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In this article, the authors review the OECD's efforts to improve tax certainty, with a particular focus on the role of mutual agreement procedures.

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In recent years, the OECD has placed improving tax certainty at the forefront of its agenda for international tax, often dangled as a carrot in exchange for compromise on new global tax reforms to address the challenges arising from the digitalization of the economy and end the perceived race to the bottom in corporate tax rates. It has even created a new holiday — Tax Certainty Day — to accompany the annual release of the OECD's mutual agreement procedure statistics, although we're still waiting for tax departments and advisory firms to give their employees the day off to celebrate.

Strengthening MAP — a mechanism established by income tax treaties to relieve double taxation — has been a core part of efforts to improve tax certainty. For disputes between the United States and most of its large treaty partners, MAP now delivers consistently favorable outcomes — a significant improvement over the state of affairs before the OECD base erosion and profit-shifting initiative's action 14.[1] Yet recent experience with MAP shows more progress is needed. Moreover, as countries outside the OECD, like Brazil, China, and India, have started to play a much bigger role in the global economy, improving certainty in these jurisdictions has become even more important. This has not gone unnoticed. In late 2020, the OECD released a public consultation,[2] reflecting a recognition by many inclusive framework members that there is

[1]For a discussion on how MAP has improved in the wake of BEPS action 14, see Mark R. Martin et al., "MAP: Past, Present, and Future," *Tax Notes Int'l*, Apr. 12, 2021, p. 175.

[2]OECD, "Public Consultation Document: BEPS Action 14: Making Dispute Resolution Mechanisms More Effective — 2020 Review" (2020) ("action 14 consultation document").

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still work to be done to make dispute resolution more effective.

This article takes stock of the progress — and regression — that has been made in the cause of tax certainty. It considers:

- Why is tax certainty so important for businesses?
- What barriers prevent businesses from accessing MAP today?
- How might proposed amendments to the OECD model tax convention make this issue worse?
- What is needed to move from progress toward perfection?

Why Does Certainty Matter?

The importance of tax certainty hardly needs stating. Certainty was one of pioneering economist Adam Smith's four principles of good tax policy, reflecting the importance of ensuring that taxes should be clear and transparent so that before making a decision, a business or individual can anticipate and account for the tax impact.

In international corporate tax, certainty is something that stakeholders strive for, but do not always achieve. International tax has become increasingly complex, and there is some inherent subjectivity in transfer pricing that means taxpayers and tax administrations can and do take different views. The best way to achieve certainty remains advance rulings — or in the context of transfer pricing, advance pricing agreements, preferably agreed bilaterally or multilaterally with all relevant tax administrations. Though APAs may be the gold standard, they are not available or appropriate in all circumstances, given the lack of treaties in force among affected tax administrations or the time and cost required to obtain one.

This means that when we talk of tax certainty in the context of transfer pricing, invariably we are not focused solely on upfront certainty, but also often on after-the-fact certainty: We are operating in a world of dispute resolution rather than dispute prevention. For businesses, this after-the-fact certainty is suboptimal, but infinitely better than double taxation. In countries where MAP is easy to access and likely to result in a successful and efficient resolution, investments can be made with more confidence and without factoring in a risk premium for unrelieved double taxation.

Barriers to Entry

Taxpayers often struggle with a myriad of barriers to entry for MAP — potentially discouraging their participation in that process. Taxpayers should not face hurdles to access MAP; rather, the procedure should be readily available whenever they have been subject to tax not in accordance with a relevant bilateral tax treaty. In a transfer pricing context, this should mean that whenever a tax administration makes an adjustment to an intragroup transaction, when the taxpayer's counterparty is a resident in a treaty partner jurisdiction, the taxpayer should be able to access MAP. Unfortunately, "should" is the key word here. Past (and ongoing) experience shows that tax administrations can use a variety of tools to prevent businesses from accessing MAP.

