INTERNATIONAL CHAMBER OF COMMERCE

Trade and Investment
Commission on Taxation

ICC Comments on OECD public consultation document on the review of BEPS Action 14: Making Dispute Resolution Mechanisms More Effective

The International Chamber of Commerce (ICC), is the world business organization speaking with authority on behalf of enterprises from all sectors in every part of the world and is a well-established arbitral institution through its International Court of Arbitration, and provides other valued dispute resolution mechanisms through its International Center for ADR. ICC appreciates the opportunity to provide input on the OECD public consultation document on the review of BEPS Action 14: Making Dispute Resolution Mechanisms More Effective, as part of the ongoing work of the OECD/G20 Inclusive Framework on BEPS (the Inclusive Framework). ICC advocates for a consistent global tax system, founded on the premise that stability, certainty and consistency in global tax principles are essential for business and will foster cross-border trade and investment.

GENERAL COMMENTS

ICC welcomes the opportunity to provide comments on the review of the BEPS Action 14 Report, which contains a minimum standard to ensure that jurisdictions resolve their treaty-related disputes through the mutual agreement procedure (MAP) in a timely, effective and efficient manner.
ICC appreciates the time and effort invested by the OECD and member countries in developing options to strengthen existing dispute resolution mechanisms. ICC strongly believes that more effective dispute resolution – providing much needed increased tax certainty and predictability for companies – is of utmost importance for enhancing cross-border trade, foreign direct investment and economic growth.

The OECD Statistics on Mutual Agreement Procedures for 2019 notes that "the inventory of MAP cases keeps increasing, with 2700 new cases in 2019 alone, and has almost doubled since 2016." The most recently released OECD MAP Statistics demonstrate that the business community is confronted with increasing instances of dispute and a greater risk of double taxation. ICC is of the view that the interpretation and implementation of the BEPS recommendations have led to a certain degree of uncertainty which inevitably leads to a higher risk of double taxation and consequently an increasing number of taxation disputes. ICC is concerned that government expenditures in the wake of the global pandemic and the efforts of the members of the Inclusive Framework in respect of addressing tax challenges arising from digitalisation will give rise to increased uncertainty and higher risk of double taxation.

In this context of increasing uncertainty and greater risk of double taxation, improved and effective dispute resolution mechanisms are more pressing than ever. ICC believes that robust dispute resolution mechanisms buttressed with mechanisms to ensure mandatory resolution of disputes and implementation of agreements must remain a fundamental corner stone of the BEPS outcomes and the work of the Inclusive Framework.

While ICC believes that much progress and valuable insight have been gained over the past five years on the implementation of the BEPS Action 14 minimum standard, continued efforts are needed to support the objectives of enhancing cross-border trade, foreign direct investment and economic growth. To this end, the integration of the full suite of alternative dispute resolution tools, such as mediation, would serve to strengthen the objectives of BEPS Action 14. Notwithstanding, dispute prevention, rather than resolution, must remain at the forefront of any dialogue on the elimination of tax uncertainty. A system that relies on resolution, by its very definition, is tactical and requires a significant expenditure of resources for both tax authorities and taxpayers.

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MAP arbitration
The OECD consultation document notes that an analysis of over 3000 tax treaties shows that only a limited number provide for MAP arbitration. "In the final report on BEPS Action 14, 20 jurisdictions committed to adopt and implement MAP arbitration in their bilateral tax treaties in addition to their commitment to implement the Action 14 Minimum Standard. Apart from these jurisdictions, another 13 jurisdictions have since then opted for MAP arbitration in the BEPS multilateral instrument, thereby modifying over 200 tax treaties to include MAP arbitration."

The document acknowledges that "implementing MAP arbitration could be an incentive to reduce the number of MAP disputes that are closed with no or only partial resolution but may also have a positive impact on more timely resolution of all pending MAP cases." It notes that "a number of jurisdictions have expressed strong support for the adoption of MAP arbitration as a means to improve the efficiency and effectiveness of the MAP, while a number of others have clearly indicated that MAP arbitration raises several issues around constitutional and sovereignty concerns, but also practical issues including cost, capacity and resource constraints, which is why they do not support its inclusion into the Minimum Standard and consider it very difficult to move away from such position."

