

Action 14 of the BEPS Project: Taking the Pulse of Tax Certainty and Determining the Effectiveness of the Peer Review Process Five Years On

This article considers Action 14 of the OECD/G20 Base Erosion and Profit Shifting Project (the “BEPS Project”) regarding the minimum standards for tax treaty dispute resolution procedures in realizing taxpayer certainty. It also evaluates the effectiveness of the OECD’s concurrent and related peer review process.

1. Introduction

The importance of maintaining and enhancing tax certainty is widely recognized as bringing “benefits for taxpayers and tax administrations alike and is key in promoting investment, jobs and growth”.¹ Tax certainty has become an increasingly critical issue for both tax administrations and taxpayers, particularly in light of the repercussions of a global pandemic that has had far-reaching and wide-ranging effects on the international economy. When the OECD’s Forum on Tax Administration (FTA),² which includes improving tax certainty as one of its main priorities, met in Amsterdam in December 2020, it was stated that: “The year 2020 has been among the most disruptive and challenging periods that our respective jurisdictions and citizens have ever faced”.³ There can be no doubt that 2021 has followed suit, as the uncertainty engendered by the COVID-19 pandemic has continued.

On 22 November 2021, the OECD held its third “Tax Certainty Day”, illustrating the interconnected nature of tax certainty and dispute resolution mechanisms by providing:

an opportunity for tax policy makers, tax administrations, business representatives and other stakeholders to take stock of the tax certainty agenda and move towards further improvements in both dispute prevention and dispute resolution.⁴

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1. *OECD Tax Certainty Day 2021* (OECD 2021), available at www.oecd.org/tax/administration/oecd-tax-certainty-day.htm (accessed 4 Jan. 2022) [hereinafter the *OECD Tax Certainty Day 2021*].
2. OECD, 2020 FTA “Amsterdam” Plenary Communique 2020, n. 1 (OECD 2020) states that: “The Forum on Tax Administration [FTA] brings together Tax Commissioners from 53 advanced and emerging tax administrations worldwide, including all OECD and G20 countries. Our goal is to work collaboratively on global tax administration challenges and opportunities, to ensure the fair, effective and efficient collection of public revenues. Together FTA members collect over EUR 11.5 trillion in revenues annually.”
3. *Id.*, at p. 1.
4. *OECD Tax Certainty Day 2021*, *supra* n. 1.

It has been six years since the final package of the OECD/G20 Base Erosion and Profit Shifting Project (the “BEPS Project”) was released, and five years since the inauguration of the Inclusive Framework, and the launch of Stage 1 peer reviews following on from Action 14, entitled “Making Dispute Resolution Mechanisms More Effective”. There can be no denying that the last five years have been an eventful time for the international tax landscape, with tax certainty becoming increasingly important in a global economy that is experiencing disruption and challenges to an unprecedented degree. This may, therefore, be a good time to take the pulse on tax certainty, and on the effectiveness of the peer review process utilized by the OECD to improve global dispute resolution mechanisms, in ensuring this certainty.

This article examines the final package of the BEPS Project introduced in 2015, focusing on Action 14 (*see* section 2.). It then considers the OECD’s motivation in developing an Inclusive Framework in 2016 to ensure global compliance with the BEPS Project’s minimum standards and examines the parameters of peer review and peer monitoring as a “soft law” tool to enhance tax certainty (*see* sections 3. and 4.). Next, the article considers whether progress has been made with regards to the Inclusive Framework, and whether the peer review process has been successful in enhancing tax certainty, and whether the minimum standard of Action 14 of the BEPS Project (the “Action 14 minimum standard”) has been fully implemented five years on, bearing in mind the terms of reference (*see* sections 5. and 6.). The article ends with the author’s conclusions, which are set out in section 7.

2. The Final BEPS Package of 2015: The Action 14 Minimum Standard

On 5 October 2015, the OECD presented the final package of its BEPS Project measures in respect of a “comprehensive, coherent and coordinated reform of the international tax rules”⁵ for discussion by the G20 Finance Ministers at their meeting in Lima, Peru. The BEPS Project represented a response to the call of OECD and G20 countries for the design of new international standards to ensure

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5. OECD, *OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting*, 5 October 2015 (OECD 2015), available at www.oecd.org/tax/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm (accessed 4 Jan. 2022).

that the profits of multinational enterprises (MNEs) would be reported where economic activities and value creation takes place. The aim of the BEPS Project was to provide governments with solutions to close the gaps in international tax rules that had allowed artificial profit shifting to low- or no-tax environments. At the time, the measures were praised as representing “the most fundamental changes to international tax rules in almost a century”.⁶

The BEPS Project consisted of 15 Actions and set out four new minimum standards as well as guidance on best practices. These minimum standards were agreed as essential to deal with issues in cases “where no action by some countries or jurisdictions would have created negative spillovers (including adverse impacts of competitiveness) on others”.⁷ Accordingly, adherence to these four minimum standards was viewed as imperative to achieving optimal updated international tax rules.

Included in the package of 13 reports on these 15 Actions was a report on Action 14 of the BEPS Project, “Making Dispute Resolution Mechanisms More Effective”.⁸ Countries involved in the BEPS Project had recognized that the fundamental changes to international tax rules envisaged could not only lead to uncertainty, even for compliant taxpayers, but also to unintended double taxation and increased disputes requiring consideration under the mutual agreement procedure (MAP) article in international tax treaties. Such tax treaties are designed and entered into to eliminate double taxation, and the MAP provides “a means through which tax administrations consult to resolve disputes regarding the application of double tax conventions”.⁹ As a result, improving dispute resolutions mechanisms was acknowledged to be an “integral component of the work on BEPS issues”,¹⁰ and was designed specifically to ensure tax certainty.

The countries involved in the BEPS Project were unanimous in acknowledging the importance of removing double taxation as an obstacle to cross-border investment and trade, and, therefore, a commitment was made to an obligatory minimum standard with respect to the resolution of treaty-related disputes. Consequently, the effective and timely resolution of cross-border tax disputes through improving the MAP became one of the four crit-

ical pillars of the BEPS Project-engendered paradigm shift in international tax reform.

The Action 14 minimum standard measures were aimed at allowing eligible taxpayers access to the MAP process, ensuring that domestic administrative procedures do not deny access to the MAP, and that article 25 of the OECD Model,¹¹ which provides the machinery to enable competent authorities to consult with each other with a view to resolving disputes, is implemented in good faith in tax treaties.

A corollary to the commitment to this minimum standard included the establishment of an effective monitoring mechanism to ensure the Action 14 minimum standard was being met and to check that countries were rapidly resolving disputes as continuous improvements were made to the MAP.¹² Consequently, this new monitoring mechanism would require the development of an authentic assessment methodology. It was envisaged that monitoring would consist of reports as to how countries had implemented the measures related to the BEPS Project, including some form of peer review:

with a view to establishing a level playing field by ensuring all countries and jurisdictions implement their commitments so that no country or jurisdiction would gain unfair competitive advantages.¹³

The emphasis here was on establishing fairness and symmetry in the international tax community, as well as tax certainty.

Efforts to improve the MAP would be facilitated by the OECD FTA. These efforts would encompass all OECD member countries and G20 countries, together with other interested countries and jurisdictions.¹⁴

At the time, it was acknowledged that a globally coherent, consistent and unified approach would have to be adopted to implementing the measures of the BEPS Project. Challenges had arisen, with some countries aggressively enacting unilateral measures. There was criticism that a heightened awareness of base erosion and profit shifting, combined with changes in the world economy, were giving rise to increasing uncertainty.¹⁵

The OECD in conjunction with the International Monetary Fund (IMF) had discerned the three major sources of tax uncertainty for MNEs to encompass uncertain tax administration practices, inconsistent approaches of different tax authorities in applying international tax standards, and issues associated with dispute resolution mechanisms.¹⁶ It was acknowledged that tax certainty required

6. Id., at statement by OECD Secretary-General Angel Gurría.
 7. OECD, *Background Brief Inclusive Framework on BEPS*, January 2017, para. 1.3, “The BEPS package” (OECD 2017), available at www.oecd.org/tax/beps/background-brief-inclusive-framework-for-beps-implementation.pdf (accessed 31 Dec. 2021) [hereinafter *Background Brief Inclusive Framework*].
 8. OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective*, OECD/G20 Base Erosion and Profit Shifting Project, OECD 2015), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264241633-en> (accessed 31 Dec. 2021) [hereinafter the *Action 14 Final Report* (2015)].
 9. See the OECD definition in the OECD, *Glossary of Tax Terms* (OECD), available at www.oecd.org/ctp/glossaryoftaxterms.htm (accessed 31 Dec. 2021) [hereinafter *Glossary of Tax Terms*]: “This procedure, described and authorized by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment”.
 10. OECD, *Action 14 Final Report* (2015), *supra* n. 8, Executive summary, at p. 9.

11. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), *Treaties & Models IBFD*, also available at http://dx.doi.org/10.1787/mtc_cond-2017-en (accessed 31 Dec. 2021).
 12. OECD, *BEPS Project Explanatory Statement: 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2016), available at <http://dx.doi.org/10.1787/9789264263437-en> (accessed 31 Dec. 2021) [hereinafter *BEPS Project: 2015 Final Reports*].
 13. Id., at para. 29.
 14. Id., at para. 15.
 15. Id., at para. 24.
 16. OECD, *OECD/IMF Report on Tax Certainty – 2018 Update* Executive summary, para. 2 (OECD 2018), available at <https://www.oecd.org/ctp/>

a globally consistent approach, going beyond OECD member countries and G20 countries. As a result, a more “inclusive framework” involving all interested countries and jurisdictions would be designed to implement and monitor the package of measures relating to the BEPS Project.

3. The Development of the Inclusive Framework in 2016

In November 2015, the leaders of the G20 countries called on the OECD to develop an Inclusive Framework by early 2016. This Inclusive Framework would be open to all interested countries (including non-G20 countries) and jurisdictions.¹⁷

The focus on encouraging the widespread (and ideally universal) adoption of the package of measure relating to the BEPS Project to provide the tax certainty and consistency that is vital to a free flow of trade and investment meant that all economies, including developing economies, should participate on an equal footing. The following two requirements were imposed for countries and jurisdictions wanting to join this framework: (i) to commit to the comprehensive package of the BEPS Project and its consistent implementation; and (ii) to pay an annual member’s fee to cover the costs of the framework.¹⁸ All of the countries and jurisdictions interested in joining the Inclusive Framework as Associates of the BEPS Project were invited to contact the OECD Secretariat, subject to these membership requirements.¹⁹ This action was to be a truly symbiotic and supportive venture to foster global collective action, as:

Being part of the Inclusive Framework on BEPS will facilitate the implementation, as well as the peer review processes of the Members, by providing them further guidance and support, including guidance covered by the Platform for Collaboration on Tax established among the IMF, the OECD, the UN and the World Bank Group.²⁰

In February 2016, the newly devised Inclusive Framework on BEPS received the sanction of the G20 Finance Ministers, and its inaugural meeting was held in Kyoto, Japan on 30 June and 1 July 2016. By June 2017, 100 countries and jurisdictions had become members, representing regionally and economically diverse nations encompassing both developing and developed countries, and accounting for more than 93% of global GDP.²¹

tax-policy/tax-certainty-update-oecd-imf-report-g20-finance-ministers-july-2018.pdf (accessed 31 Dec. 2021) [hereinafter the *OECD/IMF Report on Tax Certainty – 2018 Update*].

17. G20 Leaders’ Communiqué Antalya Summit, 15-16 November 2015, G20 Leaders’ Communiqué agreed in Antalya, Turkey, available at <http://g20.org/tr/g20-leaders-commenced-the-antalya-summit/> (accessed 31 Dec. 2021).
18. OECD, *Background Brief Inclusive Framework*, *supra* n. 7, at Executive Summary.
19. *Id.*, at p. 17.
20. *Id.*, at p. 7.
21. OECD/G20, *Inclusive Framework on BEPS Progress Report July 2016-June 2017* p. 6 (OECD 2017) [hereinafter the *Inclusive Framework Report July 2016-June 2017*].

4. The Peer Review Process: A Soft Law Tool for Improving Tax Certainty

The Inclusive Framework on BEPS was tasked with the significant mandate to review the implementation of the four BEPS minimum standards, and to commit to a peer review process, based on terms of reference and a methodology specifically designed for their relevance to each individual standard. The terms of reference by which the Action 14 minimum standard was to be evaluated consisted of the assessment of a jurisdiction’s legal and administrative framework in the four key areas of: (i) preventing disputes; (ii) availability and access to MAPs; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements.²²

The Assessment Methodology established the procedural mechanism by which jurisdictions would complete the peer review, including the monitoring process. A two-stage approach was to be adopted. In Stage 1, an Inclusive Framework member’s implementation of the Action 14 minimum standard would be reviewed according to the terms of reference, and the application of the legal framework for MAP evaluated. An individual report would be issued identifying any shortcomings the jurisdiction was experiencing in relation to each of the elements of the minimum standard and providing clear and specific individualised guidance on how these shortcomings might be addressed and overcome.

Inclusive Framework Members would undertake this review based on an agreed schedule, usually six to eight reviews initiated every four months, from 5 December 2016 to April 2019.²³ However, the FTA MAP Forum was to defer the reviews of developing countries that were neither an OECD member nor a G20 member if that jurisdiction had not yet received meaningful levels of MAP requests, and if there was no feedback that its MAP regime required improvement.²⁴ The first reports were due to be published in the second half of 2017.

In addition, the assessment schedule aimed to ensure that the Stage 2 Peer Monitoring of all 44 countries²⁵ that had committed to the outputs of the BEPS Project to be completed by 2020. Stage 2 would involve the review of the actions taken to address any shortcomings identified in the Stage 1 Peer Review, usually undertaken within 12 months of this initial stage. Stage 2, therefore, ensured

22. OECD, *BEPS Action 14 on More Effective Dispute Resolution Mechanisms – Peer Review Documents*, OECD/G20 Base Erosion and Profit Shifting Project, para. 9 (OECD 2016), available at www.oecd.org/tax/beps/beps-action-14-on-more-effective-dispute-resolution-mechanisms-peer-review-documents.pdf (accessed 31 Dec. 2021) [hereinafter the *Action 14 – Peer Review Documents*].
23. OECD/G20, *Inclusive Framework Report July 2016-June 2017*, *supra* n. 21, at Annex C – “Peer reviews of the minimum standards by the Inclusive Framework, Action 14 – Mutual agreement procedures”.
24. *Id.*
25. That is, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China (People’s Rep.), Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea (Rep.), Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Russia, Saudi Arabia, the Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. See *Action 14 – Peer Review Documents*, *supra* n. 22, at para. 7.

the follow-up of the recommendations made under Stage 1. This methodology was designed to ensure that implementation of the Action 14 minimum standard measures would be rapid, consistent, authentic and open to public scrutiny. As part of the Action 14 minimum standard, the members of the Inclusive Framework would also be required to publish MAP guidance, identifying the specific information and documentation necessary for a taxpayer to submit along with a request for MAP assistance. This guidance was to be published on a shared public platform based on an agreed template.

The OECD member countries and the G20 countries had based their design of an Inclusive Framework on the prototype established by the Global Forum on Transparency and Exchange of Information for Tax Purposes (the “Global Forum”).²⁶ The Global Forum was founded by the OECD in 2000 to promote the exchange of information between its member states and offshore financial centres. A distinctive feature of the Global Forum is the two-stage peer review process, on which the Action 14 Assessment Methodology is based. Peer review has been positively described as:

the systematic examination and assessment of the performance of a state by other states: with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles.²⁷

In adopting the peer review process, the OECD was aiming for an efficient and effective tool for instigating legal and administrative change and improvement among group members, thereby facilitating tax certainty. The process has been identified as having both strengths and weaknesses.²⁸

The peer review process is a “soft law” measure, with the OECD itself describing soft law as “co-operation based on instruments that are not legally binding, or whose binding force is somewhat ‘weaker’ than that of traditional law, such as codes of conduct, guidelines, roadmaps, peer reviews”²⁹ and providing the examples of the “OECD set of Guidelines and Principles, combined with peer review mechanisms”.³⁰ Accordingly, peer reviews appear to be synonymous with the OECD’s take on soft law. However, international peer reviews have also received widespread approval in international regulatory practice and can be found in various international treaties and regimes, for example “the United Nations Environment Program (UNEP), the UN Conference on Trade and Development (UNCTAD), the UN Economic Commission for Europe, and the World Trade Organization”.³¹ The primary reason

for this wholesale adoption of peer reviews by diverse international bodies is “their potential to achieve state compliance with the rules of international law in a collegial, and sovereignty-respecting way”.³²

