

**Inclusive Framework on BEPS: Action 14
Making Dispute Resolution More Effective
MAP Peer Review Report**

BEST PRACTICES

Colombia

2021



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Making Dispute Resolution More Effective
MAP Peer Review Report

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Best practices (2021)

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Abbreviations & Acronyms

APA	Advance Pricing Arrangement
DIAN	National Tax and Customs Administration
MAP	Mutual Agreement Procedure
OECD	Organisation for Economic Co-operation and Development

Introduction

The final report on BEPS Action 14: “Making Dispute Resolution Mechanisms More Effective” identified a number of best practices related to the three general objectives of the Action 14 Minimum Standard.

Paragraph 9 of the Terms of Reference to monitor and review the implementation of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective¹ stipulates that:

The best practices are not part of the minimum standard and whether or not a jurisdiction has implemented the best practices will not be peer reviewed or monitored, nor will it affect the assessment of the assessed jurisdiction. Jurisdictions are free, however, to identify best practices they have adopted.

Colombia has provided information and requested feedback by peers on how it has adopted best practices. In that regard, the FTA MAP Forum agreed on an optional best practices feedback form that peers have used to provide feedback on Colombia’s adoption of the best practices.

The peer review process on the implementation of the Action 14 Minimum Standard consists of two stages: a peer review process (stage 1) and a peer monitoring process (stage 2). Stage 2 is launched within one year upon the adoption of the peer review report by the BEPS Inclusive Framework through an update report by Colombia. This document contains a general overview of the adoption of best practices and comments by peers on the adoption of these best practices during stage 1 (period ranging from 1 January 2016 up to 31 August 2018) and stage 2 (ranging from 1 September 2018 up to 30 April 2020)

¹ Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective ([CTPA/CFA/NOE2\(2016\)45/REV1](#)).

Part A

Preventing Disputes

[BP1.] Implement bilateral APA programmes

Jurisdictions should implement bilateral APA programmes.

1. APAs concluded bilaterally between competent authorities provide an increased level of certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.
2. Colombia is authorised to enter into unilateral, bilateral and multilateral APAs and has implemented an APA programme. The legal basis of Colombia's bilateral and multilateral APA programme can be found, in addition to Article 25(3), first sentence of Colombia's tax treaties, under article 260-10 of Colombia's tax code and articles 1.2.2.4.1 to 1.2.2.4.10 and the Decree 2120 of 2017 provides additional guidance on this process. This part of Colombia's tax code states that the timelines for evaluating, negotiating and finalising a bilateral APA request shall be determined jointly by the relevant competent authorities. In this regard, Colombia noted that as per article 1.2.2.4.6, the starting date for an APA must be the fiscal year in which the agreement is signed and the maximum term covered is five years, including the fiscal year in which the agreement is entered into, the prior year and up to three following years. The provision further states that if Colombia's competent authority has reached an agreement under MAP on the same issue, such agreement would be the basis for the APA. Once an APA request has been accepted and discussions are initiated with the treaty partner's competent authority, Colombia noted that its competent authority would keep the taxpayer updated on the status of the bilateral negotiations and communicate any timetable agreed with the other competent authority, as appropriate.
3. Colombia further clarified that discussions on APAs in Colombia are undertaken in six stages:
 - a pre-filing meeting (stage 1), where the taxpayer can assess the likely success of an APA request, even if on an anonymous basis
 - the formal application (stage 2), where taxpayers eligible for an APA may file a formal application and the DIAN is to verify whether procedural requirements have been met
 - the evaluation stage (stage 3), where the DIAN would undertake a substantive analysis of the request
 - the negotiation stage (stage 4), where the taxpayer is informed of the position in a unilateral APA whereas position papers may be exchanged in bilateral or multilateral APAs

- drafting and agreement stage (stage 5), where the agreement is prepared in a prescribed form with all critical assumptions required and the taxpayer is invited to execute the same
 - annual compliance stage (stage 6), where the taxpayer is supposed to submit to the DIAN an annual compliance notice along with the submission of its transfer pricing return.
4. Colombia reported that it has not yet entered into a bilateral APA, although two requests have been received and are under consideration.
 5. Peers did not provide input relating to this particular best practice.