ICC strongly supports the inclusion of a mandatory arbitration mechanism in the MAP process, while understanding that some countries are not willing to accept this at this time due to some of the obstacles cited. ICC believes that legal and constitutional concerns should be alleviated in the context of MAP arbitration as sovereignty is ceded to the extent of the tax treaty and the dispute resolution mechanisms would simply enforce these provisions with the only aim of adhering to the best international tax practices, eliminating double taxation and creating a more attractive environment for investors. The sovereignty objection to binding, mandatory double-tax dispute resolution has been disproved as already some States have adopted treaties so providing[1].

Furthermore ICC holds that MAP arbitration provides assurance that MAP disputes will be resolved timeously and provide for increased certainty for taxpayers and relief from double taxation, which is the ultima ratio of this tool. MAP arbitration essentially supplements the current MAP process in cases where competent authorities are unable to resolve disputes in a timely manner, and could encourage more efficient conclusion of MAP cases.

ICC recognises that arbitrators' independence is critical from the standpoint of all parties – public and private – and such independence has been safeguarded by arbitration institutions. For example, ICC has developed institutional safeguards through the supervision of the International Court of Arbitration as well as working standards on arbitrator's independence.[2]

ICC underlines that a well-established and worldwide network of experts in developed and developing countries is crucial and notes that it has such a diverse network in place to propose and nominate experts as potential arbitrators through its International Centre for ADR.

International arbitration in a variety of contexts has grown significantly since it was initially

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[1] *E.g. Protocol amending the Convention between the Federal Republic of Germany and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and to certain other taxes signed on 29 August 1989, 1 June 2006, 2504 UNTS 90; Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 23 July 1990, 1847 UNTS 3. See also Reimer, E., and Rust, A., ed., Klaus Vogel on Double Taxation Convention, vol. II, Wolters Kluwer, 2015 at 1824; Pit, H.M., Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation, 42 Intertax 2014 at 445; Sidhu, P.K., Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration, Bull. Int. Tax. 2014 at 590.*

[2] See the ICC Rules of Arbitration: http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/

addressed in 1923 with the establishment of the ICC International Court of Arbitration. ICC notes that many of the same obstacles cited in the taxation context have existed with respect to arbitration in non-taxation areas in which effective, and broadly embraced alternative dispute resolutions have been developed by ICC and other arbitration bodies. Everything suggests that any obstacles in the use of arbitration may be overcome and the incorporation of arbitration for the resolution of disputes in the area of taxation is possible.

If international arbitration is to have credibility and legitimacy, it must reflect the diversity of all participants in the system. In fact, the international arbitration system is becoming more diverse and more inclusive, but it takes time to develop expertise in a specialised field. A key element to level the playing field in this regard is systematic capacity building. It is especially important that such capacity building takes place at the level of the OECD and the United Nations, and that these organizations, as the bodies responsible for drafting the model tax conventions, both recommend the use of arbitration for international tax disputes, and educate their users, i.e. authorities in charge of implementing the model conventions. The establishment of an international consensus regarding the procedural framework for international tax disputes could also be a way to inspire confidence in the system for developed and smaller countries, less experienced with the international arbitral process.

International arbitration may prove useful to address some of the limitations of existing tax dispute resolution mechanisms, such as the MAP. ICC has unparalleled expertise in this area, combined with a global footprint. ICC can provide arbitration clauses, arbitration-related services, know-how and best practices to assist taxpayers and authorities in resolving tax disputes.

In the absence of broadly applicable arbitration, ICC encourages countries to take incremental steps to move in the direction of arbitration in order to increase the efficiency of the process.

ICC believes that the OECD should strongly recommend the arbitration solutions already implemented by several of its Members. For example, Canada, France, Germany, Sweden, Switzerland, the United Kingdom and the United States[3] have all accepted arbitration in their taxation treaties, which has been implemented in certain cases. The EU has also implemented arbitration[4] for several decades with satisfactory results. This underlines the fact that arbitration clauses are possible. Solutions for arbitration that meet constitutional requirements in specific countries should be put forward.

