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New Developments in Dispute Resolution in International Tax

Abstract

In October 2015, the Organisation for Economic Co-operation and Development (OECD) issued its Final Reports on all 15 areas of its *Action Plan on Base Erosion and Profit Shifting* (BEPS Action Plan), with the aim of introducing comprehensive, coherent and co-ordinated reform of the international tax rules. The OECD/Group of Twenty (G20) *Final report on Making Dispute Resolution Mechanisms More Effective* (Final Report on BEPS Action 14) reflects the commitment of participating countries, including Australia, to implement substantial changes in their approach to dispute resolution. This article will evaluate the implications of these reforms, particularly from an Australian perspective.

Keywords

base erosion, profit shifting, reforms, treaty

NEW DEVELOPMENTS IN DISPUTE RESOLUTION IN INTERNATIONAL TAX

MICHELLE MARKHAM*

...multinational businesses striving to compete on the global economic stage are finding that matters of international taxation are best addressed through resolution models based on a high degree of cooperation and transparency. It is incumbent upon all tax administrations to develop and make available such models and to work together to improve and expand programs designed to resolve tax issues effectively and efficiently such that business can operate in an environment of greater tax certainty.¹

In October 2015, the Organisation for Economic Co-operation and Development (OECD) issued its Final Reports on all 15 areas of its *Action Plan on Base Erosion and Profit Shifting* (BEPS Action Plan), with the aim of introducing comprehensive, coherent and co-ordinated reform of the international tax rules. The OECD/Group of Twenty (G20) *Final report on Making Dispute Resolution Mechanisms More Effective* (Final Report on BEPS Action 14) reflects the commitment of participating countries, including Australia, to implement substantial changes in their approach to dispute resolution. This article will evaluate the implications of these reforms, particularly from an Australian perspective.

I INTRODUCTION: THE BEPS ACTION PLAN AND THE FINAL BEPS REPORTS

While the provision of efficient and effective tax treaty dispute resolution procedures has long been recognised as a critical factor in ensuring the smooth functioning of a system of international taxation of multinational enterprises (MNEs),² in 2006 the claim was made that the development of such procedures ‘has stagnated since the beginning of the 20th century.’³ However, reform of the Mutual Agreement Procedure (MAP), which is enshrined in Article 25 of the *OECD Model Tax Convention on Income and on Capital* (OECD MTC)⁴, and which has been the accepted procedure for

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¹ Forum on Tax Administration *Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement* Preamble 3, available at: <http://www.oecd.org/site/ctpfra/map-strategic-plan.pdf> adopted at the Ninth Meeting of the Forum on Tax Administration 23-24 October 2014, Dublin, Ireland (‘FTA Multilateral Strategic Plan’).

² The inaugural draft Model Treaty published by the League of Nations in 1928 sought to ensure the ‘amicable settlement’ of potential disputes as to the interpretation or application of the provisions of the Convention. See: League of Nations *Double Taxation and Tax Evasion* Report presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion, Publications of the League of Nations II. Economic and Financial 1928.II.49., Geneva, October 1928.

³ Zvi Daniel Altman *Dispute Resolution under Tax Treaties* (2006) Volume 11, Doctoral Series IBFD – Academic Council, fn 4.

⁴ OECD *Model Tax Convention on Income and on Capital* (15 July 2014).

resolving disputes between bilateral treaty partners for over 50 years⁵, was reinvigorated with the publication of the OECD's BEPS Action Plan⁶ in 2013.

The BEPS Action Plan was initiated by the G20⁷ finance ministers, which called on the OECD to address base erosion and profit shifting issues in a co-ordinated and comprehensive manner. It was a watershed document which represented a break with the past with regards to the approach taken to bilateral tax treaties. In the 1920s, the architects of the original modern international tax rules for taxing cross-border activities recognised the need for tax treaties to be designed to prevent both MNE double taxation and tax evasion. In examining these twin problems, the League of Nations described double taxation as imposing on taxpayers deriving income from multiple jurisdictions 'burdens which, in many cases, seem truly excessive, if not intolerable. It tends to paralyse their activity and to discourage initiative and thus constitutes a serious obstacle to the development of international relations and world production.'⁸ Excessive taxation was seen, by its very burden, to bring in its wake tax evasion and its similarly grave consequences. Even at this early stage it was acknowledged that international cooperation was required to ensure that both fiscal evils were kept in abeyance.⁹

Hugh Ault has commented that 'most of the effort in the ensuing years has been focused more on ensuring the relief of double taxation than making sure that double nontaxation does not take place.'¹⁰ He cites various reasons for this development, including tax competition reasons on the part of some countries. These countries were happy to facilitate double nontaxation through the use of structures that reduced the tax burden on their MNEs in their activities abroad.

The promulgation of the BEPS Action Plan represented a radical change in focus, as it related 'chiefly to instances where the interaction of different tax rules leads to double non-taxation or less than single taxation.'¹¹ It demonstrated that global policy concerns had shifted from ensuring relief from double taxation to addressing the problem that income from cross-border activities may not be taxed anywhere in the world, or be taxed at an unduly low level. This adjustment in focus may be attributed largely to the global financial crisis of 2008-2009. This crisis and the ensuing global economic slowdown 'put tremendous pressure on the fiscal situations of governments around the world, with gross government debt of OECD countries as a percentage of GDP soaring from 74

⁵ The concept of the MAP first appeared in the *OECD Draft Tax Convention on Income and on Capital* art 25 (30 June 1963). The OECD has described its function as follows: 'The MAP article in tax conventions allows designated representatives (the "competent authorities") from the governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as inconsistencies in the interpretation and application of a convention.' OECD, *Manual on Effective Mutual Agreement Procedures* (MEMAP) [1.2] (OECD 2007).

⁶ OECD *Action Plan on Base Erosion and Profit Shifting* (July 2013) ('BEPS Action Plan').

⁷ The G20, established in 1999, is an international forum comprised of the world's largest industrialised and emerging economies, namely Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, the Russian Federation, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States and the European Union.

⁸ League of Nations Publications *Double Taxation and Tax Evasion* Report prepared by the Committee of Experts on Double Taxation and Tax Evasion, Document C.216. M.85, London, 12 April 1927, 9[4122], 9[4123].

⁹ *Ibid* 9 [4123].

¹⁰ Hugh Ault, 'Some Reflections on the OECD and the Sources of International Tax Principles' (17 June 2013) *Tax Notes International* 1195, 1195.

¹¹ BEPS Action Plan, above n 6, Chapter 2. Background, 10.

percent in 2007 to 112 percent in 2013.¹² An additional contributory factor was the growing recognition that the current tax rules may facilitate arrangements whereby MNE profits are able to be transferred away from the jurisdictions where the activities creating those profits took place, to low or no-tax jurisdictions. This was certainly a concern for Australia, where it was reported that:

Arrangements, transactions and entities have steadily increased in complexity as technology has evolved and businesses have internationalised with offshore arrangements capable of being convoluted, complex and harder to track without greater commitment to multilateral cooperation. Today, approximately 50% of trade in Australia is international related party dealings, with an estimated value of \$270 billion dollars per annum. The ability to shift profits is a major risk.¹³

The BEPS Action Plan provided for 15 actions aimed at establishing international coherence of corporate income taxation, restoring the full effects and benefits of international standards and ensuring transparency while promoting increased certainty and predictability. The OECD acknowledged that the interpretation and application of the novel rules developed to counteract BEPS could introduce uncertainty for business, and that work would therefore be undertaken to examine and address obstacles preventing countries from solving treaty-related disputes. It consequently determined that work would be undertaken under Action 14 to make dispute resolution mechanisms more effective, and specifically to: ‘Develop solutions to address obstacles that prevent countries from solving treaty-related disputes under MAP, including the absence of arbitration provisions in most treaties and the fact that access to MAP and arbitration may be denied in certain cases.’¹⁴

The BEPS Action Plan was fully endorsed by G20 Leaders in Saint Petersburg in September 2013, with all interested countries being encouraged to participate.¹⁵ From 1 December 2013 to 30 November 2014 Australia chaired the G20 at a crucial time for the BEPS Project, and hosted the G20 discussions in November 2014. During this period the OECD emphasised the need for ‘greater transparency, closer international co-operation and a coherent approach to implementation...as well as the need to establish more effective dispute resolution mechanisms between tax administrations’¹⁶, noting the importance of obtaining more certainty and consistency for taxpayers in the international tax arena. It also highlighted the significance of the BEPS Project as marking ‘a turning point in the history of international co-operation on taxation’¹⁷, as the OECD Committee on Fiscal Affairs (CFA), the steering body for the BEPS Project, had brought together 44 countries on an equal footing.¹⁸ Australia’s presidency of the G20 was seen as an opportunity for the Australian Taxation Office (ATO) to ‘take the lead on driving collaborative approaches on

¹² Michael Plowgian, ‘BEPS: The Shifting International Tax Landscape and What Companies Should Be Doing Now’ (November–December 2013) *The Tax Executive* 255, 255.

¹³ Mark Konza, Deputy Commissioner, Large Business and International ‘Our compliance approach in the large market’ paper presented at the Tax Institute 28th Annual Convention Perth, 13 March 2013.

¹⁴ BEPS Action Plan, above n 6, Chapter 3. Action Plan, 23.

¹⁵ Russia G20 *G20 Leaders’ Declaration* September 2013[50].

¹⁶ OECD/G20 Base Erosion and Profit Shifting Project *Information Brief 2014 Deliverables*, 16 September 2014, 4.

¹⁷ *Ibid.*

¹⁸ These 44 countries encompassed the 34 OECD countries, two OECD accession countries (Colombia and Latvia) and eight G20 countries which are not part of the OECD: China, India, Brazil, Russia, South Africa, Indonesia, Argentina and Saudi Arabia.

international tax matters...by engaging with a number of jurisdictions both bilaterally and multilaterally to foster greater cooperation between tax administrations.¹⁹

An indication of the gathering momentum for dispute resolution reform in the international tax arena occurred in October 2014, when the Forum on Tax Administration (FTA), a unique forum on tax administration for Commissioners from 46 OECD and non-OECD countries²⁰, including every member of the G20, vowed to work in tandem with the OECD to improve the MAP through the FTA MAP Forum, a forum of FTA participant country competent authorities (CAs) created to deliberate on general matters pertaining to these countries' MAP programs.²¹ The FTA pledged to improve the practical operation of the MAP 'so that issues of double taxation are addressed more quickly and efficiently in order to meet the needs of both governments and taxpayers and so assure the critical role of those procedures in the global tax environment,'²² and endorsed a detailed Multilateral Strategic Plan for continuous MAP improvement (Multilateral Strategic Plan).²³

In December 2014, the OECD released its Public Discussion Draft on BEPS Action 14 *Make Dispute Resolution Mechanisms More Effective*.²⁴ At this stage the OECD saw Action 14 as a 'unique opportunity to make a difference in this area and to overcome traditional obstacles' but recognised that there was 'no consensus on moving towards universal mandatory binding MAP arbitration.'²⁵ The OECD received over 400 pages of comments from stakeholders in relation to BEPS Action 14, a clear indication of the growing interest in reform of international tax dispute resolution procedures.²⁶ Commentators were generally supportive of the proposed changes, with BusinessEurope offering a typical response:

The importance of adequate dispute resolution mechanisms cannot be overstated. In combination with uniform application and implementation of consistent and predictable international tax rules, effective dispute resolution provides MNEs with crucial legal certainty to foster cross border trade and investments and enhance a well-functioning and flourishing global economy.²⁷

On the other hand, a recurrent theme among the comments was that the OECD used vague and hesitant language in its recommendations, and that it needed to "get tough" on member countries and 'require binding arbitration as part of the mutual agreement procedure—as well as promote

¹⁹ Mark Konza, Deputy Commissioner, 'International BEPS Action Plan Update' (Paper presented at the Tax Institute NSW 7th Annual Tax Forum, Dalton House Sydney, Thursday 22 May 2014).