Most of the work of the OECD on international taxation is acknowledged to take place through soft law. In other words:

the work of the OECD in this field consists more in diffusing principles and policy solutions, which is known as governance through soft law... rather than in establishing precise and binding regulations which would limit the sovereignty of the member states.³³

Within this context, peer reviews are certainly a tool that the OECD has drawn on over time, as it has utilized this process from its creation and “peer review has, over the years, characterised the work of the Organisation in most of its policy areas”,³⁴ notably in the peer review monitoring (a four-stage process in this instance) of the OECD Anti-Bribery Convention.³⁵

The peer review process has achieved moderate success with regard to this Convention. The corruption landscape certainly changed dramatically in the decade after the Convention went into effect:

... all thirty-eight Convention signatories have conforming anti-bribery implementing legislation in place, thirty-seven more than had anti-bribery legislation in 1997, including most of the world’s largest economies and exporters.³⁶

However, the OECD Anti-Bribery Convention has been criticized as containing no direct accountability mechanism to ensure compliance, with a commentator remarking that “[t]he peer review process itself can be used to pressure countries, but it still cannot directly enforce accountability”.³⁷ Consequently, soft law measures, such as peer review, are often criticized for lacking the compulsion of “hard law”.³⁸

Peer review, as a soft law tool, is reliant on peer pressure – the influence and persuasion of a jurisdiction’s peers, or:

The peer review process can give rise to peer pressure through, for example: a mix of formal recommendations and informal dialogue by the peer countries; public scrutiny, comparisons and, in some cases, even ranking among countries; and the impact of all the above on domestic public opinion, national administrations and policy makers.³⁹

26. OECD, *BEPS Project: 2015 Final Reports*, *supra* n. 12, at para. 30.
 27. F. Pagani, *Peer Review as a Tool for Co-Operation and Change*, 11 *Afr. Sec. Rev.* 4, p. 15 (2002).
 28. See, for example, M. Markham, *New Developments in Dispute Resolution in International Tax* 25 *Revenue L. J.*, 1, pp. 59–86 (2017), available at <http://classic.austlii.edu.au/au/journals/RevenueLawJl/2015/4.pdf> (accessed 31 Dec. 2021).
 29. OECD, *Soft Law*, Definition, Examples, at www.oecd.org/gov/regulatory-policy/irc10.htm (accessed 31 Dec. 2021).
 30. *Id.*
 31. G. Dimitropoulos, *Compliance through Collegiality: Peer Review in International Law*, 37 *Loyola L. A. Intl. & Comp. L. Rev.* 3, pp. 275 and 290 (2016).

32. *Id.*, at p. 277.
 33. A. Vega, *International Governance through Soft Law: The Case of the OECD Transfer Pricing Guidelines*, Max Planck Institute for Tax Law and Public Finance, Working Paper 2012, p. 12 (5 July 2012).
 34. *Id.*, at p. 17.
 35. See OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, Adopted by the Negotiating Conference on 21 November 1997.
 36. A. Tyler, *Enforcing Enforcement: is The OECD Anti-Bribery Convention’s Peer Review Effective?*, 43 *George Washington Intl. L. Rev.*, p. 161 (2011).
 37. *Id.*, at p. 167.
 38. See, for example, the criticism raised in R. Creyke, *Soft Law and Administrative Law: A New Challenge*, 61 *Austrl. Inst. Admin. L. Forum*, pp. 15 and 16 (2010), to the effect that “There are those who believe that soft law is no more than policy with a fashionable label”.
 39. Pagani, *supra* n. 27, at p. 16.

Peer pressure has been described as having the greatest effect where the peer review is made public,⁴⁰ as was to be the case with the Action 14 peer review documents. Public scrutiny and the peer pressure this engenders may also give rise to implementation, thereby counteracting the poor reputational effect of an unimplemented peer review.⁴¹ While transparency and public scrutiny complement the peer review process “[s]ome international organizations involve public participation in the peer review process in order to enhance transparency of the peer review”.⁴² In this regard, it is significant that at the end of October 2016, the FTA MAP Forum also invited taxpayers, along with peer jurisdictions, to provide input in relation to their experience in three specific areas for the first batch of peer reviews (which were to examine Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States). These areas were: (i) access to MAP; (ii) clarity and availability of MAP guidance; and (iii) timely implementation of MAP agreements.⁴³ Subsequently, this invitation was extended to taxpayers in respect of all the Stage 1 peer reviews.

The OECD’s specific provision of participation by taxpayers in the peer review process constituted an acknowledgement that taxpayers are the main users of the MAP, and that transparency and the effectiveness of a jurisdiction’s MAP regime assist in providing tax certainty for this cohort. Consequently, taxpayers (individuals and corporations) and associations of taxpayers (such as business and industry associations) from all assessed jurisdictions were invited to participate. The OECD’s commitment to inclusivity, therefore, ventured beyond engagement with national revenue authorities to include input from taxpayers.

Taxpayers’ responses were not to contain any information (such as technical issues relating to specific cases), as an assessed jurisdiction would not be able to respond for reasons of taxpayer confidentiality. However, respondent taxpayers would have to identify themselves in their responses, and these would be shared with the assessed jurisdiction at the commencement of its peer review process. The assessed jurisdiction would then be given the opportunity to provide comments on these taxpayer responses to the OECD Secretariat within four weeks, after which taxpayers’ responses plus any comments by the assessed jurisdiction would be circulated among the members of the FTA MAP Forum.⁴⁴ As a result, taxpayer confidentiality was extended only to taxpayer issues, not to taxpayer identity.

At the time, an OECD official acknowledged that the peer review process was “a very sensitive topic for some people”.⁴⁵ India openly and consistently opposed the direct

participation of taxpayers in the peer review process on the grounds that this had not been a part of the Final Report on Action 14, and that taxpayers were not peers of sovereign countries.⁴⁶ The Head of the International Cooperation and Tax Administration Division of the OECD’s Centre for Tax Policy and Administration (CTPA) emphasized that taxpayers would not be considered peers in the process. Instead, their input would be taken into consideration, but would not carry the same weight as that of countries.⁴⁷ He further noted that business input was not required on all aspects of the MAP process, and that there were areas where governments would have better insights into both the flaws and strengths of the process.⁴⁸ However, he also commented that:

MAP is here to serve business and to make sure there’s no double taxation in the system. If you didn’t talk to the users of the process, if you ask everyone except the customer, that would be a strange form of customer satisfaction program.⁴⁹

Despite its reservations, in a spirit of compromise, India agreed to the inclusion of taxpayer inputs.

While some jurisdictions were against including taxpayer feedback, according to Douglas W. O’Donnell, Commissioner of the US Internal Revenue Service (IRS) Large Business and International Division, other jurisdictions (including the United States) worked very hard in developing this peer review process to enable taxpayer input to be considered. O’Donnell noted that for the first batch of peer reviews, the United States only heard from two taxpayers, while taxpayer input from the United Kingdom was also low. He commented that this was disappointing, as it would have helped the process to have more input from this source.⁵⁰ In addition, Jorge Correa, formerly with Mexico’s competent authority, commented that while business was included in peer review processes, their inclusion was not early enough, and should be taken into account much sooner, ideally “when the peer review team come into the country to check the procedures and policies”.⁵¹

At this initial stage of the Action 14 peer reviews, the OECD had realized the disadvantages that a lack of consensus could cause to the implementation of the package relating to the BEPS Project. A prime example is that, while the OECD had originally proposed the inclusion of mandatory binding arbitration as a dispute resolution tool

Administration (CTPA), quoted in K.A. Bell & J. Herzfeld, *OECD Provides Guidance on Action 14 Peer Reviews*, 25 Tax Mgt. Transfer Pricing Rpt., pp. 762 (2016).

46. OECD, *Action 14 – Peer Review Documents*, *supra* n. 22, “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”, n. 6.
47. Achim Pross cited in A. Lewis, *Final Report on OECD BEPS Action 14 Coming Soon*, Tax Notes 54153 (3 Oct. 2016).
48. Achim Pross cited in A. Lewis *MAP Peer Review May Include Business Input*, *OECD Official Says*, Tax Notes 18859 (20 Sept. 2016).
49. *Id.*
50. Douglas W. O’Donnell, cited in K.A. Bell, *Two Companies Respond to U.S. MAP Questionnaire*, Tax 25 Mgt. Transfer Pricing Rpt. 20 (23 Feb. 2017).
51. Jorge Correa, currently a partner with Creel, García-Cuellar, Aiza y Enriquez, cited in Bell, *supra* n. 50.

