical scenarios requiring competent authority assistance (transfer pricing, resident status, withholding tax, permanent establishment and characterisation or classification of income<sup>32</sup>). It further lists details of how the formal request for MAP (or bilateral APA / multilateral APA) should be made (e.g., form of application, addressee, relevant information which needs to be included etc.)<sup>33</sup>. As no arbitration is available in Malaysia until now, the

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<sup>31</sup> IRBM Mutual Agreement Procedure Guidelines, PART I Preliminary, 1. Introduction

<sup>32</sup> IRBM Mutual Agreement Procedure Guidelines, PART III Administration and Procedure, point 5

<sup>33</sup> IRBM Mutual Agreement Procedure Guidelines, PART III Administration and Procedure, point 8

Malaysian competent authority can terminate the MAP when it is recognised that the continuation of MAP will not reach any agreement<sup>34</sup>.

There is no specific timeline mentioned in the tax law for reaching an agreement. Based on our practical experience, MAP cases are generally solved within a period of one to three years depending on the nature of the case.

Further, Malaysia provides for a roll-back of APA to previous years (the rules do not specify the maximum number of years that could be covered under roll-back).

Presenting a case to the Malaysian competent authority to invoke MAP will not deprive a person from its right for appeal under the Malaysian Income Tax Act. However, while the domestic legal remedies are still available, the Malaysian competent authority will require that the taxpayer agrees to the suspension of these remedies if MAP request is accepted<sup>35</sup>.

There are no specific regulations regarding the suspension of collection procedures available during a pending MAP case. Rather, the underlying taxes have to be paid in a first place (according to the regular income tax provisions). Therefore, there are also no specific regulations available regarding the consideration of interest and penalties in Malaysia in the course of a MAP case.

#### Further aspects

There are no statistics available in public domain on MAP cases filed and resolved by the competent authorities of Malaysia. Further, there are no administrative processes in place to publish agreements reached as kind of a best practice. All information obtained / generated during the MAP process is protected by the confidentiality provisions of the Income Tax Act and the provision of the applicable tax treaty.

Adequate personnel resources are available in Malaysia. Further, the officials in charge of MAP in Malaysia have the authority to resolve MAP cases and are not dependent on the approval of the direction of the tax administration personnel who made the adjustments. Although their KPIs are not publicly available, the performance indicators of the staff in charge of MAP in Malaysia are apparently based on the amount of sustained audit adjustments or maintaining tax revenue.

## **2.2 EU**

Most of the tax treaties within the EU also provide for MAP access in accordance with Article 25 paragraph 1 to 3 of the OECD MTC. However, most of them do not provide for arbitration which stipulates the avoidance of double taxation.

Within the EU, an additional procedure applies: the EU Arbitration Convention based on Article 293 of the Treaty on the Foundation of the European Community applicable from 1 January 1995. Such procedure provides for MAP in phase 1 followed by mandatory arbitration in phase 2 (provided no agreement has been reached within the MAP process). All EU Member States are obliged – independent of any

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<sup>34</sup> IRBM Mutual Agreement Procedure Guidelines, PART III Administration and Procedure, point 19.1.6

<sup>35</sup> IRBM Mutual Agreement Procedure Guidelines, PART IV Supplemental, 21. Interaction between MAP and domestic appeal process

regulations according to a tax treaty – to avoid any double taxation in case of profit adjustments by EU Member States<sup>36</sup>. The legal nature of the arbitration agreement is a multilateral agreement.

The procedure according to Article 6 of the EU Arbitration Convention is limited to the following cases:

- Cases of double taxation regarding transfer pricing adjustments of related parties (Article 9 of the OECD MTC)
- In case of a profit allocation between the company and its permanent establishment (Article 7 of the OECD MTC)<sup>37</sup>)

It is particularly not applicable to any double taxation arising from different interpretation of a tax treaty. In October 2016, the European Commission issued a proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU. The Proposed Directive includes a reinforced mandatory binding dispute resolution mechanism in the EU. The Proposed Directive builds upon the Arbitration Convention, but seeks to broaden the scope to cover additional areas, beyond transfer pricing and allocation of profits to permanent establishment, and provides features to address certain identified shortcomings of the existing process to enhance the enforceability and the effectiveness of the mechanism.

The MAP process according to Article 6 paragraph 1 sentence 2 of the EU Arbitration Convention requires that the taxpayer files an application within three years after the first notification of the event leading to double taxation. If the MAP process does not result in an agreement to eliminate double taxation within a period of two years, the competent authorities of the countries involved are obliged to implement an advisory committee (consisting of two independent persons, chairman and representatives of both countries) for arbitration. The advisory committee has to present its comments on the case within a period of six months whereby simple majority is sufficient to reach an agreement. The competent authorities will decide on the elimination of double taxation accordingly.

In contrast to the MAP / arbitration process under the tax treaties, the taxpayer has the right to participate in the MAP arbitration under the EU Arbitration Convention.

The EU MAP process is rather effective in particular in transfer pricing cases due to the mandatory binding MAP arbitration. However, there are also some critical points to be mentioned:

- The costs for arbitration (legal, tax advisory costs, and travel costs) as well as the costs for MAP have to be borne by the taxpayers.
- The agreements made during arbitration or the comments made by the advisory committee could principally be published with taxpayer's consent.
- The procedures under the EU Arbitration Convention can be easily suspended due to a pending case regarding the suspicion of a violation against tax rules.

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<sup>36</sup> Merz/Sajogo, PISStB, Praxis Internationale Steuerberatung, 8 September 2010, September 2010, page 239

<sup>37</sup> Merz/Sajogo, PISStB, Praxis Internationale Steuerberatung, 8 September 2010, September 2010, page 239

## 2.3 US

The US is an OECD member as well as a member of the G20 and FTA MAP Forum and insofar fully participating in its work.

### Tax treaties

In principle, the US has generally implemented regulations according to Article 25 paragraphs 1 to 3 of the OECD MTC in its tax treaties. The US has arbitration clauses in its tax treaties with Germany, France, Belgium and Canada. The practical experience of the US in relation to arbitration seems to be very positive (discussed in detail in Para 4.2 of this report). This could be the reason the revised model treaty released by the US Treasury Department on 17 February 2016 modifies the MAP article to include mandatory arbitration.

### Domestic tax law

From a domestic tax law perspective, the MAP process is regulated in the Procedures for Requesting Competent Authority Assistance under Tax Treaties<sup>38</sup>. The process is described with much clarity and in a very detailed manner. The underlying rules and guidelines are published and publicly available. Further, the Procedures also define rules for arbitration for cases where the US tax treaty includes an arbitration clause<sup>39</sup>. According to these rules, the MAP process will mandatorily lead to arbitration if it has not been solved within a certain deadline (generally two years).

According to the MAP report for fiscal years up to 2015, the average processing time for the Advance Pricing and Mutual Agreement Program of the US (cases arising under the business profits and associated enterprises articles of the US) for 2015 amounts to 27.7 months for the US initiated cases and to 32.7 months for foreign initiated adjustments<sup>40</sup>. The average processing time for Treaty Assistance and Interpretation Team (cases arising under all other treaty articles, including requests for discretionary determinations under limitation of benefits provisions) amounts to 28.9 months for the US-initiated cases and to 17.8 months for foreign initiated cases<sup>41</sup>.

The US provides for bilateral APAs as well as a roll-back of such APA to previous years. It further provides for so-called Accelerated Competent Authority Procedure (ACAP)<sup>42</sup>. Under ACAP, a taxpayer may request that the terms of a competent authority resolution for a given taxable period be extended to cover subsequent taxable periods for which it has filed tax returns. This is in particular effective, as the taxpayer does not need to apply for a new MAP for these years but can rely on the first MAP for the previous years.

Most of the US tax treaties provide that competent authority resolutions are to be implemented by the US and the treaty partner notwithstanding any time limits or other procedural limitations under the domestic law of either country<sup>43</sup>.

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<sup>38</sup> Rev. Proc. 2015-40, <https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

<sup>39</sup> Section 10 Rev. Proc. 2015-40, <https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

<sup>40</sup> IRS, Large Business and International Division, CA Statistics latest ones dated April 27, 2016, Table 5

<sup>41</sup> IRS, Large Business and International Division, CA Statistics latest ones dated April 27, 2016, Table 9

<sup>42</sup> Section 4 Rev. Proc. 2015-40, <https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

<sup>43</sup> Section 11 Rev. Proc. 2015-40, <https://www.irs.gov/pub/irs-drop/rp-15-40.pdf>

There are special regulations regarding the suspension of collection procedures during a pending MAP case whereas there is no specific regulation regarding the consideration of interest and penalties.

#### Further aspects

The US reports its MAP cases in its MAP Reports on an annual basis<sup>44</sup>. There are no administrative processes in place to publish agreements reached as kind of a best practice.

There are adequate personnel resources available in the US. Further, the officials in charge of MAP in the US have the authority to resolve MAP cases and are principally independent of the Internal Revenue Service (IRS) team responsible for making transfer pricing adjustments. They are not influenced insofar, but may rely on auditors for fact-finding.

### **2.4 Summary of MAP process in selected countries**

Overall, it can be stated that the MAP process is rather new in most of the Asian countries (e.g., Malaysia and Indonesia) and not as common as for European countries or for the US. Only one country (Japan) has arbitration introduced in its national tax law. Insofar Japan has the most efficient MAP process of the selected Asian countries. It fulfils most of the minimum standards and best practices set forth in the report on Action 14 (e.g., average time frame for resolving a case is 22.4 months, adequate personnel, consultation process in place in which Japan will inform the other country in case of a rejection of a MAP application, arbitration etc.). However, Japan's donation rules and the ineligibility to access MAP in such cases create uncertainty for taxpayers. Korea and Singapore also have a working MAP process, however, they have not had implemented arbitration yet. China has developed an MAP process over the past decade and still needs to increase the headcount of skilled personnel resources responsible for MAP.

Malaysia has amended its MAP process recently by issuing new guidance so that the MAP process could work better than in the past. Indonesia also recently issued amended guidelines and we see early signs of improvements in the MAP process (though there has been a tendency for the tax authorities to argue on the lines that the subject issues are not covered by the tax treaty but under the domestic law).

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<sup>44</sup> IRS, Large Business and International Division, CA Statistics latest ones dated April 27, 2016

### **3. Analysis of the Action 14 recommendations**

Through the adoption of the report on Action 14, countries have agreed to important changes in their approach to dispute resolution, in particular by having developed a minimum standard with respect to the resolution of the treaty related disputes, committed to its rapid implementation and agreed to ensure its effective implementation through the establishment of robust peer-based monitoring mechanism. The measures developed under Action 14 of the BEPS aim to strengthen the effectiveness and efficiency of the MAP process by determining minimum standards, which should be implemented by the countries and best practices, which would be recommendable to be introduced but are not mandatory.

Additionally, the report recommends adoption of mandatory arbitration for cases that could not be resolved by way of MAP within a specified time period. A commitment to establish mandatory binding MAP arbitration - as a way to resolve disputes that otherwise could not be resolved through the MAP – has only been made by 20 countries (Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the UK and the US).