²⁰ Australia, Austria, Argentina, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong China, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, People's Republic of China, Poland, Portugal, Russian Federation, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

²¹ FTA Multilateral Strategic Plan, above n 1, [6]. The FTA planned to work particularly closely with the Focus Group on Dispute Resolution, formed by OECD's Working Party No. 1 to address Action 14 of the BEPS Action Plan.

²² *Final Communiqué*, Meeting of the Forum on Tax Administration (FTA) 24 October 2014, Dublin, Ireland, 1.

²³ FTA Multilateral Strategic Plan, above n 1.

²⁴ OECD *Public Discussion Draft BEPS ACTION 14: Make Dispute Resolution Mechanisms More Effective* 18 December 2014 – 16 January 2015.

²⁵ *Ibid* para 3.

²⁶ OECD *Comments received on Public Discussion Draft BEPS Action 14: Make Dispute Resolutions More Effective*, 19 January 2015.

²⁷ *Ibid* BusinessEurope, 57.

other mechanisms to prevent tax authorities from manipulating the MAP process to their advantage.²⁸

On 5 October 2015, the OECD released its final reports on the BEPS Project, with the OECD Secretary-General Ángel Gurría stating: “The measures we are presenting today represent the most fundamental changes to international tax rules in almost a century: they will put an end to double non-taxation...²⁹ At the same time, the OECD acknowledged that although a key focus of this work was to eliminate double non-taxation, the new rules ‘should not result in double taxation, unwarranted compliance burdens or restrictions to legitimate cross-border activity.’³⁰ In recognition of the continuing importance of removing double taxation as an obstacle to cross-border trade and investment, countries were reported to have ‘committed to a minimum standard with respect to the resolution of treaty-related disputes’³¹, as well as to including an effective monitoring mechanism and a set of best practices.

A necessary corollary of this activity would be the development of an assessment methodology to ensure compliance with the standard for the timely resolution of disputes. Australia had been recognised as a ‘key participant in shaping the BEPS outcomes’³² and as championing the BEPS Project during its Presidency of the G20 in 2014. This leadership continued in 2015, when the Australian Commissioner of Taxation, Mr Chris Jordan AO, took on a role as Vice-Chair of the FTA,³³ thereby securing ongoing Australian involvement in the improvement of the practical operation of the MAP.

This article will consider the new developments in dispute resolution encapsulated in the OECD/G20 Final Report on BEPS Action 14.³⁴ It will examine the new minimum standard to be adhered to by all OECD/G20 countries, which will be regulated by the implementation of a new monitoring mechanism. It will evaluate the impact of these innovative reforms on the MAP (including the likely effect on Australian tax treaties). Important corollary issues to effective dispute resolution, including mandatory binding arbitration and Advance Pricing Agreements, will be analyzed to evaluate Australia’s commitment to the efficacy and success of dispute resolution reform in the international tax arena.

²⁸ Delores W. Gregory ‘Comments on OECD’s Action 14 Draft Fault. “Tepid” Language, Ask for Arbitration’ (2015) 23 *Tax Management Transfer Pricing Report* 125, 125.

²⁹ *OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting, Reforms to the international tax system for curbing avoidance by multinational enterprises*. Available at: <http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm>

³⁰ *OECD/G20 Base Erosion and Profit Shifting Project Explanatory Statement 2015 Final Reports*, 20.

³¹ *Ibid* 17.

³² Letter by Pascal Saint-Amans, Director, Centre for Tax Policy and Administration, to Dr. Kathleen Dermody, Committee Secretary Senate Economics References Committee, Ref: PSA/CM/ic(2015) 20, 18 February 2015.

³³ Chris Jordan, AO, ‘Reinventing the ATO’ Commissioner’s (Speech delivered at the Tax Institute’s 30th national convention, 19 March 2015, Royal Pines Resort, Gold Coast).

³⁴ *OECD/G20 Base Erosion and Profit Shifting Project Making Dispute Resolution Mechanisms More Effective ACTION 14: 2015 Final Report*, 5 October 2015.

II THE REFORM OF THE MAP

A New Developments: The Minimum Standard and the Monitoring Mechanism

The Final Report on BEPS Action 14 is aimed at strengthening the effectiveness and efficiency of the MAP process, contained in Article 25 of the OECD MTC. The MAP is a bilateral tax treaty mechanism whereby a taxpayer is able to present their case to the CA of the Contracting State of which they are a resident if they consider the actions of one or both of these countries will result in taxation that is not in accordance with the treaty.³⁵ If the CA cannot unilaterally solve the problem, they must endeavour to resolve the case by mutual agreement with the CA of the other Contracting State.³⁶ The emphasis on relieving double taxation is evident in that the CAs are also specifically allowed to consult together for the elimination of double taxation in cases not provided for in the treaty.³⁷ Most cases considered under the MAP have in fact involved double taxation, with the majority of cases relating to economic double taxation arising from a transfer pricing adjustment to the intra-group transactions of associated enterprises in a multinational group by one or more tax administrations. However, MAP assistance is also requested for non-transfer pricing cases, including disputes over the existence of a permanent establishment, the amount of profits attributable to a permanent establishment, or the application of a tax treaty's withholding tax provisions.³⁸

Through the Final Report on BEPS Action 14, the OECD and G20 countries participating in the BEPS Project have committed to changing their approach to dispute resolution through the implementation of a minimum standard in the context of treaty-related controversies. This minimum standard 'is constituted by specific measures that countries will take to ensure that they resolve treaty-related disputes in a timely, effective and efficient manner.'³⁹

Three overarching objectives govern the minimum standard:

- (a) ensuring that treaty obligations related to the MAP are fully implemented in good faith, and that MAP cases are resolved in a timely manner;
- (b) ensuring the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and
- (c) ensuring that taxpayers can access the MAP when eligible.⁴⁰

An even more significant change inaugurated by the Report is that these countries have also agreed to ensure the effective implementation of this standard through the establishment of a 'robust peer-based monitoring mechanism that will report regularly through the Committee on Fiscal Affairs to the G20.'⁴¹

³⁵ OECD MTC, above n 4, art 25(1).

³⁶ Ibid art 25(2).

³⁷ Ibid art 25(3).

³⁸ OECD *Manual on Effective Mutual Agreement Procedures* (MEMAP) February 2007 version [1.2.1].

³⁹ Final Report on BEPS Action 14, above n 34, Introduction [4].

⁴⁰ Ibid Executive Summary 9.

⁴¹ Ibid.

1 Will the “soft law” nature of the Minimum Standard and the Monitoring Mechanism affect their efficacy?

The OECD is often described as a ‘source of soft law,’⁴² rather than a legally binding instrument of hard law. A central criticism of soft law is that it involves subjective discretion, and is therefore of limited value in compelling compliance: it is ‘often unenforceable because the parties retain discretion over the content of the obligation or over its exigibility.’⁴³ Furthermore, ‘There are those who believe that soft law is no more than policy with a fashionable label.’⁴⁴

While the BEPS Package, including the Minimum Standard and the Monitoring Mechanism, has been formally approved by all OECD and G20 members, it is ‘not a legally binding treaty.’⁴⁵ In relation to BEPS Action 14 *Making Dispute Resolution Mechanisms More Effective*, the OECD’s soft measures are regarded in some quarters as a stumbling block to effective reform, due to the lack of the incentive of a legal sanction in the event of non-compliance.⁴⁶

Pascal Saint-Amans, Director of the OECD’s Centre for Tax Policy and Administration has acknowledged:

We can do only what we can do. We are the OECD, an international organization based on consensus. We develop ‘soft legislation,’ meaning that the rules we’re developing are agreed by consensus, or are to be agreed by consensus. If there is no consensus, then there is no rule. And while the rules are morally binding, they are not legally binding. So, can we tell countries, can we instruct countries what they have to do or not to do? No, we cannot.⁴⁷

The author acknowledges that there can be problems with the enforcement of soft law, due to its inherently non-binding nature, but would contend that: ‘Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own.’⁴⁸ One advantage is that it can be easier to achieve, and this would especially be the case in the multilateral context of the BEPS Project, which involved the unprecedented participation and cooperation of over 60 diverse countries.⁴⁹ It can be an incremental step on the way to becoming hard law, allowing participants to become accustomed to the impact of agreements over time, and ‘...facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons ...and different degrees of power.’⁵⁰

⁴² Alison Christians ‘Hard Law, Soft Law, and International Taxation’, (2007) 25 *Wisconsin International Law Journal* 325, 332.

⁴³ Tadensz Gruchalla- Wesierski, ‘A Framework for Understanding Soft Law’ (1984) 30 *McGill Law Journal* 37, 40.

⁴⁴ Robin Creyke ‘Soft Law and Administrative Law: A New Challenge’ (2010) 61 *Australian Institute of Administrative Law Forum* 15, 16.

⁴⁵ Itai Grinberg and Joost Pauwelyn ‘The Emergence of a New International Tax Regime: The OECD’s Package on Base Erosion and Profit Shifting (BEPS)’ (2015) 19 *American Society of International Law*, available at: <https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd%E2%80%99s-package-base-erosion-and>

⁴⁶ See, e.g., the comments by AOTCA-CFE, above n 26, 12, 14.

⁴⁷ EY ‘An Interview with Pascal Saint-Amans, director of the OECD’s Center for Policy and Administration’, (October 2014) 15 *Global Tax Policy and Controversy Briefing*, 10, 12.

⁴⁸ Kenneth W. Abbott and Duncan Snidal ‘Hard Law and Soft Law in International Governance’ 54 (2000) *International Organization* 421, 423.

⁴⁹ OECD/G20 *Base Erosion and Profit Shifting Project Explanatory Statement 2015 Final Reports*, above n 30 [4].

⁵⁰ Abbott and Snidal, above n 48, 423.