BEPS action 14 included three minimum standards. Tax administrations must implement treaty obligations in good faith, ensure implementation of administrative processes that promote the prevention and timely resolution of treaty-related disputes, and ensure that taxpayers can access MAP when eligible. All members of the OECD/G-20 inclusive framework on BEPS, now over 140 jurisdictions, have committed to these minimum standards.[3] However, there are still jurisdictions where taxpayers struggle to access MAP.

For example, in Mexico, the Servicio de Administración Tributaria (SAT) has a process called Procuraduría de la Defensa del Contribuyente (Prodecon), a domestic dispute resolution mechanism that uses an ombudsperson. Prodecon can be an effective technique to resolve disputes in Mexico, and the SAT is a keen proponent of the process.[4] However, agreeing to a Prodecon settlement prohibits a taxpayer from accessing MAP in Mexico

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[3]OECD, "Members of the OECD/G20 Inclusive Framework on BEPS" (last updated Dec. 2022).

[4]Prodecon is intended to provide a more amicable process to resolve disputes. Potential advantages include penalty elimination (the first time Prodecon is applied) and the involvement of Prodecon officers to streamline the examination process.

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(although it is possible to engage in the Prodecon process and later proceed to MAP if a settlement was not reached). If the adjustment proposed by the SAT affects a cross-border transaction, the threshold question before entering the Prodecon process should be whether any agreement reached in the process will eliminate all double taxation. If the Prodecon resolution does not eliminate double tax, the taxpayer's options become more limited: either accept the double tax or persuade the tax authority in the counterparty jurisdiction to provide unilateral relief. Understandably, the counterparty jurisdiction will only be willing to provide relief if it agrees that the adjustment accepted by the taxpayer through Prodecon is arm's length. In short, there is a risk that a taxpayer engages in two time-consuming and potentially resource-intensive processes and still does not achieve the full elimination of double tax.

We have also experienced tax authorities in some jurisdictions offering side deals to taxpayers that choose not to enter MAP, including by indicating that domestic remedies will achieve better results or avoid more aggressive audits in the future. Sometimes, the audit settlement is explicit in limiting access to MAP; more often, the exam team does not include the limitation in the settlement agreement, allowing some taxpayers to ignore their verbal agreement and proceed to MAP. And while the taxpayers are fully within their rights to access MAP, this course of action can undermine relationships with local auditors and raise concerns that the foreign jurisdiction's next audit will be even more difficult.

In some countries, the priority order for applying the transfer pricing rules and other domestic tax rules on deductibility of expenditure may be subject to differing interpretations. This can lead to situations where exam teams make adjustments that are not based on applying transfer pricing rules and disputes arise as to whether these adjustments are eligible for MAP. For example, in the United Kingdom, disputes have arisen as to whether the transfer pricing rules should apply in priority to another rule providing that to calculate the profits of a trade, no deduction is allowed for (i) expenses not incurred wholly and exclusively for the purposes of the trade, or (ii) losses not connected with or arising out the trade. Getting agreement from the relevant competent authorities that these issues can be addressed through transfer pricing and, hence, are eligible for MAP is critical to mitigating double taxation risks.

The United Kingdom is not the only country where this issue has arisen. There have been occasions when the IRS has denied deductions because the associated intercompany expenses were considered not ordinary and necessary under section 162, rather than analyzing the transaction under section 482. As discussed below, the IRS policy is that these cases should be addressed under section 482 rather than section 162, but that policy is not always followed. More recently, the IRS Large Business and International Division issued a directive requiring exam teams to consult with the IRS advance pricing and mutual agreement program when considering adjustments related to treaty partner jurisdictions. This is meant to ensure that the proposed adjustment is in line with the negotiation strategy the APMA program has taken with a treaty partner.[5] However, the exam team may either not avail itself of this opportunity or ignore the advice it receives.

Another impediment to MAP access occurs when countries sign tax treaties that ostensibly provide for double tax relief, yet do not invest adequate resources to create a functioning competent authority. This is particularly problematic if there is a robust exam process in the jurisdiction; without practical MAP access, taxpayers are ultimately subject to double taxation. Distinct but similar issues arise when a jurisdiction creates a functioning, competent authority, but structures it so it is subordinate to, or dependent on, the examination function, limiting its ability to negotiate resolutions that differ from the local exam position.

