January 14, 2021

Organisation for Economic Cooperation and Development
Centre for Tax Policy and Administration
Tax Policy and Statistics Division
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Re: Comment Letter on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective

The National Foreign Trade Council (the "NFTC") is pleased to provide written comments on the BEPS Action 14: Making Dispute Resolution Mechanisms More Effective (Consultation Document) released for Public Consultation published November 18, 2020.

The NFTC, organized in 1914, is an association of some 200 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members value the work of the OECD and the Inclusive Framework in establishing and maintaining international tax and transfer pricing norms that provide certainty to enterprises conducting cross-border operations. A list of the companies comprising the NFTC's Board of Directors is attached as an Appendix.

General Comments

The NFTC commends the OECD for seeking to improve the effectiveness of the mutual agreement procedure (MAP) in resolving tax treaty-related disputes. The NFTC strongly supports the inclusion of a mandatory and binding arbitration provision to resolve disputes. The inclusion of appropriate arbitration provisions in the MAP process would ensure that no competent authority case goes unresolved.

Successful completion of Action Item 14 is critically important to resolving disputes. Rules and principles for determining the rights of taxing jurisdictions vis-a-vis international business activities are almost meaningless if they cannot be administered properly through country audit processes, combined with intergovernmental dispute processes, that are predictable, accessible, objective and principled. The current MAP process is already strained by the rapidly growing caseloads, and it is very difficult for companies to access with any level of confidence its application.

The Consultation Document is designed to seek solutions which will have a practical and measurable impact, rather than merely providing additional measures or guidance that will not be fully used or implemented. The Consultation Document sets out a series of proposals to resolve disputes that would: (i) consist of political commitments to effectively eliminate taxation that is not in accordance with the Convention, (such political commitments reflecting the political dimension of the BEPS Project); (ii) provide new measures to improve access to the MAP and improved procedures; and (iii) establish a monitoring mechanism to review the proper implementation of the political commitment.

The NFTC believes that it is important that the OECD not simply rely upon a political commitment to take up the specific measures identified in the Consultation Document. Jurisdictions should be encouraged to adopt the measures consistently from both scope and timing perspectives. Further, if not carefully designed, a monitoring process, could prove fraught with the weakness as a result of dealing with treaty partners diplomatically. Therefore, NFTC recommends that the FTA MAP Forum be given a central role in ensuring that the ultimate recommendations are driven forward on a strict timetable, and that the competent authorities, with the full support of their respective commissioners, be held accountable for the program of work. Finally, this work should be aligned with - or be sufficiently broad/flexible to cover - the dispute resolution elements of the Pillar 1 and Pillar 2 Blueprints.

NFTC member companies view tax treaty arbitration as a tool to strengthen, not replace, the existing treaty dispute resolution procedures conducted by the competent authorities and advocate for the revision of Action 14 to support MAP arbitration. We believe that arbitration provisions would improve the operation and efficiency of the mutual agreement procedure and perhaps even the examination process. They would, therefore, benefit both governments and taxpayers. Without mandatory binding arbitration provisions, the amount of time countries take to reach resolution can be a practical barrier to the MAP process. There are time limits imposed in some domestic laws which are unrealistic and can be used to essentially nullify the MAP process. It would be helpful if the domestic time limits that hinder the ability of taxpayer to be eligible for using the MAP process can be relaxed or eliminated. Even if a MAP process is successful, if the domestic time limit has been reached, the taxpayer may not be able to receive an agreed upon refund.

NFTC members believe MAP coverage should include any domestic adjustment which potentially results in double taxation. NFTC believes that it is critically important to ensure that in all instances in which a country believes its domestic laws preclude a treaty benefit that be communicated to the competent authority of the treaty partner. It is noted, therefore, that matters pertaining to the interaction of domestic laws and an applicable treaty must not only readily clear the requirements for MAP access in Article 25(1), but also must be readily accepted for MAP consultations under Article 25(2). This clarification is critical because of the potential wide-spread use of domestic anti-abuse rules to deny treaty benefits that may result from Action 6 of the BEPS Action Plan.

Because interpretations of treaty provisions sometimes vary between treaty partners, circumstances arise where one competent authority does not find the objection presented by the taxpayer under paragraph 1 of Article 25 to be justified, while the other competent authority