40. *Id.*
41. Dimitropoulos, *supra* n. 31, at p. 316.
42. *Id.*, at pp. 315-316.
43. OECD/FTA, *BEPS Action 14 – Making Dispute Resolution More Effective*, “Peer review and monitoring of the implementation of the BEPS Action 14 minimum standard, Questionnaire for Taxpayers, 2”.
44. OECD, *Action 14 – Peer Review Documents*, *supra* n. 22, at paras. 17-18.
45. See the remarks of Philip Kerfs, head of the international cooperation and tax administration unit at the OECD’s Centre for Tax Policy and

in its original Action Plan,⁵² this was opposed strongly by India during the discussions leading up to the publication of the final package of the BEPS Project. Even though India (as a non-OECD member) was only an observer to the BEPS Process, this opposition was sufficient to block the inclusion of this dispute resolution tool as part of the Final Report on Action 14.⁵³

Accordingly, in relation to the minimum standard peer reviews, the OECD now specified that:

While the initial assessment of whether a jurisdiction meets the minimum standard will take place at the level of the relevant subsidiary body of the Inclusive Framework, the final decision will be made at the plenary level. These reviews will be adopted subject to a “consensus minus one” rule, aimed at ensuring that no one jurisdiction, whether the jurisdiction under review or another jurisdiction with an isolated position, can block consensus on the adoption or publication of a report.⁵⁴

The “consensus minus one” rule provides that it takes more than one jurisdiction to block consensus, a significant innovation considering the OECD’s standing as a consensus-based organization. The adoption of this new rule would mean that the overarching goal of achieving tax certainty through the implementation of the minimum standards was not to be held to ransom by a single jurisdiction’s unwillingness to cooperate.

In adopting the consensus minus one rule for minimum standard peer reviews, the OECD was once again utilizing a rule that had been adopted in its Anti-Bribery Convention. The Phase 4 Monitoring Guide here specified that the relevant Working Group would undertake all aspects of this evaluation process on the basis of “consensus minus one”, specifying that “the Party under evaluation will not have a right of veto”.⁵⁵ However, the evaluated country would retain the right to have its views and opinions fully reflected in the applicable documentation. In relation to the minimum standards of the package relating to the BEPS Project, this rule was extended to not only cover the jurisdiction under review, but any jurisdiction with an isolated position.

The consensus-minus-one rule has been utilized successfully by another international organization in a non-financial context. The Organisation for Security and Co-Operation in Europe (OSCE) in its 1992 Prague Document introduced the consensus- minus-one rule to safeguard human rights, democracy and the rule of law.⁵⁶ This decision-making tool has only been used once in this context, in 1992, reflecting that the fact it may be problematic to isolate a single country. Most countries can usually find at least one ally, and even if one jurisdiction voices strong

opposition, this may be difficult to overcome, especially in the light of the “fundamental goal of keeping all parties at the table”.⁵⁷

In designing and utilizing the peer review process for Action 14 under the newly established Inclusive Framework on BEPS, the OECD had adopted a number of measures to ensure progress would be made in resolving dispute resolution under the MAP. A commitment had been made to draw in both developed and developing economies, going beyond OECD member countries and G20 countries, to include all countries interested in implementing and monitoring the package relating to the BEPS Project. The peer review process, a process endemic to the OECD, would be used to monitor the minimum standard, bolstered by peer pressure, transparency, public scrutiny, taxpayer involvement, and adopting a rule where more than one dissenting jurisdiction would be needed to derail a review. These measures had previously been successfully applied within the peer review process, not only by the OECD, but also by other international organizations. The aim of these measures was clearly to ensure tax certainty. At the G20 Leaders’ Summit in September 2016, the way forward to more effective and efficient global economic and financial governance was outlined in terms of the benefits of tax certainty:

We emphasize the effectiveness of tax policy tools in supply-side structural reform for promoting innovation-driven, inclusive growth, as well as the benefits of tax certainty to promote investment and trade and ask the OECD and IMF to continue working on the issues of pro-growth tax policies and tax certainty.⁵⁸

5. The View from December 2021: Has the Peer Review Process Been Successful in Enhancing Tax Certainty?

5.1. Introductory remarks

Five years have passed since the implementation of the package relating to the BEPS Project by way of the Inclusive Framework. It is timely to evaluate any progress that has been made in ensuring tax certainty, and the effectiveness of the peer review process in relation to Action 14 of the BEPS Project.

Tax certainty remains a vital issue for tax administrations. In March 2017, in the IMF/OECD Report for the G20 Finance Ministers, evidence was presented that tax certainty was a high priority for tax administrations.⁵⁹ An OECD Report to G20 Finance Ministers and Central Bank Governors in October 2021 likewise emphasized that:

52. OECD, *Action Plan on Base Erosion and Profit Shifting* Action 14, p. 23 (OECD 2013), Primary Sources IBFD, also available at <http://dx.doi.org/10.1787/9789264202719-en> (accessed 31 Dec. 2021).

53. J. Jefferis, *Anything Other than Arbitration*, TP Week (27 Oct. 2015).

54. OECD/G20, *Inclusive Framework Report July 2016-June 2017*, *supra* n. 21, at p. 22.

55. OECD Anti Bribery Convention, *Phase 4 Monitoring Guide Revised April 2020 B*, The Conduct of Phase 4 Evaluations, para. 6.

56. Second Meeting of the Council Summary of Conclusions Prague Document on Further Development of CSCE Institutions and Structures Declaration on Non-Proliferation and Arms Transfers Prague, 1992, IV Safeguarding human rights, democracy and the rule of law.

57. Commission on Security and Cooperation in Europe, *Helsinki Commission Report* p. 2 (5 Oct. 2020).

58. *G20 Leaders’ Communique Hangzhou Summit*, 4-5 September 2016, para. 19, available at http://www.g20chn.org/English/Dynamic/201609/t20160906_3396.html (accessed 31 Dec. 2021).

59. OECD, *IMF/OECD Report for the G20 Finance Ministers: Tax Certainty* p. 6 (OECD 2017). This Report noted that in a confidential survey of FTA tax administrations, over 80% of respondents identified tax certainty as a very high or extremely high priority of their tax administration.

Given the evolving international environment, global coordination on tax policies may be even more important to support tax certainty, fiscal stabilisation and growth.⁶⁰

This issue has become even more critical to the expansion of trade and development in the current, unpredictable global economic climate.

As the need for tax certainty escalates, the Action 14 minimum standard on dispute resolution has gained increasing importance as a tax policy issue. Peer reviews have been steadily progressing, and as at December 2021, all Stage 1 Action 14 peer reviews, (i.e. 82 Stage 1 peer reviews) and 52 Stage 2 peer reviews have been finalized.⁶¹ The Inclusive Framework has grown from the initial 82 members participating in the inaugural meeting of the OECD/G20 Inclusive Framework in July 2016 in Kyoto, to 141 members as at November 2021.⁶²

To date, 57 members of the Inclusive Framework have had their reviews deferred to a later stage.⁶³ In addition, developing countries that have recently joined the Inclusive Framework are expected to request a deferral of their Action 14 peer review in the near future.

Although it is beyond the scope of this article to take into account all peer reviews, the author will consider whether the results so far reveal an efficient tool and whether both positive and negative outcomes have been encountered (see section 5.2.).

5.2. An overview of the effect of Action 14 minimum standard peer reviews

According to the latest 2021 OECD/G20 progress report on the Inclusive Framework on the BEPS Project, the Action 14 minimum standard peer reviews have had a positive effect not only on the MAP, but also on tax certainty as jurisdictions work to address deficiencies identified in their respective reports.⁶⁴ However, it is clear that a number of problems remain, and that peer reviews have not been an unqualified success.