In the author's opinion, this monitoring system is likely to have a profound impact on the ability to compel compliance with the minimum standard by participating countries, for the following reasons. While this soft law undertaking to support the minimum standard is not legally binding, it is anticipated that the monitoring mechanism will create substantial peer pressure to act in compliance with the agreed minimum standard. There is historical precedence for the efficacy of G20/OECD-sanctioned peer review procedures. When the G20 issued its *Declaration on Strengthening the Financial System*⁵¹ in 2009, it referred to the necessity of protecting public finances and international standards against the risks posed by non-cooperative jurisdictions. It not only called on all jurisdictions to adhere to international standards, but called on the Global Forum on Transparency and Administrative Cooperation in Tax Matters to conduct objective peer reviews, and agreed to develop 'a toolbox of effective counter measures' in relation to recalcitrant countries.⁵² The clear guidelines that were established for this peer-review mechanism⁵³ assisted in making it a highly effective soft law measure. Favourable parallels with these international financial law mechanisms are now being drawn in respect of the monitoring of the minimum standards under the Final Report on BEPS Action 14.⁵⁴

The monitoring mechanism ensures that all OECD and G20 countries, as well as other jurisdictions committing to the minimum standard (44 countries in all),⁵⁵ will undergo reviews of their implementation of this standard by their peers, i.e. by the other members of the FTA MAP Forum. The reviews will not only evaluate the legal framework provided by a jurisdiction's tax treaties and domestic law and regulations, but also its country-specific MAP program guidance and its implementation of the minimum standard in practice. The peer monitoring process will result in a report identifying the strengths of this implementation, but perhaps more importantly also identifying shortcomings, providing recommendations on how these shortcomings might be addressed by the reviewed jurisdiction.

2 Implementation of the Minimum Standard and the Monitoring Mechanism: the 2016 Peer Review documents

On 20 October 2016, the OECD released the Peer Review documents⁵⁶ relating to BEPS Action 14, including the Terms of Reference, the Assessment Methodology, the MAP Statistics Reporting

⁵¹ G20 *Declaration on Strengthening the Financial System* – London Summit, 2 April 2009.

⁵² *Ibid* 4.

⁵³ OECD Global Forum on Transparency and Exchange of Information for Tax Purposes *Revised Methodology for Peer Reviews and Non-Member Reviews* 2011.

⁵⁴ See Itai Grinberg, 'Breaking BEPS: The New International Tax Diplomacy' (2015) *Georgetown Law Journal*, available at SSRN: <http://ssrn.com/abstract=2652894> or <http://dx.doi.org/10.2139/ssrn.2652894>; Greenwood and Herbert Smith Freehills 'G20/OECD deliver BEPS project but it's not over' *Tax Brief* (9 October 2015) 13.

⁵⁵ As at October 2016, the 44 countries committed to the BEPS outputs were: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China (People's Republic of), Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Saudi Arabia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. OECD *BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, 20 October 2016, Assessment Methodology for the Monitoring and Review of the Implementation of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective [7] fn 5.

⁵⁶ *ECD BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, 20 October 2016.

Framework and Guidance on Specific Information and Documentation Required to be Submitted with a Request for MAP Assistance.

Two key elements of the Peer Review process are the Terms of Reference and the Assessment Methodology. The Terms of Reference are based on the elements of the minimum standard,⁵⁷ broken down into 21 elements for assessment purposes. They ensure that a member's legal and administrative framework, including its practical implementation, is assessed relative to these 21 elements in four key areas: preventing disputes; availability and access to MAP; resolution of MAP cases; and implementation of MAP agreements. The Terms of Reference provide a clear roadmap for the consistent and complete application of the monitoring process.

The Assessment Methodology establishes detailed procedures for peer monitoring by the FTA MAP Forum in two stages. (In this respect, the FTA MAP Forum may have decided to follow the lead of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which also utilised a two-phase process). Stage 1 involves a review of a member's implementation of the minimum standard based on its legal framework for MAP and its practical application, while Stage 2 involves a review of the measures taken by a member to address any shortcomings identified in Stage 1.

Stage 1 involves a series of questionnaires based on the 21 minimum standard elements as described in the Terms of Reference. The assessed jurisdiction will initially receive the standard format questionnaire, which will: 'include requests for information on the jurisdiction's legal framework for MAP (as contained in tax treaties, domestic law and regulations), the jurisdiction's MAP programme guidance, how the jurisdiction's MAP framework operates in practice, and relevant statistics.'⁵⁸ This standard document may also be supplemented by jurisdiction-specific questions arising out of issues raised by peers and taxpayers. The assessed jurisdiction's treaty partners will receive a peer questionnaire, through which such questions and other comments can be raised. The ability for a jurisdiction's peers to provide their input on its compliance with the minimum standard is regarded by the OECD as an important element of the peer review and monitoring process.⁵⁹

On 31 October 2016, the OECD made the schedule of Stage 1 peer reviews available,⁶⁰ with the first batch, which includes Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States, commencing in December 2016. Following this, the review of a new batch will be launched every four months until the launch of the final batch in April 2019.⁶¹ The schedule

⁵⁷ While it is the minimum standard to which the OECD and G20 members have made a political commitment, and which is susceptible to assessment and review in the monitoring process, the standard is complemented by 12 recommended best practices, which are not part of the minimum standard. The reason why these best practices do not form part of the minimum standard is that, unlike the elements of that standard, they are considered to have 'a subjective or qualitative character that could not readily be monitored or evaluated or because not all OECD and G20 countries are willing to commit to them at this stage' see above n 34 [7].

⁵⁸ OECD *BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, above n 56, Assessment Methodology for the Monitoring and Review of the Implementation of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective [12].

⁵⁹ Ibid [15].

⁶⁰ BEPS Action 14: Peer Review and Monitoring *Assessment Schedule for Stage 1 Peer Reviews* 31 October 2016, available at: <<http://www.oecd.org/tax/beps/beps-action-14-peer-review-assessment-schedule.pdf>>.

⁶¹ Peer reviews in some developing countries, namely Benin, Costa Rica, Egypt, Gabon, Georgia, Jamaica, Kenya, Pakistan, Paraguay, Senegal, Seychelles and Uruguay, have been deferred until 2020.

provides that Stage 2 peer monitoring will be launched one year from the adoption of the Stage 1 Peer Review Report by the member countries.

As taxpayers are the main users of the MAP, the FTA MAP Forum also took the opportunity of inviting taxpayers to provide input via a questionnaire for taxpayers.⁶² This taxpayer questionnaire is designed to elicit the views of taxpayers on their MAP experience in the following three areas (i) access to MAP; (ii) clarity and availability of MAP guidance; and (iii) timely implementation of MAP agreements. The turnaround time for commenting on the above six jurisdictions was swift, as the FTA MAP Forum required this taxpayer questionnaire to be submitted by 28 November 2016.

The minimum standard requires jurisdictions to seek to resolve MAP cases within an average of 24 months. All members of the FTA MAP Forum will report their MAP statistics and publish their MAP profiles on an OECD public platform.⁶³ Greater transparency will be ensured by countries reporting their MAP statistics in a homogenous way using common definitions of terms, and common rules on inventory and outcomes from reporting period 2016.⁶⁴

Australia is in the fourth batch in the Assessment Schedule for Stage 1 Peer Reviews, to be launched by December 2017.⁶⁵ It will therefore possibly be able to benefit from the shared experiences of countries in the first three batches in answering its questionnaire. Australia is no stranger to OECD peer reviews by its tax treaty partners, as its Peer Review Report for the Global Forum on Transparency and Exchange of Information for Tax Purposes was published in 2011.⁶⁶ It would certainly aspire to duplicate the favourable rating it received from its peers in this report.⁶⁷

Concerns have been expressed by some countries about submitting to reviews by an international organization,⁶⁸ and there has been a mixed reaction to the FTA MAP Forum allowing taxpayers the opportunity to provide input on their experience with a country's MAP processes. It is the author's view that this wider consultation will be beneficial in providing practical insights on any shortcomings experienced by the acknowledged "main users" of the MAP, allowing these shortcomings to be reviewed and addressed. India has voiced its opposition to taxpayer participation in the Peer Review Process, stating that: '(i) this was not part of the final report on Action 14 and (ii) taxpayers are not peers of sovereign countries.'⁶⁹ Achim Pross, the head of the

⁶² See *OECD releases schedule for Action 14 peer reviews and invites taxpayer input*, available at: <http://www.oecd.org/tax/oecd-releases-schedule-for-action-14-peer-reviews-and-invites-taxpayer-input.htm>.

⁶³ *OECD BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, above n 56, MAP Statistics Reporting Framework [2]. [

⁶⁴ *Ibid* Introduction, 5.

⁶⁵ *OECD releases schedule for Action 14 peer reviews and invites taxpayer input*, available at: <http://www.oecd.org/tax/oecd-releases-schedule-for-action-14-peer-reviews-and-invites-taxpayer-input.htm> above n 62.

⁶⁶ *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Review Report Combined: Phase 1 + Phase 2 Australia*, January 2011 (reflecting the legal and regulatory framework as at June 2010).

⁶⁷ *Ibid* [3].

⁶⁸ See the remarks of Philip Kerfs, head of the international cooperation and tax administration unit at the OECD's Centre for Tax Policy and Administration, quoted in Kevin A. Bell and John Herzfeld, 'OECD Provides Guidance on Action 14 Peer Reviews' (2016) 25 *Tax Management Transfer Pricing Report* 762, 762.

⁶⁹ *OECD BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, above n 56, Assessment Methodology for the Monitoring and Review of the Implementation of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective, (iii) *Obtaining inputs from taxpayers*, fn 6.

International Cooperation and Tax Administration Division of the OECD's Centre for Tax Policy and Administration, commented that the OECD did not see a “black box peer review” in which businesses had no part as desirable, but added that as taxpayers are not considered peers in the process, their input will not carry the same weight as that of treaty partner countries.⁷⁰ In a positive move, India has agreed for the inclusion of taxpayer inputs “in a spirit of compromise.”

The author maintains that making jurisdictions in some measure accountable to taxpayers, as well as to treaty partners, contributes to the authenticity of the review process. In this regard, an interesting insight into the necessity of taxpayer participation in the review process is provided by Michael Danilack, the former deputy commissioner (international) of the United States Internal Revenue Service (IRS) Large Business and International Division. He commented that in his former role, he did not think that access to the MAP (the first item for discussion on the taxpayer questionnaire) was an issue for taxpayers. However, following his transition to the private sector, his perspective has changed: ‘Now that I've switched hats and am representing companies, I've changed my point of view. Governments may not even see the cases where access is denied, so it is comforting to know that those companies will be able to provide input during the peer review process.’⁷¹

In the author's view, the significant peer pressure to resolve cases within the prescribed 24 months will encourage swifter dispute resolution procedures. The latest OECD statistics reveal that for the OECD member countries for which data was provided, the average time for the completion of MAP cases with other OECD member countries was 20.47 months in the 2015 reporting period, down from an average of 27.30 months in the 2010 reporting period.⁷² From an Australian perspective, the latest available statistics on the OECD website indicate that for the 2015 reporting period, the average cycle time for Australian cases completed, closed or withdrawn with other OECD countries during this time was 20.43 months (slightly below the OECD average time).⁷³ However, for cases completed, closed or withdrawn involving non-OECD countries, the average time involved was 17.5 months, a significant decrease from the average time of 30 months for the 2014 reporting period.⁷⁴ This new efficient timeframe is particularly significant considering that of Australia's 44 comprehensive tax treaties, 26 (59 percent) are with OECD countries but 18 (41 percent) are with non-OECD countries – a substantial portion.