#### **3.1 Minimum standards**

According to the report on Action 14, implementation of the minimum standards by countries will:

- Ensure that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- Ensure that taxpayers can access the MAP when eligible.<sup>45</sup>

##### **3.1.1 Assessment of minimum standards**

Essentially, the components of the minimum standards can be allocated to two main areas, namely the access to MAP and a timely and effective resolution of disputes. Apart from those two broad heads, there are certain minimum standards relating to the monitoring phase (countries' participation as the members of the FTA MAP Forum) and roll-back of the APAs.

###### **i. Access to MAP**

As a minimum standard for MAP access, the report on Action 14 requires the countries to implement the paragraphs 1 to 3 of Article 25 OECD MTC in all its tax treaties. One of the key elements is that the taxpayer needs to present his case to the competent authorities of the Contracting State of which he is resident within a period of three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention<sup>46</sup>. This means that a shorter application period than three years (which is agreed in several tax treaties all over the world) is not in line with the minimum standard set forth in Action 14. A further key element is the consultation procedure according to Article 25 paragraph 3 sentence 2 of the OECD MTC in which the Contracting States may also consult together for the elimination of double taxation. Such consultation procedure is also defined as part of the minimum

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<sup>45</sup> Report on Action 14, executive summary

<sup>46</sup> Article 25 paragraph 1 sentences 1 and 2 of the OECD MTC

standard in the report on Action 14. Another key element in this regard, is that the MAP access may not be restricted by any remedies according to the domestic law of the Contracting States<sup>47</sup>.

Action 14 of the BEPS further requires as a minimum standard that countries develop and publish rules, guidelines and procedures for their MAP programmes, which should include guidance on how taxpayers may make requests for competent authority assistance. Such guidance should be drafted in clear and plain language and should be readily accessible to the public<sup>48</sup>. They shall also explain what kind of information and documentation needs to be attached to a MAP application<sup>49</sup>. In contrast, the guidance, as a form of best practice but not part of the minimum standard, determines the relationship of the MAP to the domestic appeal system or comments on multilateral MAP or interest or penalties<sup>50</sup>.

Countries should further publish their MAP profiles in a standardised form on a platform of the FTA MAP Forum.

As part of the minimum standard, it is further required that the country grants access to MAP in particular in the following cases:

- In transfer pricing cases; to avoid the economic double taxation that may result from the inclusion of profits of associated enterprises under paragraph 1 of Article 9<sup>51</sup>.
- In case of disagreement between the taxpayer and the tax authority making the adjustment as to whether the conditions for the application of a treaty anti-abuse provision have been met or as to whether the application of a domestic law anti-abuse provision is in conflict with the provision of a treaty<sup>52</sup>.

As a minimum standard, it is also required that tax audit settlements do not preclude access to MAP. Where, however, a country has in place an administrative or statutory dispute settlement or resolution process independent from the audit and examination functions and that can only be accessed through the request by the taxpayer, that country may limit access to MAP with respect to the matters that have been resolved with that administrative or statutory process<sup>53</sup>. In such cases, countries should inform their tax treaty partners of such processes and address the effects of such processes with respect to the MAP in their public guidance in order to ensure that taxpayers who choose to make use of such process are fully informed about the consequences as far as their MAP access is concerned.

Another key element of the minimum standard is that either countries (not only the Contracting State) have the right to request for MAP according to Article 25 paragraph 1 of the OECD MTC or it is ensured by way of a notification / consultation procedure that the Contracting State will present the case to the other State before objecting to the application for MAP<sup>54</sup>.

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<sup>47</sup> Article 25 paragraph 1 sentence 1 of the OECD MTC

<sup>48</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 2.1

<sup>49</sup> Fluechter, IStR, Internationales Steuerrecht, 24/2015, page 943

<sup>50</sup> Fluechter, IStR, Internationales Steuerrecht, 24/2015, page 943

<sup>51</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 1.1

<sup>52</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 1.2

<sup>53</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 2.6

<sup>54</sup> Fluechter, IStR, Internationales Steuerrecht, 24/2015, page 943

## **ii. Timely resolution of MAP**

A key element of the minimum standard for the timely resolution of MAP cases is that countries need to commit to seek to resolve MAP cases within an average time frame of 24 months<sup>55</sup>. Hereby, the starting and end date for the calculation of the 24 months period still needs to be determined (as starting date could, for e.g., be decisive the date of the filing of the first application or – much later – the date at which the application has been accepted)<sup>56</sup>. Countries' progress in meeting this time frame will be periodically reviewed on the basis of the statistics in accordance with the agreed reporting framework referred to under element 1.5 of the report on Action 14.

A further requirement under the minimum standard is that the countries should ensure that adequate resources – including personnel, funding, training and other programme needs – are provided to the MAP function, in order to enable competent authorities to carry out their mandate to resolve cases of taxation not in accordance with the provisions of the Convention in a timely and effective manner<sup>57</sup>. An important indication for adequate resources seems to be the average time frame for the resolution of the MAP of 24 months being fulfilled<sup>58</sup>.

For a timely resolution of MAP, it is additionally mentioned that countries' internal guidance and procedures for the operation of their MAP programmes should clearly establish that their staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the applicable tax treaty. They should in particular not be dependent on the approval or the direction of the tax administration personnel who made the adjustments at issue or being influenced by considerations of the policy that the country would like to see reflected in future amendments to the treaty<sup>59</sup>.

Another element of the timely resolution of MAP is that countries should not use performance indicators for their competent authority functions and staff in charge of MAP processes based on the amount of sustained audit adjustments or maintaining revenue. Appropriate performance indicators could be:

- Number of MAP cases solved;
- Consistency (i.e., a treaty should be applied in a principled and consistent manner to MAP cases involving the same facts and similarly situated taxpayers); and
- Time taken to resolve a MAP case (recognising that the time taken to resolve a MAP case may vary according to its complexity and that matters not under the control of a competent authority may have a significant impact on the time needed to resolve a case).

## **iii. Monitoring phase – countries' participation as members of the FTA MAP Forum**

The report on Action 14 further requires as part of the minimum standards that the countries should enhance their competent authority relationships and work collectively to improve the effectiveness of the MAP by becoming members of the FTA MAP Forum. The FTA is a subsidiary body of the OECD Committee on Fiscal Affairs and brings together Commissioners from 46 OECD and non-OECD countries to develop on an equal footing a global response to tax administration in a collaborative fashion<sup>60</sup>.

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<sup>55</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 1.3

<sup>56</sup> Fluechter, IStR, Internationales Steuerrecht, 24/2015, page 943

<sup>57</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 2.5

<sup>58</sup> Fluechter, IStR, Internationales Steuerrecht, 24/2015, page 943

<sup>59</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 2.3

<sup>60</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 1.4



The report on Action 14 stated that compliance with the minimum standards shall be stringently monitored whereby the details of such monitoring mechanism would be developed by the FTA MAP Forum. In accordance with this mandate, on 20 October 2016, the OECD released key documents<sup>61</sup>, approved by the Inclusive Framework<sup>62</sup> on BEPS that will form the basis of the MAP peer review and monitoring process under Action 14 of the BEPS. The peer review and monitoring process will be conducted by the FTA MAP Forum in accordance with the Terms of Reference and Assessment Methodology set out, with all members participating on an equal footing. This will complement the other BEPS minimum standards and ensure that taxpayers have access to effective and expedient dispute resolution mechanisms under bilateral tax treaties.

The Terms of Reference translate the Action 14 minimum standard into 21 elements. These elements assess a member's legal and administrative framework including the practical implementation of that framework to determine how its MAP regime performs relative to the 21 elements in the following four key areas:

- Preventing disputes;
- Availability and access to MAP;
- Resolution of MAP cases; and
- Implementation of MAP agreements.

The Terms of Reference are complemented by 12 best practices which are not part of the minimum standard and will not affect the assessment.

The Assessment Methodology sets out the two-stage approach for the reviews, which will be conducted based on the order established by the schedule of reviews. Singapore is included in the third batch, which will be launched by August 2017. The reviews are driven by peers. However, in recognition that taxpayers are the main users of the MAP, taxpayers will be invited to provide inputs on specific areas relating to access to MAP, clarity and availability of MAP guidance and the timely implementation of MAP agreements.

As part of the monitoring, the FTA MAP Member States shall also provide timely and complete reporting of MAP statistics pursuant to an agreed reporting framework to be developed in coordination with the FTA MAP Forum.<sup>63</sup>

#### **iv. Roll-back of APAs**

The minimum standards of the report on Action 14 require availability of roll-back of the bilateral APA to previous years (subject to applicable time limits) as long as the relevant facts and circumstances in the earlier tax years are the same (subject to verification of these facts and circumstances on audit<sup>64</sup>). In particular, such roll-back may be helpful to prevent or resolve potential / existing transfer pricing disputes.

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<sup>61</sup> <http://www.oecd.org/tax/dispute/beps-action-14-peer-review-and-monitoring.htm>

<sup>62</sup> The Inclusive Framework brings together over 100 countries and jurisdictions to collaborate on the implementation of the OECD/ G20 BEPS Package. Under this framework, all state- and non-state jurisdictions that commit to the BEPS project participate as BEPS Associates of the OECD's CFA. BEPS Associates have the same rights and obligations as OECD and G20 countries involved in BEPS work. Every jurisdiction that participates in the framework as a BEPS Associate will have an equal voice in reviewing and monitoring the implementation of the BEPS measures.

<sup>63</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 1.5

<sup>64</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, point 2.7

### **3.1.2 Gap analysis – MAP framework in selected Asian countries**

We have summarised the gap analysis regarding the minimum standards under Action 14 of the BEPS in **Appendix 1**. We would like to highlight the following:

#### **i. Access to MAP**

Most of the tax treaties of the selected countries provide for rules in accordance with Article 25 paragraph 1 to 3 of the OECD MTC. However, many of the treaties entered into by these countries provide for a shorter period than three years for presenting the case to the competent authority. To that extent, the minimum standard, which requires the countries to allow at least 3 years for presenting the case to the competent authority is not fulfilled.

All of the selected Asian countries provide MAP access in transfer pricing cases. These countries provide for MAP access even in case the underlying tax treaty does not have a regulation in accordance with Article 9 paragraph 2 of the OECD MTC in place. Accordingly, this minimum standard can be fulfilled by all selected Asian countries.

Japan, China and Malaysia provide for MAP access in case of a disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a treaty anti-abuse rule have been met. No specific regulations exist in Korea and Indonesia. Singapore does not have a special regulation, however, it can be expected that such access will be accepted.

Japan and China also provide for MAP access in case of a disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a domestic anti-abuse rule conflict with the provisions of a treaty. For Korea, Indonesia and Malaysia, no special regulation is in place. Singapore does not have a special regulation, albeit as unlikely as it seems. With regards to this, Singapore, Korea, Indonesia and Malaysia should revisit their positions and probably come with necessary clarifications.

All the selected Asian countries have already developed and published rules and guidelines for their MAP programmes under their national tax law. This guidance already includes information about how the taxpayers may make requests for competent authority assistance and which information and documentation needs to be attached to a MAP application. To that extent, all the selected Asian countries seem to fulfil the minimum standards.

#### **ii. Timely resolution of MAP**

As part of the minimum standards, the average time frame for resolving a MAP should principally not exceed a period of 24 months. Singapore (24 months) and Japan (22.4 months<sup>65</sup>) seem to generally be able to meet this deadline. China (two years or longer), Korea (two and half years) and Malaysia (one to three years) also seem to not deviate too far away from this time frame. Indonesia is, however, quite far behind in meeting this time frame. Indonesia is also a country where the MAP process doesn't seem to be working efficiently and thus, there seems to be a direct link between the average time frame for resolving a MAP and an effective MAP process.