Dispute resolution mechanisms in the context of OECD work to address tax challenges of digitalisation

ICC recommends that, as part of the work being undertaken concerning the FTA tax certainty agenda, further consideration be given to earlier MAP engagement and coordination where an MNE considers it likely that the actions of one or more contracting states will result in taxation not in accordance with one of the international instruments. Essentially this would entail the development of best practice guidelines to assist competent authorities to be 'MAP ready' in the sense of working with the taxpayer and the relevant audit team to obtain a sense of the relevant facts and position so as to eliminate duplicated effort once the MAP process begins. In this regard, the work currently conducted by the FTA on joint audits could be leveraged. This has, for example, proven effective in the OECD International Compliance Assurance Program (ICAP) pilot projects with simultaneous reviews conducted by different tax authorities, therefore avoiding litigation .

[3] The International Centre for Dispute Resolution (ICDR) provides administrative services in support of arbitration under the Mutual Agreement Procedure (MAP) article of United States income tax treaties. The ICDR carries out the international operations of the American Arbitration Association (AAA), a not-for-profit public service organization. The administrative services provided by the ICDR will include training and selection of arbitrators along with case management for cases sent to arbitration

[4] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, which has been recently revisited by Council Directive 2017/1852 of 10 October 2017.

Further, ICC members call upon the Inclusive Framework members to consider greater use of supplementary dispute resolution mechanisms within the context of MAP, again, either with or without mandatory binding dispute resolution mechanisms. In this respect, Inclusive Framework members are encouraged to consider the observations at paragraph 3.5.2 of the OECD's Manual on Effective MAP (published in 2007 and known as "MEMAP") and paragraphs 86 and 87 of the OECD's Commentary to Article 25 of the OECD's Model Tax Convention 2017. In this respect, ICC members consider that an MOU similar to the model mutual agreement that forms the Annex to the OECD Commentary to Article 25 of the OECD's MTC 2017 could be an appropriate mechanism to document the use of supplementary dispute resolution in the context of MAP.

ICC members believe that electivity is important for developing countries, but they should not have to go through a multi-year MAP first which will leave few resources available for mandatory binding dispute resolution (MBDR).

Growing trend of unilateral measures
The past couple of years has seen a proliferation of unilateral measures such as digital services taxes, the US BEAT, UK diverted profits tax, which fall outside of the provisions of double tax treaties and create the risk of double taxation. In this regard, ICC believes that the OECD should consider how to reduce the incidence of double taxation by ensuring that unilateral taxes are treated as covered taxes by the tax treaties (which should include all taxes levied "in lieu of" income taxes).

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RESPONSE TO SPECIFIC CONSULTATION QUESTIONS

Specific Comments

1. **Please share any general comments on your experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with jurisdictions that obtained a deferral of their peer review.**

   ICC welcomes the OECD's commitment to provide both dispute prevention and dispute resolution mechanisms. ICC notes that the key roles of mandatory binding arbitration in the MAP process are to ensure that double taxation is not suffered and provide taxpayers with as much certainty and legal clarity as possible.

   Within the new developments related to addressing the tax challenges of digitalisation, as there appears to be a move away from relatively well-established profit allocation principles, there is likely to be a proliferation of bilateral discussions and negotiations that the current dispute mechanisms are not sufficiently equipped to deal with. Even where multilateral tools can be developed and implemented, this is not expected (nor is it desirable) to eliminate the importance of bilateral mechanisms, although it could relieve the pressure on them and be useful particularly with respect to the allocation of Amount A. Therefore, even as new forms of collaboration are in the process of being designed (e.g. multilateral panels in the Pillar One Blueprint), the smooth and efficient motion of the existing tools remains crucial.