The 2021 report refers to the fact that the number of MAP cases initiated has increased in recent years, placing an additional strain on competent authority resources. Nevertheless, in spite of escalating cases, almost all of the reviewed jurisdictions have seen a significant increase in the number of MAP cases closed, with the OECD speculating that this was probably because of an increased or a more efficient use of resources by competent authorities, driven by the peer review process itself, and a desire by jurisdictions to be seen to be complying with the minimum standards of the BEPS Project. As early as 2018, the IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors referred to “anecdotal evidence” that suggested the peer pressure exerted by the anticipated publication of Action 14 peer review reports was prompting jurisdictions to begin implementing changes to their treaty networks with regard to the MAP article in their tax treaties. Jurisdictions did this both through the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (the Multilateral Instrument or MLI)⁶⁵ and through direct bilateral treaty negotiations when this action would not bring a specific tax treaty into line with the Action 14 minimum standard.⁶⁶

While the Stage 1 peer review reports have served the useful function of identifying deficiencies in a jurisdiction’s MAP regime, it is the Stage 2 peer review reports (referred to as the peer review monitoring reports)⁶⁷, which follow up on whether the targeted shortcomings have been addressed, which more authentically reveal whether progress has been made. These reports reveal disparate outcomes for different countries. While no country has been found to have addressed all the deficiencies identified, many countries have addressed “almost all” of these,⁶⁸ or “most” of these.⁶⁹ Other countries have addressed “some” of the shortcomings that were pointed out under Stage 1,⁷⁰ while other countries had not addressed any of them.⁷¹

Stage 2 peer review reports perform the function of following up on whether Stage 1 deficiencies have been over-

60. OECD, *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, Italy, October 2021, p. 132 (OECD 2021), available at www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-october-2021.pdf (accessed 31 Dec. 2021).

61. OECD, *Action 14 Mutual Agreement Procedure* (OECD), available at www.oecd.org/tax/beps/beps-actions/action14/ (accessed 17 Dec. 2021).

62. OECD, *Members of the OECD/G20 Inclusive Framework on BEPS*, Updated: November 2021, available at www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf (accessed 31 Dec. 2021).

63. These jurisdictions are: Albania, Angola, Anguilla, Antigua and Barbuda, Armenia, Belarus, Belize, Benin, Bosnia and Herzegovina, Botswana, Burkina Faso, Cabo Verde, Cameroon, Congo, Congo (Dem. Rep.), the Cook Islands, Costa Rica, Djibouti, Dominica, the Dominican Republic, Egypt, Eswatini (formerly Swaziland), Gabon, Georgia, Grenada, Haiti, Honduras, the Ivory Coast, Jamaica, Jordan, Kenya, Liberia, Malaysia, the Maldives, Mauritius, Mongolia, Montenegro, Montserrat, Namibia, North Macedonia, Nigeria, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Senegal, the Seychelles, Sierra Leone, Sri Lanka, Ukraine, Uruguay, the Turks and Caicos Islands, and Zambia.

64. OECD/G20, *Inclusive Framework on BEPS Progress Report July 2020-September 2021*, para. 2.4.1. (OECD 2021) [hereinafter the *Inclusive Framework Report July 2020-September 2021*].

65. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* art. 7 (7 June 2017), Treaties & Models IBFD [hereinafter the *Multilateral Instrument* or *MLI*] “The MLI allows jurisdictions to swiftly implement measures to strengthen existing tax treaties to protect governments against tax avoidance strategies that inappropriately use tax treaties to artificially shift profits to low or no-tax location.” For the latter comment, see OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting Information Brochure* p. 3 (2 May 2020).

66. IMF/OECD, *Report for the G20 Finance Ministers and Central Bank Governors Update on Tax Certainty* para. 40 (July 2018).

67. OECD, *Action 14 – Peer Review Documents*, supra n. 22, “Assessment Methodology for the Monitoring and Review of the Implementation of the BEPS Action 14 Minimum Standard to Make Dispute Resolution Mechanisms More Effective”, at para. 4.

68. Some examples of countries that have addressed “almost all” deficiencies identified in the Stage 1 peer review process include Australia, Ireland, Japan, Malta, New Zealand and the United Kingdom.

69. Some examples of countries that have addressed “most” deficiencies identified in the Stage 1 peer review process include Colombia, India, Latvia, Lithuania and South Africa.

70. Some examples of countries that have addressed “some” deficiencies identified in the Stage 1 peer review process include Chile, Mexico and Portugal.

71. Examples here would include Argentina, Croatia and Israel.

come in the interim period, but anomalous situations have arisen, as in the case of India. While India's Stage 2 peer review report advised that the jurisdiction has solved almost all of the deficiencies identified in Stage 1, several new issues (in particular, in relation to the implementation of MAP agreements)⁷² were identified in Stage 2, along with a lack of comprehensive MAP guidance on these recently arising problem areas.⁷³

6. The Effect of Action 14 Minimum Standard Peer Reviews on the Terms of Reference

6.1. Introductory remarks

The terms of reference by which the Action 14 minimum standard was to be evaluated aimed to facilitate the review of a jurisdiction's compliance by examining legal and regulatory frameworks in relation to its dispute resolution mechanisms. An in-depth evaluation of these terms of reference in light of the peer review reports is outside the scope of this article. The focus is on highlighting the effectiveness of the peer review reports from a tax certainty perspective, looking briefly at certain common themes that have emerged (see sections 6.2. to 6.5.).

6.2. Preventing disputes

According to the IMF and the OECD, preventing disputes is an important way of improving tax certainty, driven as it is by the belief:

that prevention is better than cure and that ideally disputes should be resolved at the earliest point in time when information is readily available and positions have not yet become entrenched.⁷⁴

The main vehicle for dispute prevention is an advance pricing agreement (APA), which has been 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.⁷⁵

While APAs can be time-consuming and costly to negotiate, from a tax certainty perspective, "such upfront diligence and costs can result in future time-savings and prevent disputes from arising in the first place".⁷⁶ Utilizing APAs rather than the MAP means that jurisdictions can deal with potential international tax disputes on a prospective basis, thereby lightening the load on the MAP and providing certainty to both taxpayers and tax administrations at an early stage.

In considering whether the peer reviews have advanced the prevention of disputes, the Stage 1 peer review reports on Action 14 of the BEPS Project revealed that many jurisdictions surveyed had no bilateral APA programme in place.⁷⁷ Other jurisdictions did not allow rollbacks of bilateral APAs, whereby issues resolved by an APA are relevant to previous tax years not included within the original scope of the APA, which is an element of the minimum standard.⁷⁸ While most of these jurisdictions did not express plans to introduce a bilateral APA programme in the future, on 10 December 2021, the South African Revenue Service (SARS) opened a consultation on a draft model for an APA programme motivated by the need to keep up to date with international developments and to provide "clarity and certainty for taxpayers of their obligation".⁷⁹ Lithuania has not allowed APA rollbacks in the past, but it has stated that it intends to do so in the future.⁸⁰ In this regard, the peer review reports appear to be influencing future behaviour in certain jurisdictions in a positive way.

The Stage 2 peer review reports paint a more positive picture with regard to the prevention of disputes. Many jurisdictions are reported as meeting most of the minimum standard in respect of Action 14 of the BEPS Project in relation to the prevention of disputes.⁸¹ A stumbling block that remains is that many countries do not include the first sentence of article 25(3) of the OECD Model in all of the tax treaties that they have concluded, although this provision is included in the majority of tax treaties. This sentence:

.....

77. Examples of jurisdictions reported as having no bilateral APA programme in place include: Argentina, Aruba, Bahrain, Barbados, Brazil, Brunei, Gibraltar, Greenland, Guernsey, the Isle of Man, Jersey, Monaco, Oman, Saint Kitts and Nevis, San Marino, Serbia, South Africa, Thailand, Trinidad and Tobago, and the United Arab Emirates.

78. Examples of jurisdictions not allowing rollbacks with regard to APAs include Chile, Colombia, Croatia, Kazakhstan, Lithuania, Romania and Vietnam.

79. SARS, *Proposed Model for Establishing an Advance Pricing Agreement Programme in South Africa and Release of Draft Legislation* para. 2, Background (10 Dec. 2021).

80. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Lithuania (Stage 2)*: Inclusive Framework on BEPS Action 14, OECD/G20 Base Erosion and Profit Shifting Project p. 9 (OECD 2021), available at <https://doi.org/10.1787/692bef12-en> (accessed 31 Dec. 2021).