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<sup>65</sup> MAP Report 2015 of the National Tax Agency, Japan

Most of the selected Asian countries have already built up people resources, though China needs to build up additional resources. Indonesia seems to have the biggest issue in this respect, which is also an indication for the long average time frame for Indonesia to resolve MAP cases.

For most of the selected Asian countries (except for China), the officials in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the tax treaty and they are not dependent on the approval of the direction of the tax administration personnel.

It is difficult to get more information regarding the performance indicators for the competent authority functions and officials in charge of the MAP processes as this information is usually not publicly available. There is a tendency for the KPIs to be based on the number of resolved cases than sustained audit adjustments.

### **iii. Monitoring phase – countries' participation as members of the FTA MAP Forum**

All the selected Asian countries are members of the FTA MAP Forum and they participate in its work on a regular basis.

Stage 1 peer review schedule released by OECD on 31 October 2016<sup>66</sup> includes review of all the selected Asian countries except Malaysia (since Malaysia is not a member of the Inclusive Framework).

With respect to the reporting of MAP statistics, only Japan is fully compliant as yet. China and Korea have recently been included in the OECD statistics and Singapore has just started to publish MAP and APA statistics whereas for Malaysia and Indonesia there are no statistics available.

### **iv. Roll-back of APAs**

All selected Asian countries provide for a roll-back in case of BAPAs and thus, are compliant with the minimum standard.

## **3.2 Best practices**

### **3.2.1 Assessment of best practices**

In addition to the minimum standards, which have to be mandatorily implemented, Action 14 of the BEPS, has determined a series of so-called "best practices". Such best practices are not obligatory but can be seen as recommendations. While the minimum standards reflect consensus by the participating countries to take specific measures that are aimed at resolving treaty-based disputes in a timely manner, the "best practices" have not been approved by all G20 and OECD countries. The best practices generally have a more subjective and qualitative character, but reflect the OECD's concern that these issues ought to be addressed to improve the functioning of the MAP process.

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<sup>66</sup> <https://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf>

The best practices can be grouped under the broad level themes of the minimum standards:

- |   |                        |
|---|------------------------|
| 1) Ensure that treaty obligations related to the mutual agreement procedure are fully implemented in good faith and that MAP cases are resolved in a timely manner. | Best practice 1        |
| 2) Ensure the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes.                              | Best practices 2 to 5  |
| 3) Ensure that taxpayers can access the MAP when eligible.  | Best practices 6 to 11 |

The best practices recommended are discussed in the following paragraphs:

**Best practice 1: Inclusion of Article 9 paragraph 2 of the OECD MTC in tax treaties**

Most countries consider that the economic double taxation resulting from the inclusion of profits of associated enterprises under Article 9 paragraph 1 of the OECD MTC is not in accordance with the object and purpose of tax treaties and falls within the scope of the MAP under Article 25<sup>67</sup> of the OECD MTC. However, some countries (e.g., India) argue that in the absence of a treaty provision in accordance with Article 9 paragraph 2 of the OECD MTC, they are neither obliged to make corresponding adjustments or to grant MAP access with respect to the economic double taxation that may otherwise result from a primary transfer pricing adjustment. It is recommended as a best practice for countries to provide in their tax treaties, a clause for tax authorities to provide for a “corresponding unilateral adjustment” (as under Article 9 paragraph 2 of the OECD MTC) in cases which they find the objection of the taxpayer to be justified.

**Best practice 2: Publishing selected MAP resolutions**

The report suggests that countries should have appropriate procedures in place to publish mutual agreements, which relate to general matters that affect the application of a treaty to all taxpayers or to a category of taxpayers (rather than to a specific taxpayer’s MAP case). Such guidance should be useful to prevent future disputes and to reinforce consistent application of bilateral tax treaties, with appropriate provisions to protect the confidentiality of the taxpayers.

**Best practice 3: Training the competent authority personnel in terms of MAPs by using FTA training material**

The report also recommends that countries should develop “global awareness” of the audit / examination functions involved in international matters through the delivery of the FTA’s “Global Awareness Training Module” to their personnel. Not only will this assist in addressing challenges faced by competent authorities with respect to resources, empowerment, relationships and posture, process improvements, relationship with the audit function and responsibility and accountability, but also prevent dysfunctional tax administration behaviours.

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<sup>67</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, number 43

Best practice 4: Countries should implement bilateral APA programmes

APAs concluded bilaterally between treaty partner competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes<sup>68</sup>. Accordingly, the report recommends the countries to implement bilateral APA programmes.

It is interesting to note that while the implementation of an APA programme has only become part of the best practices in the report on Action 14, the roll-back of such APA programme – provided that the country has already implemented an APA programme – is part of the minimum standards.

Best practice 5: Application of MAPs for several years

The issue raised for a MAP request may often be a recurring one, across several tax years. Countries may thus allow a taxpayer to request a single MAP assistance for several tax years for such recurring issues – subject to the requirement that the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances. This will help to avoid duplicative MAP requests and permit a more efficient use of competent authority resources.

Best practice 6: Suspension of tax collection procedures

Where the payment of tax is a requirement for MAP access, the taxpayer concerned may face significant financial difficulties: if both Contracting States collect the dispute taxes, double taxation will in fact occur and the resulting cash flow problems may have a substantial impact on a taxpayer's business, at least for as long as it takes to resolve the MAP case<sup>69</sup>. Moreover, "good faith" discussions would be compromised if countries may have to refund taxes already collected. The report on Action 14 thus recommends that countries should suspend tax collection procedures during the period a MAP case is pending, under the same conditions as applicable to a person pursuing a domestic administrative or judicial remedy.

Best practice 7: Implement appropriate administrative measures that choice of remedies remains with taxpayer

A taxpayer's choice of recourse is generally only constrained by applicable time limits (such as those provided by a domestic law statute of limitation). In addition, tax administrations would typically not deal with a taxpayer's case through both the MAP and a domestic court or administrative proceeding at the same time (i.e., one process will generally take precedence over the other). The report on Action 14 thus recommends that countries should implement appropriate measures to facilitate recourse to the MAP to resolve treaty-related disputes (being a comprehensive bilateral resolution of a case), recognising the general principle that the choice of remedies should remain with the taxpayer<sup>70</sup>.

Best practice 8: Publish guidance on relationship between MAP and domestic law administrative and judicial remedies

In order to resolve the uncertainty as a result of the complex interaction between domestic law and MAP, countries should include in their published regular MAP guidance -- requested as part of the minimum standards, an explanation of the relationship between the MAP and domestic law administrative and judicial remedies. This may include guidance on the processes involved and the conditions, rules and

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<sup>68</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, para 30

<sup>69</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, para 50

<sup>70</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, para 51

deadlines associated with these processes. The guidance should specifically address whether the competent authority considers itself to be legally bound to follow a domestic court decision in the MAP or whether the competent authority will not deviate from a domestic court decision as a matter of administrative policy or practice.

**Best practice 9: MAP in case of self-initiated adjustments**

Under the laws of some states, a taxpayer may be permitted under appropriate circumstances, to amend a previously filed tax return to adjust the price for a controlled transaction between associated enterprises, or to adjust the profits attributable to a permanent establishment, in order to reflect a result in accordance (in the view of the taxpayer) with the arm's length principle<sup>71</sup>. For such purposes, the report on Action 14 recommends that MAP access be allowed to taxpayers to avoid double taxation that may arise in such cases of bona fide taxpayer-initiated foreign adjustments permitted under the domestic laws of a treaty partner.

**Best practice 10: Guidance on the treatment of interest and penalties**

The report on Action 14 further recommends that countries' published MAP guidance should provide guidance on the consideration of interest and penalties in the MAP process.

**Best practice 11: Guidance on multilateral MAPs and APAs**

While the MAP process provided for in Article 25 of the OECD MTC has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global business models and the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes<sup>72</sup>. As a consequence, the report on Action 14 recommends that countries should also include guidelines on multilateral MAPs and APAs in their published guidance.

### **3.2.2 Gap analysis – MAP framework in selected Asian countries**

We have summarised the gap analysis regarding the best practices under Action 14 the BEPS in **Appendix 2**. We would like to highlight the following points:

**Inclusion of Article 9 paragraph 2 of the OECD MTC in tax treaties**

Singapore and all of the selected Asian countries have included a regulation in accordance with Article 9 paragraph 2 of the OECD MTC in the majority of their tax treaties. Even in case a tax treaty does not provide for a regulation similar to Article 9 paragraph 2 of the OECD MTC, none of the selected Asian countries denies MAP access in transfer pricing cases for this reason.

However, there have been countries (for example, India), which take a position that MAP and bilateral APAs are not possible with a treaty partner in the absence of a provision corresponding to Article 9 paragraph 2 of the OECD MTC. In order to avoid conflicting positions, it could be recommended to include a regulation similar to Article 9 paragraph 2 of the OECD MTC in all of the tax treaties. It is noteworthy that Korea has recently signed a revised treaty with India, with addition of a provision similar to Article 9 paragraph 2 as one of the major changes. Similarly, Singapore has recently signed a Protocol

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<sup>71</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, para 54

<sup>72</sup> Report on Action 14, I. Minimum standard, best practices and monitoring process, para 58

with India on 30 December 2016 which seeks to amend Article 9 of the treaty to add a provision similar to paragraph 2 of Article 9 of the OECD MTC.

#### Publishing selected MAP resolutions

None of the selected Asian countries currently publishes agreements reached in a MAP process as a kind of best practice. (Only China publishes basic information of APAs reached during the year.)

#### Bilateral APA programmes

All selected countries (including Singapore) have already implemented bilateral APA programmes and are compliant with the best practices of Action 14.

#### Application of MAPs for several years

Most of the selected Asian countries permit that taxpayers can request for a multi-year resolution through MAP of recurring issues (except for Indonesia, where there is no specific regulation in place) and are insofar compliant with the best practices set forth in the report for Action 14.

#### Measures to provide for suspension of collection

Japan, Korea and the US have measures in place that provide for suspension of the collection of the underlying taxes in the course of a MAP process so that the taxpayer does not have to face cash flow issues. In contrast to this, Singapore, Malaysia and Indonesia have no such rules in effect and are not compliant with the best practices in this respect. It is recommendable for Singapore, Indonesia and Malaysia to amend their guidance and include clear regulations on the suspension of tax payment collections in order to prevent taxpayers from facing cash flow issues.

#### Relationship between MAP and domestic remedies

Analysis of the regulations applicable in the selected countries (including Singapore) shows that in terms of the relationship between MAP and domestic law administrative and judicial remedies, all selected countries have guidance in this respect. In most countries, domestic legal remedies have to be suspended if a MAP needs be applied for.

#### MAP in case of self-initiated adjustments

A comparison of the regulations in the selected countries (including Singapore) shows that the regulations are clear only in the US and Korea. In both countries, MAPs are allowed in case of self-initiated adjustments. In all other countries (including Singapore) a possibility of a MAP application in such cases is not clearly defined, though the MAP rules mainly refer to double taxation caused by a tax audit. With respect to corresponding adjustments, Singapore transfer pricing guidelines state that such adjustments will not be allowed post-filing of income-tax return unless it is done under MAP.