Drawing comparisons with the Global Forum's work on exchange of information, the OECD's Achim Pross has described the MAP peer review process as a “powerful tool”, which will ‘not only serve as an incentive for tax administrations to decrease their MAP inventories but will also have implications for such issues as foreign direct investment.’⁷⁵

⁷⁰ Achim Pross quoted in Alexander Lewis ‘Final Report on OECD BEPS Action 14 Coming Soon’ *Tax Notes* (October 3, 2016) 54153.

⁷¹ Michael Danilack, quoted in Alexander Lewis, above n 70.

⁷² OECD Mutual Agreement Procedure Statistics for 2015, available at: <http://www.oecd.org/tax/dispute/map-statistics-2015.htm>.

⁷³ MAP Program Statistics for the 2015 Reporting Period, Country: Australia/ Australie, available at: <http://www.oecd.org/ctp/dispute/MAP%20PROGRAM%20STATISTICS%20FOR%202015%20AUSTRALIA.pdf>.

⁷⁴ MAP Program Statistics for the 2014 Reporting Period, Country: Australia/ Australie, available at: <http://www.oecd.org/ctp/dispute/MAP%20PROGRAM%20STATISTICS%20FOR%202014%20AUSTRALIA.pdf>.

⁷⁵ Achim Pross, above, n 70.

The response from tax advisers to the implementation of the minimum standard and the monitoring mechanism has been cautiously optimistic:

the fact that tax authorities may be subject to review by their peers should be seen by MNEs as a positive direction to ensure access to an effective mutual agreement process. However, we are at a very early stage on the adoption of the BEPS action items and it is difficult to predict at this point what will be the impact of the peer review process on the future behavior of tax authorities.⁷⁶

B The Specific Measures of The Minimum Standard

The specific measures envisage changes to the OECD MTC and to the Commentary on this Convention, the intention being that the alterations will be included in the next update of these documents. Both the OECD MTC and the Commentary have been described as ‘unusually self-enforcing for soft law’⁷⁷, and highly influential to the extent that ‘in some respects changes to the OECD Model are automatically incorporated into domestic law and administrative practice in many countries around the world.’⁷⁸

The elements of the minimum standard relate to three general objectives: (a) Ensuring that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner; (b) Ensuring the implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes; and (c) Ensuring that taxpayers can access the MAP when eligible.

The elements of the minimum standard (there are 17 specific measures) have been drafted to reflect clear, objective criteria intended to ensure the effective and timely resolution of treaty-related disputes, and to facilitate monitoring through the peer review process. Key elements within these three objectives will be examined below.

1 Objective One: Good Faith Implementation and Timely Resolution of Treaty Obligations Related to the Map

There are seven elements to this first objective under the minimum standard, contained in Section 1.A of the Final Report on BEPS Action 14. Element 1.1 provides that paragraphs 1 to 3 of Article

⁷⁶ EY ‘OECD releases BEPS Action 14 on More Effective Dispute Resolution Mechanisms, Peer Review’ *Global Tax Alert*, 31 October 2016 1, 2.

⁷⁷ Grinberg and Pauwelyn, above n 45.

⁷⁸ *Ibid.* The significant impact of the OECD MTC and its Commentary has been commented on by eminent authors, with Klaus Vogel declaring that ‘The OECD Model and its Commentary are very important for the interpretation of tax treaties,’ although their significance is not limited to this function. See, Klaus Vogel, ‘Double Tax Treaties and Their Interpretation’ (1986) 4 *Berkeley Journal of International and Business Law* 1, 39. More recently, Brian J. Arnold has referred to the success of the OECD MTC as “remarkable”, noting ‘the wide acceptance of the OECD Model Treaty...has been an important factor in reducing international double taxation and facilitating international trade and investment’ - Brian J. Arnold *International Tax Primer* (Kluwer Law International, 3rd ed, 2016) 142. The importance of the OECD MTC and its Commentary have been described as “undoubted” in some countries – see for example Ines Hofbauer ‘Tax Treaty Interpretation in Austria’ in Michael Lang (ed), *Tax Treaty Interpretation* (Eucotax Series on European Taxation, Kluwer Law International, 2001) 24. However, it should be noted that the hegemony of other OECD materials has in the past been rejected by the courts in both Australia and Canada.

25⁷⁹ of the OECD MTC should be included in tax treaties, as interpreted by the Commentary, that access to the MAP should be provided in transfer pricing cases and that the resulting mutual agreements should be implemented (for example by making appropriate adjustments to the tax assessed).

While the BEPS Action Plan was tasked with improving transparency as well as certainty in relation to international tax rules, and the changes brought about by the final BEPS reports have been heralded as definitive, the minimum standard in relation to Action 14 has not made alterations to one of the major problems of the MAP: the fact that under Article 25(2) CAs are only charged with “endeavouring” to resolve a MAP case, rather than with actually reaching a resolution. More than three decades ago the International Fiscal Association reported claims that, because of this failing, ‘in many cases no agreement was reached between the Contracting States.’⁸⁰ In 2004 the OECD itself reported in relation to the MAP that ‘there continue to be situations in which the cases cannot be satisfactorily concluded. For a number of reasons, it is likely that the frequency of these types of cases will increase.’⁸¹ It also acknowledged the perception by business that the MAP was a “black box” into which the taxpayer’s dispute disappeared, with the possibility that no solution would ever emerge.⁸² Hugh Ault has commented that ‘If, after “endeavoring” to agree, the two countries are in fact unable to agree... the taxpayer is potentially left with unrelieved double taxation, thus thwarting the principal purpose of the treaty, to avoid double taxation.’⁸³

While the countries participating in the BEPS Project have been charged under Element 1 with fully implementing their treaty obligations under the MAP in good faith, the fact remains that they are still only obliged to “endeavour” to seek a resolution. This is of concern, especially as the ATO has confirmed that ‘An implication of change is necessarily an increase in disputes, as rules are amended and different tax authorities contest the most appropriate view on implementation.’⁸⁴ It has also stated that ‘The need for innovative ways to implement new measures will be crucial as we move from agreed policies to working tax rules.’⁸⁵ As this is undoubtedly a time of great upheaval for the international tax system, an increase in cross-border disputes is foreshadowed, and in the absence of the innovative reform of Article 25(2) the potential for MAP cases which cannot be satisfactorily concluded is likely to increase, both in Australia and elsewhere.

While Australian Double Taxation Agreements (DTAs) generally contain paragraphs which correspond to Article 25(1) to (3), there are variations. For example, the DTA with Singapore

⁷⁹ These paragraphs ensure that the CAs of the Contracting States are empowered under the tax treaty to endeavour to resolve disputes where taxation not in accordance with the provisions of the treaty appears to be likely. CAs are also authorised to deal with interpretive or treaty application issues arising out of the controversy.

⁸⁰ Dr Karl Koch, ‘General Report’, in International Fiscal Association *Cabiers de Droit Fiscal International*, Vol. 66a (1981) ‘Mutual Agreement procedure and practice’, 93, 100.

⁸¹ OECD Report *Improving the Process for Resolving International Tax Disputes*, version released for public comment on 27 July 2004[2].

⁸² *Ibid* [9].

⁸³ Hugh J. Ault, ‘Reflections on the Role of the OECD in Developing International Tax Norms’ (2009) 34 *Brooklyn Journal of International Law* 757, 773.

⁸⁴ Mark Konza, Deputy Commissioner, International, Public Groups and International, ‘Base erosion and profit shifting - a progress report on G20/OECD action’ (Paper presented in Melbourne and Sydney, 24 - 25 September 2014).

⁸⁵ *Ibid*.

(Australia's fifth largest two-way trading partner⁸⁶), does not contain these three paragraphs in Article 20 (which contains the MAP provisions). Article 20(1) of the DTA with Singapore provides that the taxpayer's claim must be "deemed worthy of consideration" before the CAs will endeavour to come to an agreement – a proviso not present in the OECD MTC. A paragraph corresponding to the OECD MTC's Article 25(2) which provides that "Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States" is not included, and neither is a paragraph corresponding with the OECD MTC's Article 25(3) which provides that CAs may also consult together for the elimination of double taxation in cases not provided for in the Convention.

It is not clear how closely the minimum standard requires treaties to adhere to the OECD MTC, and to what extent variations are permitted. This may be an issue to be considered under the peer monitoring process. The minimum standard explicitly requires that transfer pricing issues leading to economic double taxation (such as a treaty partner country's transfer pricing adjustments) should qualify for access to the MAP.⁸⁷ There is currently no available information on any unresolved Australian MAP case in the last four years. Anecdotal evidence suggests that to date all Australian MAP cases have resulted in at least some relief of double taxation, even if this has only been partial relief.

Element 1.2 provides that MAP access should be granted where there is a disagreement between the taxpayer and the tax authorities as to whether the conditions for applying a treaty anti-abuse provision have been met, or whether the application of a domestic law anti-abuse provision conflicts with a treaty provision. This is in line with the current OECD MTC Commentary which provides that in the absence of a special provision, there is no general rule denying perceived abusive situations going to the MAP.⁸⁸ Should a country seek to limit or deny access to the MAP on these grounds, it is required to expressly agree on such limitations with its treaty partners, and notify treaty partner CAs about such cases and the facts and circumstances involved.⁸⁹ This element seeks to circumvent the denial of treaty benefits through a country's unilateral action. Stakeholders have commented that "The proliferation of domestic anti-abuse provisions, together with inconsistent application of such provisions by the courts of different countries, will undoubtedly contribute to double taxation, and there must be a way to resolve those cases."⁹⁰ Domestic anti-abuse provisions are indeed on the rise, with the introduction of the Diverted Profits Tax in the United Kingdom from 1 April 2015.⁹¹ It is reported that the UK government sought advice from a leading tax QC to help ensure the new tax could not be overridden by DTAs, and that HMRC maintains it is not obliged to grant treaty benefits in abuse cases.⁹²

⁸⁶ Department of Foreign Affairs and Trade 'Australia's Trade at a Glance – Australia's Top 10 Two-Way Trading Partners, available at: <http://dfat.gov.au/trade/resources/trade-at-a-glance/pages/default.aspx>.

⁸⁷ Final Report on BEPS Action 14, above n 39[11].

⁸⁸ See OECD MTC, art 25 Commentary [26].

⁸⁹ Final Report on BEPS Action 14, above n 39[15].

⁹⁰ OECD *Comments received on Public Discussion Draft BEPS Action 14: Make Dispute Resolutions More Effective*, above n 26, 111.

⁹¹ The Diverted Profits Tax was introduced by the Finance Act 2015 and applies at a rate of 25 per cent on diverted profits from 1 April 2015. Its purpose is 'to counter the use of aggressive tax planning to avoid paying tax in the UK', see: HM Treasury *Autumn Statement 2014* [1.243].

⁹² Alastair Munro and Martin Lambert 'Caught in a diversion' *Tax Adviser* (1 March 2015) 1, 6.