   As noted above, according to the most recent statistics[5] from the OECD the number of cross-border tax disputes continues to increase: with 2700 new cases, representing a 20% increase in transfer pricing cases and a 10% increase in other cases, and the number of outstanding and new disputes also increased. This was despite the fact that the statistics

[5] OECD Statistics on Mutual Agreement Procedures for 2019

demonstrate that more disputes were resolved in 2019 than in 2018. While many of these cases may relate to implementation of the BEPS rules (and thus the rate of increase may slow in coming years), there is no indication that the number of annual cases will not continue to increase into the future, which will place even greater strain on the process unless new mechanisms are introduced and/or additional capacity is created in tax administrations. In light of the above ICC believes that it is necessary that a more practical approach is adopted by tax authorities when dealing with these cases in order to reduce deadlines and inventory.

a) In many cases it can be difficult to access MAP and the process takes a number of years simply due to a lack of resource on the part of tax authorities. Jurisdictions should be encouraged to ensure adequate resources, with appropriately trained staff, are in place to handle case volumes in a timely manner.

b) In addition, communications from tax authorities and visibility over the process is generally poor for taxpayers during this timeframe. Greater transparency regarding case progression and specific issues that may create challenges in the resolution of cases alongside an opportunity for MNEs, particularly on factual matters, to clarify such issues could be paramount in improving case progression and resolution timelines.

c) While not specific to jurisdictions that have obtained a deferral of their peer review, there are troubling examples in which some jurisdictions will only settle (or agree to better settlements) audit cases on the condition that the taxpayer does not apply for MAP. Clearly, such an approach conflicts with both the spirit and purpose of the MAP process and thought should be given as to appropriate disincentives and possible sanctions for countries that adopt this approach.

d) Furthermore, ICC notes that further work is needed to ensure that MAPs provide useful and practical tools to avoid double taxation and prevent disputes as opposed to extenuous processes that ultimately may not provide certainty.

e) Arbitration is particularly important in ensuring resolution. As such, there are a number of factors that are key to ensuring that arbitration is effective. ICC's experience in arbitration in non-taxation areas identifies the following elements as key for developing successful arbitration programmes:

- Timeliness, efficiency and independence;
- Identify the common and discrete objectives of the parties involved;
- Develop a thorough understanding of the obstacles needed to be overcome including legal and implementation challenges;
- Study the experience of successful alternative dispute resolution mechanisms in other areas[6]. ICC has broad experience to develop a tailor-made process;
- Outline a proposed approach that deals with the obstacles to the use of arbitration for the resolution of tax disputes, e.g. transparency *versus* confidentiality;
- Develop an approach that supports and strengthens broader accessible, effective and efficient dispute resolution mechanisms in which countries are encouraged to reach a mutually acceptable agreement where arbitration is the exception rather than the rule;

[6] e.g. HM Revenue and Customs, Tax disputes: Alternative Dispute Resolution (ADR) 2014. https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr, Belastingdienst (Dutch Tax and Customs Administration), Mediation, 2015. http://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/standaard_functies/individuals/contact/you_do_not_agree/mediation/

- Establish consensus driven processes that safe-guard the interests of multiple parties;
- Implement with an institution that has broad experience in administering cases through dispute resolution mechanisms in other contexts.

The consideration of lessons learned may provide useful guidance for forging a path by which countries embrace international taxation arbitration, as well as establishing and administering other dispute resolution mechanisms such as mediation and the administration of expert proceedings. With expert proceedings a mutually acceptable expert makes a (usually) binding decision on parts of the dispute. As with arbitration, rather than directly resolving the MAP, the competent authorities would generally be obliged to resolve it themselves according to the Early Neutral Evaluation decision. If not binding, its main function would be (e.g. in a specialist area such as transfer pricing) to prevent the dispute from escalating and help reduce double taxation.

Dispute prevention
ICC believes that clear rules, consistently applied by all tax authorities are essential to prevent disputes. To this end there is still significant uncertainty in respect of application of the OECD transfer pricing guidelines and the BEPS measures. In addition, mandatory agreements bringing competent authorities into accord on how to tax certain transactions, or, put simply, how to split the 'tax cake' are key to dispute prevention. Clarity in rules and guidance is an important way to prevent disputes and reduce the need for countries to debate how to relieve double taxation. Certainty, transparency, dispute prevention over tax assessments and proactive resolution in the event of disputes, should remain central priorities to achieving political agreement.