[BP.2] Publish mutual agreements of a general nature

Jurisdictions should have appropriate procedures in place to publish agreements reached by competent authorities on difficulties or doubts arising as to the interpretation or application of their tax treaties in appropriate cases.

6. Agreements reached by competent authorities to resolve difficulties or doubts arising as to the interpretation or application of their tax treaties in relation to issues of a general nature which concern, or may concern, a category of taxpayers reflect the competent authorities' mutual understanding of the meaning of the convention and its terms. As such agreements provide information that might be useful to prevent difficulties or doubts in the interpretation or application of tax treaty provisions, publication of these agreements is valuable.
7. Colombia reported that its tax administration has occasionally issues opinions of a general nature related to the application and implementation of double tax treaties, which have been published on DIAN's website. Further, Colombia and one treaty partner recently concluded and published an agreement entered into under the equivalent of Article 25(3), first sentence of the OECD Model Tax Convention (OECD, 2017) contained in their tax treaty to clarify the procedure to be applied for the refund of the treaty partner's withholding tax on dividends and interest for residents of Colombia.
8. Peers did not provide input relating to this particular best practice.

[BP.3] Provide guidance on APAs

Jurisdictions' published MAP guidance should provide guidance on APAs.

9. Guidance on a jurisdiction's APA programme facilitates the use of that programme and creates awareness for taxpayers on how the APA process functions. As APAs may also prevent future disputes from arising, including information on APAs in a jurisdiction's MAP guidance is relevant.
10. In order to clarify the procedure applicable for unilateral, bilateral and multilateral APAs, Colombia issued APA guidance in July 2019, which can be found (in English) at:

<https://www.dian.gov.co/Transaccional/GuaServiciosLinea/CT-GM-10106%20Cartilla%20APA%20Ingles%20v1.pdf>

11. The APA guidance explains the APA process in a simple and accessible manner with details on the definition of an APA in Colombia including types of agreements covered, the benefit granted to taxpayers under APAs, the mutual expectations of the taxpayers and the DIAN in the APA process, eligibility to apply for an APA, the period covered in an APA, the scope of APA requests and issues that may be covered, the right of withdrawal and refusal and details on each stage of the APA process, including possibility of revision, revocation and termination once concluded. The APA guidance also prescribes a questionnaire applicable for the pre-filing meeting, the information required in an APA request and the form of the annual compliance report in its Appendices.
12. Peers did not provide input relating to this particular best practice.

[BP.4] Develop “global awareness” of the audit/examination functions

Jurisdictions should develop the “global awareness” of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration’s “Global Awareness Training Module” to appropriate personnel.

13. Making audit/examination function of tax administrations that are involved in international matters aware of: (i) the potential for creating double taxation, (ii) the impact of a proposed adjustment on the tax base of one or more jurisdictions and (iii) the process and principles by which competing juridical claims are reconciled by competent authorities, may be useful to prevent disputes from arising. Using the Global Awareness Training Module developed by the Forum on Tax Administration (FTA) can be helpful in this respect.
14. Colombia reported that its tax and customs authority has a specialised division called the *Escuela de la DIAN*, which is in charge of providing continuing training to its tax officials. Colombia reported that training is not restricted to domestic law and such training also focuses on issues relating to tax treaties.
15. Furthermore, Colombia reported that its tax administration staff is exposed to a variety of trainings, some of which are sponsored by the Inter-American Development Bank. Colombia noted that this institution offers training sessions on theory and practical case studies to DIAN’s officials in charge of transfer pricing. Colombia noted that DIAN’s staff receive anonymous feedback regarding the appropriate way to perform such audits and that officials from Colombia’s International Audit Unit, the Large Taxpayer unit, Bogota’s Regional Offices, as well as from the Legal Directorate and Head of Audit all participate in such workshops.
16. Colombia also reported that it has nine skill-building programme workshops, which address a variety of transfer pricing topics from a theoretical and practical standpoint through theory presentations and case study discussions. Colombia noted that these include but are not limited to intra-group services, transfer pricing methods, mining and other extractive industries, intangibles, tax transparency, business restructuring, financial transactions, BEPS issues, thin capitalisation, and consumer good issues. Colombia also reported that two workshops include the direct participation of businesses including the mining and consumer goods sector.
17. Colombia further reported that its officials undergo trainings related to advance pricing agreements with the World Bank Group. In these trainings, Colombia noted that its