81. See, for example, the Stage 2 reports, OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Australia (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2021), available at <https://doi.org/10.1787/da7fc990-en> (accessed 31 Dec. 2021) [hereinafter the *2021 Australia (Stage 2) Report*]; OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, United Kingdom (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project, (OECD 2019), available at <https://doi.org/10.1787/33e2bf3d-en> (accessed 31 Dec. 2021) [hereinafter the *2019 United Kingdom (Stage 2) Report*]; and OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, United States (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (OECD [year]), available at <https://doi.org/10.1787/da7fc990-en> (accessed 31 Dec. 2021).

72. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, India (Stage 2)*, Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2021), available at <https://doi.org/10.1787/cc6e7579-en> (accessed 31 Dec. 2021), where it was identified that "there is a risk that access to MAP is denied in eligible cases where the issue under dispute is pending substantive determination or has already been decided by the Authority for Advance Rulings (AAR) in India. Furthermore, for cases where taxpayers and the tax administration enter into audit settlements through IN: Vivad se Vishwas Act 2020, access to MAP would be denied if the taxpayer files a MAP request before India's competent authority". See *id.*, at Executive Summary, 10.

73. *Id.*, at p. 9.

74. OECD/IMF *Report on Tax Certainty – 2018 Update*, *supra* n. 16, at para. 33.

75. OECD, *Glossary of Tax Terms*, *supra* n. 9.

76. OECD, *2019 Progress Report on Tax Certainty: IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors*, p. 15 (OECD 2019).

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77. Examples of jurisdictions reported as having no bilateral APA programme in place include: Argentina, Aruba, Bahrain, Barbados, Brazil, Brunei, Gibraltar, Greenland, Guernsey, the Isle of Man, Jersey, Monaco, Oman, Saint Kitts and Nevis, San Marino, Serbia, South Africa, Thailand, Trinidad and Tobago, and the United Arab Emirates.

78. Examples of jurisdictions not allowing rollbacks with regard to APAs include Chile, Colombia, Croatia, Kazakhstan, Lithuania, Romania and Vietnam.

79. SARS, *Proposed Model for Establishing an Advance Pricing Agreement Programme in South Africa and Release of Draft Legislation* para. 2, Background (10 Dec. 2021).

80. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Lithuania (Stage 2)*: Inclusive Framework on BEPS Action 14, OECD/G20 Base Erosion and Profit Shifting Project p. 9 (OECD 2021), available at <https://doi.org/10.1787/692bef12-en> (accessed 31 Dec. 2021).

81. See, for example, the Stage 2 reports, OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Australia (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (OECD 2021), available at <https://doi.org/10.1787/da7fc990-en> (accessed 31 Dec. 2021) [hereinafter the *2021 Australia (Stage 2) Report*]; OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, United Kingdom (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project, (OECD 2019), available at <https://doi.org/10.1787/33e2bf3d-en> (accessed 31 Dec. 2021) [hereinafter the *2019 United Kingdom (Stage 2) Report*]; and OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, United States (Stage 2)*: Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project (OECD [year]), available at <https://doi.org/10.1787/da7fc990-en> (accessed 31 Dec. 2021).

invites and authorises competent authorities to solve these cases, which may avoid submission of MAP requests and/or future disputes from arising, and which may reinforce the consistent bilateral application of tax treaties.⁸²

It also forms part of the minimum standard. A general response from jurisdictions with non-compliant tax treaties is that they will either be modified by the MLI to contain the required provision, will be included in the list of tax treaties for which negotiations are envisaged, scheduled or pending, or will be included in the plan for renegotiations. In addition, many countries have stated the intention to seek to include the first sentence of article 25(3) of the OECD Model in all of the future tax treaties that they will conclude.

6.3. Availability and access to MAP

An essential aspect of making dispute resolutions more effective and providing tax certainty for taxpayers is addressing the fact that access to a MAP may be denied in certain cases. The OECD has specified in its terms of reference that “jurisdictions should ensure that taxpayers have access to MAP and that information relating to taxpayer access to MAP is readily available and accessible to the public”.⁸³

As at December 2021, over 100 Inclusive Framework jurisdictions have published their MAP profiles on the OECD website,⁸⁴ facilitating the use of the MAP by taxpayers. Other positive outcomes include the publication of updated comprehensive MAP guidance by a number of jurisdictions, and the fact that access to MAP:

is now granted for transfer pricing cases even where the treaty does not contain Article 9(2) of the OECD Model Tax Convention, especially in those jurisdictions that did not provide access to MAP in such cases in the past.⁸⁵

An increasing number of jurisdictions have introduced or updated comprehensive MAP guidance to provide clear rules and guidelines on this process.⁸⁶ For instance, the Inland Revenue Authority of Singapore (IRAS) has recently released updated guidance on tax dispute resolution and the MAP in its new Transfer Pricing Guidelines,⁸⁷ and Germany’s *Bundesministerium der Finanzen* (Federal Ministry of Finance) has also released updated guidance on international dispute resolution.⁸⁸ Some countries have taken the opportunity to enhance tax certainty by changing their policies to allow for a wider access to the MAP. In this context, the OECD has reported that:

82. OECD, *2019 United Kingdom (Stage 2) Report*, *supra* n. 81, at para. 1.
 83. OECD, *Action 14 – Peer Review Documents*, *supra* n. 22, at para. B.13.
 84. See OECD, *OECD/G20 Inclusive Framework on BEPS Progress report July 2020 – September 2021* <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-on-beps-progress-report-july-2020-september-2021.pdf>, p. 12.
 85. OECD/G20, *Inclusive Framework Report July 2020-September 2021*, *supra* n. 64, at para. 2.4.1.
 86. See, for example, Belgium, Brunei, Colombia, Croatia, Guernsey, India, the Isle of Man, Jersey, Lithuania, Luxembourg, Monaco, Serbia and South Africa.
 87. SG: IRAS e-Tax Guide Transfer Pricing Guidelines (Sixth Edition) (10 Aug. 2021).
 88. DE: *Bundesministerium der Finanzen* (Federal Ministry of Finance), *Leaflet regarding Dispute Resolutions in the Field of Income and Property Taxes* (27 Aug. 2021).

Switzerland revised its MAP guidance and simplified its procedures for taxpayers to submit a MAP request for both transfer pricing cases and cases concerning individuals. Greece and Mexico both changed their policy to allow access to MAP after a judicial decision has been rendered.⁸⁹

Other countries, such as Argentina, are busy preparing a regulatory decree containing MAP guidance for the first time, as recommended in their peer review.⁹⁰ However, other jurisdictions have published no guidance at all in this area.⁹¹

Spurred on by the MAP peer reviews, some countries have made significant progress regarding the availability and access to MAPs, but still require improvement in certain areas. For instance, the United Kingdom has issued comprehensive guidance on the MAP and clarified certain access issues arising from its Stage 1 peer review report. Her Majesty’s Revenue & Customs (HMRC)’s *International Manual on Transfer Pricing and the MAP* now specifically states that the United Kingdom will not deny access to a MAP where taxpayers and the HMRC have entered into an audit settlement.⁹² However, some areas for improvement remain in respect of treaty modifications in respect of the MAP, for example, certain treaties of the United Kingdom do not include a time limit for submission of a MAP request, while others do not contain a provision that is equivalent to article 25 of the OECD Model. Ongoing recommendations for reform have been made in the Stage 2 peer review report.⁹³

6.4. Resolution of MAP cases

According to the OECD’s Terms of Reference, an effective dispute resolution mechanism must be capable of resolving disputes in a timely and principled manner.⁹⁴ Among other things, jurisdictions should ensure that their tax treaties contain a provision requiring the resolution of MAP cases by competent authorities in justified situations, with the legal authority for this process being derived from article 25(2) of the OECD Model. Adequate resources should be provided for the MAP function, and the independence of staff resolving MAP cases ensured. The average time frame for resolving a MAP case should be 24 months.

Once again, the peer reviews present a chequered picture of compliance with the Action 14 minimum standard. While most jurisdictions surveyed in the Stage 2 peer reviews were found to have included the requisite provision relating to a MAP in the majority of their tax treat-

89. OECD/G20 *Inclusive Framework on BEPS Progress report July 2018-May 2019*, *supra* n. 64, at p. 18.
 90. OECD (2021), *Making Dispute Resolution More Effective – MAP Peer Review Report, Argentina (Stage 2): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project* para. 125 (OECD 2021), available at <https://doi.org/10.1787/ad982afd-en> (accessed 31 Dec. 2021).
 91. Countries that have not published guidance on the availability of a MAP include: Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Trinidad and Tobago, the United Arab Emirates and Vietnam.
 92. UK: HMRC, *International Manual on Transfer Pricing and the MAP*, sec. 423030.
 93. OECD, *2019 United Kingdom (Stage 2) Report*, *supra* n. 81, at p. 48.
 94. OECD, *Action 14 – Peer Review Documents*, *supra* n. 22, at para. 16.

ties, few jurisdictions were found to be fully compliant in this area.⁹⁵ According to the peer review reports, the MLI will be used to bring some tax treaties into line with the minimum standard, while bilateral treaty negotiations are intended to result in those tax treaties not covered by the MLI being brought into conformity with Action 14.