Mediation
Mediation, being consensual resolution of a dispute with the assistance of a neutral third party, has proved useful in settling tax disputes, particularly over the past decade. ICC has a full suite of mediation clauses and services, which can be used either in conjunction with arbitration or as a standalone process. Mediation can provide a quick and cheap way of resolving tax disputes that preserves the privacy of the process and stakeholders. However, more could be done at a political level to encourage tax administrations to utilise such tools.

Proposals to strengthen the minimum standard

Proposal 1: Increasing use of bilateral APAs Please share your views on this proposal. Introduce the obligation to establish a bilateral APA programme except for jurisdictions with a low volume of transfer pricing MAP cases.

2. ***Please share your views on this proposal.***

ICC fully supports the proposal that participating countries implement and increase the use of bilateral and even multilateral Advance Pricing Agreement (APA) programmes. Bilateral and multilateral APAs are essential tools to avoid litigation and ensure advanced tax certainty. However, ICC would caution that under their traditional administration, this objective would likely require a significant allocation of resources to be successful. Adequate resources are needed within tax administrations in order to achieve reasonable deadlines and to implement effective processes for reaching a decision on the APA.

Taxpayers report that the most significant barrier to participating in an APA is the time it takes for them to be agreed. Considering it may take several years (as is often the case) to conclude an APA then while it has accelerated the process (compared to a traditional MAP scenario following an action of a contracting state) and given the typical term of an APA, the resolution

may nonetheless be retrospective in its application, and in most cases any prospective application will be severely limited.

While unilateral agreements can be viewed as less desirable in certain circumstances, ICC notes their continued role as an important means of reducing disputes and increasing efficiency, particularly when applied on a prospective basis. Transparency and the ability to set aside any unilateral agreement in the event of a challenge from the other tax authority are important features of a unilateral mechanism.

ICC also submits the following suggestions for consideration for increasing dispute prevention via greater use of bilateral APAs and more focus on training on international tax issues for auditors:

- The APA programmes of different jurisdictions can differ in terms of procedures and the extent and nature of information required. Standardised documentation requirements and alignment of the procedural aspects of APA would serve to significantly improve the accessibility of APAs.

- Introduction of a common online platform for filing of bilateral APAs. Greater use of bilateral APAs can be promoted by enabling online filing of APAs. Time-lags in notifications by jurisdictions to each other can thereby be eliminated as well as the need for filing voluminous documentation.

- The development of administrative and procedural guidelines and best practices may be useful in broadening the use of APAs particularly for countries in nascent stages of implementing APA programmes.

- Similar to a MAP, it would be beneficial to consider establishing target timelines for each stage of the APA process and a corollary commitment, on the part of competent authorities to adhere to such timelines. Considering the cost and resource intensity of an APA, the availability of mandatory binding arbitration in those circumstances where an agreement cannot be reached or cannot be timely reached would improve efficacy as a dispute prevention tool.

- Fast track renewal of APA applications, where renewal applications are considered as a fresh application and a simplified process. In cases where there are no material changes in its FAR analysis vis-à-vis previously accepted APAs, processing of such applications can be expedited via adequate disclosures at the time of renewals.

In addition to APAs, fostering the use of joint audits (with standard processes and common rules) would also be an efficient way of reducing the number of cases which are discussed in the context of a MAP.

Proposal 2: Expand access to training on international tax issues for auditors and examination personnel

3. ***Do you have experience with inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAP? If so, what do you think would be the best way to address this situation? For instance, would you support elevating the best practice into the Minimum Standard?***

   ICC believes that only with appropriate training and capacity, can tax officials approach MAP/APAs efficiently. ICC strongly supports the elevation of the best practice into the minimum standard.

4. ***Do you have suggestions on how tax administrations can increase awareness on international taxation in the relevant audit and examination staff?***

   ICC recommends a continuous improvement and learning programme through which the respective competent authorities may:
   a) Provide specific feedback to the examiner/auditor on the resolution reached in respect of a specific reassessment.
   b) Share common resolutions to common reassessments/ issues with local examination/ audit personnel.
   c) Specifically summarise and make auditors/ examiners aware of reassessments that have been withdrawn along with the associated rationale.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardised documentation requirements for MAP requests