officials discuss APA case studies as well as technical and processing questions regarding DIAN's current APA caseload and that such discussions sometimes include representatives from the private sector.

18. Peers did not provide input relating to this particular best practice.

Part B

Availability and access to MAP

[BP.5] Implement appropriate administrative measures to facilitate recourse to MAP

Jurisdictions should implement appropriate administrative measures to facilitate recourse to the MAP to resolve treaty-related disputes, recognising the general principle that the choice of remedies should remain with the taxpayer.

19. Under Article 25(1) of the OECD Model Tax Convention, the mutual agreement procedure is a dispute settlement procedure in annex to domestic available remedies and not a substitute for such remedies. Reference is made to inter alia paragraph 7 of the Commentary to Article 25 of the OECD Model Tax Convention, which specifies that the right to submit a MAP request is available to taxpayers *without depriving them of the ordinary legal remedies available*. Facilitating recourse to the MAP through appropriate administrative measures, under the general principle that the choice of remedies remains with taxpayers, enables them to effectively resort to such dispute settlement procedure.

20. Article 736 of Colombia's tax code and Article 93-97 of Colombia's Administrative Procedure and Contentious Administrative Code state that if a taxpayer has not exhausted the administrative remedies provided in Colombia's law, the taxpayer could make a request for direct revocation to the relevant administrative authority. Colombia also reported that taxpayers have the opportunity to file a reconsideration plea, which is available to taxpayers who want to challenge administrative acts issued by Colombia's tax administration. Colombia noted that once an assessment has been notified by its tax administration, taxpayers have two months to file such a reconsideration plea with the appeals division of DIAN.

21. With respect to available judicial mechanisms, Colombia reported that a taxpayer has up to four months from the notification of the assessment or from the notification resolution in response to a reconsideration plea to file a request for annulment and restoration of rights before Colombia's administrative tribunal in the first instance. In the second instance, Colombia reported that the taxpayer would file this request to the Council of State. Colombia noted that smaller claims would always be decided by an administrative judge and by the administrative tribunal in the second instance.

22. Colombia reported that a taxpayer may request MAP assistance at any time once it has received notification of a proposed adjustment in writing, so long as the filing period as stipulated under the tax treaty has not expired. Colombia further reported that a taxpayer is allowed to file a request for MAP assistance at any time prior to a final judicial ruling issued by Colombia's competent court. This is confirmed in Articles 31 and 32 of Colombia's MAP guidance. However, Articles 31 and 32 further provide that if a taxpayer

files a MAP request in a situation where the taxpayer has a pending administrative review or judicial claim, the taxpayer is given a time period of 15 days from the notification of acceptance of the MAP request to withdrawn such administrative review process or judicial claim. In the event that the taxpayer does not do so, Article 24(4) of the MAP guidance states that Colombia's competent authority would stop proceeding with the MAP case.

23. Colombia further reported that access to MAP would also be granted if Colombia's domestic remedies have been finalised, even though Colombia is not able to derogate from decisions of its domestic courts and thus will only seek correlative relief at the level of the treaty partner. This is also confirmed in Article 32 of Colombia's MAP guidance.

24. As noted above and as mentioned in BP.10, Colombia's MAP guidance addresses the relationship between MAP and domestic law administrative and judicial remedies.