finds the objection to be justified. For example, some competent authorities hesitate to overturn assessments made by their own tax administrations and, consequently, unilaterally determine that the taxpayer's objection is not justified and, therefore, refuse to discuss the case with the competent authority of the other State. Given this potential whipsaw, a process in which a competent authority can unilaterally determine that the taxpayer's objection is not justified – and thereby prevents the case from being addressed bilaterally through the second stage of the MAP – raises legitimate issues as to the bilateral nature of treaty interpretation and application. Some countries use domestic law to effectively adjust the income of local entities arguing that such costs are for the benefit of another group member. These transfer pricing adjustments done under domestic law can lead to double taxation of the same profit stream. Other countries adjust transfer pricing which leads to secondary adjustments, such as on deemed interest, which can also lead to double taxation. These domestic law adjustments should be included in the MAP process so as to avoid double taxation and to provide for a way to resolve these disputes.
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NFTC members support strong dispute resolution mechanisms and have always supported mandatory binding arbitration in all U.S. bilateral tax treaties as a way to resolve disputes in a timely manner. However, in practice, access to the MAP process can be difficult and the process to work through resolution of a dispute can take a number of years simply due to a lack of resource on the part of Tax Authorities. The NFTC encourages jurisdictions to ensure there are adequate resources with appropriately trained staff in place to handle case volumes in a timely manner. We also believe that the new international dispute resolution processes should be transparent and allow for taxpayers' involvement in the MAP process. NFTC member experience indicates that current MAP process can be closed-door discussions between tax officers of the two countries with no taxpayer insight into the resolution of the dispute.

In some cases, jurisdictions will only settle audit cases on the condition that the taxpayer does not apply for MAP. Taxpayers may feel pressured into giving up access to the mutual agreement procedure if they are given the choice between a high assessment without any suspension of collection, but with access to MAP, or a relatively moderate assessment without access to MAP. Additionally, taxpayers may accept such settlements based on broader concerns for their future relationship with the tax administration involved. Such audit settlements may be a significant obstacle to the proper application of the treaty, as well as to the functioning of the mutual agreement procedure. They lead to situations in which taxation not in accordance with the Convention remains while the treaty partner is not aware of the situation and may be vulnerable to self-help measures taken by the taxpayer. As a result of such settlements, the competent authority of the country where the audit took place may also remain unaware that the treaty has been improperly applied and is thus unable to take appropriate measures to ensure that the treaty is applied according to its object and purpose. 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. Often effective access to the MAP process is precluded as jurisdictions take different interpretations of bilateral tax treaties. 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. There are also a number of developing countries which have MAP provisions in treaties but which either do not have domestic guideline in place or essentially ignore any MAP requests in practice.

Business is not static and there are mergers and acquisitions, spin-offs, reorganizations and other changes in a business entity's structure. Clarity is needed as to what entity is taxable and which entity is able to enter into the MAP process. Where potential assessments will be made, the country assessing the tax should always identify the counterparty to that tax.

It would be helpful if there was an effective mechanism under which an agreement under the MAP process could be rolled forward into an Advance Pricing Agreement (APA) at the taxpayers' option, thereby resolving disputes and providing certainty for Taxpayers and tax authorities going forward. Similarly, it would also be helpful if there was an effective mechanism in which agreement of an APA could be rolled back to cover open years which are under audit or dispute.

In some countries, in order to access dispute mechanisms, or to avoid the accrual of interest, taxpayers are required to deposit upfront the tax payment at stake. In such cases, Tax Authorities have limited or no incentive to complete the MAP process as the tax payment has been collected and any agreement may ultimately result in repayments to taxpayers. Jurisdictions should be encouraged not to require settlement in advance of access to any dispute resolution mechanism. There might be a mid-level option, such as a bank guarantee rather than the full tax collection. Jurisdictions should be encouraged to make changes to their local law in cases in which such provisions are an impediment to effective dispute resolution. Several jurisdictions currently automatically adopt changes in the OECD Transfer Pricing Guidelines into their law and a similar approach should be encouraged with respect to dispute resolution provisions.

Proposals to strengthen the Minimum Standard

The OECD has put forth eight separate proposals to strengthen the minimum standard.

Proposal 1: Increase the use of bilateral APAs
Introduce the obligation to establish a bilateral APA program except for jurisdictions with a low volume of transfer pricing MAP cases.

- We strongly support the increase in the use of bilateral APAs. When concluded bilaterally between competent authorities, APAs provide an increased level of tax certainty, lessen the likelihood of double taxation, and proactively prevent transfer pricing disputes. To date, however, bilateral APA programs have not been universally adopted. The NFTC recommends that there be a commitment by all countries to fully support the use of their bilateral APA programs, as our members have experienced barriers to bilateral APAs even in countries that have such programs. We believe this proposal would be helpful so long as there is also a commitment from jurisdictions to appropriately resource these programs.

Proposal 2: Expand access to training on international tax issues for auditors and examination personnel.
Introduce the obligation to roll-out the Global Awareness Training Module or a similar training program.

- NFTC members support training for auditors and examination personnel and believe this would be a helpful requirement. We encourage training for tax audit documentation and would like to uniform rules as much as possible. Audit training, specifically in developing countries would be helpful as the positions taken by some auditors lack consistency.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardized documentation requirements for MAP requests
Provide criteria for determining whether access to MAP should be given as well as to define what information taxpayers (as a minimum) should include in their MAP requests. Jurisdictions should reflect both items in their MAP guidance.

(Q5) 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.

(Q6) Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.