5. ***Based on your experience, are there any particular situations or circumstances in which access to MAP was inappropriately denied and that are currently not covered by the Action 14 Minimum Standard? In addition, are there circumstances where you did not submit a MAP request because access would be denied according to available information? If so, please specify these situations or circumstances.***
6. ***Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.***
7. ***We recognise differences between jurisdictions in the documentation that needs to be provided when a MAP request is filed. Have these differences led to problems in practice? If so, would a common list of minimum information that needs to be provided solve these problems? If so, please specify: a. Whether any particular items should or should not be included in such list; and b. Whether there is a need to align the content of such (to be developed) list with any other international rules relating to tax-dispute resolution procedures. If so, please specify which rules and what items in particular.***

   ICC believes that harmonisation of documentation requirements would be helpful in ensuring coherence, efficiency and reducing administrative burden for both taxpayers and tax authorities.

8. ***Do you have any other comments on this proposal?***

   Self-initiated adjustments seem to inevitably make bilateral disputes more difficult to resolve. Today, most countries resist self-initiated adjustments that are negative to their own revenue results. Accordingly, ICC believes that staff training regarding the treatment of self-initiated adjustments would be helpful.

   Constitutional and domestic laws may restrict access to MAP. For example, in many jurisdictions, taxpayers need to exhaust domestic remedies or waive the right to these before a MAP may be initiated.

   The legal basis for a MAP is the Double Tax Treaty of the countries involved. Unfortunately, not every Double Tax Treaty includes a MAP clause and between many countries there is no Double Tax Treaty in place at all. In those cases, companies that find themselves confronted with double taxation have no possibility to apply for any dispute resolution mechanism other than available domestic remedies. ICC suggests that in addition to strengthening dispute resolution mechanisms under the treaties, effort could be directed to also expanding the treaty network.

   ICC members have observed that in certain circumstances effective access to MAP is precluded as a result of jurisdictions taking different interpretations of tax treaty articles. For

example, in practice it is difficult to access MAP if one treaty partner asserts (in line with the tax treaty definition) that a Permanent Establishment of the taxpayer exists in their jurisdiction, but the other treaty partner disagrees that a PE is present. Thought should be given as to how MAP could be made more accessible in such cases.

ICC strongly believes that countries "should" commit to adopt the best practices included in the MEMAP.

In order to facilitate access and minimise the administrative burden, ICC suggests that there should be two different approaches in terms of documentation: (i) "basic" information and documentation provided by the taxpayer or the administration to assess access to MAP; and (ii) "comprehensive" or additional information requested by both tax administrations only where needed. The information should focus on the specific problem to be resolved and the required information should be agreed by tax administrations before it is requested to minimise duplication of effort and/or misunderstandings.

One country specific requirement that can be an obstacle is the language in which the information and/or documentation is provided. MNEs that centralise certain functions may face challenges in preparing a local MAP request or, even where translation is outsourced, validating the contents of that request. A mechanism to minimise the burden of translation may help to improve the accessibility of the MAP; particularly for smaller MNEs.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules

9. ***Has the lack of suspension of tax collection in MAP cases created problems in specific cases? Should the best practice be elevated to a Minimum Standard?***

Some countries require taxpayers to pay some or all of the tax at risk before entering into local or cross-border resolution procedures which can make the process financially burdensome/impossible. ICC agrees that suspension of tax collection should be elevated to a minimum standard.

ICC strongly recommends that each contracting state should provide for a deferral of the amount of double taxation until such time as resolution is achieved (except in circumstances of jeopardy).

10. ***If you support the elevation to a Minimum Standard, what can be reasonably expected from taxpayers to ensure that taxes due can be collected if the outcome of the MAP process confirms the taxes imposed?***

There are a number of options that may be available, but ICC members have observed that certain jurisdictions may be able to provide a guarantee or that security may be provided in its stead.

11. ***Do you have any other comments on this proposal?***

ICC makes these additional observations:

- Taxpayers are often forced to settle cross border related disputes since a settlement offers certainty and often a reduction in the tax payable and thus this might for many taxpayers be the only chance to afford the payment of any additional tax due. It should also be noted that in cases in which tax payers are required to deposit upfront the tax at stake, tax authorities may be disincentivised to complete the MAP process as the tax has been collected and any agreement may ultimately result in refunds.
- Unlike disputes involving matters of domestic taxation, where an amount of tax may

be due and may not have been paid, in the case of cross-border disputes, particularly relating to transfer pricing and the attribution of income, tax may have been paid (albeit potentially at a different rate) in the corresponding jurisdiction.