Why are tax authorities engaged in this type of behavior? In some jurisdictions, the pressure to close cases with an adjustment is the prevailing expectation. While MAP may sustain some or all of the adjustment, it adds more time to the case, even though the case is no longer in the audit

[5] IRS, "Interim Guidance on Mandatory Issue Team Consultations With APMA for Examination of Transfer Pricing Issues Involving Treaty Countries," LB&I-04-0219-001 (Feb. 19, 2019).

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team's purview. Or, as noted above, some jurisdictions struggle to implement an effective and independent competent authority function under the treaty, either for lack of knowledge and resources, or because of impediments in the tax authority's institutional structure.

Whatever the reason, it is concerning for taxpayers to see tax administrations imposing barriers to MAP, either by deliberating proposing settlements that require a taxpayer to relinquish its rights to enter MAP, or by using alternative domestic regimes to deny deductions for intragroup transactions that fall squarely within the ambit of transfer pricing rules. Both approaches create barriers to entry to MAP, which risks taxpayers facing double taxation.

Amendments to the Article 9 Commentary

Though many of the OECD's initiatives offer a path toward improved tax certainty and dispute resolution, proposed amendments to article 9 (associated enterprises) of the OECD model tax convention risk undoing some of this progress.[6] To understand why, we need to explore the legal basis for MAP in a bit more detail.

Background

Article 9(1) of the OECD model tax convention is described in the OECD transfer pricing guidelines as "the authoritative statement of the arm's length principle."[7] In turn, the OECD transfer pricing guidelines serve as an elucidation of the arm's-length principle set forth in article 9.[8]

By including article 9(1) in their bilateral tax treaties, countries establish a right to apply their domestic transfer pricing law to transactions between related parties covered by a relevant tax treaty, simultaneously constraining their right to adjust the profits of an enterprise to situations in which the "commercial or financial relations" are inconsistent with the arm's-length principle. Also, many countries include a commitment to the arm's-length principle in their domestic law, though they do not always use that term: The U.S. regulations refer instead to the "arm's length standard."[9]

The OECD model tax convention harmonizes the right of a contracting state to make transfer pricing adjustments under article 9(1) through article 9(2), requiring the other treaty partner to provide a corresponding adjustment to relieve double tax when it agrees that the adjustment made by the first-mentioned state reflects an arm's-length result. Not all treaties contain an equivalent to article 9(2), but almost all treaties contain article 25, which provides for MAP. In a MAP case, the competent authorities of both treaty partners are obligated to negotiate and endeavor to eliminate double tax arising from article 9(1) adjustments, as well as other taxation not in accordance with the applicable treaty. Some treaties include mandatory binding arbitration as a backstop to MAP; for the United States, this is a distinct minority of only seven treaties.[10] Unfortunately, if taxpayers are denied access to MAP, they will also be unable to access the associated arbitration process.

Most often, the taxation not in accordance with the treaty is double taxation arising from an article 9(1) transfer pricing adjustment: For cases starting after 2015, the latest OECD statistics show 2,676 transfer pricing cases in global MAP inventories as of the end of 2021, compared with 2,300 non-transfer-pricing cases.[11] Although the OECD statistics do not report the monetary amounts at issue by case type, anecdotal evidence

[6] OECD, "Public Consultation Document: Proposed Changes to Commentaries in the OECD Model Tax Convention on Article 9 and on Related Articles" (2021).

[7] OECD, "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations," at 31 (2022).

[8] OECD, Model Tax Convention on Income and on Capital 2017, commentary on article 9, para. 1 (The Committee on Fiscal Affairs "has spent considerable time and effort (and continues to do so) examining the conditions for the application of this Article, its consequences and the various methodologies which may be applied to adjust profits where transactions have been entered into on other than arm's-length terms. Its conclusions are set out in the report entitled *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, which is periodically updated to reflect the progress of the work of the Committee in this area.").