The main goal of the Action 14 report is to resolve double taxation incurred due to income adjustments in one country. However, it can be stated that most of the selected countries do not comply with the best practice recommendations insofar. Therefore, it is advisable to review the current practice in terms of self-initiated adjustments. From a taxpayer's perspective, clear guidance on whether self-initiated adjustments are subject to a MAP is preferred.

### Guidance regarding interest and penalties

In terms of the treatment of interest and penalties in the course of a MAP process, none of the countries analysed have a guidance in this respect. It is recommendable for countries to include specific guidance addressing the interest and penalty considerations for MAP process.

### **3.3 Mandatory arbitration**

The business community in general and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively resolved through MAP<sup>73</sup>. However, the countries involved in the BEPS discussion have not reached consensus on the adoption of arbitration as a mandatory mechanism to ensure an effective procedure in terms of MAP processes. A problem that the OECD faces is that several key countries will not entertain the possibility of mandatory and binding arbitration. During the discussions, some governments raised issues on whether mandatory arbitration would be contrary to their constitutions and would reduce their fiscal sovereignty; other raised issues concerning the institutional framework within which arbitration would take place, the process of selecting arbitrators and resolving cases<sup>74</sup>. India, for example, would struggle with such proposals because the federal structure is unsuitable – binding local authorities would be almost impossible for the central authorities in Delhi to keep up with<sup>75</sup>. There were also concerns on the part of developing countries about the cost of arbitration<sup>76</sup>.

As a consequence, arbitration has neither become part of the minimum standards nor the best practices in the final report on Action 14. Only a few countries have committed to introduce mandatory binding arbitration as a way to resolve disputes, which could not be solved within a MAP process upfront. The countries that have expressed interest in doing so include Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the UK and the US<sup>77</sup>. These countries collectively account for more than 90% of the outstanding MAP cases at the end of 2013<sup>78</sup>.

With respect to the design of the arbitration, the report on Action 14 does not provide any details. It only states that a mandatory binding MAP arbitration provision would be developed as part of the negotiation of the multilateral instrument envisaged by Action 15 of the BEPS<sup>79</sup>. The text of the multilateral instrument, released by OECD in November 2016, includes a chapter on arbitration. This has been discussed in detail in section 5 of this report.

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<sup>73</sup> Report on Action 14, II. Commitment to mandatory binding MAP arbitration, para 62

<sup>74</sup> Univ.-Prof. Dr h.c. Michael Lang / Prof. Dr Jeffrey Owens in International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Preface

<sup>75</sup> Joe Stanley-Smith, International Tax Review dated 24 February 2015, OECD looking for a way forward on arbitration

<sup>76</sup> Univ.-Prof. Dr h.c. Michael Lang / Prof. Dr Jeffrey Owens in International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Preface

<sup>77</sup> Report on Action 14, II. Commitment to mandatory binding MAP arbitration, para 62

<sup>78</sup> Report on Action 14, II. Commitment to mandatory binding MAP arbitration, para 62

<sup>79</sup> Report on Action 14, II. Commitment to mandatory binding MAP arbitration, para 63



Analysis of the selected Asian countries shows that none of them provide for a mandatory arbitration programme in their tax treaties with Asian countries. Japan is the only country with a mandatory binding arbitration process in place (with selected European countries)<sup>80</sup>.

### 3.4 Concluding remarks and our recommendations

Monitoring implementation and the impact of the different BEPS measures is a key element of the work ahead. The OECD has established an Inclusive Framework on BEPS, which allows interested countries and jurisdictions to work with the OECD and G20 members on developing standards on BEPS-related issues and reviewing and monitoring the implementation of the whole BEPS Package. In October 2016, the OECD released key documents, approved by the Inclusive Framework on BEPS that will form the basis of the MAP peer review and monitoring process under Action 14. The peer review and monitoring process will be conducted by the FTA MAP Forum in accordance with the Terms of Reference and Assessment Methodology, with all members participating on an equal footing. The key objective of the monitoring and peer review of a jurisdiction's compliance with the minimum standard is to help the jurisdiction identify areas where it can improve to achieve an efficient and effective MAP process. In this regard, it is important for both the FTA MAP Forum and the assessed jurisdiction to follow up on the recommendations in the Stage 1 Peer Review report to address the shortcomings identified and to publicly acknowledge progress made by the assessed jurisdiction.

Singapore has been included in the third batch (to be launched by August 2017) in the assessment schedule for Stage 1 Peer Reviews. Comparing the recommendations set forth in the final report on Action 14 (both the minimum standards as well as the best practices) with the current MAP practice in Singapore, it can be seen that the current regulations issued by Singapore's government fulfil a majority of the minimum requirements in terms of MAP proceedings. With respect to the best practices, it can be seen that the current rules published by the IRAS already comply with many of the recommendations. However, four important aspects are currently not yet covered.

The first aspect relates to the treatment of self-initiated adjustments and the taxpayer's right to apply for a MAP in this respect. For multinational groups, it is important to have clarity in this respect as self-initiated income adjustments are often necessary, for e.g., to reflect agreements of a tax audit in another country. From a taxpayer's perspective, it is important to have access to MAP as the cases of self-initiated adjustments are common and they also give rise to economic double taxation.

Second, to allow taxpayers to make use of Article 25 of the OECD MTC, and in particular paragraph 1 (presenting a case within the specified timeline to the competent authority of the state of which the taxpayer is resident), the minimum standard requires that countries make sure that both competent authorities are aware of MAP requests that are filed. This means that a taxpayer should be able to file a request in either of the Contracting States, which would require an amendment to the current wording of Article 25 paragraph 1; alternatively, a bilateral notification or consultation process would need to be implemented to allow the other competent authority to be informed in case one competent authority considers the taxpayer's objection not justified.

Third, in line with the prescribed best practices, it is recommendable for Singapore to amend its guidance and include clear regulations on the suspension of tax payment collections (because of which, taxpayers

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<sup>80</sup> Overview of tax treaties with arbitration clauses in International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Annex in Chapter 2 to point 2.6

have to face cash flow issues) and also the relevant guidance on consideration of interest and penalties in the MAP.

Lastly, Singapore needs to consider the possibility of adopting mandatory arbitration as part of its dispute resolution policy. There are several considerations to be taken into account of while analysing the need for mandatory arbitration, which will be discussed in the next section of this report.

## 4. Mandatory arbitration – a critical analysis from Singapore’s perspective

### 4.1 Need for Singapore to revisit its dispute resolution policy

The existing MAP provides a generally effective and efficient method of resolving international tax disputes. However, there will inevitably be cases in which the MAP is not able to reach a satisfactory result<sup>81</sup>. The inability of the current MAP to provide for all steps possible to facilitate a final resolution of issues arising under treaties was pointed out by both private sector representatives and tax officials as one of the principal obstacles to ensure an effective MAP. It causes taxpayers to hesitate in making the resource commitment to enter into the MAP and likewise provides no incentive to competent authorities to take all steps necessary to ensure a speedy resolution of the issues involved.<sup>82</sup>

The problem of economic double taxation can commonly be seen in transfer pricing cases. Inland Revenue Authority of Singapore (IRAS) published Singapore’s first transfer pricing guidelines in 2006 (a decade after the OECD had published its guidelines in 1995). Nevertheless, the IRAS has maintained that it has applied the arm’s length principle all along, particularly through Singapore’s tax treaties.

Indeed, the arm’s length principle had existed from as early as 1963 in Article 9 of the OECD’s MTC. The Article and its subsequent revisions have generally been adopted in the tax treaties concluded by Singapore. The arm’s length principle is also present in Article 7 in respect of attributing profits to a permanent establishment.

Arising from its tax treaty obligations, there were a number of transfer pricing cases even prior to 2006, in particular, cases filed under the MAP Article of the relevant tax treaty. The IRAS could be said to have started building up its transfer pricing expertise from these early MAP cases. In our experience, for these cases the Singapore taxpayer would have sought redress with the IRAS for upward transfer pricing adjustments made by the other treaty country instead of the other way round. A number of these MAP cases also progressed to be bilateral APA cases concluded between the IRAS and its treaty partners.

The IRAS’ early experience with transfer pricing-related MAPs and APAs could be the main reason why Singapore’s first transfer pricing guidelines issued in 2006 had a strong emphasis on the need for Singapore taxpayers to be aware of and maintain transfer pricing documentation in the event that they require the IRAS’ assistance in a MAP or APA. Singapore has come a long way since its first encounters with transfer pricing. Since its first experiences with APAs, the IRAS has now concluded more than 50 APAs, the majority of which are bilateral APAs.

In terms of the experience of MAP framework in Singapore, one can see that the majority of cases being discussed under MAP relate to transfer pricing. The average time taken by Singapore for dispute resolution under MAP is 24 months, which is in line with global standards as well as the Action 14 recommendations. While, in our experience, the success rate for resolution of disputes by MAP process is quite high for Singapore; a limited team size and consequent longer time period involved in dispute resolution is something that can be improved. Lack of cooperation and a longer time period taken by the competent authorities of some countries have often been cited as a challenge by the IRAS, which hinders the effectiveness of the MAP process. Further, one needs to bear in mind the possibility of increase in disputes in the area of international taxation in the post-BEPS world given the likelihood of different interpretations and scope by different countries for new and novel measures proposed under the BEPS.

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<sup>81</sup> OECD, Centre for Tax Policy and Administration, Improving the resolution of tax treaty disputes, February 2007, Chapter A. No. 10

<sup>82</sup> OECD, Centre for Tax Policy and Administration, Improving the resolution of tax treaty disputes, February 2007, Chapter A. No. 11

Therefore, undoubtedly, every country needs to revisit its dispute resolution policy to ensure that the adoption of the BEPS measures is supported by an effective, certain and time-bound dispute resolution framework. Adoption of a mandatory arbitration provision could be a potential solution for the challenges faced by Singapore in the MAP process in terms of lack of co-operation by treaty partner or uncertain positions relating to the new unique issues arising out of the BEPS.

With this background, this section of the report seeks to analyse the arbitration as dispute resolution mechanism from Singapore's perspective.

#### **4.2 Practical experience of the arbitration proceedings in other countries**

Singapore has established an investor-friendly business environment and attracted many international investors. In order to maintain this status, it will be of particular importance for Singapore to position itself as a country that is adaptable to new measures and proposals in order to mitigate economic double taxation. One way to mitigate the risk of economic double taxation could be to have an effective MAP process in place, which guarantees effective resolution of the disputes. Singapore has MAP provision included in all of its tax treaties. However, arbitration has been agreed upon only in its tax treaty with Mexico. It has neither practical experience insofar nor has implemented arbitration in its domestic tax law.

For the assessment on whether it makes sense for Singapore to agree on mandatory binding arbitration clauses in its tax treaties, the practical experiences of other countries could be taken into account.

#### **US**

The US has entered into four tax treaties / protocols to provide for mandatory arbitration of certain cases in the MAP, namely Germany, Belgium, Canada and France. Separately, the competent authorities of the US and the above-mentioned four countries (i.e., Germany, Belgium, Canada and France) recently signed an arrangement regarding the application of the arbitration procedure. The purpose of the arrangement, as stated, is to provide guidance under which the arbitration procedure will operate.