Proposal 5: Align interest charges / penalties in proportion to the outcome of the MAP process

12. ***Have you experienced cases where interest and penalties have not been aligned with the outcome of the MAP process? If so, is this an important issue and should aligning interest charges and penalties with the MAP outcome become part of the Minimum Standard?***
13. ***Do you have any other comments on this proposal?***

ICC supports the elevation of this proposal to be a part of the minimum standards.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements

14. ***Based on your experience with the implementation of MAP agreements, has such implementation been prevented by the expiration of domestic time limits in any of the jurisdictions involved in the process? Alternatively, have you experienced cases where competent authorities did not come to an agreement because an agreement could no longer be implemented as a result of domestic time limits?***

As noted in paragraph 25 and 26 a number of treaties do not contain the second sentence of article 25 (2) and are not accordingly modified under the MLI. A number of examples can be cited in these circumstances as a consequence of a late reassessment or long MAP process in which a settlement may not be implemented. ICC supports the inclusion of both a) and b) of the proposal in the minimum standards.

15. ***Based on your experience with the implementation of MAP agreements, have you experienced cases where solutions were found to implement the agreements despite domestic time limits having expired? If yes, please describe those solutions.***
16. ***Do you have any other comments on this proposal?***

ICC further reiterates that a legal framework should be as consistent as possible in order to avoid misalignment or different approaches across countries. ICC supports inclusion of this proposal in the minimum standards.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed tax years

17. ***Please share any experience with the multi-year resolution of recurring issues through the MAP process, in particular whether this was possible and, if so, under what circumstances.***
18. ***Are there any other options – based on your experience – that would allow recurring issues to be dealt with in MAP or another dispute prevention/resolution process (e.g. a roll-forward of the MAP agreement to future years via bilateral APA)?***
19. ***Do you have any other comments on this proposal?***

ICC supports the implementation of coordinated administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues. ICC would welcome the roll-back of APAs or the roll forward of a MAP agreement into an APA to provide certainty going forward. Domestic timelines for tax assessments and individual country laws for invoking MAPs may need to be factored in if multi-year MAP resolutions are to be considered.

It is important for the procedure to be simple and efficient to be effective. The procedure could be based on the grouping together of disputes. In the context of APAs, it could be useful to have guidance and best practices with respect to the eligibility of historical taxation years for a roll-back.

ICC would further note that a multi-year resolution would also support the objectives of Proposal 4 and Proposal 5 where a resolution can be achieved expeditiously such that the settlement is known in advance of subsequent reassessments or where further audit action can be held pending the conclusion of a multi-year resolution.

Proposal 8: Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through the mutual agreement procedure

20. ***Based on your experience, how do tax disputes under treaties with MAP arbitration compare to tax disputes under treaties without MAP arbitration in terms of resolution time, effectiveness of the solution and costs of proceedings?***
21. ***Separately, do you have views or other suggestions regarding alternative approaches to dispute resolution that could provide taxpayers full and timely resolution of cases that remain unresolved in the MAP? Question for public consultation***

ICC supports mandatory binding arbitration and notes that experience has shown its effectiveness in improving certainty, i.e. a resolution is reached and that in practice arbitration serves to ensure resolution rather than be the mechanism of resolution and has also proven to be effective in improving timelines. Where resourcing is a constraint, arbitration also creates convergence in timelines such that all cases tend to be resolved within the prescribed timeline.