25. Finally, Colombia noted that although taxpayers are not required to pay a fee to initiate a MAP request, any extraordinary expenses arising during the process such as for expert witnesses, would have to be borne by the taxpayer. If the taxpayer does not reimburse such expenses, Article 24(5) of Colombia's MAP guidance notes that Colombia's competent authority would then stop MAP discussions.

26. Peers did not provide input relating to this particular best practice.

[BP.6] Provide access to MAP for bona fide taxpayer-initiated foreign adjustments

Jurisdictions' published MAP guidance should provide that taxpayers will be allowed access to the MAP so that the competent authorities may resolve through consultation the double taxation that can arise in the case of bona fide taxpayer-initiated foreign adjustments.

27. A taxpayer-initiated foreign adjustment is considered bona fide where it reflects the good faith effort of the taxpayer to report correctly, timely and properly the adjusted taxable income from a controlled transaction or the profits attributable to a permanent establishment with a view to reflect an arm's length result, and where the taxpayer has otherwise timely and properly fulfilled all of its obligations related to such taxable income or profits under the laws of the treaty partners. As such taxpayer-initiated foreign adjustments may lead to cases of double taxation, it is relevant that there is access to MAP for resolving these cases. Furthermore, specifying whether there is access to the MAP for these adjustments in a jurisdiction's MAP guidance also provides additional clarity.

28. Colombia reported that it generally allows taxpayers to request MAP in case of bona fide taxpayer-initiated foreign adjustments. Article 14 of Colombia's MAP guidance requires taxpayers to disclose whether they have made bona-fide taxpayer initiated adjustments in the treaty partner jurisdiction while submitting a MAP request and where this is disclosed, Colombia noted that access to MAP would be granted in eligible cases.

29. Peers did not provide input relating to this particular best practice.

[BP.7] Provide guidance on multilateral MAPs

Jurisdictions' published MAP guidance should provide guidance on multilateral MAPs.

30. In recent years, globalisation has created unique challenges for existing tax treaty dispute resolution mechanisms. Whilst the mutual agreement procedure provided for in Article 25 of the OECD Model Tax Convention has traditionally focused on the resolution of bilateral disputes, phenomena such as the adoption of regional and global value chains as well as the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes. In that regard, it is for clarity purposes relevant that jurisdiction's MAP guidance includes information on availability of and access to multilateral MAPs.

31. Colombia reported that it generally allows taxpayers to request for multilateral MAP. Article 14 of Colombia's MAP guidance requires taxpayers to disclose whether they would want the multilateral resolution of an issue in MAP while submitting a MAP request and where this is requested for, Colombia noted that access to MAP would be granted in eligible cases.

32. Peers did not provide input relating to this particular best practice.

[BP.8] Provide for suspension of collection procedures for pending MAP cases

Jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy.

33. If, following an adjustment taxpayers immediately have to pay the tax due, whereas the same amount was already paid to the tax administration of the other jurisdiction involved, double taxation will in fact occur. As taxpayers may then face significant cash-flow issues, at least for the period the MAP case is pending, it is relevant that jurisdictions provide for suspension of collection procedure for this period under at least the same conditions as available for domestic remedies.

34. Colombia reported that its domestic law allows for suspension of tax collection during the period when a MAP case is pending on the basis of Article 869-3 to the Colombian Tax Code. This is also confirmed in Article 30 of Colombia's MAP guidance.

35. Peers did not provide input relating to this particular best practice.

Part C

Resolution of MAP Cases

[BP.9] Permit taxpayers to request multi-year resolution of recurring issues through the MAP

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayer 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.

36. In certain cases, a MAP request with respect to a specific adjustment to income may present recurring issues that may be relevant in previous or subsequent tax years. Allowing taxpayers to submit requests for the multi-year resolution through MAP with respect to such recurring issues, where the relevant facts and circumstances are the same, may help avoid duplicative MAP requests and facilitate a more efficient use of competent authority resources.

37. Colombia reported that it generally allows for taxpayers to request for the multi-year resolution of recurring issues through MAP. Article 14 of Colombia's MAP guidance requires taxpayers to disclose whether they would want the multi-year resolution of recurring issues in MAP while submitting a MAP request and where this is requested for, Colombia noted that access to MAP would be granted in eligible cases.