Australian has introduced its version of the Diverted Profits Tax in the form of the Multinational Anti-Avoidance Law (MAAL),⁹³ effective from 1 January 2016. The legislation involves the broadening of Part IVA of the *Income Tax Assessment Act 1936*, Australia's general anti-avoidance provision, to deal with corporate structures which artificially avoid attributing profits to a permanent establishment in Australia. The *International Tax Agreements Act 1953*, which gives Australia's tax treaties the force of law, also gives these treaties priority over its domestic tax law, apart from Part IVA.⁹⁴ As Part IVA takes precedence over Australia's DTAs, the MAAL has been described as a domestic anti-avoidance provision 'which is intended to unilaterally override Australia's tax treaty obligations.'⁹⁵ It remains to be seen how cases arising under these new laws will be dealt with under the monitoring mechanism.

On 29 November 2016, the Australian government released exposure draft legislation and a draft explanatory memorandum for the proposed Australian diverted profits tax rules, another domestic anti-abuse provision. This exposure draft Bill and associated explanatory material is intended to further strengthen the anti-avoidance rules in Part IVA. Like the MAAL, the Australian Diverted Profits Tax aims to prevent the artificial diverting or shifting of profits out of Australia to offshore associates. Applicable from 1 July 2017, it will impose a 40 per cent penalty tax on profits that have been artificially diverted from Australia by MNEs. The consultation period for the draft legislation closed on 23 December 2016.

Element 1.3 prescribes that as part of the good faith implementation of MAP treaty obligations, countries should commit to seek to resolve MAP cases within an average timeframe of 24 months.

Progress towards this target will be periodically reviewed by the peer monitoring process. One reason for the emphasis on an average time for MAP case completions, as part of the minimum standard, is that a time frame for CA resolution of MAP cases is required before mandatory binding arbitration proceedings can be instituted by participating countries. This issue will be discussed below.⁹⁶ The average time frame of 24 months for a MAP resolution has received consensus endorsement in the MAP Statistics Reporting Framework, as discussed above. This is possibly because in the 2006 to 2014 reporting period, for the OECD member countries for which data was provided, the average time for the completion of MAP cases with other OECD member countries was less than 24 months for six of the nine years under scrutiny.⁹⁷ In addition, as mentioned above, the latest 2015 OECD statistics reveal that for the OECD member countries for which data was provided, the average time for the completion of MAP cases with other OECD member countries was comfortably less than 24 months.

Nevertheless, stakeholders do hold differing positions in relation to this time frame. The International Chamber of Commerce (ICC) has taken the pragmatic stance that 'the imposition of a deadline of 24 months would be an improvement on the status quo where many MAP disputes take significantly longer than 24 months to be resolved.'⁹⁸ Quantera Global has expressed the view

⁹³ *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015*, enacted 3 December 2015.

⁹⁴ The *International Tax Agreements Act 1953* s 4(2) is that Part IVA is the exception to the rule that tax treaties have precedence over domestic tax legislation in cases of conflict.

⁹⁵ PwC 'Australia introduces multinational anti-avoidance legislation into parliament' *Tax Insights from International Tax Services* (21 September 2015) 1, 2.

⁹⁶ See 'The Issue of Mandatory Binding Arbitration' [2.2.1].

⁹⁷ OECD Mutual Agreement Procedure Statistics 2006-2014, available at: <http://www.oecd.org/ctp/dispute/map-statistics-2006-2014.htm>

⁹⁸ ICC submission to OECD Discussion Draft on BEPS Action 15 Multilateral Instrument, submitted to the OECD 30 June 2016, 1, 3.

that the statistics on the average processing time of MAPs are flawed as they include cases of individuals and do not account for substantial differences between countries, commenting: 'It would be interesting to see what the average processing time would be if cases of individuals are eliminated. A fair guess would be that this period will turn out to be substantially longer than 24 months.'⁹⁹ A practitioner who has been acknowledged as one of the 50 most influential individuals in the tax world, Heather Self, has expressed the practical view that the 24-month time limit for resolving cases 'is welcome but it is still too slow. Often disputes don't get into the formal process until they are several years old.'¹⁰⁰

In the author's opinion, the MAP Statistics Reporting Framework as set out in the Peer Review documents¹⁰¹ should standardize reporting to account for any time lag in cases being admitted to the formal MAP process, and promote more objective country comparisons in this area. The current OECD MAP reporting period for a specific calendar year 'is either that calendar year itself or any 12-month period ending during that calendar year, whichever best corresponds to the competent authority's recordkeeping practice.'¹⁰² At present countries are strongly encouraged to report on a calendar year basis, but the use of a fiscal year reporting period is acceptable if a country finds a calendar year reporting too burdensome.¹⁰³ The OECD does not currently specify whether a particular country is using a calendar year or non-calendar year in its statistics. This present unsatisfactory reporting methodology will change with the implementation of the MAP Statistics Reporting Framework, which specifies how the "start" date and "end" date for each MAP case should be determined, promoting uniform reporting among jurisdictions.¹⁰⁴ The author believes that this greater alignment of reporting periods will be helpful in improving the quality of OECD MAP statistics.

The agreed framework contains four Annexes: Annex A for the reporting and publication of MAP statistics relating to MAP requests for pre-2016 cases; Annex B for the reporting and publication of MAP statistics relating to MAP cases that are received by a CA from the taxpayer on or after 1 January 2016; and Annex C and Annex D which contain definitions of terms and the rules for counting MAP cases for the purposes of Annex A and Annex B. There are two template tables under Annex B for the post 2015 cases, Table 1 relating to attribution/allocation MAP cases and Table 2 to other MAP cases. Each jurisdiction is required to complete these two tables, noting the number of post-2015 cases closed during the reporting period by a variety of outcomes.¹⁰⁵ The

⁹⁹ Quantera Global IFA 2016: International dispute resolution, 27 September 2016.

¹⁰⁰ Heather Self of Pinsent Masons, quoted in 'OECD: countries commit to minimum standards on international tax dispute resolution' *Out-Law.com*, 6 October 2015. See also, 'Global Tax 50 2016' *International Tax Review*, 6 December 2016.

¹⁰¹ OECD *BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, above n 56, MAP Statistics Reporting Framework.

¹⁰² OECD *Definitions of Terms Used in MAP Statistics*, available at: <<http://www.oecd.org/ctp/dispute/definitionsotermusedinmapstatistics.htm>>.

¹⁰³ *Ibid.*

¹⁰⁴ OECD *BEPS Action 14 on More Effective Dispute Resolution Mechanisms Peer Review Documents*, above n 56, MAP Statistics Reporting Framework, (i) *Starting of MAP case ("start" date)* and (ii) *Closing of MAP case ("end" date)*.

¹⁰⁵ Possible outcomes include: denied MAP access; objection is not justified; withdrawn by taxpayer; unilateral relief granted; resolved via domestic remedy; agreement fully eliminating double taxation/fully resolving taxation not in accordance with tax treaty; agreement partially eliminating double taxation/partially resolving taxation not in accordance with the tax treaty; agreement that there is no taxation not in accordance with the tax treaty; no agreement including agreement to disagree; and any other outcome.

greater detail to be provided in these tables, especially the new breakdown into ten different MAP outcomes, will provide a much clearer picture of MAP processes in practice.

Elements 1.4, 1.5 and 1.6 all align with the OECD's emphasis on a more effective MAP framework: countries should become members of the FTA MAP Forum and participate fully in its work. They should provide timely and complete reporting of MAP statistics, and should have their compliance with the minimum standard reviewed by their peers in the context of the FTA MAP Forum. Peer review by the other members of the FTA MAP Forum is essential to ensure the meaningful implementation of the minimum standard contained in Section 1.A of the Final Report on BEPS Action 14. These three elements seek to ensure that tax administrations will actively participate in the FTA MAP Forum, and both be accountable and simultaneously hold other administrations accountable to the minimum standard. This is line with the FTA's Multilateral Strategic Plan, which addresses the issue of accountability in its vision for continuous MAP improvement by emphasising a consensual undertaking of both individual and joint responsibility by participating CAs, to the effect that 'Tax conventions charge competent authorities with responsibility individually, but competent authorities must act in concert to address the problems they face together.'¹⁰⁶ It also dovetails with the idea of soft law as providing norms that are not thought of as law per se but which still 'compel a law-like sense of obligation in states.'¹⁰⁷

(a) The Issue of Mandatory Binding Arbitration

The final element of the good faith implementation of treaty obligations is the provision of transparency with respect to countries' position on MAP arbitration. Element 1.7 provides for the deletion of the current footnote to paragraph 5 of Article 25 in the OECD MTC. This paragraph essentially provides for an "escape clause" for countries wanting to disallow mandatory binding arbitration in their bilateral tax treaties. The footnote recognises various reasons for not allowing this dispute resolution mechanism, including national law, policy or administrative considerations, and sanctions the option of including such arbitration in treaties with some States, while not with others. As the footnote and related paragraphs in the OECD MTC Commentary make it unnecessary for OECD member countries to enter reservations or for non-OECD economies to enter positions on the provision, there is currently a lack of transparency with regards to countries' positions with respect to MAP arbitration. Through Element 1.7 the OECD is seeking to compel countries to take a position on mandatory binding MAP arbitration by eliminating a provision which allows secrecy on this matter until a country concludes a new treaty or protocol.

Since the inauguration of the BEPS Project the issue of mandatory binding arbitration was "on the table" as part of the reform of the MAP system. The arbitration of disputes arising under income tax treaties has been described by Tillinghast as being necessary from the taxpayer's point of view, as 'a means to eliminate juridical or economic double taxation by binding two governments to apply the treaty between them in a consistent way... The existing competent authority process may achieve this result, but does not always do so.'¹⁰⁸ For example, in *Boulez v. Commissioner*¹⁰⁹ the United States and German CAs were unable, under the MAP, to agree on whether certain payments constituted royalties or compensation for personal services. Characterization of the payments as personal services would have meant liability to tax in the United States, but the payments would be

¹⁰⁶ FTA Multilateral Strategic Plan, above n 1, [30].

¹⁰⁷ Christians, above n 42, 331.

¹⁰⁸ David R. Tillinghast, 'Issues in the implementation of the arbitration of disputes arising under income tax treaties' (2002) 56 *Bulletin for International Fiscal Documentation* 90, 91.

¹⁰⁹ 83 T.C. 584 (1984).

exempt there if they were characterised as royalties. The taxpayer ultimately suffered double taxation, as they were taxed on the income as royalties in Germany and again as personal services income in the United States.