Adequately resourcing the MAP function is vital to ensure the swift and efficient processing of MAP cases, thereby enhancing tax certainty. The peer review reports indicate that a number of jurisdictions have increased their competent authority staff, along with other organizational improvements.⁹⁶ However, while Hong Kong has increased its competent authority personnel, the Stage 2 peer review noted that a peer (jurisdiction) had experienced difficulties in resolving a MAP case in a timely, efficient and effective manner, which may indicate that the Hong Kong competent authority is not adequately resourced. Hong Kong's MAP caseload was found to have significantly increased since 1 January 2016, which may also indicate that the competent authority function requires more staff.⁹⁷ Hong Kong was advised to closely monitor this situation to establish whether it might be necessary to increase the resources available to the competent authority function.

In relation to the independence of the competent authority function, Greenland was advised in the Stage 1 peer review that its competent authority needed to operate independently from audit function, otherwise:

The personnel directly involved in the adjustment at issue may be part of the decision making process of the MAP case, which bears the risk that staff in charge of MAP cannot handle and resolve MAP cases absent any approval/direction by such personnel.⁹⁸

Other countries reported in Stage 1 peer reviews to be struggling to maintain the independence of the competent authority function due to the small number of personnel involved in MAP cases include Kazakhstan and Vietnam.

The peer review reports reveal that the MAP caseload has increased for many jurisdictions since 2016. This may be a strong influencing factor in a number of countries struggling to resolve MAP cases within 24 months. Some coun-

tries were able to comply with this time frame,⁹⁹ while others did not.¹⁰⁰ A case in point here was Brazil. The Stage 2 peer review report revealed that Brazil's MAP inventory increased by 100% from 2016 to 2019, with its number of attribution and/or allocation (transfer pricing) cases increasing by a startling 260%.¹⁰¹ Accordingly, it is no surprise that Brazil did not close its MAP cases within the pursued average of 24 months. In fact, the average time needed to close MAP cases during this time was 43.63 months.¹⁰² Brazil has reported that it is currently working on a draft of internal rules to speed up the average time required to resolve MAP cases.¹⁰³

6.5. Implementation of MAP agreements

Tax certainty cannot be provided to taxpayers unless there is assurance that where the competent authorities have agreed on a MAP case resolution, the agreement can be implemented, and done so on a timely basis. The second sentence of article 25(2) of the OECD Model provides that such agreements should be implemented notwithstanding any domestic time limits imposed by the jurisdiction. Furthermore, the Action 14 minimum standard requires that jurisdictions should either provide in their tax treaties that any mutual agreement reached through a MAP should be implemented notwithstanding any domestic law time, or:

be willing to accept alternative treaty provisions that limit the time during which a Contracting Party may make an adjustment pursuant to Article 9(1) or Article 7(2), in order to avoid late adjustments with respect to which MAP relief will not be available.¹⁰⁴

According to the Action 14 peer reports, most jurisdictions meet the Action 14 minimum standard with regard to the implementation of MAP agreements.¹⁰⁵

Many jurisdictions state that their tax treaties will either be modified by the MLI to include the second sentence of article 25(2) of the OECD Model, or that they will renegotiate their tax treaties so as to comply with the requirements under the Action 14 minimum standard. However, even these undertakings may not necessarily cover all tax treaties. For instance, 11 of Australia's 52 tax treaties do not contain this second sentence and will not be modified by the MLI. With regard to four of these tax treaties, Australia has stated its intention to attempt to include the required provision via the MLI, or request via bilat-

95. Fully compliant jurisdictions in this area tended to be countries with few tax treaties, for example, Greenland has only 10 tax treaties, but they all contain a provision equivalent to article 25(2) of the *OECD Model* (2017). See OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Greenland (Stage 1): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project* para. 71 (OECD 2021), available at <https://doi.org/10.1787/c1f5577f-en> (accessed 31 Dec. 2021) [hereinafter the *2021 Greenland (Stage 2) Report*].

96. Examples of jurisdictions that have improved their competent authority function include: Australia, Belgium, Colombia, Croatia, Estonia, Hungary, India, Ireland, Israel, Japan, Lithuania, Mexico, the Netherlands, New Zealand, Portugal, the Slovak Republic, Turkey and the United Kingdom.

97. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Hong Kong, China (Stage 2): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project* para. 194 (OECD 2021), available at <https://doi.org/10.1787/a8bc6871-en> (accessed 31 Dec. 2021).

98. OECD, *2021 Greenland (Stage 2) Report, supra* n. 95, at para. 99.

99. Examples of jurisdictions that complied with the average 24-month timeframe for resolving MAP cases included: Argentina, Australia, Chile, Latvia and Lithuania.

100. Examples of jurisdictions that did not comply with the average 24-month timeframe for resolving MAP cases included: Brazil, Croatia, Greece, Hungary, India, the Slovak Republic, South Africa and the United Kingdom.

101. OECD, *Making Dispute Resolution More Effective – MAP Peer Review Report, Brazil (Stage 2): Inclusive Framework on BEPS: Action 14, OECD/G20 Base Erosion and Profit Shifting Project* para. 133 (OECD 2021), available at <https://doi.org/10.1787/30e8a050-en> (accessed 31 Dec. 2021) [hereinafter the *2021 Brazil (Stage 2) Report*].

102. *Id.*, at para. 144.

103. *Id.*, at para. 152.

104. OECD, *Action 14 – Peer Review Documents, supra* n. 22, at para. 17.

105. Examples of jurisdictions that meet the Action 14 minimum standard with respect to the implementation of MAP agreements include: Argentina, Colombia, Croatia, Estonia, Greece, Hungary, Latvia, Lithuania, the Slovak Republic, Slovenia and the United Kingdom.

eral negotiations the inclusion of the required provision. However, where this is not possible, and for the remaining tax treaties, Australia has not put in place a plan for bringing these tax treaties in line with the requirements of the Action 14 minimum standard.¹⁰⁶ Consequently, the Stage 2 Peer Review report has recommended that “for the remaining seven treaties, without further delay, request via bilateral negotiations the inclusion of the required provision”.¹⁰⁷

The United Kingdom is in a similar situation to Australia with respect to including the second sentence of article 25(2) of the OECD Model in its tax treaties. Here the Stage 2 peer review report has recommended that the United Kingdom follow up on initiating bilateral negotiations so as to comply with the minimum requirement.¹⁰⁸

Other jurisdictions may have a problem complying with the requirement of the Action 14 minimum standard as their domestic legislation contains a statute of limitations. Where this is the case, and the relevant tax treaties do not include the second sentence of article 25(2) of the OECD Model, there is a risk that MAP agreements will not be implemented.¹⁰⁹

While most of Australia’s and the United Kingdom’s tax treaties include the second sentence of article 25(2) of the OECD Model in their tax treaties, this is missing from the majority of Brazil’s tax treaties (27 out of 36 tax treaties).¹¹⁰ Once again, the peer review report recommends that negotiations should be initiated or continued with the non-conforming treaty partners. Brazil has reported that it is currently exploring amending its legislation to mitigate the risk of the non-implementation of MAP agreements when its domestic statute of limitations has expired.¹¹¹ It also intends to require the relevant competent authority to be notified by the local office when the implementation is concluded, and that periodic checks should be carried out to ascertain whether any MAP agreement has already been implemented, to mitigate this risk further.¹¹² In this regard, it has been noted with approval that:

three peers had reported, during the Stage 1 peer review, that MAP cases had not arrived at satisfactory solutions, due to Brazilian authorities’ application of local statute of limitation rules. No such cases were reported during the Stage 2 peer review.¹¹³

For some jurisdictions that have only undergone a Stage 1 peer review, compliance with the Action 14 minimum standard on the implementation of MAP agreements

106. OECD, *2021 Australia (Stage 2) Report*, *supra* n. 81, at para. 297.

107. *Id.*, at para. 298.