[9] Reg. section 1.482-1(b); despite the gesture toward independence in nomenclature, it is a distinction without a difference: "The Treasury and IRS consider section 482 and the regulations to be wholly consistent with treaty obligations and the OECD Transfer Pricing Guidelines." AM 2007-007.

[10] The United States has bilateral income tax treaties, including mandatory binding arbitration provisions, with Belgium, Canada, France, Germany, Japan, Spain, and Switzerland.

[11] OECD, "2021 Mutual Agreement Procedure Statistics" (last accessed Jan. 4, 2023). Pre-2016 cases were not reported using an agreed method, so pre-2016 totals include double counting. If pre-2016 cases are included, transfer pricing cases outnumbered all other cases 3,340 to 2,962 as of the end of 2021.

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suggests that transfer pricing cases — which in the largest instances can involve billions of dollars — are not simply more numerous than other cases, but also represent a larger share of the amounts at stake in MAP. This makes appropriately defining what cases fall within the ambit of article 9, and thus are eligible for MAP under article 25, an issue of paramount importance.

The relatively simple text of article 9(1) is supported by both the OECD transfer pricing guidelines and commentary to the OECD model tax convention; it is this commentary that the OECD is considering amending. The bulk of the proposed amendments relate to the commentary on article 9, with smaller conforming edits proposed to articles 7 (business profits), 24 (nondiscrimination), and 25 (MAP).

Is a Loan a Loan?

There is one scenario in which it is unlikely that the OECD can achieve consensus amongst tax administrations regarding the coordination of transfer pricing and domestic regimes — and that is determining whether a loan is a loan. This dispute dates back to at least 1979, as recognized in a precursor to the OECD transfer pricing guidelines, which stated: "As things stand today, there is a distinct possibility that the same financial transaction could be treated as a loan by one country and as an equity contribution by another. . . . This is an unsatisfactory situation which it would be desirable to improve."[12] The continued difference in the views of countries was explicitly recognized in the most recent addition to the OECD transfer pricing guidelines, which stated: "Jurisdictions may have different views on the application of Article 9 to determine the balance of debt and equity funding of an entity within an MNE group."[13] Setting this aside, for businesses, what is most important is that the different views countries take on whether article 9 should be used to characterize debt and equity do not undermine the consistent application of article 9 to other types of intragroup transactions.

Proposed Edits

The proposed changes to the article 9(1) commentary seek to address two conceptual issues: (i) what type of accounts are adjusted under article 9(1); and (ii) can article 9(1) be used to determine whether a loan is, in fact, a loan. At least in part, the changes have been drafted to address a very practical concern: that article 9(1) could constrain or override the interest limitation rules agreed as part of BEPS action 4.[14]

The existing commentary on article 9 states that tax administrations may "re-write the accounts . . . [when] the accounts do not show the true taxable profits arising in that State."[15] The concern that the OECD seems to have is that rewriting a group's tax accounts could prevent a contracting state from later applying other domestic rules denying deductions for certain expenses. The proposed changes would essentially provide that once profits have been allocated among associated enterprises, it is generally left to the domestic law of each jurisdiction how those profits are taxed, including whether costs and expenses are deductible or may be subject to other domestic limitations. There seems to be concern that, having applied article 9(1) to reduce the interest expense of a resident entity to reflect an arm's-length result, a tax administration would be prevented from capping the interest deduction further based on mechanical interest limitation rules like those agreed under BEPS action 4. The proposed changes also cite rules denying deductions for entertainment expenses, which are common in many countries, as an example of how domestic law may apply to disallow expenses.

At a high level, that objective makes sense. Drawing a distinction between the allocation of expenses via transfer pricing and the deductibility of those expenses will be familiar to U.S. practitioners and is consistent with U.S. law, which not only applies the arm's-length principle to financial transactions between related parties but also applies limits on interest deductibility.[16]

[12] OECD, "Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises," at para. 190 (1979).