(Q7) 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.

(Q8) Do you have any other comments on this proposal?

- As noted above, there is experience of jurisdictions agreeing to settle 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.

- NFTC Member experience indicates that, in general, the dispute resolution processes can be very lengthy. Some countries are not entering into MAP at all. Some countries start a tax audit procedure again after the initial audit, which is very burdensome for both the taxpayer and the tax authorities. The NFTC members would like the MAP process to include a list with information that needs to be provided and we would like to see uniform standards. This information must be reasonable.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules
Introduce the obligation that tax collection is suspended during the period a MAP case is pending, under the same conditions as are available to taxpayers under domestic rules.

(Q9) 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?

- In cases in which taxpayers are required to deposit upfront the tax at stake, Tax Authorities have limited or no incentive to complete the MAP process as the tax has been collected and any agreement may ultimately result in repayments. Suspension of tax collection should be elevated to a minimum standard. As we noted above, some sort of guarantee, such as a bank guarantee can be provided.

Proposal 5: Align interest charges / penalties in proportion to the outcome of the MAP process
Jurisdictions should ensure that penalties/interest charges are aligned in proportion to the outcome of the MAP process.

(Q12) 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?

(Q13) Do you have any other comments on this proposal?

- The proposals seem appropriate and worthy of being made general recommendations (or even minimum standards). Under the current approach, interest and penalties can be significant and detrimental to taxpayer and act as a barrier to the MAP process. It would be helpful if interest charges and penalties can be mitigated or waived to reward the good faith and transparency/collaboration of the taxpayers.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements
Jurisdictions should ensure that all MAP agreements can be implemented notwithstanding the expiration of domestic time limits.

(Q14) 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?

(Q15) 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.

(Q16) Do you have any other comments on this proposal?

- The proposals seem appropriate and worthy of being made general recommendations (or even minimum). As we noted above, there are domestic time limits that hinder the ability of taxpayers to use the MAP process, and even where there is a resolution under the MAP process, the domestic time may have elapsed for the taxpayer to receive the agreed upon refund. We recommend that domestic time limits that conflict with the MAP process be rescinded.
- Some jurisdictions refuse to enter into MAP discussions with the Competent Authority from the other State, which limits the usefulness of the MAP process and hinders the ability to resolve disputes. We recommend that all jurisdictions commit fully to the MAP process as a dispute resolution mechanism.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed tax years
Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayers which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

(Q17) 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.

(Q18) 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)?

(Q19) Do you have any other comments on this proposal?

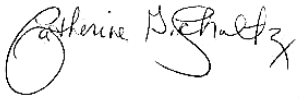
- As noted above, it would be helpful if there was an effective mechanism under which an agreement under MAP could be rolled back to cover years under audit or dispute and rolled forward into an APA to provide additional certainty at the taxpayer's option. There is a need for ACAP processes to be in place to handle on-going issues in advance.

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

(Q20) 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?

- The NFTC strongly supports MAP arbitration and we have found that where arbitration is permitted disputes are resolved much more quickly. When there is mandatory binding arbitration, cases are resolved within the two-year negotiating window. Without arbitration, our experience is that cases can drag on for years, often more than ten in some instances. The two-year time period only starts once all information has been provided to tax authorities. In reality, tax authorities can always take the position that not all information has been provided and therefore the timeframe is not starting. A defined list of information that needs to be provided would help solving this issue.

Sincerely,



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Appendix to NFTC Comments on the BEPS Action 14: Making Dispute Resolution Mechanisms More Effective

NFTC Board Member Companies:

ABB Incorporated
Albright Stonebridge Group
Amazon
American International Group
Amgen
Anheuser-Busch
Applied Materials
BP America Inc.
British American Tobacco Company
Caterpillar Inc.
Chevron Corporation
Cisco Systems, Inc.
Coca Cola Company (The)
ConocoPhillips, Inc.
Corning Incorporated
Dentons US LLP
DHL Express (USA) Inc.
DLA Piper LLP (US)
eBay Inc.
Ernst & Young LLP
ExxonMobil Corporation
Facebook
FCA US LLC
FedEx Express
Fluor Corporation
Ford Motor Company
General Electric Company
Google Inc.
Halliburton Company
Hanesbrands Inc.
Hewlett Packard Enterprise Company
HP Inc.
IBM Corporation
Johnson Controls
KPMG LLP
Mars Incorporated
Mastercard International
Mayer Brown
McCormick & Company, Inc.
Microsoft Corporation
MillaporeSigma
Mondelēz International, Inc.
National Foreign Trade Council
Oracle Corporation
Pernod Ricard USA
Pfizer International Incorporated
Pitney Bowes
PricewaterhouseCoopers LLP
Procter & Gamble Company
Qualcomm Incorporated
Samsung Electronics
Siemens Corporation
TE Connectivity
Total
Toyota Motor North America
United Technologies Corporation
UPS
Visa Inc.
Walmart