For a MAP case to go to an arbitration panel, the US tax treaties require that the relevant taxpayers agree to arbitration and the release of their information to the arbitrators. They also require that both the taxpayers and their authorised representatives make certain agreements regarding confidentiality of the arbitration process. To indicate these agreements, the US IRS has developed three documents for taxpayers and representatives to sign.

##### **a. Taxpayer Consent to MAP Arbitration and Nondisclosure Statement**

By signing this document, the US taxpayer and members of its consolidated group establish their consent to the competent authorities using MAP arbitration to resolve their case. In signing the document, the taxpayer and other concerned persons agree that they will not disclose information received in connection with the arbitration proceeding, other than the final arbitrated determination.

##### **b. Nondisclosure Statement of Taxpayer's Authorised Representative**

Treaty arbitration provisions, e.g., Article 25(5)(c) and 25(6)(d) of the US-Germany treaty, require each representative of each of the taxpayers involved to agree not to disclose information about an arbitration, which is indicated when they execute this document. This applies to both the US and to foreign representatives.

c. Taxpayer Authorisation to Disclose Tax Information for Purposes of Treaty MAP Arbitration Proceedings

By signing this document, the US taxpayer and members of its consolidated group consent to the disclosure of taxpayer information to non-governmental employees or organisations, which may or will be involved in the arbitration proceeding, most importantly the arbitrators themselves.

The US uses the services of an external dispute resolution organisation, the International Centre for Dispute Resolution (ICDR), to expedite some of the administrative tasks of MAP arbitration. The contract with the US IRS requires ICDR to provide confidentiality to taxpayer information. By signing the above documents, the taxpayer also consents to IRS' use of the services of ICDR and disclosure by ICDR to arbitrators and potential arbitrators, as necessary, to obtain and use their services. The treaty partners involved in MAP arbitration may also use the services of ICDR or a similar organisation.

While there is limited public information available regarding the experience of the US relating to mandatory arbitration, tax consultants and academics have indicated successful and satisfying outcomes of the policy. The academics in the US consider the adoption of mandatory arbitration by the US as the most significant treaty policy in recent years. This was evident from the comments made by Professor Rosenbloom<sup>83</sup> at a conference organised by Singapore Management University Centre for Excellence in Taxation in September 2015<sup>84</sup>. To Professor Rosenbloom, the essential goal of having mandatory arbitration provisions in the US tax treaties was to have no arbitration at all. More specifically, the mandatory arbitration provision was to act mainly as a deterrent measure for treaty partners to resolve MAP cases in a fair and efficient way without the need for any external intervention such as arbitration. Professor Rosenbloom observed that the deterrence seemed to have some effect in the US, as there had been no arbitration case thus far involving the US and Germany, Belgium and France. Professor Rosenbloom also mentioned that there were currently three more US tax treaties with Switzerland, Japan and Spain, which incorporated the mandatory arbitration provision but the protocols amending those treaties were pending domestic approval in the US.

Based on his experience and having been involved in some arbitration cases in the US, Professor Rosenbloom seemed extremely satisfied with the process, which to him had worked efficiently and was inexpensive. To him, the secret to the US' success with mandatory arbitration lies in its adoption of the baseball or last-best-offer methods of arbitration. Under that mechanism, the arbitration panel has no authority to deviate from the positions put up by the two countries involved in the arbitration and that itself is an enormous incentive for countries to take reasonable positions in a MAP case. The baseball method of arbitration is also not much of an incursion to the sovereign rights of countries as it does not allow the arbitration panel to take an independent position on the MAP issue that is different from the positions put up by the countries (discussed in details in Para 4.4 of this report).

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<sup>83</sup> Director, International Tax Program, New York University School of Law

<sup>84</sup> Summary of the proceedings of the conference available at <https://accountancy.smu.edu.sg/cet/tax-disputes-and-role-map-and-arbitration>

According to Prof H. David Rosenbloom, some complicated MAP cases, which had resisted resolution for years, were concluded once it became clear that there would be a mandatory arbitration provision in a particular treaty<sup>85</sup>. Thus, he mentioned that arbitration has been beneficial in hastening the resolution of complex matters by the competent authorities.

He also mentioned that it is not clear that any actual arbitrations have occurred under the US treaties with Belgium, Germany or France as there have been no public pronouncements to that effect. However, he mentioned that there have been arbitrations under the treaty with Canada. The number is not certain — accounts range from three to eight — but it appeared that the decision in each instance had been made in favour of the US<sup>86</sup>. Prof H. David Rosenbloom concluded in his paper that the arbitration under the US treaties is a means of reaching a resolution within the MAP.

It is also noteworthy that the revised model tax treaty released by the US Treasury Department on 17 February 2016 modified the MAP article to include mandatory arbitration.

### UK

The UK began to incorporate provision for arbitration in its tax treaties as a policy from 2011<sup>87</sup> (at least if the other negotiating party is willing to agree to it) and it can now be found in a number of its tax treaties (such as France, Germany, Iceland, Netherlands, Norway etc.). Out of these, many of the treaties preclude the availability of arbitration where a decision on the subject issues has already been rendered by a court or administrative tribunal of either treaty partner state. However, as a policy, the UK seeks, when agreeing to treaties, to have terms that are more favourable to the taxpayer, where possible<sup>88</sup>. For example, the UK's treaties with Bahrain and Qatar do not have any such restriction relating to decision by a court or administrative tribunals which blocks the access to arbitration. Further, these treaties provide for a time-limit of three years for the competent authorities of the two countries to resolve the issues before it goes for arbitration (as against the time-limit of two years prescribed in most of the treaties). An inference could be that the respective governments of these countries wish to encourage the competent authorities to resolve the issues at MAP level highlighting the “threat” of access to arbitration.

### Canada

Canada has only one bilateral tax treaty (with the US) with a mandatory binding arbitration clause in operation<sup>89</sup>. Because of the non-disclosure agreements in the Canada-US Memorandum of

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<sup>85</sup> Paper submitted to Vienna University of Economic and Business available at: [https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU\\_Global\\_Tax\\_Policy\\_Center/Arbitration/12\\_article\\_\\_arbitration\\_of\\_disputes\\_pursuant\\_to\\_tax\\_treaties\\_the\\_experience\\_of\\_the\\_united\\_states.pdf](https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/Arbitration/12_article__arbitration_of_disputes_pursuant_to_tax_treaties_the_experience_of_the_united_states.pdf)

<sup>86</sup> Paul Mulvihill & Steven Wrappe, “Arbitration in Tax Treaties: The Canada-United States Income Tax Convention,” *Corporate Bus. Tax Monthly* (Mar. 1, 2012).

<sup>87</sup> Policy Paper - Statement of Practice 1 (2011)- updated 5 April 2016 – issued by HMRC

<sup>88</sup> Policy Paper - Statement of Practice 1 (2011)- updated 5 April 2016 – issued by HMRC

<sup>89</sup> Canada has also signed *An Agreement concerning the application of the arbitration provisions of the Convention between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (the “Convention”), which was concluded through an exchange of notes dated July 27, 2015 and August 11, 2015. Canada and the UK will notify each other of the completion of their respective procedures that are necessary for the entry into force of the Agreement. The Agreement will enter into force and have effect on the date of the later of these notifications.

Understanding, no official statistics concerning the number of cases referred for mandatory arbitration, or how they were decided, have been publicly released. Generally speaking, the reaction of taxpayers and tax professionals to the availability of arbitration has been quite positive.

#### Challenges based on the practical experiences in the above countries

While adoption of mandatory arbitration as a “last resort” has delivered positive outcomes, one should also note the challenges experienced in the above countries.

- There has been a tendency for the competent authorities to use a good portion of the full two years to negotiate a MAP case, as the threat of arbitration and brinkmanship play out during this period.
- The competent authorities often either jointly request more time from the taxpayer (to extend discussions past the two-year time frame) or agree to adjust the commencement date to allow the competent authorities more time.
- Sometimes the settlements on the verge of arbitration (completion of the two / three years, as specified) are not always the “best” resolutions what was expected or would have been predicted.
- Lastly, the institutional framework within which arbitration would take place, the process of selecting arbitrators and resolving cases could be time consuming.

Having regards to the above challenges and handful of treaties with mandatory arbitration, one could raise doubts regarding the benefits of a mandatory arbitration clause. However, the experience in general in the above countries and others with mandatory binding arbitration have shown that the simple availability (or “threat”) of arbitration has improved the speed with which MAP cases are resolved by the two competent authorities. The competent authorities are encouraged to settle tax disputes within the regular MAP process without going into arbitration. This can be seen in particular for the final offer arbitration approach as the arbitrators are forced to choose one of the two presented options (“all or nothing” approach). There is no possibility insofar to find a compromise in between the two presented solutions. In summary, the fear of a mandatory binding arbitration at the end of a MAP process may support an effective and efficient MAP process.

#### **4.3 Recommendations from Singapore’s perspective**

From an industry perspective, an efficient dispute resolution mechanism is of utmost importance to address the possible disputes and conflicts that could arise in the post-BEPS world. There is a need for a strong “link” between the BEPS measures under the various Action plans and the dispute resolution mechanisms that are available to taxpayers. Whenever the parties are not able to reach an agreement within a reasonable time frame (e.g., two years), there is no better way to reach the resolution of the case than by mandatory binding arbitration. Further, the fact that there is a mandatory binding arbitration for the case that the mutual agreement negotiations fail has a positive side effect that states more often find solutions in the preceding mutual agreement discussions. If there is a “threat” of involving a third party in order to reach the final decision (as in case of mandatory binding arbitration), it may help to motivate the competent authorities to cooperate better and reach agreement in a pre-arbitration phase.

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Canada also has entered into tax treaties with certain other countries with a mandatory arbitration provision (such as Switzerland and France) but the said provision is yet to be given effect by way of exchange of diplomatic notes.

The MAP can thus be improved by supplementing it with additional dispute resolution techniques such as mandatory arbitration to help resolve issues, which have prevented the countries from reaching an agreement in a MAP. The very existence of the mandatory arbitration can encourage greater use of the MAP since both governments and taxpayers will know at the outset that the time and effort put into the MAP will likely produce a satisfactory result<sup>90</sup>.

Further, considering that Singapore already has an established international arbitration centre, adoption of mandatory arbitration in tax matters only makes sense and it would also help Singapore to specialise in arbitration for tax disputes or even develop a tax arbitration hub.

With these recommendations for Singapore to consider adoption of mandatory arbitration as part of its dispute resolution policy, we have provided an overview of the different arbitration approaches and the key considerations to be taken into account while designing an effective arbitration model in the following sections of this report.

#### **4.4 Different arbitration approaches**

From a purely legal and conventional standpoint, countries have a wide choice of models and frameworks for conducting arbitration in tax matters. The most commonly used arbitration models include:

- Arbitration according to the OECD Model
- Arbitration according to the UN Model
- Arbitration according to the EU Arbitration Convention
- Baseball arbitration

##### **i. Arbitration according to the OECD Model**

According to Article 25 paragraph 5 of the OECD MTC, a taxpayer can request that any unresolved issues be submitted to arbitration provided that such case has been presented to the competent authority of a Contracting State under Article 25 paragraph 1 of the OECD MTC and the competent authorities are unable to reach an agreement to resolve that case within two years from the presentation of the case to the competent authority of the other Contracting State.

According to Article 25 paragraph 5 sentence 2 of the OECD MTC, these unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either states. Further, the arbitrated agreement is binding for the tax authorities involved and must be implemented unless the taxpayer files an objection and rejects the agreement reached (Article 25 paragraph 5 sentence 3 of the OECD MTC).