As the international tax landscape is in the process of substantial evolution due to the BEPS Project, it is likely that the number of tax controversies where the CAs are unable to reach agreement will increase. The concern has been expressed that in certain areas of the BEPS Final Reports 'the standards adopted are too vague and will lead to increased tax disputes.'¹¹⁰ Hugh Ault has warned that the pressure for OECD consensus can result in principles being established at such a high level of generality that questions of interpretation and implementation are not advanced, although he acknowledges that 'creative ambiguity can at times be useful.'¹¹¹ However:

As a delegate once observed, if country A says the world is flat and country B says the world is round, and after a long discussion, the OECD issues a report that says the world is an attractive shape and declares a consensus has been reached, it is difficult to call that real progress in establishing international norms.¹¹²

Not only may disputes increase in number in the post-BEPS implementation period, but agreement on controversies may be delayed, causing considerable hardship to taxpayers: there is anecdotal evidence of ongoing MAP cases being unresolved after more than ten years.¹¹³

To the disappointment of the business community, mandatory binding arbitration was not at the forefront of the Public Discussion Draft on Action 14 due to a lack of consensus on this issue, with the focus instead being on complementary solutions. At the public consultation on dispute resolution in Paris in January 2015, a number of business delegates warned that if mandatory binding arbitration was not adopted under Action 14 'a tsunami of double taxation disputes will result in chaos.'¹¹⁴ Carol Dunahoo, former US Competent Authority and Director, International (Large and Mid-Size Business) at the US Internal Revenue Service (IRS), speaking on behalf of the International Alliance for Principled Taxation, stated that 'The MAP process is at breaking point already in many countries' and that arbitration 'is the only mechanism that has proven effective in ensuring resolution of MAP disputes.'¹¹⁵

Concern about the inefficiency of the MAP process is borne out by the latest figures in the OECD report on MAP statistics. At the end of 2015, there were 6,176 open MAP cases in OECD member countries in ending inventory, representing a more than 13.7% increase compared to the previous 2014 reporting period, and a more than 162.5% increase compared to the 2006 reporting period.¹¹⁶

¹¹⁰ Robert Stack, the United States Treasury's deputy assistant secretary for international tax affairs, quoted in Kevin A. Bell, Rick Mitchell and Alex M. Parker 'Final BEPS Reports Herald Broad Global Tax System Changes' *International Tax Monitor*, 6 October 2015.

¹¹¹ Ault, above n 83, 763.

¹¹² *Ibid.*

¹¹³ Tillinghast, above n 91, fn 11 refers to a practitioner reporting a mutual agreement case between the United States and Japan which was unresolved after more than ten years.

¹¹⁴ Kevin A. Bell 'Business Community Pleads with OECD To Endorse Mandatory Binding Arbitration' (2015) 23 *Tax Management Transfer Pricing Report* 1251, 1251.

¹¹⁵ *Ibid.*

¹¹⁶ Inventory of MAP Cases at End of Reporting Period, OECD member countries, available at: <<http://www.oecd.org/tax/dispute/map-statistics-2015.htm>>.

The most recent statistics demonstrate that Germany, the United States and Belgium had the largest ending inventory of MAP cases, with 1147, 998 and 632 cases respectively outstanding at the end of the reporting period.¹¹⁷ These same three countries experienced the largest number of new MAP cases initiated for the same reporting period, with Belgium taking the lead with 428 new cases, followed by Germany with 363 and the United States with 289.¹¹⁸ By comparison, Australia only investigated 14 new MAP cases in the 2015 reporting period, down from the top figure of 21 cases in the 2010 reporting period.¹¹⁹ Historically, only a very small percentage of OECD Member country MAP cases have arisen in Australia.

The OECD was unable to achieve consensus on mandatory binding arbitration in its BEPS Final Report on Action 14. However, in addition to the commitment to implement the minimum standard by all countries participating in the BEPS Project, 20 countries have committed to provide for mandatory binding MAP arbitration in their bilateral tax treaties ‘as a mechanism to guarantee that treaty-related disputes will be resolved in a specified timeframe.’¹²⁰ Australia was one of the countries to commit to binding mandatory arbitration. It has already demonstrated its good faith in this regard by providing for such arbitration in its recently-signed bilateral tax treaties with New Zealand,¹²¹ with Switzerland,¹²² and with Germany.¹²³

Altogether 17 of Australia’s bilateral tax treaty partners have agreed to this mechanism, including four countries which are among Australia’s top ten biggest trading partners.¹²⁴ The significance of this agreement is that in the future, Australian MNEs doing business with these countries can be assured that any disputes arising under the MAP should reach a speedy and final resolution.

A mandatory binding MAP arbitration provision has now been developed as part of the negotiation of the multilateral instrument envisaged by Action 15 of the BEPS Action Plan. On 24 November 2016, the members of the ad hoc Group on the Multilateral Instrument concluded the negotiations on the text of the Convention, with a first high-level signing ceremony expected to take place in June 2017.¹²⁵ This instrument will ‘facilitate the modification of bilateral tax treaties in a synchronised and efficient manner, without the need to invest resources to bilaterally renegotiate

¹¹⁷ Inventory of MAP Cases at End of Reporting Period, OECD member countries, available at: <<http://www.oecd.org/tax/dispute/map-statistics-2015.htm>>.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Final Report on BEPS Action 14, above n 34, Executive Summary, 10. The participating countries are: Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States.

¹²¹ *Convention Between Australia And New Zealand For the Avoidance of Double Taxation with Respect to Taxes on Income And Fringe Benefits And The Prevention Of Fiscal Evasion* (Paris, 26 June 2009) Entry into force: 19 March 2010.

¹²² *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with respect to Taxes on Income, with Protocol* (Sydney, 30 July 2013) Entry into force: 14 October 2014.

¹²³ *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance and Protocol* (Berlin 13 November 2015) Entry into force: 7 December 2016.

¹²⁴ David Scutt “TABLE: These were Australia’s top trading partners in 2015” *Business Insider Australia* 27 May 2016, available at: <http://www.businessinsider.com.au/table-these-were-australias-top-trading-partners-in-2015-2016-5>

¹²⁵ OECD Multilateral Instrument - Information Brochure, November 2016.

each treaty',¹²⁶ and as a binding treaty will constitute "hard law." Governments are currently preparing their lists of treaties to be covered by the Multilateral Instrument, and are considering which options to select and which reservations to make.

While the commitment to mandatory binding arbitration by the 20 participating countries was hailed by the OECD as 'a major step forward'¹²⁷ (especially as these countries were reported as being involved in more than 90 percent of outstanding MAP cases at the end of 2013)¹²⁸, a number of G20 countries have avoided this undertaking. Countries notably absent from making a commitment included China (Australia's Number 1 two-way trading partner in 2015)¹²⁹, as well as the other so-called "BRIC" countries – Brazil, Russia and India. It is these countries which the OECD is encouraging to explain their reasons for not participating in this dispute resolution mechanism in Element 1.7 of the minimum standard. No developing countries are listed as supporting mandatory binding arbitration. This factor may significantly influence successful dispute resolution in the international tax arena – evidenced by the notoriously high number of disputes between the United States and India in recent years.¹³⁰

It is not clear how useful it will be to require countries to explicitly record their views on mandatory binding arbitration, although clarifying their objections will enhance transparency. Itai Grinberg has stated in this regard that 'at least within the OECD, tax treaty negotiators feel substantially constrained to accept model treaty provisions in their future negotiations with other sovereigns where they have not registered a reservation or observation with respect to a given OECD Model Treaty provision.'¹³¹

Some commentators in the business community have expressed optimism about the future of universal mandatory MAP arbitration, remarking that 'Even if this solution is not accepted by all countries from the beginning, considering the history of other multilateral agreements it may be expected that after a certain period of time the majority of countries will accede.'¹³² A positive development emerging in November 2016 was that Mexico, a developing country which has long been opposed to mandatory arbitration on sovereignty grounds,¹³³ was, in the words of Juan Carlos Trujillo, director of international tax treaties for Mexico's State Administration of Taxation (SAT), 'seriously considering adopting mandatory arbitration.'¹³⁴

However, the United Nations Committee of Experts on International Cooperation in Tax Matters has been less encouraging regarding the widespread prospective acceptance of this issue:

¹²⁶ OECD/G20 *Base Erosion and Profit Shifting Project Explanatory Statement 2015 Final Reports*, above n 30, [20].

¹²⁷ Final Report on BEPS Action 14, above n 34, Executive Summary, 10.

¹²⁸ *Ibid.*

¹²⁹ Scutt, above n 124.

¹³⁰ See, eg, the comments made by Douglas W. O'Donnell, Commissioner of the Internal Revenue Service Large Business and International Division referring to the "total backlog of 250 disputes between India and the U.S." in Dolores Gregory 'U.S., India Working Through Backlog of Double Tax Cases' (2016) 24 *Tax Management Transfer Pricing Report* 1389, 1389.

¹³¹ Grinberg, above n 54, 38.

¹³² OECD *Comments received on Public Discussion Draft BEPS Action 14: Make Dispute Resolutions More Effective*, above n 26, Asia Oceania Tax Consultants' Association - Confederation Fiscale Europeenne, 14.

¹³³ See the comments of Nadja Dorothea Ruiz Euler, central administrator for international tax legal affairs, MAP Competent Authority, Mexico, in Kristen A. Parillo, 'Competent Authorities Debate Sovereignty and Arbitration' Tax Notes (15 December 2014) 1224, 1224.

¹³⁴ See the comments of Juan Carlos Trujillo in Emily Pickrell 'Mexico May Add Arbitration Language to Tax Treaties' (2016) 25 *Tax Management Transfer Pricing Report* 782, 782.

Clearly, even in the OECD context there are many countries not yet fully committed to mandatory binding arbitration after many years of discussion and “acclimatization”. Other countries may require at least as long as OECD countries and G20 non-OECD countries in assessing whether such arbitration is suited for them, currently and in future.¹³⁵

2 Objective Two: Administrative Processes that Promote the Prevention and Timely Resolution of Treaty-Related Disputes

The second objective of the minimum standard is contained in Section 1.A.2 of the Final Report on BEPS Action 14, and comprises seven elements related to overcoming obstacles related to the internal operations of a tax administration, including the CA function. These elements are mainly concerned with transparency and resourcing measures.

Elements 2.1 and 2.2 provide for the publication of clear rules, guidelines and procedures to access and use the MAP, and the publication of country MAP profiles on a shared public platform (pursuant to a template to be developed in coordination with the FTA MAP Forum). The OECD points out that MAP guidance may be particularly relevant where an adjustment may potentially involve issues within the scope of a tax treaty, for example where a transfer pricing adjustment is made with respect to a controlled transaction with an associated enterprise in a treaty jurisdiction.¹³⁶ This information should be readily available to taxpayers.