38. Peers did not provide input relating to this particular best practice.

[BP.10] Publish explanation of the relationship between the MAP and domestic remedies

Jurisdictions should publish an explanation of the relationship between the MAP and domestic law administrative and judicial remedies.

39. As mentioned under BP.5, pursuant to Article 25(1) of the OECD Model Tax Convention taxpayers are allowed to submit a MAP request irrespective of available domestic remedies. This, however, does not further specify how to proceed if both available remedies are initiated and the case is dealt with in the bilateral phase of the MAP. Publicly available guidance on the relationship between the MAP and domestic remedies provides clarity to taxpayers as well as treaty partners.

40. As discussed under BP.5, Colombia's MAP guidance includes an explanation addressing the relationship between MAP and domestic law administrative and judicial remedies in Colombia. This MAP guidance is (in Spanish) available at:

<https://www.dian.gov.co/normatividad/Normatividad/Resoluci%C3%B3n%20000085%20de%2021-08-2020.pdf>

41. Chapter V of this MAP guidance addresses the relationship between MAP in Colombia and other administrative and judicial remedies under its domestic law.

42. Peers did not provide input relating to this particular best practice.

[BP.11] Provide guidance on consideration of interest and penalties in MAP

Jurisdictions' published MAP guidance should provide guidance on the consideration of interest and penalties in the mutual agreement procedure.

43. As interests and penalties may concern substantial amounts, providing clarity in a jurisdiction's MAP guidance on whether interest and penalties are in the scope of the MAP is relevant to ensure that a taxpayer is well-informed on this issue.

44. Colombia reported that it takes interest and/or penalties into consideration in a mutual agreement procedure as long as they are directly relevant to taxes covered by the tax treaty. This is confirmed in Article 35 of Colombia's MAP guidance.

45. Peers did not provide input relating to this particular best practice.

[BP.12] Include Article 9(2) of the OECD Model Tax Convention in tax treaties

Jurisdictions should include paragraph 2 of Article 9 of the OECD Model Tax Convention in their tax treaties.

46. Article 9(2) of the OECD Model Tax Convention allows competent authorities to make a corresponding adjustment to unilaterally eliminate double taxation arising from primary adjustments. Including this provision in tax treaties provides taxpayers the possibility to obtain the elimination of such double taxation via a unilateral corresponding adjustment.

Overview of tax treaties

47. All of Colombia's 15 tax treaties contain a provision equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017) requiring their state to make a correlative adjustment in cases where a transfer pricing adjustment is imposed by the treaty partner.

Recent developments

48. Colombia signed a new tax treaty, which is a newly negotiated treaty with a treaty partner with which there was no treaty yet in place. This treaty has not yet entered into force. It contains a provision that is equivalent to Article 9(2) of the OECD Model Tax Convention (OECD, 2017). The effects of this newly signed treaty have been reflected in the analysis above where they have relevance.

49. Colombia reported it will seek to include Article 9(2) of the OECD Model Tax Convention (OECD, 2017) in all of its future tax treaties.
50. Peers did not provide input relating to this particular best practice.

Part D

Implementation of MAP agreements

51. There are no best practices for Part D.

Glossary

Action 14 Minimum Standard	The minimum standard as agreed upon in the final report on Action 14: Making Dispute Resolution Mechanisms More Effective
MAP Statistics Reporting Framework	Rules for reporting of MAP statistics as agreed by the FTA MAP Forum
OECD Model Tax Convention	OECD Model Tax Convention on Income and on Capital as it read on 21 November 2017
Tax Decree	Titulo 2 Precios de Transferencia - Artículos 1.2.2.4.1 – 1.2.2.4.10, as modified by Decree 2120 of 2017
Terms of Reference	Terms of reference to monitor and review the implementing of the BEPS Action 14 Minimum Standard to make dispute resolution mechanisms more effective



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