108. OECD, *2019 United Kingdom (Stage 2) Report*, *supra* n. 81, at para. 283.

109. For instance, Chile, Iceland, Romania, South Africa and Turkey have such a domestic statute of limitations.

110. OECD, *2021 Brazil (Stage 2) Report*, *supra* n. 101, at paras. 218-220.

111. *Id.*, at para. 206.

112. *Id.*, at para. 207.

113. EY, *OECD releases Brazil Stage 2 peer review report on implementation of Action 14 minimum standard* (28 Oct. 2021), available at www.ey.com/en_gl/tax-alerts/oecd-releases-brazil-stage-2-peer-review-report-on-implementation-of-action-14-minimum-standard#:~:text=On%2026%20July%202021%2C%20the,Action%2014%20of%20the%20BEPS (accessed 31 Dec. 2021).

could not be assessed, as no MAP agreements had been reached between 2016 and 2019.¹¹⁴

7. Conclusions

Looking back over the past five years, it would be fair to say that the peer review process has resulted in substantial progress in relation to the resolution of disputes under the MAP. In addition, however, when examined on a global basis (and bearing in mind that the aim of the Inclusive Framework was the achievement of international tax consistency), the tax certainty results of the peer review process have been uneven.

As with the OECD Anti-Bribery Convention, the peer review reports have been a qualified success as a soft law tool. In response to the peer pressure exerted by the MAP peer reviews, many countries have now published MAP guidance, and added resources to their MAP function. Consequently, the number of Inclusive Framework jurisdictions that have published their MAP profiles on the OECD website has increased. While some jurisdictions have held out against this peer pressure, their recalcitrance is now recorded in the public domain. This situation may have a detrimental reputational effect on tax certainty for those jurisdictions, being a vital element of trade and development. In turn, this state of affairs may exert external pressure to reform.

The OECD has acknowledged this uneven progress:

Half of the assessed jurisdictions made very good progress on updating their treaty network and achieved this by carrying out an action plan that prioritised relevant tax treaty negotiations when the treaties are not expected to be modified by the MLI. Some jurisdictions are bringing their tax treaties in line with the Action 14 minimum standard through ratification of the MLI.¹¹⁵

One major obstacle that remains relates to the MAP article in tax treaties not conforming to the Action 14 minimum standard. It is significant that, although the publication of the final batch of Stage 1 peer review reports in 2021 has brought the total number of Action 14 recommendations to 1,759, the majority of these recommendations (approximately 66%) are reported to relate to MAP article deficiencies in tax treaties.¹¹⁶

While peer pressure has been effective in improving the MAP function, as with the OECD Anti-Bribery Convention, the process cannot directly enforce accountability. In this respect, expert commentators have pointed out that it is unclear how countries that fail to implement the minimum standard should be brought into line:

The most likely scenario is that the vast majority of countries will implement the agreed minimum standards. However, the OECD documents make no provision for procedures to deal with the situation where a commitment has been given, but has

114. Jurisdictions for which no MAP agreement had been reached between 2016 and 2019 include Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, the United Arab Emirates and Vietnam.

115. *OECD/G20 Inclusive Framework on BEPS Progress report July 2018-May 2019*, *supra* n. 64, at p. 19.

116. *OECD/G20, Inclusive Framework Report July 2020-September 2021*, *supra* n. 64, at p. 12.

later been withdrawn, or where the accompanying legislation and regulations have not been implemented in time or correctly.¹¹⁷

The suggestion has been made that peer pressure may need to be exerted by groups of countries “to persuade those countries that are lagging behind to abandon their resistance and proceed to implement the standards”.¹¹⁸

When the assessment methodology was originally introduced, the OECD envisaged its review in 2020 in light of the experience gained in conducting peer monitoring to ensure that any shortcomings identified in relation to the MAP were effectively improved.¹¹⁹ Although this timeline was not met, the OECD released a consultation document in November 2020,¹²⁰ to seek stakeholder input. Once again, the OECD, therefore, acknowledged the value of taxpayer input in improving the MAP.

Based on the experience gained with peer reviews, the OECD described the consultation as “an opportunity to re-examine what is working well in the MAP process and what could be further improved”,¹²¹ and has emphasized that the MAP process “will continue to be an important part of the wider tax certainty agenda”.¹²² The consultation confirms the OECD’s position that the MAP process requires further improvement.

The consultation document contained proposals to strengthen the Action 14 minimum standard. In this context, the OECD admitted that even taking into account the positive effect of the MLI on bringing tax treaties into line with the Action 14 minimum standard, more than 20% of treaties reviewed still posed a potential problem with respect to the implementation of MAP agreements, either due to jurisdictions not being able to implement MAP agreements or being prevented from negotiating a solution due to the expiration of domestic time limits.¹²³ The consultation document suggested several options to address the risk of non-implementation, including obligations imposed on jurisdictions to bring their non-compliant tax treaties into line with the Action 14 minimum standard.¹²⁴ Once again, however, there is no statement as to how the suggested obligations should be enforced. To date, there has been no indication from the OECD when revised materials on the minimum standard will be released.

The OECD has applied a two-phase peer review and peer monitoring process in relation to the Action 14 minimum standard. The results so far reveal that, although there

have been many positive overall developments (which arguably would not have taken place without the soft law peer review process), there is still more work to be done to achieve a global approach to making international tax dispute resolution mechanisms more effective. Again, while most deficiencies have been addressed, there is a need for ongoing monitoring, whereby any non-compliance is made open to public scrutiny. The OECD may want to consider whether subsequent monitoring, perhaps in the form of “Stage 3 reports” should be introduced, especially as no single jurisdiction has addressed all the deficiencies identified by its peers in the Stage 1 and Stage 2 reports. Many jurisdictions have also outlined future improvements to their MAP in their Stage 2 documents, especially in relation to non-compliant tax treaties. These stated intentions will require monitoring for the requisite peer pressure to be exerted where execution of the planned reform is delayed.

The comment has been made on behalf of enterprises from all sectors in every part of the world that:

robust dispute resolution mechanisms buttressed with mechanisms to ensure mandatory resolution of disputes and implementation of agreements must remain a fundamental cornerstone of the BEPS outcomes and the work of the Inclusive Framework.¹²⁵

Taking the pulse of tax certainty and the effectiveness of the peer review process five years after its inception, the necessity for a consistent global tax system of dispute resolution ensuring the tax certainty that will promote cross-border trade and investment remains a vital international tax issue. In the interim period, levels of tax controversy have increased in almost every jurisdiction, making it even more essential that all taxpayers can access the MAP, and for international consensus on dispute resolution mechanisms to be achieved. Although a great deal of progress has been made since the inception of the Inclusive Framework, due in no small part to the peer review process, further improvements to enhance tax certainty are necessary. The OECD has taken steps to consult widely on the possible expansion of the Action 14 minimum standard, for which it should be commended.

In conclusion:

[while] much progress and valuable insight have been gained over the past five years on the implementation of the BEPS Action 14 minimum standard, continued efforts are needed to support the objectives of enhancing cross-border trade, foreign direct investment and economic growth.¹²⁶

117. A. de Graaf & K.-J. Visser, *BEPS: Will the Current Commitments and Peer Review Model Prove Effective?*, 27 *EC Tax Rev.* 1, pp. 36 and 46 (2018).
 118. *Id.*, at p. 47.
 119. OECD, *Action 14 – Peer Review Documents*, *supra* n. 22.
 120. OECD, *Public Consultation Document BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review 18 November 2020-11 January 2021* (OECD 2021).
 121. *OECD secretariat invites public input on the 2020 Review of BEPS Action 14*, available at www.oecd.org/tax/beps/oecd-secretariat-invites-public-input-on-the-2020-review-of-beps-action-14.htm (accessed 31 Dec. 2021).
 122. *Id.*
 123. *Id.*, at para. 26.
 124. *Id.*, at para. 27.

125. *ICC Comments on OECD public consultation document on the review of BEPS Action 14: Making Dispute Resolution Mechanisms More Effective* p. 1 (ICC 2021), available at <https://iccwbo.org/content/uploads/sites/3/2021/01/icc-comments-oecd-consultation-beps-action-14-final-110121.pdf> (accessed 31 Dec. 2021).
 126. *Id.*