In 2000 Australia published a Taxation Ruling providing detailed guidance on transfer pricing adjustments, relief from double taxation, and the MAP.¹³⁷ This guidance now requires updating, especially in light of the outcomes of the BEPS Project, and is currently in the process of being revised. Elements 2.1 and 2.2 are supported by Best practice 10, that the country-specific MAP guidance should provide guidance on the consideration of interest and penalties, which are deemed to be of significant importance, particularly in light of the potential for the BEPS Project to place additional pressure on the MAP.¹³⁸ Australian taxpayers currently seeking MAP relief, particularly for transfer pricing adjustments (the majority of Australian MAP cases have involved transfer pricing), are not relieved from penalties and/or interest charged by the ATO. The reason for this is that each of Australia’s DTAs specifically excludes penalty or interest relating to tax from the definition of ‘tax’, thereby rendering such amounts ineligible for double tax relief.¹³⁹

Element 2.3 requires countries to ensure that staff in charge of MAP processes have the requisite authority to resolve MAP cases in accordance with the terms of the applicable treaty, and Element 2.4 provides that appropriate performance indicators should be used for the CA function and staff. The independence of CAs is intrinsic to these requirements – their decisions should not require the approval of tax administration personnel in the tax administration’s audit or examination function who made the adjustments to resolve a MAP case. Similarly, they should not be influenced

¹³⁵ United Nations Committee of Experts on International Cooperation in Tax Matters Tenth Session *Secretariat Paper on Alternative Dispute Resolution in Taxation* Agenda item 3 (b) (vi) Dispute settlement: arbitration issues for developing countries and possible ways forward, Geneva, 19-23 October 2015 [20].

¹³⁶ Final Report on BEPS Action 14, above n 34 [25].

¹³⁷ ATO, ‘Taxation Ruling TR 2000/16 ‘Income tax: international transfer pricing – transfer pricing and profit reallocation adjustments, relief from double taxation and the Mutual Agreement Procedure’, 22 November 2000.

¹³⁸ Final Report on BEPS Action 14, above n 34 [56].

¹³⁹ ATO, Taxation Ruling TR 2000/16, above n 137 [1.8].

by treaty changes their respective countries would like to make when approaching a MAP negotiation. Performance indicators should not be based on criteria which undermine the efficacy of MAP case resolutions, such as the amount of sustained audit adjustments or the maintenance of tax revenue, but on appropriate indicators which support the MAP process, such as the number of MAP cases resolved, consistency in dealing with MAP cases, and the time taken to resolve a MAP case.¹⁴⁰ These Elements coincide with the FTA's Multilateral Strategic Plan vision of the empowerment of CAs as an area of strategic focus in bringing about continuous MAP improvement:

Tax administrations should ensure their governance arrangements respect the convention-based mandate of the competent authority and support the resolution of its MAP cases in accordance with accepted multilateral principles. Governance arrangements that cause the competent authority to bring into consideration other factors such as efforts to maximize revenue collection will necessarily impede that mandate and lead to difficult MAP discussions.¹⁴¹

Element 2.5 requires countries to ensure that adequate resources are provided to the MAP function, including personnel, funding, training and other needs. There is no doubt that having adequate resources dedicated to the MAP will be essential in ensuring that tax authorities meet the minimum standards required in BEPS Action 14. However, revenue authorities around the world are facing budget constraints, even without the additional resources required to implement the entire BEPS Package. Josephine Feehily, the former chairman of the Irish Revenue Commissioners and former Chairman of the OECD's FTA (until the end of 2014) has admitted that: 'We don't have enough resources to do everything we need, and neither do any of the other tax administrations.'¹⁴² In the United States, current and former agency officials have stated that the Internal Revenue Service (IRS) is 'looking to cooperation and creativity to handle the growing list of international issues as its resources and staff are severely diminished'¹⁴³ The IRS is specifically looking to improve the timeliness and processing of APA and MAP cases.¹⁴⁴

In the Asia-Pacific region, negotiating MAPs and APAs are reported to involve smoother processes in Japan and South Korea, complex processes in China, and the ability of countries such as Indonesia and Vietnam to negotiate in this area has been described as 'nearly nonexistent.'¹⁴⁵ In Australia, the ATO established the new APA/MAP Program Management Unit (PMU) in mid-2014, which considerably strengthened Australia's competent authority network. This is currently comprised of 13 competent authority personnel and headed by Deputy Commissioner, International, Mark Konza.¹⁴⁶ This compares favourably with China, where in 2015 the State

¹⁴⁰ ATO, Taxation Ruling TR 2000/16, above n 137[28].

¹⁴¹ FTA Multilateral Strategic Plan, above n 1, Preamble[13].

¹⁴² 'An Interview with Josephine Feehily, outgoing chairman of the OECD's Forum on Tax Administration' in EY (15) *Global Tax Policy and Controversy Briefing* 2014, 1, 9.

¹⁴³ Joyce E. Cutler 'LB&I: Budget Cuts Force IRS To Do Less with Less' (2015) 24 *Tax Management Transfer Pricing Report* 940, 940.

¹⁴⁴ Dolores W. Gregory 'IRS: Reorganization to Expand Transfer Pricing Practice' (2015) 24 *Tax Management Transfer Pricing Report* 941, 941.

¹⁴⁵ Michael Standaert 'In Asia Pacific, Countries' Handling of Disputes Varies' (2015) 24 *Tax Management Transfer Pricing Report* 691, 691.

¹⁴⁶ The 13 CAs are: Mark Konza, Lyndall Crompton, Cameron Smith, Gloria Cassimatis, Paul Korganow, James Beeston, Annamaria Carey, Mathew Umina, Debbie Vegar, Hayden Wells, Cathy Pugh, Geoff Morris and Robert Thomson (confirmed in an email to the author by the Program Management Officer APA/MAP Program Management Unit, dated 19 December 2016).

Administration of Taxation (SAT) was reported to have only three people allocated to working on APAs.¹⁴⁷ The effect of this lack of personnel is detrimental to MAP resolutions: Douglas W. O'Donnell, Commissioner of the Internal Revenue Service (IRS) Large Business and International Division recently commented on China not having enough people to discuss MAP cases with the IRS.¹⁴⁸

The minimum standard also requires countries to clarify in their MAP guidance that audit settlements between tax authorities and taxpayers do not preclude access to MAP, as part of Element 2.6. There is a proviso that access to the MAP may be limited where taxpayers voluntarily access a domestic administrative or statutory dispute resolution process independent from the audit and examination functions. However, in such cases there is a duty to notify treaty partners of such processes, and also address the effects of such processes in their public MAP guidance. This element focuses on transparency, in that in a situation where a CA would not consider the taxpayer's objection to be justified, notification of the case should still be provided to the treaty partner country. This element of the minimum standard is an attempt to counter inappropriate audit settlement practices, which were reported to be 'prevalent throughout the world' at the beginning of 2015.¹⁴⁹ The FTA Multilateral Strategic Plan also supports ensuring 'that mutual agreement procedures are not burdened by wayward audit practices'¹⁵⁰, and clearly states that 'MAP access should not be manipulated by auditors (e.g., through threats of higher adjustments or by referring to penalties) if the taxpayer desires MAP resolution.'¹⁵¹

Advance Pricing Arrangements

The final element related to administrative processes that promote the prevention and timely resolution of treaty-related disputes is Element 2.7, which provides that countries with bilateral Advance Pricing Arrangement (APA) programmes should provide for the roll-back of APAs in appropriate cases.

An APA is defined by the OECD as:

an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.¹⁵²

A unilateral APA exists between the taxpayer and its revenue authority, whereas a bilateral APA includes a foreign revenue authority as a party to the contract agreeing that the APA methodology, etc. is correct. The provision of the roll-back of APAs in Element 2.7 refers to offering taxpayers the option of having the APA's methodology applied to (or "rolled back" to) tax years prior to those covered by the APA.

¹⁴⁷ Standaert, above n 145, 941.

¹⁴⁸ 'LB&I Commissioner Shares Views on U.S.-China Cases, OECD Efforts to Improve Double-Tax Resolution Process' (2016) 25 *Tax Management Transfer Pricing Report* 661, 661.

¹⁴⁹ OECD *Comments received on Public Discussion Draft BEPS Action 14: Make Dispute Resolutions More Effective*, above n 26, United States Council for International Business, 398.

¹⁵⁰ FTA Multilateral Strategic Plan, above n 1 [25].

¹⁵¹ *Ibid* [27].

¹⁵² OECD *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* July 2010[4.123].

The OECD is focusing on an efficient use of resources under the MAP, as APA roll-backs may serve to resolve audit disputes in prior years as well as secure agreement for future years. Tax practitioners have commented that:

Rollbacks can allow taxpayers to implement a consistent result in prior open years, typically without adverse consequence. Without a rollback, taxpayers may be reluctant to approach the tax administration for an APA for fear of excessive penalties or interest exposure in prior periods. Much like voluntary disclosure programs, penalty protection in APA rollbacks encourages tax compliance.¹⁵³

Some countries, such as the United States, have long embraced the idea of roll-backs as enhancing voluntary compliance, and it has been, and continues to be, the policy of the IRS that whenever feasible they should be utilised to resolve issues pertaining to prior taxable years in an APA.¹⁵⁴ In fact the current IRS Revenue Procedure on APAs stipulates that a roll-back may even be required by the Advance Pricing and Mutual Agreement (APMA) Program as a condition of beginning or continuing the APA.¹⁵⁵

In Australia, roll-backs are provided for in the new Practice Statement on APAs,¹⁵⁶ where they are viewed as ‘one approach’¹⁵⁷ to dealing with issues arising in income years prior to the commencement of the APA. In considering whether a roll-back will be applied, the APA team leader will consider the availability of relevant information in respect of the prior years and whether there are any material changes in the taxpayer’s circumstances – the decision will be made on a risk assessment basis.¹⁵⁸ Generally, the ATO will not seek roll-back for issues rated as low risk, and will be more likely to seek roll-back for a lesser number of years in the case of a voluntary APA request.¹⁵⁹ Thus the ATO would seem to be focused on providing roll-backs only in high risk situations where there are no material changes in a taxpayer’s circumstances. In the author’s opinion, while roll-backs would ideally be provided to all taxpayers seeking an APA, the ATO’s current policy of concentrating scarce resources on high risk situations may be the most pragmatic approach, bearing in mind the budget cuts that the ATO has been experiencing in recent years.¹⁶⁰ The ATO recognises the need for the APA/MAP PMU to be streamlined and cost effective: the ATO’s Deputy Commissioner International, Mark Konza has referred to the internal review of the effectiveness and efficiency of the ATO’s APA and MAP programs as a compliance initiative being undertaken under the BEPS umbrella. He has lauded the benefits of the APA program as providing

¹⁵³ OECD *Comments received on Public Discussion Draft BEPS Action 14: Make Dispute Resolutions More Effective*, above n 26, EY, 110.

¹⁵⁴ See IRS Revenue Procedure 2015-41 Procedures for Advance Pricing Agreements Internal Revenue Code § 482: Allocation of income and deductions among taxpayers I.R. B 2015-35 31 August 2015, Section 1. Purpose, Background, Rules of Construction, and Definitions. .01 *Purpose and Background*. (2) In the interest of efficient tax administration, rollback years may be formally covered within an APA.’

¹⁵⁵ *Ibid.*

¹⁵⁶ ATO, ‘Practice Statement Law Administration PS LA 2015/4 Advance Pricing Arrangements’, 23 July 2015.

¹⁵⁷ *Ibid* [24A].

¹⁵⁸ *Ibid* [24B]-[24C].

¹⁵⁹ *Ibid* [24E].