[13] OECD, "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations," at 404 (2022).

[14] OECD, "Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 — 2015 Final Report" (2015).

[15] OECD model tax convention, commentary on article 9, para. 2.

[16] *See* reg. section 1.482-2; section 163(j).

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Yet some of the language the OECD has proposed to meet this objective is potentially problematic and, if adopted, could lead to a misalignment of the OECD model tax convention commentary and the OECD transfer pricing guidelines.

Proposed new paragraph 3.1 states that "article 9 does not deal with the issue of whether expenses are deductible when computing the taxable income of either enterprise." In principle, we agree — but this stark statement does not consider the troubling context of domestic deductibility arguments in transfer pricing disputes. That context demands a more nuanced treatment to ensure that the changes to the OECD model tax convention commentary succeed in the aim of clarifying that debt-equity issues, like other questions of policy-based deductibility, are outside the scope of article 9 without undermining access to MAP and the harmonization of transfer pricing adjustments that article 9 is intended to achieve.

Gatekeeping Article 9

A fundamental part of the OECD transfer pricing guidelines — which, to reiterate, interpret the arm's-length principle set forth in article 9 of the OECD model tax convention — is the benefits test. Under paragraph 7.6 of the guidelines, an activity does not rise to the level of a compensable intragroup service unless it provides a benefit, some "economic or commercial value," to the recipient. Benefits test questions and related issues frequently arise in transfer pricing disputes. Many multinational enterprises perform various administrative and management services (like human resources, legal, finance, accounting, treasury, and information technology services) at a global or regional level. Some of those activities may be performed on the parent entity's behalf (for example, for financial reporting purposes); others are performed on behalf of local affiliates. Sometimes the individuals at headquarters performing these services track the time they spend on activities benefiting specific affiliates, but most of the time, they do not. In most cases, therefore, the costs of these activities are spread among the benefiting entities using a reasonable allocation key like third-party revenues or headcount.

Headquarter service allocations are an important part of transfer pricing and are consistent with the arm's-length principle; without these centralized services, each recipient would need to either develop the capacity to perform them in-house or outsource them to a third-party provider. Yet tax administrations commonly take issue with the costs allocated to local affiliates, arguing that the taxpayer has failed to substantiate that the local affiliate benefited from these services. Tax administrations commonly argue, among other things, that the benefits provided to the local affiliate are so indirect or remote that an unrelated party would refuse to pay for the services, or that the headquarter activities are duplicative of those performed by the local affiliate and therefore provide no benefit. Other times, tax administrations simply take the position that the taxpayer has failed to substantiate a benefit — no matter how much evidence the taxpayer has provided.

Determining whether services are beneficial falls squarely within the scope of arm's-length inquiries under article 9. After all, the arm's-length analysis begins with the benefits test inquiry. Yet questions about the existence of a benefit — and questions whether the compensation paid for services is excessive relative to the benefit received — can also be framed as inquiries under domestic deductibility rules. For instance, in some older cases, the IRS challenged intercompany pricing issues under section 162's ordinary and necessary business expense rules. This was a problematic position: Section 162 is a rather blunt instrument to apply to transfer pricing, and it does not allow for the correlative relief that would accompany adjustments under section 482. Recognizing this, the IRS adopted a policy in the 1980s of applying section 482, rather than deductibility rules, in cases where section 482 is applicable.[17]

That is a laudable policy, but it has not been emulated in other countries. We are aware of tax auditors in several countries that have deliberately addressed perceived mispricing of

[17] *See* GCM 38676 (1981); 1996 FSA Lexis 354. The one exception is cases involving excessive employee compensation, which are addressed under a specialized body of law.

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intercompany transactions through domestic rules, taking the position that any resulting adjustments are outside the scope of article 9 and thus ineligible for MAP. Then, too, from time to time, even IRS exam teams depart from the IRS's stated policy in favor of applying section 482. At a juncture when tax certainty is more important than ever, these are troubling developments.

