TEMASEK

8th January 2021

By email to: taxpublicconsultation@oecd.org
Organization for Economic Co-operation and Development (OECD)
2, rue Andrě Pascal
F-75775 Paris Cedex 16
France

Attention: International Co-operation and Tax Administration Division
Centre for Tax Policy Administration

Dear Messrs. and Mesdames,

BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review Public Consultation Submission

We are writing to provide our input in respect of the proposals set forth in the public consultation document for the 2020 review of the BEPS Action 14: Making Dispute Resolution Mechanisms More Effective ("Action 14 Minimum Standard").

Temasek is an investment company incorporated in 1974 and is wholly owned by the Singapore Government through the Minister for Finance, a body corporate constituted under the Minister for Finance (Incorporation) Act, Chapter 183 of Singapore.

We believe the development of an effective dispute resolution framework under treaties is critical to the BEPS project. To that end, we also support the view articulated in the Pillar One Blueprint that dispute resolution and establishment of a bilateral APA program are integral to the consensus-based solution under BEPS Pillar One.

Part I: Proposals to Strengthen the Minimum Standards

Proposal 1: Increase the use of bilateral APAs

Tax certainty is a key priority for multinational enterprises ("MNEs") and investors alike. Where there is clarity in the tax economics, businesses and investors are able to accurately factor in these costs in evaluating expansions and investments. The latter activities are much needed in a post Covid-19 environment to drive expenditure and economic growth.

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The introduction of a bilateral APA framework will provide an opportunity for MNEs and investors to achieve tax certainty prior to a transaction rather than rely on the resolution of disputes via mutual agreement procedures (MAP) which are often "after the fact". Where there are clear and robust pathways for taxpayers to seek clarity in tax costs, this engenders confidence and encourages investments. Taxation does not drive business decisions, but it is a risk which may deter investments and transactions where there is a lack of certainty in the liabilities payable.

We support the proposal to introduce an obligation to establish a bilateral APA program as part of BEPS Action 14 Minimum Standard.

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

It is important for tax administrations to define criteria to access MAP as this provides much needed transparency in the process and adds to tax certainty. Together with a set of pro forma standardised documentation to be adopted by tax administrations globally, this will help to minimise conflicts and aid efficient resolution of cases, adding to tax certainty.

If possible, a uniformed list of criteria adopted by every Inclusive Framework (IF) member will strengthen the use of MAP as a robust dispute resolution mechanism.

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

We support the suspension of tax collection for the duration of the MAP process under similar conditions to those applicable under domestic rules. In certain jurisdictions, where a case is determined in the taxpayer's favour, a refund of the tax paid requires an audit. Albeit the taxpayer has succeeded at MAP, based on domestic internal procedures, the refund is not forthcoming until the taxpayer undergoes a local tax audit. Having successfully pursued a MAP, the taxpayer is unduly burdened with having to defend an audit. Hence, suspension of tax collection pending a MAP outcome is key in ensuring its viability as a dispute resolution mechanism.

If the MAP process confirms the taxes imposed, to ensure tax administrations can collect on taxes suspended while MAP is pending, an escrow account can be set up if the amount involved is sufficiently material. Tax administrations may also obtain a bank guarantee of the taxes at stake.

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

The possible misalignment of interest and penalties with the outcomes of MAP resolutions in certain jurisdictions have not only resulted in financial hardship but has a dissuasive effect in considering whether to pursue MAP processes at all. Where the timeframe for the resolution of an issue under MAP is likely to be lengthy, and the jurisdiction in question imposes interest

regardless of the outcome of the underlying issue (including a reversal of the tax subject to the MAP), a cost versus benefit analysis ensues as to whether the MAP is worth pursuing given a significant and irrecoverable interest expense will result.

Moreover, the deductibility in the country of residence of the taxpayer of interest payable (and penalties) to the jurisdiction party to the MAP, as mitigant to further charges, is frequently not available. This can be because, for example, the interest expense is so significant it exceeds the applicable limitations on deductibility of interest. Where the interest is material, such inability to take a deduction can cause the interest charge to be tantamount to a double tax.

For the reasons stated above, we support a requirement that jurisdictions impose interest and penalties solely on taxes that survive a MAP challenge or agreement.

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

We support the introduction of a framework which ensures fiscal years are kept open until MAP proceedings have been finalised in order not to frustrate the MAP process and reinforce its status as a viable dispute resolution mechanism.

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

In practice, it is frequently the case once an investment structure is set up, the cross-border cash flows within the structure in scope of treaty benefits are recurring in nature rather than one-time occurrences. For example, interest payments on debt may be made on an annual basis. Similarly, dividend payments may be made with the same regularity. Consequently, any resolution of disputes in respect of the application of a treaty to any such flows continue to be applicable to tax periods beyond the initial tax year in which the issue first arises.

Pursuing a separate claim through MAP for each occurrence of the issues would lead to an unnecessary expenditure of resources both for the taxpayer and for the tax administrations in the jurisdictions involved.

We are therefore in favour of allowing multi-year resolution through MAP of recurring issues with respect to filed years. Further, given the repeated nature of cross border flows and of treaty issues attaching to such flows, we believe the ability to apply the determinations of a resolution pursuant to MAP to subsequent years will contribute to tax certainty and alleviate the pressure placed on resources both from taxpayers' and tax administrations' perspectives. This could be achieved by rolling a MAP determination into an APA or APA-type construct.

We further note transaction structures, once developed, are frequently applied to more than one investment, from an operational efficiency perspective. To that end, we further submit resolutions pursuant to MAP should also apply when similar facts and circumstances present themselves in separate situations. For example, subsequent transactions using identical

structures should be afforded the same treatment as concluded during a MAP without the need to further pursue another MAP.

Proposal 8: Implement MAP arbitration or other dispute resolution mechanisms to guarantee the timely and effective resolution of cases through the MAP

Where parties are not able to resolve MAP issues within a set time frame (subject to OECD determination), we support requiring contracting states to pursue MAP arbitration. This would facilitate the negotiation process as parties could "come to the table" focused on resolving issues. This requirement also mitigates the possibility of jurisdictions not turning up for MAP negotiations or refusing outright to negotiate.

Conclusion

Thank you for the opportunity to provide our views on the public consultation regarding the proposals for the 2020 review of the BEPS Action 14 Minimum Standard.

We believe the evolution of the Action 14 Minimum Standard to require the proposals described above would contribute to tax certainty, reduce tax risks of investments and business expansions especially with the availability of bilateral APAs as well as ensuring MAP remains a viable dispute resolution mechanism.

We are happy to respond to any questions the OECD may have regarding the above matters.

Yours faithfully,

Belinda Chan
Head, Tax