¹⁶⁰ See, eg, Peter Martin ‘ASIC, ACCC and Tax Office budgets slashed in Coalition’s first three years’ Sydney Morning Herald 1 May 2016, available at: <http://www.smh.com.au/business/federal-budget/asic-accs-and-tax-office-budgets-slashed-in-coalitions-first-three-years-20160430-goj50q.html>

‘practical certainty to support business planning, whilst reducing compliance costs and double tax exposure.’¹⁶¹

Element 2.7 is underpinned by Best Practice 4: Countries should implement bilateral APA programmes. While not part of the minimum standard, it is useful to note that the OECD endorses APAs concluded bilaterally between treaty partner countries as providing an increased level of certainty in both jurisdictions, as well as lessening the likelihood of double taxation and possibly proactively preventing transfer pricing disputes.¹⁶² The number of APAs is predicted to increase in the post-BEPS era, as MNEs seek to safeguard their future transactions from audits and penalties.¹⁶³

Australia has an active bilateral APA programme, with the most recent statistics revealing that 22 bilateral agreements were entered into in the 2015-16 fiscal year.¹⁶⁴ Acceptance into the programme is not automatic, however. The ATO has listed a number of factors that will make it more likely to enter into an APA. These include the complexity of the transfer pricing issues involved, whether there is uncertainty as to how the transfer pricing rules apply, and if the probability of economic double taxation is high in the absence of an APA.¹⁶⁵ The ATO’s APA programme appears to be focused on high value transactions, as it is less likely to enter into an APA where the value of the cross border dealings is not material¹⁶⁶ (with materiality a matter for the Commissioner’s judgment, and dependent on the facts and circumstances¹⁶⁷). Here again, the ATO is focused on using its limited resources in the most efficient way.

While the OECD MTC has traditionally focused on the resolution of bilateral disputes, with the increasing pace of globalisation ‘phenomena such as the adoption of regional and global business models and the accelerated integration of national economies and markets have emphasised the need for effective mechanisms to resolve multi-jurisdictional tax disputes.’¹⁶⁸ The OECD has therefore recommended as a best practice¹⁶⁹ that countries should develop and include guidance on multilateral MAPs and APAs in their published guidance on the MAP and APAs.¹⁷⁰ Australia currently offers no specific guidance on multilateral MAPs or APAs, although multilateral APAs are provided for in the current practice statement on APAs, and in the 2015-16 fiscal year the ATO entered into three multilateral APAs.¹⁷¹ In the author’s view, multilateral initiatives are becoming increasingly applicable and appealing in resolving multijurisdictional disputes involving multiple revenue authorities, as such initiatives recognise and are tailored to the increasingly global nature

¹⁶¹ Mark Konza, Deputy Commissioner, International, Public Groups and International, ‘Base erosion and profit shifting - a progress report on G20/OECD action’ (Paper presented in Melbourne and Sydney, 24-25 September 2014).

¹⁶² Final Report on BEPS Action 14, above n 34, [48].

¹⁶³ ‘Number of APAs set to increase with BEPS guidance’ *TP Week*, 28 July 2015.

¹⁶⁴ ATO presentation ‘The Year in Review’, PGI ATO Conference, Sydney, 28 September 2016, slide 3.

¹⁶⁵ ATO, ‘Practice Statement Law Administration PS LA 2015/4 Advance Pricing Arrangements’, above n 156[6B].

¹⁶⁶ *Ibid* para. 7A.

¹⁶⁷ See Taxation Ruling TR 2014/8 ‘Transfer pricing documentation and Subdivision 248-E’ 17 December 2014[41].

¹⁶⁸ Final Report on BEPS Action 14, above n 34[58].

¹⁶⁹ Best practice 11: Countries’ published MAP guidance should provide guidance on multilateral MAPs and advance pricing arrangements (APAs).

¹⁷⁰ Final Report on BEPS Action 14, above n 34[58].

¹⁷¹ ATO presentation, above n 164, slide 5.

of MNE transactions. Guidance on multilateral MAPs and APAs should therefore be issued promptly in order to encourage their use in resolving such cross-border controversies.

3 Objective Three: Ensuring that Eligible Taxpayers can access the Mutual Agreement Procedure

The Final Report on BEPS Action 14 acknowledged that issues in relation to MAP access are likely to become more significant as a result of the work on BEPS.¹⁷² The final objective of the minimum standard therefore focuses on ensuring that eligible taxpayers, i.e. those taxpayers meeting the requirement of paragraph 1 of Article 25 of the OECD MTC (taxpayers being allowed to present their case involving taxation not in accordance with the Convention to the CA of the Contracting State of which they are either a resident or a national) can access the MAP.

Element 3.1 therefore requires that both CAs be made aware of MAP requests submitted, and that both be able to give their respective views on whether the request is to be accepted or rejected. Two alternatives are possible: (i) the amendment of paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the CA of either Contracting State; or (ii) implement a bilateral notification or consultation process for cases where the CA to which a MAP case is presented does not consider the taxpayer's objection to be justified.¹⁷³ In the Final Report on BEPS Action 14, the OECD outlines the changes to be made to paragraph 1 of Article 25 and the OECD MTC Commentary to give effect to the first alternative, and thus enhance the transparency of the MAP. It is interesting to note that in a previous DTA with the United Kingdom, Australia provided taxpayers the right, in its MAP Article, to present their case 'to either taxation authority.'¹⁷⁴ This Article was changed in the current treaty with the United Kingdom, but there is a precedent for the OECD's latest innovation in this area in Australia's tax treaty history.

Another transparency measure is included under Element 3.2: participating countries are required to publish MAP guidance identifying the specific information and documentation a taxpayer is required to submit along with a request for MAP assistance. The purpose of this requirement is to prevent countries arbitrarily limiting access to the MAP on the basis of insufficient information. The FTA MAP Forum will develop guidance on the specific information and documentation to be submitted with a taxpayer's request for MAP assistance.¹⁷⁵

Finally, countries are required to allow for the implementation of MAP agreements, regardless of any time limits in the domestic law of the Contracting States in Element 3.3. Countries are therefore required to include the second sentence of paragraph 2 of Article 25¹⁷⁶ in their tax treaties. In the alternative, a country should be willing to include an alternative provision limiting the time during which a MAP adjustment can be made under Article 9(1) (Associated Enterprises) or Article 7(2)

¹⁷² Final Report on BEPS Action 14, above n 34[34].

¹⁷³ Final Report on BEPS Action 14, above n 34 [35].

¹⁷⁴ See *Agreement between the Government of the Commonwealth of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* (Canberra, 7 December 1967) entry into force: 8 May 1968, art 20(1).

¹⁷⁵ Final Report on BEPS Action 14, above n 34[37].

¹⁷⁶ Article 25(2), sentence two states: "Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States."

(Business Profits), in order to avoid late adjustments with respect to which MAP relief would not be available.¹⁷⁷

The DTA between Australia and Singapore contains no reference to the OECD MTC Article 25(2) provision that ‘Any agreement shall be implemented notwithstanding any time limits in the domestic law of the Contracting States’, so in light of the BEPS minimum standard, certain changes may need to be made to this treaty.

The final objective of ensuring MAP access for eligible taxpayers is supported by Best Practice 6. This provides that countries should take appropriate measures to suspend collection procedures during the period a MAP case is pending. The OECD has recognised that where the payment of tax is required in order to gain access to the MAP, this may cause significant financial difficulties for taxpayers. Double taxation will occur, and the resulting cash flow problems could have a substantial adverse impact on the taxpayer’s business while the case is being resolved.¹⁷⁸ There is also an acknowledgement that a CA may find it more difficult to enter into good faith MAP discussions when there is the prospect of having to refund taxes that have already been collected. Consequently, countries are encouraged to suspend collection procedure while a MAP case is pending, at a minimum under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy. The OECD plans to amend the Commentary on Article 25 accordingly in its next OECD MTC update.

III CONCLUSION

The international income taxation problems addressed in the BEPS Action Plan have been described as being ‘among the most difficult issues confronted by the international tax regime in recent decades’,¹⁷⁹ with the business community regarded as being ‘rightly concerned that political pressures to address base erosion and profit shifting will result in uncoordinated solutions that risk substantial increases in disputes and risk of unresolved double taxation.’¹⁸⁰

The OECD acknowledges that ‘The stakes are high’,¹⁸¹ with estimates indicating that the global corporate income tax revenue losses due to BEPS could be between 4 and 10 percent of such revenues, i.e. USD 100 to 240 billion annually.¹⁸² Attempts by national tax authorities to recoup these estimated losses are likely to involve contentious areas of interpretation under the new rules to be implemented under the BEPS suite of reforms, with a consequent rise in international tax controversies. The ATO is not alone in predicting an increase in disputes in the wake of the BEPS Project,¹⁸³ and Australian companies are concerned they could be placed ‘in the middle of border disputes between revenue authorities.’¹⁸⁴

¹⁷⁷ Final Report on BEPS Action 14, above n 34[39].

¹⁷⁸ Ibid [50].

¹⁷⁹ Hugh J. Ault, Wolfgang Schön and Stephen E. Shay, ‘Base Erosion and Profit Shifting: A Roadmap for Reform’ (June/July 2014) *Bulletin for International Taxation* 275, 275.

¹⁸⁰ Ibid 277.

¹⁸¹ OECD/G20 *Base Erosion and Profit Shifting Project Explanatory Statement 2015 Final Reports*, above n 30, 16.

¹⁸² Ibid.

¹⁸³ Mark Konza, above, n 84.

¹⁸⁴ Nassim Khadem, ‘BEPS plan puts companies in the firing line, say experts’ *The Sydney Morning Herald Business Day* (online), 7 October 2015.

Dispute resolution is viewed as a “critical element” in resolving some of these controversies that are likely to arise as ‘governments and taxpayers transition to a post-BEPS project world’¹⁸⁵ particularly with respect to key areas where clarity is still sought, such as the revised transfer pricing guidance. At a time of significant changes in the international tax landscape it is important that ‘tax administrations should be held accountable to their stakeholders, including multinational companies, to ensure fair and principled outcomes are achieved with respect to cross-border disputes. It is through this commitment that real change can be made.’¹⁸⁶

Although the OECD BEPS Project has been focused on preventing “double non-taxation or less than single taxation”, it has also confirmed the importance of removing double taxation. In this regard, the improved efficiency and effectiveness of the MAP, as envisaged in the Final Report on BEPS Action 14, is essential to success of the BEPS Project as a whole. MNEs require effective and well-functioning dispute resolution procedures in order to ensure that double taxation is eliminated in practice, thus facilitating the legal certainty which is foundational to cross-border trade and investments in the global economy. The swift implementation of BEPS Action 14 is vital for both MNE taxpayers and tax administrations, as without an efficient dispute resolution mechanism the enforcement of the other 14 Actions could be jeopardised.

¹⁸⁵ Stephanie Soong Johnston ‘Dispute Resolution Key to Success of Transfer Pricing Guidelines’ *Tax Notes International* 19 October 2015, 356, 357.

¹⁸⁶ PwC ‘Release of BEPS deliverable: Making Dispute Resolution Mechanisms More Effective’ *Tax Insights from Tax Controversy and Dispute Resolution Tax Policy Bulletin* 21 October 2015, 1, 3.