The arbitration process, according to the OECD MTC, comprises several steps, which are briefly described in the following. The OECD MTC itself does not include these procedural regulations; rather, they are set forth in the Commentary to the OECD MTC<sup>91</sup> (in particular in the Annex: Sample Mutual Agreement on Arbitration). Competent authorities are, of course, free to modify, add or delete any provisions of the sample agreement when concluding their bilateral agreement for arbitration proceedings. Broad highlights of the sample agreement are discussed in the following paragraphs.

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<sup>90</sup> OECD, Centre for Tax Policy and Administration, Improving the resolution of tax treaty disputes, February 2007, Chapter A. No. 13

<sup>91</sup> OECD Commentary on Article 25, Sample Mutual Agreement on Arbitration



The process is initiated at the request of the taxpayer, which must be submitted in writing to one of the competent authorities and accompanied by a statement of each of the persons either making the request or directly affected by the case that no decision on the same issues has been rendered by a court or administrative tribunal. Within 10 days of the receipt of the request, the competent authority who received it shall send a copy of the request and the accompanying statements to the other competent authority.

The competent authorities need to agree on the Terms of Reference within three months of the submission of the request and must communicate them to the taxpayer. The Terms of Reference contain the questions to be decided by the arbitration panel and administrative information, such as the place and language of arbitration and the briefing schedule.

Within three months after the Terms of Reference have been received by the person who made the request for arbitration, the competent authorities shall each appoint one arbitrator. Within two months of the appointment of the first two arbitrators, they in turn will appoint the Chair of the arbitral panel. It should be noted that in contrast to the EU Arbitration, the competent authorities do not participate in the arbitration process as they are not members of the arbitration panel.

The arbitrators review and assess the case at hand based on the facts and arguments presented and decide independently. They may come to different opinions as the competent authorities as they are not bound by the legal opinions expressed by the competent authorities (so-called “independent opinion” approach<sup>92</sup>). This means that arbitrators are called upon to interpret the relevant laws and apply them to the facts of the case as they have determined them.

The arbitral decision is determined by simple majority and must be presented in writing to the competent authorities and the taxpayer within six months from the date on which the Chair notifies the competent authorities and the taxpayer that he has all the information necessary to consider the case. The competent authorities will implement the arbitration decision within six months from the communication of the decision to them by reaching a mutual agreement on the case that led to arbitration. This requirement serves to highlight the nature of the arbitration procedure – it is part of the MAP, of which it is firmly embedded<sup>93</sup>.

The decision of the arbitral panel is binding for the Contracting States and only for the specific case at hand. The Contracting States are not bound by the arbitration decision for future years or for other taxpayers; thus, the decisions do not have precedential value<sup>94</sup>.

## **ii. Arbitration according to the UN Model**

Article 25 of the UN Model provides two alternative versions of MAP, one of which provides for arbitration. Under Article 25 paragraph 5 (alternative B), unresolved issues in MAP cases under Article 25 paragraph 1 that have not been resolved within three years can be submitted for arbitration if *one* of the competent authorities so requests. The arbitration clause in Article 25 (alternative B) of the UN Model differs from that in the OECD Model in several respects: three-years allowed to resolve the dispute by MAP as against two years under the OECD MTC; arbitration must be requested by a competent authority under the UN model as against the taxpayer under the OECD model; authority to the competent authorities to

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<sup>92</sup> OECD Commentary on Article 25, Annex, General approach of sample agreement, para. 2

<sup>93</sup> Jasmin Kollmann, Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 2, 2.3.2.2 Arbitration process pursuant to Article 25 (5) of the OECD Model

<sup>94</sup> Ismer in Klaus Vogel, Commentary on Double Taxation Conventions, Fourth Edition, Art. 25, No. 127

depart from the arbitration decision and agree on a different solution within six months after the arbitration decision is communicated.

The most important difference between the OECD and UN Models with respect to arbitration is that under the UN Model, arbitration is not truly “mandatory” because it is required to be initiated by one of the competent authorities rather than the taxpayer.

### **iii. EU Arbitration**

There is an arbitration model already in place for all EU Member States under the EU Arbitration Convention<sup>95</sup>. In contrast to the other models, the EU Arbitration is not agreed upon within tax treaties; moreover the EU Arbitration Convention can be qualified as a kind of multilateral agreement. This means the EU Convention applies for dispute resolution cases of double taxation between related parties within the EU (it doesn’t apply even if one of the parties is not the EU Member State). The general concept of the EU Arbitration is comparable to the one under the OECD Model (“independent opinion approach”). One of the main differences compared to the arbitration according to the OECD model is the scope. Arbitration under the EU Arbitration Convention is limited to transfer pricing cases and profit adjustments resulting from permanent establishment issues. Another difference compared to the OECD Model is that arbitration under the OECD Model is only applicable provided that no agreement was reached on all issues. In contrast to this, EU Arbitration is available according to Article 7 of the EU Convention as long as double taxation remains (at least partly). In contrast to the OECD model, the EU Convention includes detailed rules concerning the election of the independent panel members. Thus, the contracting parties involved are entitled to appoint five arbitrators from a common list of independent potential arbitrators.

In order to improve and accelerate the arbitration process (in light of the predictability of the taxpayer), the EU Joint Transfer Pricing Forum developed a Code of Conduct issued in 2004 by the Economic and Financial Affairs Council (ECOFIN)<sup>96</sup>. The Code of Conduct sets the rules of interpretation and application of the EU Arbitration Convention.

It is also noteworthy that in October 2016, the European Commission issued a proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU. The Proposed Directive includes a reinforced mandatory binding dispute resolution mechanism in the EU. The Proposed Directive builds upon the Arbitration Convention, but broadens the scope to cover additional areas, beyond transfer pricing and allocation of profits to permanent establishment, and provides features to address certain identified shortcomings of the existing process to enhance the enforceability and the effectiveness of the mechanism.

### **iv. Baseball arbitration**

In general, the baseball arbitration process (also known as “final offer” or “last best offer” arbitration) is particularly common in the US. The process was developed as a result of salary disputes in the US baseball league. Baseball arbitration was firstly introduced in the US tax treaties from 2008 onwards as a result of the change of the OECD to include mandatory binding arbitration in 2008. The US generally uses

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<sup>95</sup> Convention 90/463/EEC

<sup>96</sup> Code of Conduct for the Effective Implementation of the Arbitration Convention, see Commission Communication 2004; in order to further improve the arbitration process the EU Joint Transfer Pricing Forum (EU JTPF) published its “Final Report on Improving the Functioning of the Arbitration Convention” in March 2015. The report summarises the results of a monitoring exercise of the practical functioning of the Convention (JTPF/002/2015/EN).

the baseball arbitration for resolving MAP disputes wherever there is an arbitration provision in its tax treaties.

The main feature of baseball arbitration, which distinguishes it from “independent opinion” arbitration, is that the authority of the arbitrators is severely restricted. They are not allowed to reach an independent decision on the case. Instead, their decision only involves the choice between the two options for resolution offered by the contracting states<sup>97</sup>.

The Sample Mutual Agreement on Arbitration generally allows final offer arbitration as well as the independent opinion approach and also any variation between these two options<sup>98</sup>, although the OECD Model is in favour of the independent opinion approach.

According to the IRS, the arbitration process usually starts provided that the Contracting States did not resolve the MAP tax dispute within a period of generally two years<sup>99</sup>. In contrast to the arbitration under the OECD Model, the arbitration is initiated by the competent authorities and not by the taxpayer. The arbitration panel will be determined by the competent tax authorities. However the taxpayer has a veto right. Further, the taxpayer is allowed to submit his views on the case to the arbitration panel<sup>100</sup>.

In contrast to the arbitration, according to the OECD Model, where the arbitrators will review and assess the specified case independently and entirely, the arbitrators within a baseball arbitration can only choose between the two opinions presented by the Contracting States to the arbitration panel. They cannot review the specified case themselves. As a consequence, a decision within a baseball arbitration can be reached very fast compared to the independent opinion approach. This increases the speediness with which the issue is resolved and lowers the cost<sup>101</sup>.

A side effect of the limited authority is that the “decision” is, in fact, just a number without any additional information or comments by the arbitrators<sup>102</sup>. I.e., the arbitrators do not have to provide any reasons for their decision in writing. While most arbitration cases are related to transfer pricing issues and therefore revolve around the determination of the correct transfer price, the use of the final offer arbitration in other cases, especially those where complex decisions are required might be limited<sup>103</sup>. In particular, in cases of the interpretation of a tax treaty, it will be difficult to apply such an arbitration system as such an issue is usually not limited to a numeric impact.

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<sup>97</sup> Raffaele Petrucci, Petra Koch and Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 6, 6.2.2.1 The “single choice” mechanism

<sup>98</sup> Sample Mutual Agreement on Arbitration, para. 2 and 3

<sup>99</sup> Procedures for Requesting Competent Authority Assistance under Tax Treaties, 26 CFR 601.201: Rulings and determination letters; Section 10 Arbitration

<sup>100</sup> Procedures for Requesting Competent Authority Assistance under Tax Treaties, 26 CFR 601.201: Rulings and determination letters; Section 10 Arbitration

<sup>101</sup> Raffaele Petrucci, Petra Koch and Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 6, 6.2.2.1 The “single choice” mechanism

<sup>102</sup> Raffaele Petrucci, Petra Koch and Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 6, 6.2.2.2 No written decisions

<sup>103</sup> Raffaele Petrucci, Petra Koch and Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 6, 6.2.2.1 The “single choice” mechanism

Where a case involves several years, there are two possible procedural variations to deal with this: issue-by-issue arbitration and package deals<sup>104</sup>. For e.g., the US and Canada have generally agreed on an issue-by-issue arbitration. While the proposed resolutions and the respective position papers must cover all years concerned, the arbitration panel will separately decide on each issue.

A comparison of the above arbitration model is given in **Appendix 3**.

#### **4.5 Key considerations for designing an effective arbitration model**

In the following paragraphs, we have discussed certain key considerations, which need to be taken into account while deciding on the adoption of arbitration procedure as part of the MAP policy and designing an effective arbitration model.

There are several factors to consider for defining an efficient arbitration model. These could include *inter alia*:

- Time frame
- Personal resources
- Loss of sovereignty
- Transparency
- Costs

##### *Time frame*

The period of time, in which the arbitration resolution is reached, is one of the most critical factors especially from the taxpayer's perspective. As far as the time frame is considered, there is a significant difference between the final offer approach and the independent opinion approach. Within the independent opinion approach (as implemented in the OECD MTC and the EU Arbitration Convention), the arbitrators have to review and assess the specified case completely and independently of any legal opinions. Further, they have to present their argumentation and resolution in writing. In contrast to this, the arbitrators within a final offer approach could summarily decide the case from the two options presented by the parties and they even do not have to present their argumentation in writing. From a timing perspective, the baseball arbitration will definitely be the faster alternative.

##### *Personnel resources*

The implementation of an efficient arbitration process requires that the competent authorities of each country have the personnel resources available to deal with MAP as well as with arbitration in an appropriate time frame and that they are familiar with the procedures and the cases.