By flatly stating that deductibility issues are separate from transfer pricing without grappling with the role of the benefits test, the proposed revisions to the OECD model tax convention commentary risk aggravating the issue that they ought to be addressing. The goal of the commentary should be to clarify and stabilize the application of article 9. In our view, there is a workable solution. Where tax administrations possess the ability to challenge intragroup transactions under transfer pricing or other rules (for example, deductibility), an adjustment under either set of rules should fall within the scope of article 9 (and thus of article 25) if the conditions triggering the domestic rule are similar to those that determine the transfer pricing treatment.

For instance, if the factors considered when denying a deduction are similar to the factors that would be considered under the benefits test or other transfer pricing principles, a dispute regarding the application of the domestic deductibility rule should be eligible for MAP just as if it were a transfer pricing adjustment, on the grounds that it could just as easily have been one. Adopting that rule would facilitate resolutions that arrive at the right answer through transfer pricing, rather than through blunt deduction deniability rules, and would improve tax certainty, reducing friction for taxpayers and tax administrations alike.

Building on Progress

Though barriers to accessing MAP remain, significant progress has been made since the publication of the BEPS action 14 final report in October 2015. In the sea of BEPS actions, action 14 stands out for its taxpayer-favorable provisions — which, of course, help tax administrations as well, because prolonged disputes and doubts about access to MAP are not good for anyone.

Indeed, action 14 has been a marked success: The OECD's MAP statistics show that today, most countries' MAP programs are quite successful at eliminating double tax.[18] Over the last few years, countries have made significant progress in addressing issues identified in MAP peer reviews and ultimately making it more effective and efficient.

Of course, action 14 has not been a panacea. Improving dispute resolution mechanisms will not be effective if taxpayers are prevented from accessing these mechanisms in the first place. There are a variety of ways that tax administrations continue to prevent taxpayers accessing MAP, whether through informal side deals, procedural coordination rules, or by addressing transfer pricing issues through non-transfer-pricing regimes. It is important the OECD does not lose sight of these issues.

Further strengthening the MAP peer review process could help to address this issue. There are two ways this process could be strengthened. The first is increasing the involvement of taxpayers in the review process, as taxpayers are best placed to identify when tax administrations fall short of the minimum standard agreed under BEPS action 14. The second is to impose real consequences that tax administrations would face if they are found to have acted in a way that is inconsistent with the minimum standards.

Even in situations where taxpayers are able to access MAP, jurisdictions continue to struggle with the 24-month time frame for resolution, and access issues persist — which, as noted above, may be exacerbated by the proposed changes to the article 9 commentary. So it was very welcome that, from November to December 2020, the OECD held a consultation on improving action 14.[19]

The OECD's consultation document laid out several proposed enhancements to the action 14 minimum standard that, if adopted, would go a long way toward improving the international dispute resolution system:

[18] The presence of some irrelevant outcome categories in the statistics obscures the true success of MAP. For an analysis of the statistics and a discussion of the salutary effects of action 14, see Martin et al., *supra* note 1.

[19] Action 14 consultation document, *supra* note 2.

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- require jurisdictions with more than a minimal number of MAP cases to introduce APA programs;
- improve access to training for auditors;
- define MAP eligibility criteria;
- introduce standardized MAP submission requirements;
- provide for suspending tax collection during MAP to the extent available for domestic remedies;
- require that interest and penalties be reduced proportional with MAP outcomes;
- ensure the implementation of MAP agreements notwithstanding domestic statutes of limitations;
- roll forward MAP resolutions to later filed years; and
- implement arbitration as a backstop to MAP.[20]

Commentators suggested further improvements, including examination teams to consult with the competent authority before proposing adjustments that would be subject to MAP.[21]

If this sounds somewhat familiar, that may be because the pillar 1 tax certainty developments that have taken up more of the limelight have moved in a similar direction. Consistent with the inclusive framework's high-level political agreement, the OECD's October 2022 progress report on pillar 1 addresses not only tax certainty for amount A, but also tax certainty for issues (like transfer pricing and permanent establishment disputes) that are related to and will affect amount A.[22] For those related issues, the focus is on designing a mechanism to provide mandatory and binding dispute resolution as a backstop to MAP through article 19 of the envisioned amount A multilateral convention. That mechanism isn't exactly arbitration — which, because of the discomfort articulated by some countries, has become something of a taboo word throughout discussions on pillar 1 — but it shares some similarities with traditional treaty arbitration.