For example, ICC observes that timeliness of resolving a tax dispute but also safeguarding the powers of competent authorities to reach a resolution are important considerations that could be linked to the binding nature of the decision and the ability to seek resolution in other fora. Drawing on the mechanisms in the Energy Charter Treaty Art. 21(5)(b), in the event that a decision is not reached by competent authorities within a specific time frame (e.g. 24 months), the MAP decision seeks to become binding but takes the nature of an instructive decision for other fora.[7]

22. ***Do you have other suggestions to strengthen the Action 14 Minimum Standard? In your response please also mention whether there are any other best practices that you think should be elevated to elements of the Minimum Standard.***

ICC believes that MAP arbitration and other dispute resolution mechanisms are essential to guarantee the timely and effective resolution of cases through the mutual agreement procedure. In this respect, ICC suggests that there should be clear focus in terms of resources and capacity building to enhance the effectiveness of these mechanisms which should be general recommendations or minimum standards.

ICC observes that there can be significant variability in the time taken to implement and give effect to a MAP settlement once a resolution has been reached and accepted by the MNE. The inclusion of timelines for the implementation of a MAP resolution would serve to strengthen the minimum standards.

Proposals to strengthen the MAP Statistics Reporting Framework

[7] See e.g. Energy Charter Treaty Art. 21(5)(b), which provides for a 6-month timeframe for the resolution of a dispute by competent authorities. If a resolution is reached within 6 months, it is then binding on an investment tribunal. If it is reached after 6 months, it becomes instructive/non-binding.

Proposal 1: Reporting of additional data relating to pending or closed MAP cases

23. ***Please share your views on the three proposals for the reporting of additional data under the MAP Statistics Reporting Framework, in particular whether they will provide more transparency and clarity on jurisdictions' MAP inventory.***

    Strengthening the tracing tool so it is linked to the specific international agreement could provide additional clarity.

24. ***Are there any other items that could be reported under the MAP Statistics Reporting Framework to provide further transparency or to allow a more meaningful assessment of jurisdictions' progress toward meeting the 24-month target timeframe to resolve MAP cases?***

    Reporting of additional statistics to provide a complete picture of the cases closed and the ones that remain in inventory.

    Publication of implementation statistics summarising cases closed would be a welcome addition.

Proposal 2: Providing relevant information on other practices that impact MAP – APA statistics

25. ***Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.***

    Providing the full picture of a jurisdiction's efforts regarding dispute prevention and resolution by the addition of statistics on APAs.

    ICC believes that publication of these statistics would be a welcome addition and should be implemented.

26. ***What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?***
27. ***Do you have other suggestions on how the MAP Statistics Reporting Framework could be supplemented or modified to provide increased transparency?***

    In addition to the items described in the table the following additional items may further support the objectives of the reporting framework:
    - Similar to the proposal with respect to MAP cases, time taken to conclude an APA by type of outcome or by commonly defined stages of the APA process will help jurisdictions to evaluate the time elapsed during the APA process.
    - A delineation of the specific issue involved and methodologies employed will be useful to MNEs in evaluating the complexity of transactions addressed, likelihood of success and better form expectations regarding the time required.
    - A number of jurisdictions have extensive pre-acceptance procedures and can result in a significant amount of elapsed time before an APA is even initiated. The time spent on the acceptance process will provide a more complete picture on the amount of time actually required to complete an APA.
    - In some cases, once an APA is agreed to by all of the relevant parties, a significant amount of time can elapse before the resolution is implemented. Statistics related to the implementation process may similarly be useful in evaluating the true time required to fully conclude and give effect to an APA.

28. ***Do you have other suggestions on how the MAP Statistics Reporting Framework could be supplemented or modified to provide increased transparency?***

Indicative reference ranges for transfer pricing disputes and prevailing jurisprudence for commonly encountered tax issues could be made available via a central repository funded by all members, while ensuring that the confidentiality of taxpayers' information is preserved.

With respect to allocation/attribution cases it may be useful to distinguish between those involving Article 7 and those involving Article 9 and to further delineate the specific issue involved. Such additional data may be useful:

- To the Secretariat and member countries in identifying areas of further work
- To tax authorities in their domestic legislative efforts and assist with identifying training needs for audit and examination personnel
- To MNEs in evaluating risk and allocating resources to improve certainty through tools such as APAs

As previously noted, there can be significant variability in the time taken to implement and give effect to a MAP settlement once a resolution has been reached and accepted by the MNE. The inclusion of statistics related to the time taken to implement a MAP resolution would assist jurisdictions in evaluating the true time required to resolve double taxation.

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