Further, for an efficient arbitration process, it is imperative that the arbitrators have the relevant skillset. They should have the expertise, good judgement and be independent. By expertise, it means that the arbitrators need to have a deep understanding of (international) tax law and practice and should at least be legally trained; further, at least one of the arbitrators (e.g., the chairman) should have experience in arbitration matters. Other important attributes of arbitrators include: fluency in at least one of the languages of the arbitration party and understanding of the cultural differences between countries. (Disputes involving a UK multinational being taxed in China or a US multinational conducting businesses

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<sup>104</sup> Raffaele Petrucci, Petra Koch and Laura Turcan, International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 6, 6.2.2.3 Package versus issue-by-issue arbitration

in Venezuela require some understanding of the different cultures and sometimes long-standing issues involved in the relationship<sup>105</sup>).

As it can be quite time-consuming to determine the arbitrators, it is recommendable that international organisations should provide lists of arbitrators. States should have access to a list of arbitrators they can choose from, so that they can have quick and objective information about the experience and qualifications of potential arbitrators for their case<sup>106</sup>.

#### *Loss of sovereignty*

The main legal concern raised by countries (particularly, developing countries) is that an arbitration in tax matters would lead to a loss of sovereignty. According to the critics, the final arbitration resolution (as a MAP resolution) would lack legitimacy since the results would not have been approved by the legislature, unlike treaties<sup>107</sup>. Hence, the arbitration resolution is not subject to the decision of the same governmental institution approving of the tax treaty. Further, it is criticised that the Contracting States cannot influence the decision of the arbitration panel at all, in particular when it comes to the independent opinion approach. Within the independent opinion approach, the arbitration panel has to review, analyse and assess the case in its entirety without taking into consideration the legal opinion of the Contracting Countries. Insofar, the arbitrators are independent in their decision. In contrast to this, the arbitrators in a final offer arbitration are bound by the offers presented by the Contracting Countries and can only choose amongst one of them.

However, there could be counterarguments in response to the above concerns that the domestic legislation is always limited and restricted when it comes to the application of international treaties; for e.g., tax treaties. Agreeing on a tax treaty has already an impact on the sovereignty of a country. Further, it should be considered that the Contracting States can principally nominate the arbitrators and to that extent, have some influence on the process although they cannot directly influence their decision.

#### *Transparency*

A further concern relates to the lack of transparency. Arbitration proceedings are generally private proceedings and the taxpayer who is concerned is not allowed to join the meetings. The decisions will generally not be published (which is consistent with the MAP). As a consequence of this, there are no precedential cases available. However, arbitrators should generally be consistent in their argumentation and reasoning so that this becomes more an issue of reliance and trust. However, the lack of transparency generates risks of either bias or the perception of it, both of which in turn contradict the main objective of establishing a reliable arbitration process.

#### *Costs*

A further concern is that particularly for countries with a rather nascent MAP/APA programme in place, a one-time cost incurred for the establishment of competent, well-skilled and trained people to act as arbitrators also needs to be considered.

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<sup>105</sup> Ricardo Escobar C., International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 12, 12.4.1. A thoughtful award

<sup>106</sup> Ricardo Escobar C., International Arbitration in Tax Matters, WU Institute for Austrian and International Tax Law, Chapter 12, 12.4.1. A thoughtful award

<sup>107</sup> Luis Eduardo Schoueri, International Arbitration in Tax Matters, Chapter 8, 8.3.3 Fiscal sovereignty

In addition to the one-time cost, the running costs incurred for an arbitration need to be taken into consideration. The Contracting States have to bear costs for the arbitrators, traveling expenses, administrative costs, amongst others.

While there are some concerns as discussed above in adoption of arbitration as part of the MAP policy, they are not that big of an issue, which warrants absolute discarding of this dispute resolution mechanism. Having regard to the positive impact of the arbitration procedure in resolution of conflicts and also on the efficiency and effectiveness of the overall MAP process, it is advisable for Singapore to consider adoption of mandatory binding arbitration. This can be done either by way of amendments of existing bilateral tax treaties (at least with the major trading partners) or being a party to the multilateral instrument designed as part of Action 15 (discussed in detail in the next section).

## **5. Implications of the Multilateral Instrument developed as part of Action 15**

### **5.1 Background of the Multilateral Instrument**

Action 15 of the BEPS project provides for an analysis of the tax and public international law issues related to the development of a multilateral instrument to enable countries that wish to do so to implement measures developed in the course of the BEPS project and amend bilateral treaties. On the basis of this analysis, interested countries came together to develop a multilateral instrument aimed at adapting quickly to the changes suggested by the OECD as BEPS measures rather than amending each and every bilateral treaty amongst the participating countries. This is an innovative approach with no exact precedent in the tax world, though precedents for modifying bilateral treaties with a multilateral instrument exist in various other areas of public international law.

On the analysis of international tax, public international law and political issues that arise from such an approach, the BEPS report concluded that a multilateral instrument is desirable and feasible. Based on this analysis, a mandate for the formation of an ad hoc group to develop a multilateral instrument on tax treaty measures to tackle BEPS was approved by the OECD Committee on Fiscal Affairs in February 2015. The group commenced its work in May 2015. More than 100 jurisdictions concluded the negotiations on a multilateral instrument, which was realised in November 2016. The new instrument is expected to transpose results from the OECD/G20 BEPS project into more than 2,000 tax treaties worldwide. A signing ceremony is scheduled to be held in Paris in June 2017.

### **5.2 Multilateral Instrument (Convention) released by the OECD – key characteristics**

The Convention allows flexibility to the signatory countries to:

- Specify the tax treaties to which the Convention applies
- Choose a provision (out of the alternatives) that relates to a minimum standard
- Opting out of provisions or parts of provisions with respect to all the covered tax agreements
- Opting out of provisions or parts of provisions with respect to covered tax agreements that contain existing provisions with specific, objectively-defined characteristics
- Choosing to apply optional provisions and alternative provisions to address a particular BEPS issue

Part VI of the Convention (Articles 18 through 26) reflects the result of the work of the Sub-Group on Arbitration to develop provisions for the mandatory binding arbitration of mutual agreement procedure cases, of which the competent authorities are unable to reach agreement within a fixed period of time.

The key points to be noted with respect to the arbitration mechanism provided for under the multilateral instrument are as follows:

- The multilateral instrument gives a “choice” to countries to apply Part VI (Arbitration). In other words, unlike the other Articles of the Convention, Part VI applies only between Parties that expressly choose to apply the same with respect to their covered tax agreements by way of a notification.
- In addition, while Part VI includes some defined reservations, Parties that choose to apply Part VI are also permitted to formulate their own reservations with respect to the scope of cases that will be eligible for arbitration (subject to acceptance by the other Parties).

- The Convention provides a flexibility to the competent authorities to agree to a different time period (as against the two years mentioned in the Convention) with respect to a particular case, provided that they notify the person who presented the case of such agreement prior to the expiration of the two-year period. This different time period, with respect to a particular case, could be longer or shorter than the two-year period depending, for example, on the nature and complexity of the particular case.
- Arbitration decision shall be binding on both Contracting Jurisdictions except in three situations: (i) if a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision; (ii) if the arbitration decision is held to be invalid by a final decision of the courts of one of the Contracting Jurisdictions; and (iii) if a person directly affected by the case pursues litigation in any court or administrative tribunal on the issues, which were resolved in the mutual agreement implementing the arbitration decision.
- By default, a “final offer” arbitration process (otherwise known as “last best offer” arbitration) will apply, except to the extent that the competent authorities mutually agree on different rules.
- The Convention gives an option to the countries to allow the competent authorities to depart from the arbitration decision and agree on a different resolution within three calendar months after the decision has been delivered to them. This may arise, for example, if the arbitration panel issues a decision that both competent authorities consider to be an inappropriate resolution of the issues in the case. This is an optional provision and will be applied with respect to a covered tax agreement only if both Contracting Jurisdictions choose to apply it.

### **5.3 Multilateral Instrument – impact analysis**

As recognised in the report on Action 15, there could be situations involving multi-country tax disputes, which are easier to address multilaterally than in bilateral instruments<sup>108</sup>. In the absence of bilateral treaty relationships between all of the parties, a number of governments are of the view that a multilateral MAP or APA would only be possible where the multilateral instrument itself contains a specific multilateral MAP provision, as well as an exchange of information provision that would permit taxpayer information to be exchanged amongst all the parties (assuming there is not some other basis for exchange of information between the parties, such as the MAC or a bilateral Tax Information Exchange Agreement)<sup>109</sup>.

Although competent authorities within tax administrations expressed interest in the possibility of developing a multilateral MAP to resolve such multi-country disputes, some countries foresee legal constraints in the absence of a hard law instrument authorising multilateral MAP<sup>110</sup>. Other countries do not believe they can use MAP to resolve cases, which touch on issues not explicitly addressed in their existing bilateral tax treaties in the absence of an international law instrument that provides that authority<sup>111</sup>. These and other legal obstacles that arise in implementing multilateral MAP are sought to be addressed in the context of the multilateral instrument.

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<sup>108</sup> Report on Action 15, I. A multilateral instrument is desirable and feasible, para 14

<sup>109</sup> Report on Action 15, I. A multilateral instrument is desirable and feasible, Notes

<sup>110</sup> Report on Action 15, I. A multilateral instrument is desirable and feasible, para 14

<sup>111</sup> Report on Action 15, I. A multilateral instrument is desirable and feasible, para 14



As it can be seen from the aforementioned points, the Convention developed provides for a “menu” approach with all the options and flexibility to apply the provisions of the Convention to specific tax treaties and specific provisions. This, to some extent, deviates from the stated objectives of the multilateral instrument to swiftly adapt to the BEPS changes rather than revising each and every treaty separately. The “pick and choose” approach given to the countries will force them to analyse the impact of the multilateral instrument on each and every tax treaty they have entered into before deciding on the specific treaties they would like to cover. This exercise by the countries is as good as revising each and every treaty separately.

With respect to arbitration, the flexibility given to the competent authorities with reference to the time period for resolution under MAP, distorts the “mandatory” nature of arbitration and tends to reduce the effectiveness of this dispute resolution mechanism to provide certainty. In the authors’ view, an option given to countries and the competent authorities to agree on a different resolution even after the delivery of the arbitration decision further creates doubts with regards to the seriousness of which the proceedings would be carried out at arbitration level.

#### **5.4 Concluding remarks**

As concluded in Section 4 of this report, Singapore should consider adopting mandatory arbitration as part of its treaty policy. This can be done either by way of amendments of existing bilateral tax treaties (at least with the major trading partners) or by being a party to the multilateral instrument designed as part of the Action 15. In the authors’ view, there would not be much difference in terms of the efforts and time frame involved for both options. Given the limitations of the arbitration model under the multilateral instrument, it is advisable that Singapore considers developing its own arbitration model, with regards to the key considerations mentioned in Para 4.5 of this report.

## **6. Simultaneous audits and joint audits – alternatives to arbitration**

The future of the tax world points to global integration and collaboration is. From a taxpayer's perspective, there appears to be increasing focus on attaining certainty for businesses by way of APAs and advance rulings. From a tax administration's perspective, one can see greater degrees of collaboration amongst the countries and exchange of information to counter the BEPS situations. Undoubtedly, the global tax landscape is undergoing a big shift and there have been efforts to find new, novel and more efficient ways to manage controversy and dispute resolution. Joint audits and simultaneous tax audits are amongst those new and novel approaches countries have been increasingly resorting to in recent years.