The dispute resolution panel mechanism under article 19 would provide for referral of a MAP case to a dispute resolution panel if the competent authorities of the relevant jurisdictions fail to reach an agreement after two years from the case's "start date," similar to existing precedents (like the Canada-U.S. tax treaty) that would refer a case to arbitration after two years from a case's "commencement date."[23] Again similar to the Canada-U.S. tax treaty,[24] the dispute resolution panel would employ baseball-style ("last best offer") arbitration, selecting one of the resolutions proposed by the competent authorities by majority vote, rather than arriving at an independent conclusion. On the other hand, the article 19 process includes rules intended to prevent the unilateral deadlock by one competent authority that can arise under existing arbitration provisions. Unlike treaty-based arbitration, which uses a panel of independent experts, the article 19 panel includes tax administration officials alongside experts.

The OECD's related-issues proposal is notable for its thorough design of the article 19 process, but it falls short when it comes to MAP itself. The amount A multilateral convention would include a new MAP article — article [X] — which improves upon some treaties' articles by eliminating any need for treaty notification, providing a standard three-year presentation window, and allowing resolutions to be implemented notwithstanding statutes of limitations. Even better, article [Y] would extend MAP coverage between countries without an existing double tax treaty in place. Yet in both articles, a more thoroughgoing effort to improve MAP, like that reflected in the 2020 action 14 consultation, is conspicuously absent.

Moreover, if amount A is ultimately enacted, the enhanced dispute resolution framework for issues related to amount A would only be available for the small group of large, highly

[20] Also, the OECD proposed expanding the data contained in the MAP statistics and requiring statistical reporting for APAs. In January the OECD released an updated MAP statistics reporting framework and a new APA statistics reporting framework. OECD, "BEPS Action 14 on More Effective Dispute Resolution Mechanisms: Peer Review Documents" (Jan. 2023); OECD, "Advance Pricing Arrangement (APA) Statistics Reporting Framework: Enhancing Tax Certainty" (Jan. 2023).

[21] The IRS adopted such a requirement in 2019. *See* IRS, *supra* note 5.

[22] OECD, "Progress Report on the Administration and Tax Certainty Aspects of Pillar One" (Oct. 2022).

[23] Article XXVI(7)(c).

[24] IRS, "Arbitration Board Operating Guidelines Under the U.S.-Canada Treaty," section 13 (2010).

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profitable multinationals — initially, about 100 companies — that are within the scope of amount A. Lack of access to improved dispute resolution processes could be mitigated if the amount A multilateral convention allowed jurisdictions to elect to apply the article [X] and article 19 rules to all taxpayers in controversies involving treaty partners that made the same election, but there has been no indication that the inclusive framework is considering this. Even if the multilateral convention permitted such an election, its adoption would no doubt be patchwork. For all but the largest taxpayers, hope for improvement rests in the action 14 consultation and in tax administrations' own efforts, not the work on amount A.

Conclusion

Significant effort has been devoted to improving tax certainty through MAP, and in many ways, that work has been successful. Action 14 was transformative, and MAP statistical reporting gives reliable insight into the workings of once-obscure competent authority relationships. Yet for all the progress that has been made, issues remain — and new issues are arising. That MAP resolutions are generally successful is cold comfort to taxpayers who are denied access to MAP in the first place. Keeping MAP effective, and further improving it, will require continued vigilance.[25] ■

[25]The foregoing information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only, and does not necessarily represent the views or professional advice of KPMG LLP.

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