Simultaneous tax audits involve situations where the tax administrations of two or more countries examine a taxpayer simultaneously, each in its own territory. As against this, a joint audit involves a procedure where two or more countries join to form a single audit team to examine issues or transactions of one or more related taxable persons with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organised in the participating countries and in which the countries have a common or complementary interest<sup>112</sup>. Simply put, joint audit refers to a practice where two or more tax administrations will work together as a single team.

### **Legal basis for conducting simultaneous or joint audits**

If the countries wish to explore the option of simultaneous or joint audit, it is first necessary to determine the legal framework on which they can cooperate. The basis for cooperation can be found in a network of bilateral and multilateral tax treaties such as:

- Article on "Exchange of information" in bilateral tax treaties, which imposes obligations on the treaty partners to exchange information that is foreseeably relevant for implementation of both tax convention and domestic fiscal legislation;
- Bilateral Information Exchange Agreements entered into; and
- The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (to which Singapore is also a signatory).

Article 8 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters provides a legal foundation for conducting simultaneous tax examinations. Article 8 of the convention reads as follows:

#### *"Article 8 - Simultaneous tax examinations*

1. *At the request of one of them, two or more Parties shall consult together for the purposes of determining cases and procedures for simultaneous tax examinations. Each Party involved shall decide whether or not it wishes to participate in a particular simultaneous tax examination.*
2. *For the purposes of this Convention, a simultaneous tax examination means an arrangement between two or more Parties to examine simultaneously, each in its own territory, the tax affairs of a person or persons in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain."*

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<sup>112</sup> Report by OECD Forum on Tax Administration on Joint Audit, September 2010, para 7.

Singapore could also consider legislating the framework for conducting simultaneous or joint audits under the domestic law.

### **Suitability of simultaneous or joint audits**

Joint audits could be considered<sup>113</sup>:

- When there is an added value compared to the procedure of exchange of information;
- When the countries have a complimentary or common interest in the fiscal affairs of one or more related taxpayers; and
- In order to obtain a complete picture of a taxpayer's tax liability in reference to some portion of its operations, or to a specific transaction, where a domestic audit is not sufficient.

In September 2010, joint audit protocols appeared in an OECD report and practical guide was issued at the end of the Istanbul meeting of the OECD Forum on Tax Administration. The OECD report identified the need for joint audits and for tax administrators to cooperate and collaborate more closely. The following list provides for illustrative issues that may be suitable for a joint audit<sup>114</sup>:

- Transfer pricing issues
- Complex business restructuring processes
- Split benefit agreements (including royalty payments)
- Cost allocation agreements
- Hybrid financial instruments
- Back-to-back loans
- Structured transactions
- Double-dip leases
- Service agreements and cost sharing agreements
- Private equity funds
- Dealings with source issues

### **Practical experiences**

There have been cases in the past where two countries collaborated for joint audits. Canada and the US conducted one such joint audit in 2013<sup>115</sup>. The US also conducted one such joint audit with Australia. Russia has conducted simultaneous tax audits with Sweden and Finland<sup>116</sup>. EU countries have conducted several simultaneous tax audits. The South African Revenue Service was undertaking a joint audit of a High Net Worth Individual with the UK's HMRC. In fact, the OECD report on joint audits mentions that many of the 13 countries<sup>117</sup> (forming the OECD Study Team for the report) have successfully pursued cooperative activities, including simultaneous tax examinations.

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<sup>113</sup> Report by OECD Forum on Tax Administration on Joint Audit, September 2010, para 9.

<sup>114</sup> Report by OECD Forum on Tax Administration on Joint Audit, September 2010, para 73

<sup>115</sup> CRA, Summary of the Corporate Business Plan 2014-2015 to 2016-2017

<sup>116</sup> Global Forum on Transparency and Exchange of Information for Tax Purposes, OECD, Peer Review Report Phase 2, Implementation of the standard in practice, Russian Federation, page 505

<sup>117</sup> Australia, Canada, Denmark, France, Japan, Korea, Mexico, Netherlands, South Africa, Spain, Turkey, the UK and the US



Appendix 1 – Overview of gap analysis regarding minimum standards

Minimum standards of Action 14		Singapore	Japan	China	Korea	Indonesia	Malaysia	USA
1.1.	Do the tax treaties of your country generally include regulations according to para 1 to 3 of Art. 25 as interpreted in the Commentary to the OECD MTC?	Yes	Yes	Yes	Yes	Most of the treaties	Yes	Yes
	Does your country provide MAP access in transfer pricing cases even in the case of the tax treaty not providing for regulations similar to Article 9 para. 2 of the OECD MTC?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
1.2.	Does your country provide MAP access in case of disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a treaty anti-abuse rule have been met?	Likely	Yes	Yes	Unlikely	No specific regulation	Yes	MAP relief available in LOB cases
	Does your country provide MAP access in case of disagreement between the taxpayer and the competent authority as to whether the conditions for the application of a domestic anti-abuse rule conflicts with the provisions of the treaty?	Unlikely	Yes	Yes	Unlikely	No specific regulation	No regulation	No



Appendix 1 – Overview of gap analysis regarding minimum standards

Minimum standards of Action 14		Singapore	Japan	China	Korea	Indonesia	Malaysia	USA
	place of which competent authorities are able to fully and effectively carry out their mandate to take an objective view of treaty provisions and apply them in a fair and consistent manner?							
2.1.	Does your country provide for and publish clear rules, guidelines and procedures to access and use the MAP? Is this information publicly available?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2.3.	Do the staff in charge of MAP processes have the authority to resolve MAP cases in accordance with the terms of the tax treaty? Are they dependent on the approval of the direction of the tax administration personnel who made the adjustments? Are they influenced in their decision?	Yes	Yes	No, there is an approval process from the provincial level to the SAT and also within the SAT	For the first question, yes. For the second and third question, no	Yes, Director of Tax Regulations II has the authority to resolve MAP cases	Yes, they do. They are not dependent on approvals or influences insofar	Yes. MAP team is independent of the IRS team responsible for making TP adjustments. They are not influenced, but may rely on auditors for fact-finding
2.4.	What are the performance indicators for the competent authority functions and staff in charge of MAP processes? Are they based on the amount of sustained audit adjustments or maintain tax revenue?	Not based on the quantum of tax revenue. KPIs not publicly indicated but likely to include number of	Yes	No public information. Both could be relevant factors	Based on number of cases resolved	Information is not publicly available	It could be a combination of the two	Information is not publicly available

Appendix 1 – Overview of gap analysis regarding minimum standards

Minimum standards of Action 14		Singapore	Japan	China	Korea	Indonesia	Malaysia	USA
		cases resolved as these are reflected in IRAS' Annual Report						
2.5.	Does your country have adequate people resources (headcount / skills--wise)?	Yes	Yes	In the process of building up such resources	Yes, there is a dedicated MAP team	CA team is reasonably skilled because of trainings; from practical experience, not sure whether this is sufficient	Yes	Yes
2.6.	Does your country provide MAP programme guidance, which makes it clear that audit settlements between tax authorities and taxpayers do not preclude access to mutual agreement procedure? Does the CA of your country consider independently whether the audit settlement would result for the taxpayer in taxation not in accordance with the provisions of the	Yes – the crux lies in whether the taxpayer has applied under the relevant MAP Article and is able to determine which treaty clause is in breach, even with the	Yes	1) Yes 2) Chinese tax authorities are sometimes quite aggressive on TP audit and they may assess the case from a China TP / tax collection perspective 3) No, the SAT issues a formal	1) No. The taxpayer can apply within three years of the assessment 2) Yes 3) Technically, yes	Audit settlements are not formal in nature and nothing precludes access to MAP	1) Yes. Also, taxpayers are encouraged to notify the Office of MAP 2) Yes 3) The MAP authorities will only notify the taxpayer, not the CA of its treaty partner	Obtaining MAP relief is considered an exhaustion of remedies





Appendix 2 – Overview of gap analysis regarding best practices

Best practices under Action 14		Singapore	Japan	China	Korea	Indonesia	Malaysia	USA
1.	Does your country generally include a regulation similar to Article 9(2) of the OECD MC in its tax treaties?	Yes	Yes	Yes	Yes	Yes, most of the tax treaties	Yes	Yes
2.	Does your country have appropriate administrative processes in place to publish agreements reached as a kind of best practice for other taxpayers?	No	No	No, except basic information of APAs reached during the year	No	No	No	No
3.	Does your country intend to develop the "global awareness" of the audit / examination functions involved in international tax matters through the delivery of the Forum on Tax Administration's "Global Awareness Training Module" to appropriate personnel?	No information available	Yes	No information available	No information available	No	No information available	No information available
4.	Has your country implemented bilateral APA programmes?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5.	Are there appropriate procedures in place in your country to allow taxpayers to request for multi-year resolution through MAP of recurring issues?	Yes	Yes	Yes	Yes	No specific regulation	Yes	Yes
6.	Does your country provide for appropriate measures to provide for a suspension of collections procedures during a pending MAP case (conditions similar to the	No information available	Yes	No	Yes	No	No	Yes

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	domestic administrative or judicial remedy)?							
7.	Has your country implemented appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes?	Yes	Yes	Yes	Yes	No	No, based on experience, taxpayer and Malaysian CA will typically engage their own legal advisor	Guidance is published on requesting MAP relief
8.	Does your country publish in its MAP guidance an explanation of the relationship between the MAP and domestic law administrative and judicial remedies?	Yes	Yes	Yes, it is indicated in the MAP regulations that such regulations are drafted based on the tax treaty and domestic tax law	Yes	Yes, domestic disputes can be run in parallel	Yes, the CA will require the taxpayer to agree to the suspension of the domestic legal remedies if MAP request is accepted	Yes
9.	How does the competent authority treat a bona fide taxpayer-initiated foreign adjustment (e.g., of a tax return) in the context of an ongoing MAP case?	Subject to agreement with IRAS	-	Look at a case by case basis. Tax adjustments will be made based on the final agreement reached between the CAs	It is not influenced	No specific guidance	This depends on the nature of foreign adjustment being made	MAP relief is generally allowed in the case of taxpayer-initiated adjustments
10.	Does your country also publish MAP guidance regarding the consideration of interest and penalties?	No	No	No. In practice, Chinese tax authorities refer to interest provisions for TP audit	No	No	No specific regulation	No

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11.	Does your country also publish MAP guidance regarding multilateral MAPs and APAs?	Yes	No	Yes, the MAP-related regulations apply to multilateral MAPs and APAs	Only APAs, in the form of an annual report	No	Yes	Yes
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Appendix 3 – Comparison of Arbitration Models

Criteria		Arbitration according to OECD Model	Arbitration according to UN Model	EU Arbitration	Baseball Arbitration
1.	Timeline for submitting arbitration after having presented for MAP	Two years	Three years	Two years	Generally two years
2.	Mandatory / voluntary binding arbitration	Mandatory	Voluntary	Mandatory	Mandatory
3.	Who has to file for arbitration?	Taxpayer	Competent authorities	Competent authorities	Competent authorities
4.	Scope of arbitration	Disqualification of any tax treaty matters	Disqualification of any tax treaty matters	Only transfer pricing issues	Disqualification of any tax treaty matters
5.	Independent opinion / final offer approach	Independent opinion	Independent opinion	Independent opinion	Final offer